# E-Discovery

## Three Strategic Choices in E-Discovery

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BY CHRISTINE PAYNE AND MICHELLE SIX

Electronic discovery gets a bad rap. Most lawyers find it unappetizing, high risk, and unglamorous. This perspective, however, overlooks a key litigation opportunity: developing e-discovery strategy hand in hand with trial strategy. It's the best approach for achieving solid results for your clients. And it's best for morale, as well, because once you start to think of e-discovery as a strategic landscape, it's much more fun. Here are three quick examples of strategic choices to make:

**Should you send a preservation letter to the other side?** Imagine that you have a new case, and find yourself anxious that the other side will not preserve all the data and documents you will need to win. You consider sending them a letter reminding them that they must preserve that stuff. Good idea?

If you are in the federal system, the rules and case law already provide significant protections. In particular, the FRCP codify sanctions for failure to preserve electronically stored information (ESI) under Rule 37(e). Case law, especially that which post-dates the December 2015 amendments, offers details and guidance about how and when those sanctions are meted out. And, if you are in state court, you might even have a state-law tort of spoliation to lean on if, in the future, it turns out that your adversary did not preserve relevant evidence.

The key question is this: Why are the default protections afforded by existing law not enough for you and your case?

Setting the stage for your answer here should be the goose/gander rule: Whatever you ask the other side to do, you must be ready and willing to do yourself, lest your words be turned back on you. For example, in our experience, few litigants could ever live up to the standard set forth in e-discovery professor and superstar Craig Ball's famous (infamous?) "Perfect Preservation Letter," which is truly admirable, but which we would submit goes beyond what is actually required given the emphasis on proportionality in the amended Rule 26. So, if you represent an individual plaintiff with zero e-discovery burden, then copy-paste Mr. Ball's masterwork and fire away. If you represent anyone else, think twice before touching that one.

> Developing **e-discovery strategy hand in hand with trial strategy** is the best approach for achieving solid results for your clients

Instances where you should indeed consider sending a preservation letter are those where sanctions, if applied after spoliation occurs, cannot make your client happy. For example, in a case alleging theft of trade secrets, pertinent data may be ephemeral or quickly destroyed if counsel on the other side fails to take immediate steps to ensure preservation. In that type of a situation, your case may be lost as the evidence is destroyed—post-hoc fighting over Rule 37 won't make your client whole. Another case might be one involving unusual types of data that could be overlooked by a routine preservation process (which would be likely to focus on the usual suspects of email, user hard drives, etc.). If you do end up sending a letter, be thoughtful in your correspondence so that you don't inadvertently set out unattainable preservation standards that could someday come back to bite your client.

**How do you pick a review method and what are the consequences of your choice?** Next scenario: Your client asks you to recommend a method for document review and there are precisely a bajillion documents in the pool. To start, what are the choices? Roughly, there are two routes you can take: (1) the tried-and-true method of attorney review, which is generally some combination of contract-attorney review and outside counsel review; (2) technology-assisted review (or TAR, as the cool kids say).

*Here's the case for human review:* Much has been made in recent years about the superiority of TAR to human review. We respectfully disagree. If you drill down on some of the studies on which those claims are based, the results are modest (finding TAR only "at least as accurate" as manual review) and the methods are questionable (utilizing review teams of volunteer law students, for example). Bottom line: In terms of accuracy (not necessarily speed or cost), we would put one of our attorney review teams ups against any TAR tool, any day.

Human review is an excellent way for the trial team to learn about the details of the case as the review progresses. A well-run review team will meet periodically, with each person giving an overview of their data set and talking about key documents they've seen and themes that are emerging. The trial team is required to participate, to be quickly alerted to new information and also to correct course if the review has strayed. Weekly meetings sound expensive, you say? For clients that like to win, they're worth every penny.

Another reason for choosing attorney review might be that you have a data set that contains types of files that are incompatible with any TAR tool (computer code, CAD files, etc.). Additionally, if you don't trust the other side to do a good job with TAR, regardless of how much "cooperation and transparency" is going on, angling toward both sides agreeing to attorney review could be a good idea.

*Here's the case for TAR:* If you select the right TAR tool, you can have a review completed in record time, with excellent cost efficiencies. The per-document pricing for any TAR tool, compared to attorney review, is tantalizingly attractive, especially for clients who are repeat players in litigation. You should know, however, that there are many different types of TAR tools; they are not all created equally; and selecting the right one is critical (think screw driver v. hammer here). Broadly, there are tools driven completely by algorithms and there are tools that incorporate linguistic modeling.

We've found that most sales folks selling TAR tools aren't sufficiently knowledgeable about the limitations of what they're hawking. If you ask » Page 10

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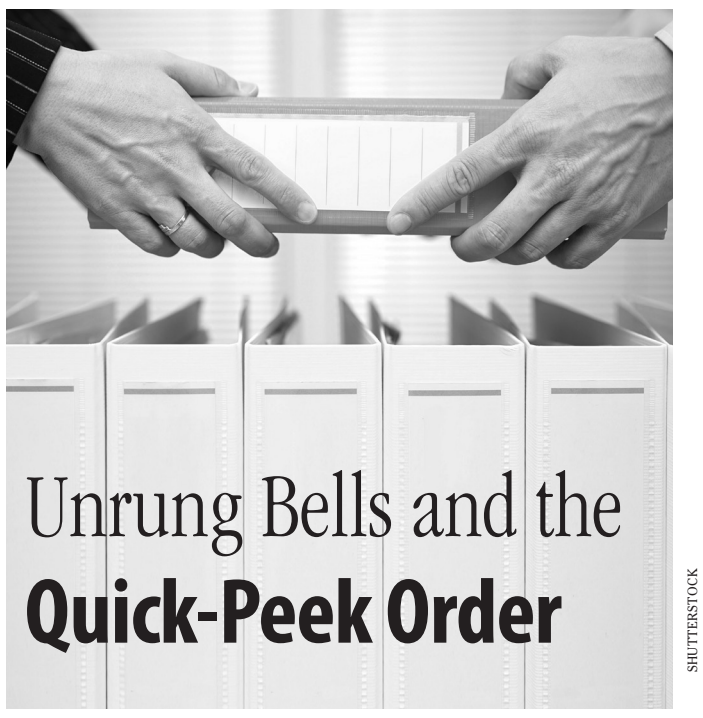

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## Unrung Bells and the Quick-Peek Order

BY THOMAS ROHBACK

Electronic discovery was originally viewed as a much more efficient way of collecting documents in the course of discovery. That ease of storage, search, and retrieval, however, led to the exponential growth of the volume of data being collected and reviewed. This has led to more burdens and more discovery disputes. Grappling with the associated delays and discovery motions, courts have fashioned more creative discovery processes. One such mechanism is the "quick-peek" agreement. Viewed as a mechanism for parties to exchange data quickly without the fear of waiving privilege or its subject matter, courts started to consider the mandatory use of the quick-peek to streamline discovery in 2014.

On Oct. 29, 2014, Judge John T. Copenhaver of the Southern District of West Virginia issued an interesting order that set forth the court's authority to order the "quick-peek" of privileged documents over a party's objection under Federal Rule of Evidence (FRE) 502. *Good v. Am. Water Works Co.*, No. 2:14-01374, 2014 WL 5486827 (S.D. W.Va. Oct. 29, 2014). In *Good*, the parties had agreed to use technology assisted review to outline the scope of data to be produced. Id. at 2. Plaintiffs requested a quick-peek order to prevent defendants from engaging in a privilege review prior to production. Id. at 1. The court found, however, that a quick-peek order was not yet necessary—that defendants had not shown any signs of delaying discovery as a result of their privilege review, and there was not yet a dispute over documents being withheld as privileged. Id. at 3. In its dicta, however, the *Good* court emphasized the value of a quick-peek order as a means to hasten discovery, expressly noting it was within the court's inherent power to enter such an order even over objection of a party. Id.

After *Good*, only one other federal district court issued a quick-peek order over a party's objection as an alternative to issuing a discovery sanction where it found the defendant's privilege log inadequate and that the defendant had refused to cooperate with plaintiff. Other than the *Summerville* decision, there was no decision taking that position—until October 2017. *Summerville v. Moran*, No. 14-cv-2099, 2016 WL 233627 (S.D. Ind. Jan. 20, 2016).

In *Fairholme Funds,* the U.S. Court of Federal Claims ordered the government—over the government's objection—to produce 1,500 documents for a quick-peek, which had been withheld under the "deliberative process and bank examination privileges." *Fairholme Funds v. United States*, No. 13-465 MMS, 2017 WL 4768385, (U.S. Fed. Cl., Oct. 4, 2017). Unlike *Summerville*, where the quick-peek was ordered as an alternative to sanctions, the *Fairholme* court recognized that "plaintiff does not allege and the court does not find that the government has failed to satisfy its discovery obligations …" Id. at 8. Instead, the court ordered a quick-peek as a method for moving the case and discovery along more quickly. Noting that previous motions to compel had resulted in additional disclosures, the *Fairholme* court found "and the government concedes, the government's production of documents in this case has been piecemeal." Id. In a pragmatic fashion, the court reasoned that "if the court were to deny plaintiffs' request …, plaintiffs would file another motion seeking the court's in camera review of all of the remaining 1500 documents." Id. at 9. Essentially *deciding that it would rather have plaintiffs' counsel conduct the review than the court,* the *Fairholme* court ruled that "[g]iven the court's heavy caseload and limited resources, the use of the quick-peek procedure is a much more viable and attractive option." Id. To support this result, the court stated that, "[f]irst and foremost, it is 'axiomatic that a trial court has broad discretion to fashion discovery orders.'" Id. The court then rejected the government's argument that requiring a quick-peek would run afoul of Rule 502(d) of the Federal Rules of Evidence: "[T]he purpose of the rule was to address two issues not relevant to the current dispute—the need to provide protection for inadvertently disclosed materials and the need to address the high cost of discovery in cases involving large quantities of ESI … ." Id. Likewise, the court rejected the government's argument that allowing its adversary to review the content of privileged documents would destroy the protection of the privilege. The court's rationale on this point elides the fact that information will inevitably become known by the adversary. Rather, the court focuses on the idea that there is a clawback mechanism for the documents and that the protective order prohibits parties from using privileged information: "Thus, although there is no way to unring a bell that has already been rung, both parties can be assured of the fact that pursuant to the protective » Page 10

> Viewed as a mechanism for parties to exchange data quickly without the fear of waiving privilege or its subject matter, **courts started to consider the mandatory use of the quick-peek** to streamline discovery in 2014.

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## Getting It Right the First Time: Avoid the Dreaded Privilege Log 'Re-Review'

BY MARC R. SHAPIRO AND KELLY M. CULLEN

Privilege logs are loathed by the attorneys who create them, the judges who review them, and the clients who pay for them. And the only thing worse than creating a privilege log is *re-creating* a privilege log. While we can't promise a pain-free process, an organized approach upfront will help avoid this judicially-mandated infliction of pain. Follow these tips for outlining the law, log format options, and your internal processes and you're more likely to get your log right the first time.

### Know the Law

Do not underestimate the value of well-planned privilege review instructions. Counsel are often eager to jump right into the review process, which can lead to inadequate (or no) instructions. Think through the range of issues you'll likely confront. To that end, avoid "re-using" old instructions: privilege law varies by jurisdiction and issues differ based on your client and/or the types of documents you'll encounter. Below are several factors to consider when identifying the relevant law:

**Choice of Law.** Choice of law issues frequently arise in federal court, particularly MDLs and transferred cases. Recall that federal courts sitting in diversity apply the choice-of-law rules of the states in which they sit. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). However, when a case is originally filed in a proper venue and then transferred, the choice-of-law rules of the *transferor* jurisdiction apply. *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

**Corporations.** When your client is a corporation, special issues arise in defining the "client" for attorney-client privilege purposes. Courts apply two tests:

• *Subject Matter Test:* Applicable in most jurisdictions, including New York. The privilege may apply if the communications "concern[] matters within the scope of the employees' corporate duties," and the employees understand the discussions with counsel occurred so "the corporation could obtain legal advice." *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981).

• *Control Group Test:* Minority and more restrictive approach. Protection afforded to communications by "decisionmakers or [those] who substantially influence corporate decisions." *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 257 (Ill. 1982).

**Legal vs. Business Advice.** Attorneys all too often categorically treat communications between in-house counsel and corporate employees as privileged. However, in-house counsel often serve a "dual role of legal and business advisor." *United States v. ChevronTexaco*, 241 F. Supp. 2d 1065, 1073 (N.D. Cal. 2002). Therefore, a nuanced approach is advised. You should assess "whether a particular communication was made for the purpose of securing legal advice (as opposed to business advice)." Id. Under New York law, to qualify as privileged, the "predominant purpose" of the » Page 11

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# Beyond Document Review: Meeting Other Big Data Challenges

BY BRUCE HEDIN

Years after Judge Andrew Peck declared it to be "black letter law" in *Rio Tinto Plc v. Vale S.A.*, 2015 U.S. Dist. LEXIS 24996, 8 (S.D.N.Y. March 2, 2015), technology-assisted review has finally entered the mainstream among a growing suite of technology-driven e-discovery tools. It is taking a bit longer, however, for practitioners to fully recognize that document review over large data populations is an information retrieval (IR) task.

Why does this matter? For one thing, it is important to understand that the scientific disciplines now marshaled for an effective information retrieval effort (data science, linguistics, and statistics) are essential to the successful conduct of document review. Once document-by-document manual review was augmented—or in some cases supplanted—by technological tools, it became a different exercise altogether; one that relies upon knowledge and expertise to properly execute. This understanding has been affirmed in the recently published ISO standard on e-discovery (see ISO 27050-3), which put it as follows:

> An ESI review … is fundamentally an information retrieval exercise; an effective ESI review will therefore draw upon, as appropriate, the kinds of expertise that are brought to bear in *information retrieval science*. (emphasis added).

One of these IR competencies—expertise in sampling—plays an important role in information retrieval and is, in fact, at the heart of a successful document review effort. Although it may bring us back to specialized and sometimes arcane terminology that we may not have had occasion to think about since we passed Statistics 101 (e.g., mean, variance, standard deviation, confidence level, confidence interval), sampling, correctly applied, can provide decisive answers to questions that would otherwise cause us to lose sleep.

### Applications of Statistical Sampling Outside Document Review

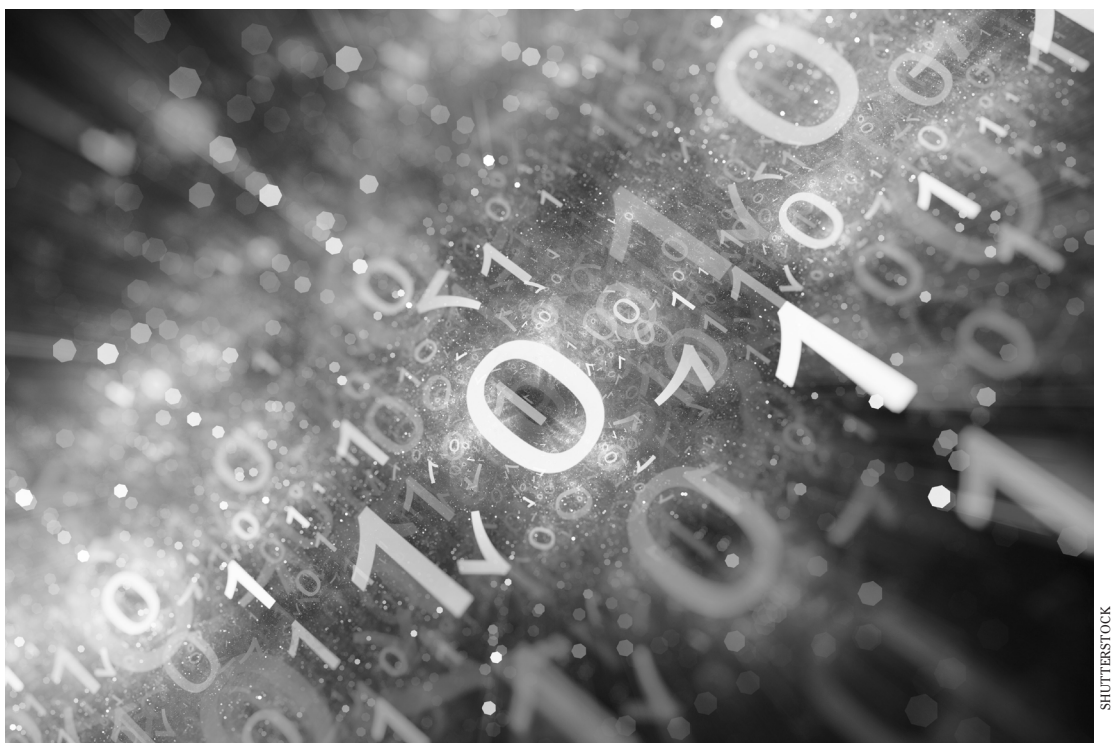
While sampling and statistical estimation can provide decisive empirical answers to questions related to document review (chiefly, but not only, through the provision of statistically-sound estimates of how effective a process is), they can also provide actionable answers to data-related questions practitioners may have in other contexts. (See Hedin, B., D. Brassil & A. Jones, "On the Place of Measurement in E-Discovery" (2016), in J. R. Baron, R. C. Losey & M. D. Berman (eds.) *Perspectives on Predictive Coding* (pp. 375-416)). Large volumes of ESI have not only transformed the nature of the challenges posed by document review, they now present more general challenges to companies seeking efficient ways to extract the most useful information from their data. Such data dilemmas arise more and more frequently as organizations endeavor to engage in data management, reduction or automation efforts. Sampling can help.

Here are just a few real-world examples:

### Case Study 1: Multiple Email Sources

*Situation.* In the face of impending litigation, Company A has collected and reviewed a large population of emails from its Exchange servers. The company subsequently realizes that its information archiving technology has created a data repository that could be a source of over 3 million additional in-scope emails. The company believes that emails in the second repository should be largely duplicative of the already-reviewed emails and so do not need to be reviewed. In order to decide whether or not to review the second archive, however, the company needs more than a hypothesis; it needs sound empirical guidance.

*Solution.* At first blush, just deduplicating the population seems like a good solution. However, an effective approach requires more than simple deduplication because, given that the two sources of emails have been processed by different technologies, standard deduplication techniques will leave many genuine duplicates unrecognized. Instead, the following exercise is designed, which uses sampling to help achieve statistically reliable results.



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Starting from a large sample (approximately 120,000 emails) drawn from the un-reviewed archive, the effort proceeds progressively through stages of:

(1) automated exact deduplication (against the already-reviewed population);

(2) automated near-duplicate identification, and then;

(3) using a second smaller sample (4,000 emails) drawn from emails *not yet identified as duplicative*, manual review coupled with manual search.

The results of the exercise provide the company with a statistically-sound estimate of the prevalence of non-duplicative responsive material in the second repository. The study's findings—that the upper threshold for the percentage of non-duplicative responsive documents in the second archive is extremely low (a fraction of a percent)—findings which hold at a high level of statistical confidence, provide Company A with the empirical grounds it needs to exclude the second archive from further review, saving untold hours and a significant spend.

This case study illustrates how a well-designed sampling exercise can provide a statistically-sound answer to a question a company has about its data in an efficient manner, making use of large samples in early stages when less costly automatic techniques can be applied, and then drawing smaller samples when more costly manual methods are required.

### Case Study 2: The Accuracy Of Document-Assembly Software

*Situation.* Company B uses automated document assembly technology as an aid in preparing notices that the company sends to users of its services. The company wishes to obtain a measure of the accuracy of the information contained in the notices, which is the product both of the document-assembly technology and of the quality-control performed by the individual ultimately responsible for preparing and sending the notice. The company would like a measure of the accuracy of the notices both in aggregate and broken down by individual preparer (so as to see whether there are any meaningful differences among individual preparers).

*Solution.* A study is designed whereby:

(1) the population of notices in-scope for the study is defined;

(2) the specific fields of information within notices that are to be assessed for accuracy are identified;

(3) a random sample of notices is drawn from the study population;

(4) the sampled notices are manually reviewed for accuracy against records known to contain the correct information, and;

(5) estimates (and associated 95 percent confidence intervals) for the mean accuracy of the notices, both in aggregate and broken down by individual preparer, are obtained.

The study's findings—that the information in the notices is highly accurate (over 99 percent) and that there is no meaningful variation among individual preparers—findings which hold at a high level of statistical confidence, provide Company B with assurance that its notice preparation procedures are working as intended.

This case study illustrates how, once a meaningful metric is identified (here, mean accuracy of notices with respect to key fields), a sampling exercise can provide a simple and decisive answer to the question at hand.

### Concluding Remarks

Practitioners are increasingly aware of the insights sampling can provide with regard to the effectiveness of their document review procedures. The two case studies we have briefly reviewed illustrate how sampling can also be leveraged to provide efficient but scientifically-sound answers to other questions companies or their counsel may have about their data. The potential applications of sampling to solve such problems are myriad.

In a world in which almost all aspects of the practice of law are impacted by big data, legal practitioners would be well-advised to be on the lookout for opportunities to take advantage of the power and efficiency that sound sampling protocols offer. More generally, legal practitioners would benefit from the recognition that the law-science collaboration that has helped them meet the challenges of eDiscovery can also help them meet other data-related challenges they and their clients face.

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## Quick Peek

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order already in place, protected information—which includes both confidential and privileged information—is just that." Id. at 10. In rejecting the government's reference to the position taken by The Sedona Conference, the court concluded by stating, "The court's sole purpose in utilizing the procedure is to bring jurisdictional discovery to an end so that the case may move forward." Id. at 11.

There is no dispute that the costs and burdens associated with electronic discovery and especially the care of privileged materials are growing. And it is generally accepted that courts have the discretion to fashion their discovery protocols. But, due to the unintended consequences of such non-consensual quick-peek orders, courts should remain close to the teachings of the Sedona Conference, which find that "although a court may enter a Rule 502(d) order allowing the parties to engage in a 'quick-peek' process, the court cannot [or should not] order a quick-peek process over the objection of the producing party" as this "might implicate due process concerns." The Sedona Conference, "Commentary on Protection of Privileged ESI," 17 Sedona Conf. J. 99, 140 (2016). They further observed that FRE 502 "was designed to protect producing parties, not to be used as a weapon impeding a producing parties' right to protect privileged material." Id. Other than its concern about the added burden to the court in having to conduct an in camera review, the objectives of the *Fairholme* court could have been accomplished by having the court—or a neutral discovery master—conduct the quick-peek rather than opposing counsel. In that way, the discovery dispute could be quickly advanced without the risk of adversaries learning protected information. And no bell would need to be "unrung."

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## Choices

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for a vendor's data scientist—or maybe their expert in data analysis and information analytics—you're likely to get someone who can answer the tough questions. You need a very frank evaluation of whether a particular tool is well-suited for your documents. Whether the sales folks will admit it or not, there are certain TAR tools that will simply never, ever work on certain data sets.

If you select one of those, you'll end up with a senior associate crying in the night, valiantly trying—but failing—to make the system stabilize. Clients need to consider the entire e-discovery spend (outside counsel time + vendor time + per document TAR cost) before being beguiled by the potential cost savings TAR purports to offer.

Then finally, with TAR come increased levels of "cooperation and transparency." While it is wholly inappropriate for the other side to be involved in making or reviewing your determinations of responsiveness (because of obvious privilege considerations), there is a whole lot of information that you will indeed be required to provide. You will likely have to provide an overview of your TAR process, information about its design and outputs, and quality-control metrics such as recall and precision. If you're working with a reasonable opposing counsel, this process isn't so bad. If you're working with opposing counsel who is new to things and/or prone to gamesmanship, then "cooperation and transparency" can feel a lot more like "drawn and quartered." Your client will agree, once she sees the bill.

**Who should handle discovery disputes that end up before the court?** When clients hire counsel, they tend to focus on the person who will be first chair at trial, and rightly so. But additionally, clients should ask a critical series of next questions: Who is the No. 2? Who will be running the case on a day-to-day basis? If there's an e-discovery dispute, who will handle it and, if necessary, argue it before the court?

Rather than trying to prop up a very experienced lead trial attorney with last-minute knowledge of technical e-discovery issues, consider whether there is a person on the team or at the firm who already has that knowledge as well as the courtroom presence to be persuasive for a judge. Oftentimes, firms will have an e-discovery specialist, but that person have little or no courtroom experience. Conversely, some senior trial attorneys sometimes see e-discovery work as the bush leagues, and don't know much about it. This is a bad model. Advocacy in e-discovery is a specialized skill; an experienced advocate can address the e-discovery problem as a trustworthy subject matter expert, presenting themselves to the judge as the most reasonable person in the room. They can seize opportunities to condition the judge on key trial themes, helpful client information, and the rightful goals of the litigation. Sending in the wrong person for that hearing can lead to bad rulings and missed opportunities.

Simply put, e-discovery strategy needs to be married to trial strategy from the beginning of the case. Lawyers should rise to the challenge, and clients should demand as much.

Simply put, e-discovery strategy needs to be married to trial strategy from the beginning of the case. Lawyers should rise to the challenge, and clients should demand as much.

# Regulator Preservation Notices—**Can You Narrow the Scope?**

BY ROBERT LINDHOLM AND LUCIE COHEN

A federal or state regulator, such as the SEC or a state attorney general, sends a company a preservation notice stating that it believes the company may possess "documents" relevant to an ongoing investigation and requests that the company "reasonably" preserve such evidence until further notice. The stated subject matter of the investigation is very broad and the notice requests the company preserve documents going back a number of years. "Documents" is defined broadly in the notice and includes not only emails, hard copy documents, Word documents, and even voicemails, but also categories that may be undefined and unfamiliar to many such as backup files, file fragments, and logs. The notice advises that the company may need to act to prevent routine destruction practices, including regular deletion of emails and recycling or rotation of backup tapes. The notice also states that if the company does not comply it could face civil or criminal liability.

How should the company respond? Should it attempt to comply in full, including suspending email deletion policies, suspending backup tape recycling or rotation schedules, and preserving documents such as backup files, file fragments, and logs? Or should it seek to narrow certain requests at the risk of appearing non-cooperative? This article focuses on two requests in a typical regulator preservation notice—the requests to preserve backup files and suspend backup tape recycling or rotation schedules—and examines the potential consequences of non-compliance with the requests, the ramifications of complying with the requests, and how a company can effectively narrow the obligations while minimizing the risk of losing cooperation credit.

**Retain Counsel With Experience in Government Investigations and E-Discovery.** Upon receipt of a preservation notice from a regulator, in-house counsel will want to engage outside counsel experienced in government investigations and e-discovery.

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**How should the company respond?** Should it attempt to comply in full, including suspending email deletion policies, suspending backup tape recycling or rotation schedules, and preserving documents such as backup files, file fragments, and logs? Or should it seek to narrow certain requests at the risk of appearing non-cooperative?

Regulators will all but expect a company to hire outside counsel and often look at that decision as an indication of how serious a company is taking an investigation. Although it is commonplace for a company to engage counsel with government investigations experience, companies often overlook the importance of having counsel with significant e-discovery experience. Companies must make important decisions on e-discovery issues such as preservation very early on despite having little information regarding the scope of the regulator's investigation. In fact, when a company receives a preservation notice, it likely does not even know whether it is a target of the investigation and almost certainly will not know how long it will be required to preserve documents.

The implications of e-discovery decisions can be long-lasting and very costly. For example, in 2014, General Electric Co. reported that it had spent nearly $6 million in one matter to collect and preserve documents and litigation had still not even been filed. It reported that it was spending over $100,000 a year to preserve those documents. Letter from Bradford A. Berenson to Federal Rules Advisory Committee (Feb. 7, 2014).

**The Potential Consequences of Non-Compliance Are Severe.** The consequences of failing to comply with a preservation notice can be severe and scare away most companies from even considering attempting to narrow the obligations in a preservation notice. *First*, as a preservation notice typically advises, failure to comply with the notice could result in civil or criminal liability. The SEC and other regulators can impose monetary sanctions for non-compliance and the Sarbanes-Oxley Act provides criminal penalties of up to 20 years for anyone knowingly destroying, concealing, or falsifying any record with the intent to impede an investigation. 18 U.S.C. §1519. *Second*, if the case ever goes to a jury, the judge could give an adverse inference instruction advising the jury that it could infer that the information in destroyed documents was unfavorable to the company. Fed. R. Civ. P. 37(e). *Third*, failing to comply with a preservation notice could indicate to a regulator an unwillingness to cooperate in the investigation and could threaten a company's ability to obtain cooperation credit. *Fourth*, a regulator could interpret a failure to comply as an effort to dispose of incriminating evidence.

**The Ramifications of Preserving Backup Tapes Are Significant.** The preservation of backup files and the corresponding suspension of backup tape recycling or rotation schedules are often the most burdensome and costly requests to a company in a regulator preservation notice. At the outset, it is important to note that regulators generally do not provide in the notice any definition for the term "backup files", but the reasonable interpretation of that term is that it covers files maintained in backup environments, including backup tapes. Nor do regulators' notices typically distinguish between backup tapes used for traditional disaster recovery purposes and backup tapes used for routine data storage in the ordinary course. A regulator likely will not be amenable to excluding backup tapes used for routine data storage from preservation, whereas a regulator may entertain a request seeking to exclude disaster recovery backup tapes from preservation.

Many companies use backup tapes to periodically copy data from the company's regular, everyday storage to a tape so that the data can be recovered if there is a hard disk crash or failure. Each tape represents a snapshot in time that generally contains data from one or more data sources and contains numerous employees' data for various time periods. Because of the massive amount of data that most companies generate, backup tapes are generally overwritten after some period of time and reused. Backup tape recycling or rotation schedules can vary widely by company and by industry depending on many considerations, including regulatory requirements. Suspending the backup tape recycling or rotation schedule forces a company to purchase massive amounts of additional storage, at significant cost, and can result in a company preserving a copy of all company data every day, day after day after day, as long as the preservation obligation exists.

In addition, once the decision is made to suspend the recycling or rotation schedules, a company may be forced to continue running outdated systems or programs that it had scheduled to decommission or risk not being able to access the data on the backup tapes from those systems or programs in the future. Companies must decide whether to pay license fees and upkeep costs to keep those systems or programs running or let the systems or programs go out of use and attempt to later restore the systems or programs or rely on a specialized data recovery company to extract data from the tapes. As a result of near certain complications surrounding preservation, companies are forced to pull significant human resources away from normal company operations to prepare and implement a preservation plan, monitor compliance, and troubleshoot as issues arise. Furthermore, if a regulator actually requested a company pull data from backup tapes, many companies would have significant difficulties identifying which backup tapes contain the requested information.

**Tips on Narrowing the Scope.** In light of these potential consequences, can a company attempt to narrow the obligation to preserve backup files and suspend backup tape recycling or rotation schedules? Many attorneys assume the answer is no because of the risks discussed above, but that assumption paints with too broad a brush. To be clear, there may be situations where attempting to narrow these requests is not an option. However, in the appropriate situation, a company can attempt to narrow these preservation requests and there are a few things a company can do to maximize the chances that the regulator agrees with its position and minimize the chances it jeopardizes potential cooperation credit.

*First*, in what may seem like an obvious warning to most, a company should always communicate to the regulator any decision not to comply with the preservation notice as written. There is no better way to watch the risks discussed above become reality than to decide your company or client is not going to comply with the preservation notice and fail to advise the regulator of that decision. *Second*, counsel should be prepared to discuss the preservation efforts the company is undertaking in response to the preservation notice in order to demonstrate to the regulator that the company is taking the preservation request very seriously and the steps taken by the company are reasonable and sufficient. *Third*, counsel should thoroughly understand and be prepared to explain in detail to the regulator a company's data retention policies and the difficulties and consequences of implementing the requests at issue in the preservation notice. *Finally*, specifically with respect to the topic of backup tapes, it is critical that counsel make clear that the company utilizes backup tapes for potential disaster recovery purposes, as opposed to routine storage (although counsel should be aware that there could be documents on disaster recovery backup tapes that are not available elsewhere).

**Conclusion.** Keeping these considerations in mind, a company may find a regulator willing to bend on its preservation expectations, which may in turn provide some relief from otherwise onerous preservation obligations and significant costs that could saddle a company for years.

# Re-Review

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communication must be to obtain legal advice. *Koumoulis v. Indep. Fin. Mktg. Grp.*, 29 F. Supp. 3d 142, 146 (E.D.N.Y. 2014).

**Joint defense/common interest privilege.** The joint defense/common interest privilege is an exception to the rule that a party waives privilege by disclosing confidential information to third parties. Under New York law, the exception applies where the parties share a common interest but is limited to communications related to legal advice in pending or reasonably anticipated litigation. *Ambac Assurance v. Countrywide Home Loans*, 27 N.Y.3d 616, 628 (2016). Counsel should note though that this exception varies considerably by state.

**Self-critical analysis privilege.** The self-critical analysis privilege treats as confidential corporate communications intended to assess compliance with laws and regulations. Many federal courts, including the Second Circuit, have not yet adopted it. See *Martinez v. Metro-N. Commuter R.R.*, 2017 WL 4685114, at *2 (S.D.N.Y. Oct. 18, 2017). Notably though, even where adopted, the privilege only applies to the evaluation itself, not the facts analyzed. Id. at *4.

### Know Your Format Options

Document-by-document privilege logs are time consuming to create and review. But privilege logs *can* come in all shapes and sizes. Local rules, model ESI orders, or judicial preference may be instructive. Consider these non-traditional options when negotiating your privilege log.

**Categorical logs.** Some jurisdictions, including New York, have local rules promoting the use of categorical logs. Under Rule 11-b of the N.Y. Rules of the Commercial Division of the Supreme Court, parties may use "any reasoned method of organizing the documents" into categories rather than creating a document-by-document log. Refusal to adopt a categorical approach may allow a party to shift costs, including attorney fees.

If a categorical log isn't appropriate for all of your privileged documents but could be used for some (e.g., privilege is indisputable or descriptions will be identical), consider a "hybrid" log where a subset of documents are logged categorically. See generally Hon. John M. Facciola & Jonathan M. Redgrave, "Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework," 4 Fed. Cts. L. Rev. 19 (2009).

**Metadata logs.** Once considered "alternative," metadata logs (e.g., logs that include email author, recipient, date, and subject) are becoming mainstream. The Seventh Circuit eDiscovery Pilot Program's case management order proposes identifying "as much objective metadata as is reasonably available" along with the privilege and/or protection being asserted. As for the dreaded "narrative description," it proposes describing the "categories of ESI" withheld rather than individual descriptions. Similarly, the Western District of Washington's Model Agreement Regarding Discovery of Electronically Stored Information proposes a metadata log for ESI, including additional information only if metadata is "insufficient" for evaluating privilege claims.

If the parties agree metadata-only logs are sufficient, be careful because metadata may not include enough information to assess privilege and you don't want to re-review documents. Consider including a description in circumstances with a generic email subject or document title—you're better off drafting the description on the first review than going back and re-reading. You'll also need to manually include metadata for non-ESI.

### The Nitty Gritty

You'll inevitably encounter surprises once you dig into the documents. Identify as many potential issues as you can to curtail a re-review—some potential issues and ideas are outlined below:

**Timing.** Identify when you'll produce your log. Ensure that your workflow allows time for review as an unreasonable timeline may result in the dreaded "re-review."

**Privilege review process.** Create a clear review hierarchy. Have first-level reviewers screen documents for privilege (e.g. identifying attorney names) and direct to a pre-designated privilege screening team. You can also use artificial intelligence alongside your review team to help identify and categorize documents. Identify a protocol for evaluating "close calls"—whether that's a specific team member, the client, or a committee. And provide guidance on common close calls (e.g., "FYI" emails to attorneys or general references to "legal" or "counsel").

Federal Rule of Evidence 502(d) Orders should be used in every case **to protect against inadvertent disclosure**. But 502 should also be used to protect against advertent production.

**Efficiencies.** Negotiate using email threading to log the most inclusive emails and treating post-complaint emails with outside counsel as per se privileged. When drafting narrative descriptions, set standards and provide examples to promote consistency. Or consider using narrative automation tools: technology has reduced narrative drafting time by more than 50 percent in just a few years.

**Redactions.** Come to early agreement on inclusion of privilege log redactions. As with privilege calls, create a protocol for the redaction process (e.g., have first-level reviewers mark redactions and second-level reviewers apply). If your data includes a large number of spreadsheets or PowerPoints, negotiate native redactions—it will reduce costs and potential challenges. If redacting for personal information as well as privilege, decide how to distinguish the redactions.

**Third parties.** If you know third parties received documents and/or communications, identify them and determine whether disclosure waives privilege. Savvy eDiscovery professionals can isolate documents that include third parties.

**Distribution lists.** If your client utilizes distribution lists, identify the individuals on those lists as soon as possible. And recall distribution lists change over time: determine whether your client maintains historical membership information.

**Attachments to privileged emails.** Attorneys all too often presume that attachments to privileged emails are themselves automatically privileged. They are not. See, e.g., *Leonen v. Johns–Manville*, 135 F.R.D. 94, 98 (D.N.J.1990). Independently assess privilege for these documents.

**Miscellaneous quality control.** Review a sample of the documents and log entries. Look at the log in its entirety to see trends that may cause issues (ex. poor descriptions or blanks). Is there any privileged information on the log (ex. in email subject lines)? Put attorney names in bold font and use metadata to identify likely challenges (ex. communications without attorneys or including third parties). Confirm redacted documents are produced.

**Rule 502(d) orders.** Federal Rule of Evidence 502(d) Orders should be used in every case to protect against inadvertent disclosure. But 502 should also be used to protect against *advertent* production. For example, if your client elects to produce potentially privileged documents sent to distribution lists due to the cost of analyzing recipients of historical distribution lists, a 502 order can be used to protect against waiver in present and future cases. *Chevron v. Weinberg Grp.*, Misc. Action No. 11-409, at *1 n.1 (D.D.C. Oct. 26, 2012).

**Letters Welcome**

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