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Volume 28 | Issue 2

Perspective

2015

The Federal Rules Of Civil Procedure, Electronic Health Records, And The Challenge Of Electronic Discovery

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Recommended Citation

Terrance K Byrne, *The Federal Rules Of Civil Procedure, Electronic Health Records, And The Challenge Of Electronic Discovery*, 28 J.L. & Health 379 (2015)
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THE FEDERAL RULES OF CIVIL PROCEDURE, ELECTRONIC HEALTH RECORDS, AND THE CHALLENGE OF ELECTRONIC DISCOVERY

TERRANCE K BYRNE

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[E]lectronic discovery is suddenly upon us. It became ubiquitous and essential very quickly. Although intuitively we think of the ability to gather, retrieve, and search vast amounts of information remotely and electronically as the source of great savings in time, effort, and money, so far the reverse has proven true. Electronic discovery is more expensive, more time-consuming, more difficult, and more anxiety producing than paper discovery.¹

I. INTRODUCTION

Picture the not so distant future of healthcare:

Mary, a forty-two year old mother of three, was having chest pain. Her physician ordered a chest x-ray. He saw a “hazy area,” and ordered a Computerized Tomography (CT) scan of her chest. The procedure was completed with no mention of any abnormality. A year later, Mary went back to her physician because she found a lump in her breast. She was diagnosed with cancer that had spread to her lungs. After several months of aggressive, but unsuccessful treatment, Mary was moved to hospice and died. Her husband hired an attorney who requested all medical records and all diagnostic images, including shadow or unused CT exam slices, as well as audit trails from all systems that housed Mary’s electronic records, including audits showing which practitioners reviewed her CT scan and results.

¹ Hon. Lee H. Rosenthal & James C. Francis IV, *Managing Electronic Discovery: Views from the Judges*, 76 FORDHAM L. REV. 1, 4 (2007).

Jim worked at the local plant for forty-two years. Jim was a meat and potatoes guy, who had a sedentary lifestyle and was overweight. Jim started having chest pain and was taken to the emergency room, where the doctors there found that his heart was enlarged. He was taken to surgery for a cardiac catheterization and placement of a stent. After the procedure, his heartbeat was irregular. Because of this, he was admitted to the hospital again. He was placed in the cardiac unit with continuous telemetry monitoring so that his doctors and nurses could more easily monitor his heart rhythm at a central desk. In the middle of one night, a Code Blue is called on Jim, because his heart had stopped. Despite the quick work of the doctors and nurses, Jim did not survive. Six months later, an attorney representing Jim's family requested his medical records including all of the continuous monitoring data for the time that Jim was in the cardiac unit. The attorney also requests all of the images from the catheterization lab and the time sheets of all staff.

Rita was an eighty-three year old mother of two, grandmother of four, and great grandmother of one. Rita had been a widow for years, and had continued to live on her own. She was active and in reasonably good health. One day she noticed she had shortness of breath and went to see her doctor. After taking a chest x-ray, he diagnosed her with pneumonia. She was admitted to the hospital for antibiotic therapy. Because of Rita's age, diagnoses, and medications, she was considered "high risk" for falls. Accordingly, special precautions had to be taken. Her daughter talked with the nurses and physician and made sure Rita was comfortable. Later that night, Rita got up to go to the bathroom. On her way back to bed she tripped and fell, fracturing her hip. For the next six months Rita was confined to a wheelchair. She had move to an extended care facility. Rita's family sued. Their attorney requested Rita's entire medical record, the hospital's policy on "high risk" falls, an audit of her bed alarm, an audit of all nurse calls for the floor, and any instructions given to patients and families regarding falls.

While these stories are all hypothetical, similar accidents happen in hospitals on a routine basis, some of which are preventable.² Litigation often follows. With the advent of electronic health records ("EHRs") and electronic monitoring tools, the risks that hospitals face regarding the storage and production of electronically recorded data have increased, and will continue to increase.

Widespread adoption of EHRs³ spurred by the Health Information Technology for Economic and Clinical Health Act ("HITECH"),⁴ combined with recent advances in electronic monitoring and recording of patient data, will continue to change the nature of healthcare litigation.⁵ Long battles over electronic discovery ("e-

² See LINDA T. KRON, JANET CORRIGAN & MOLLA S. DONALDSON, *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM I* (Mike Edington et al. eds., 2000).

³ See Chun-Ju Hsaio & Esther Hing, *Use and Characteristics of Electronic Health Record Systems Among Office Based Physician Practices: United States, 2001–2013*, U.S. DEP'T OF HEALTH & HUMAN SERVS., CTR. FOR DISEASE CONTROL & PREVENTION NAT'L CTR. FOR HEALTH STATISTICS 1, 1 (Jan. 2014), available at <http://www.cdc.gov/nchs/data/databriefs/db143.pdf>.

⁴ See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

⁵ See Blake Carter, *Electronic Medical Records: A Prescription for Increased Medical Malpractice Liability*, 13 VAND. J. ENT. & TECH. L. 385, 389 (2010).

discovery”) have already begun. Archetypal cases such as *Zubulake v. UBS Warburg*⁶ (“*Zubulake I*”) and *Rowe Entertainment, Inc. v. The William Morris Agency*⁷ illustrate the serious financial implications of e-discovery.⁸

Before the recent change to EHR, medical records were paper documents.⁹ When a legal dispute arose, the record was secured.¹⁰ When healthcare litigation began, specifically in the area of medical malpractice, the plaintiff’s attorney would request the “complete medical record,” which included all physician orders, progress notes, nursing documentation, and results of any testing.¹¹

What constituted a complete legal medical record could be clearly defined. Health care providers, with some direction from Centers for Medicare and Medicaid services (CMS) and the Joint Commission (JC), outlined what was to be included in the complete legal medical record.¹² The daily list of tasks needed for the patient care, reams of monitoring strips, the ubiquitous sticky notes left on the front of the chart to remind the physician to reorder the patient’s antibiotics, and such similar items were routinely discarded in the usual course of business.¹³

The advent of electronically stored records has caused a tremendous increase in the volume, type, and location of information that become part of a patient’s treatment history.¹⁴ At the same time, recent amendments to the Federal Rules of Civil Procedure (“FRCP”), specifically relating to electronically stored information (“ESI”),¹⁵ have broadened the definition of “legal medical record.” The combination has markedly increased the challenges and risks of litigation.¹⁶

⁶ *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003).

⁷ *Rowe Entm’t v. The William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002).

⁸ *Id.* at 423, 431-433.

⁹ See Sandeep S. Mangalmurti et al., *Medical Malpractice Liability in the Age of Electronic Health Records*, NEW ENG. J. MED. 2060, 2061 (Nov. 8, 2010), available at <http://www.nejm.org/doi/pdf/10.1056/NEJMhle1005210>.

¹⁰ See *id.* at 2060.

¹¹ See e.g., *Fundamentals of the Legal Health Record and Designated Record Set*, AMERICAN HEALTH INFORMATION MANAGEMENT ASSOCIATION (Feb. 2011), available at http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1_048604.hcsp?dDocName=bok1_048604.

¹² WILLIAM K. MCLENDON, *THE LEGAL HEALTH RECORD: REGULATIONS, POLICIES AND GUIDELINES* 83-84 (Michael R. Lowe, ed., 2nd ed. 2011).

¹³ *Id.* at 14-15.

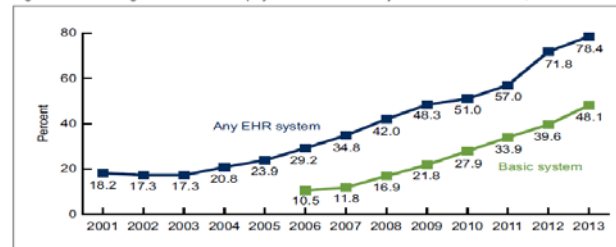
¹⁴ See *id.* at 10.

¹⁵ See *id.* at 67-70 (recognizing and broadening the need to retain emails, text messages, video, audio, etc).

¹⁶ See *id.* at 42, 64.

Adoption of basic EHR systems by office-based physicians increased 21% between 2012 and 2013.

Figure 1. Percentage of office-based physicians with EHR systems: United States, 2001–2013



NOTES: EHR is electronic health record. "Any EHR system" is a medical or health record system that is either all or partially electronic (excluding systems solely for billing). Data for 2001–2007 are from in-person National Ambulatory Medical Care Survey (NAMCS) interviews. Data for 2008–2010 are from combined files (in-person NAMCS and mail survey). Estimates for 2011–2013 data are based on the mail survey only. Estimates for a basic system prior to 2006 could not be computed because some items were not collected in the survey. Data include nonfederal, office-based physicians and exclude radiologists, anesthesiologists, and pathologists. SOURCE: CDC/NCHS, National Ambulatory Medical Care Survey and National Ambulatory Medical Care Survey, Electronic Health Records Survey.

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In an era of electronic health records, these and other issues will have to be addressed. Disparities among different courts' interpretations of the FRCP amendments have caused confusion for those in law and healthcare.¹⁸ Additional amendments to the FRCP are necessary to provide clarity, especially in the area of healthcare electronic discovery. Specifically, future amendments should include:

1. Enforcing the "Meet and Confer" process, especially as related to e-discovery and ESI;
2. Clear specification about when the duty to preserve information begins;
3. Delineating reasonable and consistent standards for production of information; and
4. Outlining the details for when sanctions for failing to retain ESI are appropriate.

II. THE WORLD OF DISCOVERY

As a guiding principle, Rule 1 states that the Rules are to be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."¹⁹ Under that premise, the purpose of discovery is not intended to be a tool for one party to gain a strategic advantage over its adversary.²⁰ Rule 26(b)(2) of the Rules specifically details the scope and limits of the civil discovery process.²¹ Generally, and unless otherwise limited by the court, "[p]arties

¹⁷ Hsaio & Hing, *supra* note 3 at 1.

¹⁸ See e.g., *The Legal Health Record in the Age of Discovery*, Healthcare Information and Management Systems Society (Nov. 2008), <http://www.himss.org/files/himssorg/content/files/legalhealthrecord.pdf>.

¹⁹ Fed. R. Civ. P. 1

²⁰ See *Igbinoia v. Catholic Healthcare West*, No. 2:07-CV-01170, 2010 WL 507881 (D.Nev. Dec. 7, 2010) (unreported case).

²¹ See Fed. R. Civ. P. 26(b).

may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."²²

The scope of discovery is intended to be quite broad.²³ As expansive as a process that discovery may be, it is not intended to be without bounds. Indeed, the Rules provide clear grounds for the court to justifiably interfere with the discovery process.²⁴ The dramatic rise in the pervasiveness of EHRs, while improving outcomes and ensuring better accuracy for patient treatment, has concurrently complicated the discovery process when litigation is required to resolve a dispute.²⁵

Discovery is an integral component of the litigation process. Black's Law Dictionary defines it as:

1. The act or process of finding or learning something that was previously unknown 2. Compulsory disclosure, at a party's request, of information that relates to the litigation 3. The facts or documents disclosed 4. The pretrial phase of a lawsuit during which depositions, interrogatories, and other forms of discovery are conducted.²⁶

The FRCP delineate what evidence is to be shared during discovery.²⁷ Rule 26 details what kind of information must be shared between parties during discovery:

(a) Required Disclosures.

(1) *Initial Disclosure.*

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

²² Fed. R. Civ. P. 26(b)(1).

²³ See e.g. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case.").

²⁴ See Fed. R. Civ. P. 26(b)(1) (empowering district court to order discovery of any relevant matter); see *Hickman* 329 U.S. at 507 ("But discovery, like all matters of procedure, has ultimate and necessary boundaries.").

²⁵ *Hickman* 329 U.S. at 507 (1947).

²⁶ BLACK'S LAW DICTIONARY 564 (10th ed. 2014); see also GEOFFREY C. HAZARD JR. & MICHELLE TARUFFO, *AMERICAN CIVIL PROCEDURE: AN INTRODUCTION* 115 (1993):

Discovery has a broad scope. According to Federal Rule 26, which is the model in modern procedural codes, inquiry may be made into any matter, not privileged, that is relevant to the subject matter of the action.' Thus, discovery may be had of facts incidentally relevant to the issues in the pleadings even if the facts do not directly prove or disprove the facts in question.

²⁷ FED. R. CIV. P. 26.

- (ii) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
- (iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and
- (iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.²⁸

At least forty-four states have adopted similar statutes and court rules to address discovery of ESI in state proceedings.²⁹ The purpose of discovery is clear: Each party during discovery shares essential information that allows them to more efficiently prepare, present, and perhaps defend its case. While the discovery rules generally permit discovery of all relevant information, and the while the Supreme Court has construed the rule liberally,³⁰ there is a prohibition on discovery of privileged information or information otherwise protected by attorney client privilege or, in healthcare, peer review protection.³¹

Considering this rule more precisely in the context of healthcare unearths an initial and significant question: What *kind* of information must be kept? Discussing this question in the context of antitrust litigation, one judge stated in her order:

Documents, data, and tangible things" shall be interpreted broadly to include writings, records, files, correspondence, reports, memoranda, calendars, diaries, minutes, electronic messages, voice mail, E-mail, telephone message records or logs, computer and network activity logs, hard drives, backup data, removable computer storage media such as tapes, discs and cards, printouts, document image files, Web pages, databases, spreadsheets, software, books, ledgers, journals, orders, invoices, bills, vouchers, check statements, worksheets, summaries, compilations, computations, charts, diagrams, graphic presentations, drawings, films, charts, digital or chemical process photographs, video, phonographic, tape or digital recordings or transcripts thereof, drafts, jottings and notes, studies or drafts of studies or other similar such material. Information that serves to identify, locate, or link such material,

²⁸ *Id.*

²⁹ *Current Listing of States That Have Enacted E-Discovery Rules*, K&L GATES, <http://www.ediscoverylaw.com/state-district-court-rules/> (last visited Mar. 23, 2015).

³⁰ *Hickman* 329 U.S. at 507 (1947).

³¹ Scope and extent of protection from disclosure of medical peer review proceedings relating to claim in medical malpractice action, 69 A.L.R.5th 559

such as file inventories, file folders, indices, and metadata, is also included in this definition.³²

This seems to be at odds with the rule found in what many courts regard as the leading case in e-discovery: *Zubulake v. UBS Warburg* (“*Zubulake I*”). In *Zubulake I*, despite chastising defendants for failing to retain substantive backup tapes, the court opined, “[m]ust a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, ‘no.’”³³ Such a requirement would surely cripple large corporations.”³⁴ Despite various amendments³⁵ to the FRCP and the correlating state rules, the persisting lack of clarity from either the FRCP itself or the Supreme Court tacitly permits courts to vary in their rulings about the kinds of information need to be kept, or that may instead, be appropriate to destroy. This lack of clarity has led to significant confusion for parties to a lawsuit.³⁶

III. SPOILIATION

During discovery a party may realize that information it seeks is no longer available. This loss of information may occur in the usual course of business, or may implicate a purposeful deprivation of information to which the other party is entitled. In these cases, a court must determine the intention behind the destruction as well as the availability of other potentially supplemental resources. If the information is intentionally destroyed, the court may need to address whether “spoliation” has occurred.

Spoliation generally refers to “[t]he intentional destruction, mutilation, alteration, or concealment of evidence.”³⁷ The Sedona Conference (“TSC”),³⁸ a non-profit organization involved in research and development of law and policy, regularly publishes and updates its *Glossary for E-Discovery and Digital Information Management*.³⁹ The general definition of spoliation may be more relevantly

³² In re Flash Memory Antitrust Litig., C-07-00086, 2008 WL 1831668 (N.D. Cal. Apr. 22, 2008).

³³ *Zubulake v. UBS Warburg L.L.C.*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

³⁴ *Id.*

³⁵ Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 Duke L.J. 597 (2010).

³⁶ A Jailhouse Lawyer’s Manual, COLUM. HUM. RTS. L. REV. (2009), available at <http://www3.law.columbia.edu/hrlr/jlm/toc/>.

³⁷ BLACK’S LAW DICTIONARY 1620 (10th ed. 2014).

³⁸ “The mission of TSC is to drive the reasoned and just advancement of law and policy by stimulating dialogue amongst leaders of the bench and bar to achieve consensus on tipping point issues [with the] goal of creating practical solutions and recommendations of immediate benefit to the bench and bar.” THE SEDONA CONFERENCE, <https://thesedonaconference.org> (last visited Apr. 19, 2015).

³⁹ The Sedona Conference, *The Sedona Conference Working Group Series, May 2005 Version*, available at <https://thesedonaconference.org/download-pub/3757>.

expanded to include: “[T]he destruction of records or properties, such as metadata,⁴⁰ that may be relevant to ongoing or anticipated litigation, government investigation or audit.”⁴¹ “Spoliation is the destruction of records which “[c]ourts [have] may be relevant to ongoing or anticipated litigation, government investigation or audit. Courts differ[ed] in their interpretation of the level of intent required before sanctions may be warranted.”⁴²

Rule 37 of the FRCP outlines a court’s role in determining what steps can be taken against parties that do not participate or collaborate during the discovery process.⁴³ In 2006, Rule 37(e)⁴⁴ was specifically added to address electronic data.⁴⁵ As the Committee Notes to the amendment state:

[The Rule] focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use. Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. Under Rule 37(e), absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system.⁴⁶

The Committee Notes for the 2006 amendment to Rule 37 also discuss “good faith” more specifically:

Whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under Rule 26(b)(2) depends on the circumstances of each case. One factor is whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources.⁴⁷

⁴⁰ BLACK’S LAW DICTIONARY 1141 (10th ed. 2014) (“Secondary data that organize, manage, and facilitate the use and understanding of primary data. Metadata are evaluated when conducting and responding to electronic discovery.”).

⁴¹ The Sedona Conference, *supra* note 39.

⁴² *Glossary, ELECTRONIC DISCOVERY REFERENCE MODEL*, <http://www.edrm.net/resources/glossaries/glossary/s/spoliation>, (last visited Apr. 5, 2015).

⁴³ FED. R. CIV. P. 37.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

Many state courts have adopted this position or one similar to it, though each state rule can vary.⁴⁸ Courts have also shown significant variation in evaluating evidence loss or destruction as well as imposition of any sanctions in the event of spoliation.⁴⁹ This variation has led to inconsistent and contradictory court rulings.⁵⁰ In *Spoliation of Evidence and Medical Malpractice*, Dr. Anthony Casamassima discussed possible remedies to be applied in cases of spoliation:

Three policy reasons exist justifying the control of spoliation of evidence: promotion of truth-seeking, fairness, and preservation of the integrity of the judicial system. There are three corresponding purposes for remedial measures in response to spoliation: restoration of accuracy, compensation of the victim of spoliation, and punishment of the spoliator. In turn, the aim of punishment may be retribution against the spoliator or deterrence of spoilage conduct. The purpose of restoration of accuracy is closely tied to the policy of promoting truth-seeking; the compensation purpose parallels the fairness policy; and the punitive aspect may prevent further incursions upon judicial integrity.⁵¹

Discretion then is given to the court to determine the sanctions that will be applied.⁵² This discretion has lent itself to a wide variation in the application of the rule.⁵³

IV. ZUBULAKE V. UBS WARBURG, L.L.C.

Prior to the 2006 amendments to the FRCP, *Zubulake* provided an insightful framework for addressing e-discovery.⁵⁴ The case⁵⁵ analyzed when the duty to preserve begins, whether electronic records are discoverable, and the circumstances in which data is accessible.⁵⁶ That case also discussed appropriate sanctions for failing to preserve evidence after the duty to preserve has attached.⁵⁷

Rule 26(b)(2) imposes limitations on the discovery process with regard to ESI. The 2006 amendment to the rule was a specific attempt to standardize the discovery

⁴⁸ Seymour Moskowitz, *Discovery in State Civil Procedure: The National Perspective*, 35 W. ST. U. L. REV. 121, 124-25 (2007).

⁴⁹ Eric M. Larsson, *Causes of Action 2d 1 Causes of Action for Spoliation of Evidence* (Mar. 2015).

⁵⁰ *Id.*

⁵¹ Anthony C. Casamassima, *Spoliation of Evidence and Medical Malpractice*, 14 PACE L. REV. 235, 239-40 (1994).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ William P. Barnette, *Ghost in the Machine: Zubulake Revisited and Other Emerging E-Discovery Issues Under the Amended Federal Rules*, 18 RICH. J.L. & TECH. 11, 17 (2012).

⁵⁵ *Zubulake v. UBS Warburg, L.L.C.*, 217 F.R.D. 309 (S.D.N.Y. 2003).

⁵⁶ See Barnette, *supra* note 54, at 17.

⁵⁷ *Id.*

process with regard to ESI.⁵⁸ Subsection B specifically contemplates limitations on the production of ESI:

A part need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations Rule 26(b)(2)(C). The court may nonetheless specify conditions for discovery.⁵⁹

While “[t]here is a presumption that the responding party must bear the expense of complying with discovery requests,” the responding party may invoke the court’s discretion under Rule 26(c) for an order to protect it from “undue burden or expense in complying” with the request.⁶⁰

In *Zubulake*, the plaintiff was dismissed from her job as an equity sales person at UBS Warburg.⁶¹ She filed her original complaint with the Equal Employment Opportunity Commission (“EEOC”), alleging that she was specifically targeted because she was a woman.⁶² Her claim alleged that she was wrongfully discharged.⁶³ During the protracted discovery period, *Zubulake* asked the court to order UBS to produce all relevant emails and to do so at its own expense.⁶⁴

During discovery, it was determined that UBS had destroyed some of the backup tapes containing responsive emails.⁶⁵ The court recognized however, that only if UBS had a duty to retain the information could such a loss be properly considered spoliation.⁶⁶ In light of this decision, a question remained regarding the appropriate point in time that UBS *should* have known it was required to retain the information.

In answering this question the court clarified that, “[t]he duty to preserve attached at the time that litigation was *reasonably* anticipated.”⁶⁷ Because plaintiff

⁵⁸ See Vlad Vainberg, *When Should Discovery Come With a Bill? Assessing Cost Shifting for Electronic Discovery*, 158 U. Pa. L. Rev. 1523, 1556 (2010) (“There is one key difference between . . . *Zubulake* and Rule (26)(b)(2). *Zubulake* conditioned the findings of whether production of documents is unduly burdensome or expensive . . . primarily on whether it is kept in an accessible or inaccessible format.” (internal quotation omitted)).

⁵⁹ Fed R. Civ. P. 26(b)(2)(B).

⁶⁰ *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 170, 71 (3d Cir. 2012).

⁶¹ *Zubulake*, 217 F.R.D. at 312.

⁶² *Id.* at 313.

⁶³ *Zubulake*, 217 F.R.D.; *Id.* at 309.

⁶⁴ *Id.* at 312.

⁶⁵ *Zubulake v. UBS Warburg, L.L.C.*, 220 F.R.D. 212, 214 (S.D.N.Y. 2003).

⁶⁶ *Id.* at 216.

⁶⁷ *Id.* at 217 (emphasis added).

Zubulake filed her lawsuit in August 2001, the court determined that UBS reasonably should have anticipated the litigation in April 2001.⁶⁸ The court subsequently penalized UBS, requiring it to pay for re-deposition of several key witnesses.⁶⁹ Such action thus set a new standard for cases involving e-discovery.⁷⁰ The framework created in *Zubulake*, although not binding, has nonetheless has been adopted by several other courts.⁷¹

V. UPDATING THE FEDERAL RULES OF CIVIL PROCEDURE

After the *Zubulake* rulings, it became apparent that the FRCP, as well as related state rules, had not adequately addressed ESI in the context of discovery. In May 2005, the FRCP Advisory Committee⁷² introduced several changes to the Rules to better address ESI⁷³ that became effective in December 2006:⁷⁴

1. Early attention to Electronic Discovery Issues: Rule 16, 26(a), 26(f) and Form 35
2. Discovery into Electronically Stored Information that is Not Reasonably Accessible: Rule 26 (b) (2).
3. Procedure for Asserting Claims of Privilege and Work Product Protection after Production: Rule 26(b)(5)
4. Interrogatories and Requests for Production Involving Electronically Stored Information: Rules 33, 34(a) and (b)

⁵⁸ *Id.*

⁶⁹ *Id.* at 222.

⁷⁰ *See id.* at 217.

⁷¹ *See e.g.* Automated Solutions Corp. v. Paragon Data Sys., Inc., 756 F.3d 504, 514-15 (6th Cir. 2014); Micron Tech., Inc. v. Rambus Inc., 645 F.3d 1311, 1320 (D.C.Fed. Cir. 2011); John B. v. Goetz, 531 F.3d 448, 459 (6th Cir. 2008); Lindsay v. Clear Wireless L.L.C., Civil No.13-834, 2014 WL 813875 (D.Minn. Mar. 3, 2014) (citing applicability of *Zubulake* factors in context of inaccessible ESI) (unreported case); Boeynaems v. LA Fitness Intern., 285 F.R.D. 331, 336 (E.D.Pa. 2012) (“Many reported decision apply standards for requiring that the requesting party share discovery costs. Recently most of these cases involve ESI. The leading opinion is undoubtedly Judge Scheindlin’s *Zubulake*.”); W Holding Co. v. Chartis Ins. Co. of Puerto Rico, 293 F.R.D. 68, 73 (D.P.R. 2013) (discussing application of *Zubulake*); Helmert v. Butterball, L.L.C., No.4:08-CV-00342, 2010 WL 2179180 (E.D.Ar. 2010) (applying *Zubulake*) (unreported case); Proctor & Gamble Co. v. S.C. Johnson & Son, Inc., No. 9:08-CV-143, 2009 WL 440543 (E.D.Tex. 2009) (analysis based on *Zubulake*) (unreported case); Semsroth v. City of Wichita, 239 F.R.D. 630, 636 (D.Kan. 2006) (“*Zubulake* is the leading case on “cost-shifting of electronic discovery.”).

⁷² “The Supreme Court first established a rules advisory committee in June 1935 to help draft the Federal Rules of Civil Procedure, which took effect in 1938. Today, Advisory Committees . . . carry on a continuous study of the rules and recommend changes to the Judicial Conference through a Standing Committee on Rules of Practice and Procedure.” *Committee Membership Selection*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection> (last visited Sept. 9, 2015).

⁷³ FED. R. CIV. P. 34(a)(1).

⁷⁴ *See* FED. R. CIV. P. 26 (effective Dec. 1, 2006).

5. Sanctions for Certain Types of Loss of Electronically Stored Information⁷⁵

While the amendments were responsive to some of the issues with which courts have struggled, and that *Zubulake* explicitly addressed,⁷⁶ the amendments have nevertheless failed to provide sufficient guidance.

VI. "MEET AND CONFER" REQUIREMENT UNDER RULE 26(F)

The goal of the drafters of Rule 16, 26(a) and 26(f) was to have litigants and courts discuss issues regarding discovery material in a timely fashion to avoid confusion and concerns with the confidentiality (or privilege), integrity, and availability of information relevant to the case.⁷⁷ Specifically, 26(f) requires the parties to "meet and confer"⁷⁸ about specific discovery issues:⁷⁹

There are three primary changes in the Amended Rule. First, the parties are required to discuss the issue of preservation of potentially relevant records. This obligation applies not only to ESI [electronically stored information] but also to all "documents" as that term is defined within the Federal Rules. This is the first time the obligation to discuss and address preservation has ever been expressly set forth in the Federal Rules. Second, the parties are required to discuss the disclosure of ESI and, specifically, the format production of ESI. Finally, the parties are required to discuss the issue of privilege in the context of inadvertently produced documents.⁸⁰

In the conference notes to the 2006 amendments, the committee noted:

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.⁸¹

⁷⁵ LEGALPUB.COM INC., THE NEW E-DISCOVERY RULES (Dahlstrom Legal Publishing 2006).

⁷⁶ See *Zubulake v. UBS Warburg, L.L.C.*, 220 F.R.D. 212 (S.D.N.Y. 2003).

⁷⁷ See LEGALPUB.COM INC., *supra* note 75 at 11.

⁷⁸ Moze Cowper & John Rosenthal, *Not Your Mother's Rule 26(f) Conference Anymore*, 8 SEDONA CONF. J. 261, 263 (2007).

⁷⁹ *Id.* at 261.

⁸⁰ *Id.* at 261, 262.

⁸¹ FED. R. CIV. P. 26.

The meet and confer process, although seemingly straightforward, nevertheless continues to present difficulties to litigants. In *Love v. Permanente Medical Group*,⁸² the plaintiff brought an action against her employer for wrongful termination and retaliation.⁸³ The judge offered a sharp rebuke of the parties as she issued a discovery order:

During the course of the hearing, the court repeatedly noted the failure of the parties to engage in meaningful meet and confer sessions and cooperative discovery practice. The parties were directed to review the Northern District of California “Guidelines for the Discovery of Electronically Stored Information” and “Checklist for Rule 26(f) Meet and Confer Regarding ESI.” In light of the record in this case, the court orders that all further meet and confer sessions, including those required by this order, must include a discussion about specific sources and search protocols (including search terms, if applicable) before any search is conducted.⁸⁴

The court in *Mikron v. Hurd Windows* also recognized the purpose of the “meet and confer” requirement.⁸⁵ That case involved a contract dispute.⁸⁶ In light of the extensive discovery, the defendants sought to shift some of the costs of searching their electronic files to the plaintiffs.⁸⁷ The court denied defendant’s motion to shift costs, finding that the parties did not meet their obligation to meet and confer in good faith.⁸⁸ The court chastised the litigants, stating that the purpose of the Rule 26 meeting was not just for their benefit, but also to better ensure that the court’s resources were not wasted, “to ensure that only genuine disagreements are brought before the Court.”⁸⁹

Courts may impose sanctions if parties do not follow the meet and confer rule. In *Laserdynamics v. Asus Computer*,⁹⁰ the court addressed counsel’s failure to adhere to the rules:

⁸² *Love v. Permanente Medical Group*, 2013 WL 6056657, at *4 (N.D. Cal. Nov. 14, 2013).

⁸³ *Id.* at *1.

⁸⁴ *Id.* at *4.

⁸⁵ *Id.* at *1 (referring to the “meet and confer” requirement under Fed. R. Civ. P. 26(c) because the motion was for a protective order).

⁸⁶ *Mikron Indus., Inc. v. Hurd Windows & Doors, Inc.*, 2007 WL 3033933, at * 1 (W.D. Wash. Oct. 12, 2007).

⁸⁷ *Id.*

⁸⁸ *See Mikron*, 2008 WL 1805727, at * 1.

⁸⁹ *Id.*

⁹⁰ *Laserdynamics, Inc. v. Asus Computer Int’l*, 2009 WL 153161 (E.D. Tex. Jan. 21, 2009).

Prior to the claim construction hearing in this case, the parties filed eight discovery motions. That conduct is indicative of the manner in which this case has proceeded since before the initial scheduling conference. Most, if not all, of these motions should not have been necessary, and these disputes are indicative of a reckless disregard of the discovery obligations and the rules of practice applicable in this court. This order resolves the discovery disputes and imposes sanctions on the Asus defendants for the reasons expressed herein.⁹¹

A parallel example of such conduct the context of medical malpractice was seen in *Hernandez ex rel. Telles-Hernandez v. Sutter Medical Center*.⁹² There, the plaintiffs sued for neurological and developmental problems related to complications that occurred during childbirth.⁹³ After the hospital and a physician settled, the government was the remaining defendant in the case.⁹⁴ The court found that the government delayed and failed to meet and confer in good faith with the opposing party.⁹⁵ In denying the government's motion for partial summary judgment, the court emphasized:

All parties are expected to meet and confer before filing any motion before this court. This requirement is *mandatory*. It requires a reasonable and good faith effort by the parties to meet and confer and resolve their differences, prior to using the resources of this Court and its authority to resolve their dispute. This rule has many benefits and is supported by a number of positive public policies. In particular, it streamlines litigation, allows the parties and the Court to use their time and resources more efficiently, and often facilitates settlement. More importantly, *until the parties meet and confer, they do not know whether they have a genuine dispute* to bring before the Court, tying up its scarce resources. In many cases, it will obviate the need for a motion, altogether. As such, the requirement is not a mere formality. Nor is it a duty the parties may take lightly.⁹⁶

The courts require parties to follow "meet and confer" requirements, both federal and local, to discuss issues related to discoverable information in a case.⁹⁷

⁹¹ *Id.* at *1.

⁹² No. C 06-03350, 2008 WL 2156987, at *1 (N.D. Cal. May 20, 2008). The U.S. Government was also a party to the case because Plaintiff brought a claim under the Federal Tort Claims Act. *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at *1, *3-4 (explaining that in "2007, the Court approved a stipulation to substitute the government for Dr. Steele, because when he treated Hernandez, he was acting under a program funded under the Indian Self-Determination and Education Assistance Act of 1975").

⁹⁵ *See Id.* at *1.

⁹⁶ *Id.* at 6.

⁹⁷ *Id.*

Therefore, the “meet and confer” process raises issues as to what information is relevant, and more importantly, when the duty to preserve information begins.

VII. KNOWN OR SHOULD HAVE KNOWN STANDARD

One issue in discovery is determining when the duty to preserve information begins.⁹⁸ Though some courts have held that the duty exists when the providing party has been put on notice that the information needs to be preserved,⁹⁹ the court in *Zubulake* went further, stating, in essence, that the duty may exist when a party “should have known” that litigation was anticipated.¹⁰⁰

The duty of preservation clearly starts if a party anticipates *further* litigation.¹⁰¹ In *Innis Arden v. Pitney Bowes*, the plaintiff, Innis Arden Golf Club (“Innis Arden”), found polychlorinated biphenyls on its property.¹⁰² It engaged a company to do soil analysis in the hopes of determining where the source of contamination came from.¹⁰³ Innis Arden’s intent was to determine the source of contamination and then engage in discussions about remediation and recovery costs.¹⁰⁴

During discovery it was determined that Innis Arden had not informed the contractor hired to perform the soil analysis to preserve the soil samples and data that it had acquired.¹⁰⁵ The soil samples were destroyed as part of the normal business practices.¹⁰⁶ In addition, the computer analysis of the data had become corrupted and was also not available.¹⁰⁷

The court noted, “Innis Arden not only did not perform all the tests that it believed to be relevant before the samples were destroyed, it precluded Pitney Bowes [a neighboring company that Innis Arden sued as the alleged source of the contamination] from running potentially exculpatory tests by failing to preserve this material.”¹⁰⁸ In addition, the court noted that the duty to preserve began with the collection of the soil samples, as Innis Arden “recognized from the beginning that the analysis of soil samples was the key evidence in this case”¹⁰⁹

This concept of “knew or should have known” presents a new standard.¹¹⁰ In healthcare, when can one “reasonably anticipate” litigation? Negative outcomes are

⁹⁸ See e.g., *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004).

⁹⁹ See *Kronish v. United States*, 150 F.3d 112, 126 (2d Cir. 1998); *Zubulake v. USB Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

¹⁰⁰ *Zubulake*, 220 F.R.D. at 216.

¹⁰¹ See *Innis Arden Golf Club v. Pitney Bowes, Inc.*, 257 F.R.D. 334, 339 (D. Conn. 2009).

¹⁰² See *id.* at 335.

¹⁰³ See *id.* at 335-36.

¹⁰⁴ See *id.*

¹⁰⁵ *Id.* at 338.

¹⁰⁶ *Id.*

¹⁰⁷ *Innis Arden Golf Club v. Pitney Bowes, Inc.*, 257 F.R.D. 334, 338 (D. Conn. 2009).

¹⁰⁸ *Id.* at 341.

¹⁰⁹ *Id.* at 340.

¹¹⁰ Compare *Kronish v. United States*, 150 F.3d 112, 126 (2d Cir. 1998) (holding that the duty to preserve evidence begins when a party should have known the evidence may be

often a foreseeable result of illness or injury, even when care is properly rendered. Physicians, especially surgeons, will advise patients of the “Risks, benefits, and alternatives” as part of the informed consent process prior to a procedure.¹¹¹

Clearly if a patient suffers a “Never Event,” as defined by the Centers for Medicare and Medicaid Services, litigation may ensue.¹¹² But, how then would peer review cases be handled? In the introductory cases, would one assume that all occurrences triggering similar events would qualify as “foreseeable litigation,” for which all data collected should be preserved.¹¹³

A recent case illustrates the difficulty parties face in determining if evidence should be kept.¹¹⁴ In *Martinez v. Abbott Labs*, the plaintiff filed an appeal of summary judgment in favor of the defendants.¹¹⁵ The patient, Martinez, had surgery and postoperatively had a patient controlled analgesia (PCA) pump with morphine.¹¹⁶ According to the medical records, the patient appeared to receive an overdose of morphine, which made her unresponsive.¹¹⁷ Martinez sued the hospital and the pump manufacturer; however, the trial court granted both defendants’ motions for summary judgment.¹¹⁸ Martinez filed an appeal,¹¹⁹ that the trial court permitted “peer review privilege” which hindered her capacity to adequately present her case.¹²⁰ Interestingly, in analyzing the peer review privilege, the appellate court addressed whether the hospital had a duty to preserve the pump.¹²¹ The court stated that the hospital “had no duty to isolate or download information from the PCA pump because nothing about the circumstances surrounding the incident would have put [it] on notice that there was a substantial chance Martinez would pursue a claim.”¹²² Despite the court documents and depositions that a Risk Management Committee and a Quality Review Committee both reviewed the case, the court still did not feel there was a need to maintain the pump information.¹²³ The court did not

relevant to future litigation), *with* *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68 (S.D.N.Y. 1991) (holding that the duty to preserve evidence begins when a party is on notice that litigation is likely to be commenced).

¹¹¹ See AMERICAN MEDICAL ASSOCIATION OPINION 8.08 – INFORMED CONSENT (2006), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion808.page?>

¹¹² See Medicare & Medicaid Guide (CCH) ¶ 4247 (2012).

¹¹³ See *Zubulake*, 220 F.R.D. at 216.

¹¹⁴ *Martinez v. Abbott Labs*, 146 S.W.3d 260 (Tex. App. 2004).

¹¹⁵ *Id.* at 263.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 264.

¹¹⁹ *Id.* at 263.

¹²⁰ *Martinez v. Abbott Labs*, 146 S.W.3d 260, 265 (Tex. App. 2004).

¹²¹ *Id.* at 270.

¹²² *Id.*

¹²³ *Id.* at 267.

address the concern that the hospital should have known that legal action might have occurred and should have at least kept the log of the PCA pump.¹²⁴

In *National Tank Co. v. 30th Judicial District Court*, the court recognized the difficulty in determining when the duty to preserve information begins, especially when a company has performed an investigation.¹²⁵ In this action, the court reviewed, “whether accident reports and witness statements prepared by relator and its insurer following a plant explosion are privileged from discovery.”¹²⁶ The court commented, “[t]he fundamental problem that has plagued other courts is determining whether a “routine” investigation is conducted in anticipation of litigation.”¹²⁷ The court identified several cases, both for and against all accident investigations giving rise to the belief that litigation may be pending.¹²⁸ In summarizing, the court left the standard open ended, stating that information should be kept if:

an investigation is conducted in anticipation of litigation for purposes of Rule 166b(3) when a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.¹²⁹

Once the question of when the duty to preserve information occurs is answered, then the question becomes one of whether responsive information exists.¹³⁰ If responsive information does exist, how will it be produced?

VIII. PRODUCTION OF ELECTRONIC INFORMATION

One of the other difficult rules to arbitrate between parties is the format in which the documents or information will be produced.¹³¹ Rule 34 of the Federal Rules of Civil Procedure covers the production of documents during discovery.¹³²

¹²⁴ See generally Martinez, 146 S.W.3d at 260-272.

¹²⁵ Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 206 (Tex. 1993).

¹²⁶ *Id.* at 195.

¹²⁷ *Id.* at 205.

¹²⁸ *Id.*

¹²⁹ *Id.* at 207.

¹³⁰ *In re Enron Corp. Sec., Derivative & Erisa Litig.*, 762 F. Supp. 2d 942, 965 (S.D. Tex. 2010).

¹³¹ Gavin Foggo et al., *Comparing E-Discovery in the United States, Canada, the United Kingdom, and Mexico*, MCMILLAN LLP (Aug. 2007), available at http://www.mcmillan.ca/Files/BHarrison_ComparingE-Discoveryintheunitedstates.pdf.

¹³² FED. R. CIV. P. 34.

Unfortunately, the rule is somewhat contradictory and lends itself to interpretation by both the parties and the courts.¹³³

Rule 34(b)(1)(C) states that parties “may specify the form or forms in which electronically stored information is to be produced.”¹³⁴ Rule 34(b)(2)(D) allows the responding party to object to a form of production, and to state the form that it will produce the information.¹³⁵ Rule 34 (b)(2)(E) complicates that matter further by stating:

Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms . . .¹³⁶

In *Dahl v. Bain Capital Partners*, “shareholders of publicly listed target companies brought an action claiming that private equity firms illegally colluded in their purchase of target companies as part of leveraged buyouts (LBO) in violation of antitrust laws.”¹³⁷ As discovery began, plaintiffs filed a motion objecting to a request by the defendant to produce documents in a specified format.¹³⁸ The court agreed with the plaintiff, reading the rule as only requiring a party to produce information as it normally kept it in the course of doing business.¹³⁹

In *Waste Mgmt. of Texas, Inc.*, a competitor of a waste removal company filed an antitrust lawsuit.¹⁴⁰ Several rounds of discovery requests ensued, with the trial court outlining that the production of documents should be in a reasonable format.¹⁴¹ Waste Management subsequently submitted 25 gigabytes of documents in PDF format.¹⁴² Plaintiffs filed a motion to compel the electronic documents in native format with metadata.¹⁴³ Waste Management cited the plaintiffs’ third request,

¹³³ See e.g. Joshua Gilliland, *Adventures in Statutory Construction of FRCP Rule 34(b)(2)(E)*, BOW TIE LAW’S BLOG (Nov. 20, 2011), <https://bowtielaw.wordpress.com/2011/11/20/adventures-in-statutory-construction-of-frcp-rule-34b2e/> (last visited Apr. 5, 2015).

¹³⁴ Fed. R. Civ. P. 34(b)(1)(C).

¹³⁵ Fed. R. Civ. P. 34(b)(2)(D).

¹³⁶ Fed. R. Civ. P. 34(b)(2)(E).

¹³⁷ *Dahl v. Bain Capital Partners, L.L.C.*, 655 F. Supp. 2d 146 (D. Mass. 2009).

¹³⁸ *Id.* at 149-50.

¹³⁹ *Id.* at 149.

¹⁴⁰ *In re Waste Mgt. of Texas, Inc.*, 392 S.W.3d 861 (Tex. App. 2013).

¹⁴¹ *Id.* at 865.

¹⁴² *Id.*

¹⁴³ *Id.*

which asked for, “[a]ny and all data or information which is in electronic or magnetic form should be produced in a reasonable manner.”¹⁴⁴ Regardless, the court, in siding with the defendants illustrated this point:

A request for reasonably useable or a reasonable manner is sufficient. It provides some flexibility to the producing party. For example, a request for.docx file format used by Microsoft Word 2010 might require some producing parties to purchase the specific software requested and expend resources converting files to the requested format. On the other hand, if the request was simply for a “reasonably useable” electronic discovery, the producing party could produce files in Word Perfect X4 format instead. Communication between the parties is essential, and, if a party feels a request is too ambiguous, that party should contact the opposing side. A small amount of ambiguity, though, does not give the producing party *carte blanche* to do whatever it wants.¹⁴⁵

The court, in *United States of America ex rel. John Becker*, provided a thorough review of why the defendant was required to produce documents in native format with metadata, as opposed to the TIFF and OCR images already produced.¹⁴⁶

Metadata associated with properly preserved and produced native documents is more accurate than metadata associated with TIFFs. A Native document includes all of its metadata within it. When Native documents are converted from Native to TIFF format, all of the metadata associated with them is lost in the conversion process. To partially remedy this metadata loss, some metadata fields from the original Native documents are extracted and provided as part of the load file accompanying the TIFF productions. Unfortunately, most of the hundreds of metadata elements that can be obtained from a Native document are not provided as part of the load file in a TIFF-based production.¹⁴⁷

However, production in the agreed upon format may not protect a party from having to produce it again in a different format.¹⁴⁸ In *City of Colton v. Am. Promotional Events, Inc.*, cities brought action against owners of the property formerly used as United States Army ammunition storage facility, seeking cleanup costs.¹⁴⁹ The United States objected to the court ordered production of responsive documents in their native format, as opposed to the TIFF images produced.¹⁵⁰

¹⁴⁴ *Id.* at 875.

¹⁴⁵ *Id.* at 874.

¹⁴⁶ *United States v. Tools & Metals, Inc.*, 2010 WL 1476043 *1 (N.D. Tex. 2010).

¹⁴⁷ *Id.* at *2.

¹⁴⁸ *Id.* at *13.

¹⁴⁹ *City of Colton v. Am. Promotional Events, Inc.*, 277 F.R.D. 578, 580 (C.D. Cal. 2011).

¹⁵⁰ *Id.* at 585.

Plaintiffs argued that they followed the original order of the special master assigned to the case.¹⁵¹ Defendants argued that “Rule 34(b)(2)(E)(i) required the United States either (1) to produce documents, including ESI, as they are kept in the usual course of business or (2) to organize and label the production to correspond to the Production Requests.”¹⁵²

In its response, the Court separated production from organization.¹⁵³ It clarified, despite the government’s argument, that documents produced in electronic format must still be submitted in an organized fashion.¹⁵⁴ The court further noted:

Unless and until the parties agree to amend their production protocol to include metadata fields sufficient to satisfy the requirement under Rule 34(b)(2)(E)(i) that documents, including ESI, be produced as they are kept in the usual course of business, the Rules require the United States (and Defendants) to organize and label their productions to correspond to the categories in the request.¹⁵⁵

The production from electronic health records will be particularly vexing.¹⁵⁶ As commented in *Once Byten, Twice Shy: Preservation and Production of Electronic Health Records*, Jennifer Albert notes:

An EHR system is a database of electronic health records, but that description is somewhat deceptive. When users view a patient's electronic health record, they are not viewing a discrete document, but a report generated by a database query and built of select fields of information culled from a complex dataset. It is then presented in a user-friendly arrangement determined by the EHR system's client capabilities and user settings. Therefore, the EHR report the user sees on a screen may “feel” like a traditional document, but it is drawn from different sources within the database that are constantly subject to change.¹⁵⁷

Albert goes further and states, “Paper production, such as a paper printout of what the EHR system user views as a patient's medical record, is not sufficient because electronic medical records contain data relevant to the litigation that is not readily apparent from a paper printout.”¹⁵⁸

¹⁵¹ *Id.* at 580.

¹⁵² *Id.* at 582.

¹⁵³ *Id.* at 585-86.

¹⁵⁴ *Id.* at 584.

¹⁵⁵ *City of Colton v. Am. Promotional Events, Inc.*, 277 F.R.D. 578, 585-86 (C.D. Cal. 2011).

¹⁵⁶ See Jennifer A. Albert, *Once Byten, Twice Shy: Preservation and Production of Electronic Healthcare Records*, 32 REV. LITIG. 395, 423 (2013) (“The nature of HER databases presents unique challenges to the healthcare lawyer designing an effective legal hold.”)

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 424.

A view of the difficulties Northshore University Health System experienced illustrates the current transitory nature of healthcare record production.¹⁵⁹ Northshore University Health System was sued by a patient for negligence.¹⁶⁰ During the discovery phase, the plaintiff requested a copy of the entire medical record.¹⁶¹ The only option available to Northshore was to use the “print screen” function to print individual pages.¹⁶² After production, the court granted a motion for the plaintiff to review the system in person, as well as a copy of the system that could be reviewed later.¹⁶³ Even after all of that, the plaintiff remained concerned that all the patient’s health information may not have been provided.¹⁶⁴

Not all electronic data continues to be available, or it is in an unreadable format that cannot be accessed without special software. In a study called *Using IV Infusion Pump Electronic Memory for Retrospective Drug Utilization Reviews*,¹⁶⁵ the authors note that the data from the pump is available utilizing specialized software.¹⁶⁶ However, information was not uploaded to the EHR, and lacked information on the operator or patient.¹⁶⁷ Concern exists regarding practitioners’ reliance on the new “smartpumps.”¹⁶⁸ The inability to determine who accessed and selected the medication and to verify that the correct patient information was used will present issues.¹⁶⁹

In the examination of a malpractice case, Smith and Berlin outline a particular issue that perplexed the defendant hospital.¹⁷⁰ The plaintiff’s wife sued the hospital and radiologists after a perceived delay in diagnosis of the decedent’s abdominal aortic aneurysm.¹⁷¹ During discovery it was determined that the images of the CT scan stored in the picture archiving and communication system (PACS) were never

¹⁵⁹ See generally Chris Dimick, *EHRs Prove a Difficult Witness in Court*, J. AM. HEALTH INFO. MGMT. ASS’N (Sept. 24, 2010), <http://journal.ahima.org/2010/09/24/ehrs-difficult-witness-in-court/> (last visited Mar. 19, 2015).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Kathy A. Tran, et al., *Using IV Infusion Pump Electronic Memory for Retrospective Drug Utilization Reviews*, 187 AM. J. RESPIRATORY & CRITICAL CARE MED. A5327 (2013).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Smart pumps have built in drug dictionaries and protocol that the operator selects when giving the medication. This assists in preventing programming errors. INST. FOR SAFE MED. PRACTICES, *PCA Drug Libraries: Designing, Implementing, and Analyzing CQI Reports to Optimize Patient Safety, available at* <http://www.ismp.org/profdevelopment/PCADrugLibrariesforwebce.pdf>.

¹⁶⁹ *Id.* at 6.

¹⁷⁰ John J. Smith and Leonard Berlin, *Picture Archiving and Communication Systems and the Loss of Patient Examination Records*, 176 AM. J. ROENTGENOLOGY 1381, 1381-84 (2001).

¹⁷¹ *Id.* at 1381.

saved.¹⁷² After an expert review and a search of the database, the study was found under a different patient name and identifier.¹⁷³

This illustrates that the “how, when, and where” ESI is stored is becoming more of an issue and introduces questions about the repercussions of failing to protect or produce evidence.

IX. SANCTIONS FOR SPOILIATION

Several cases illustrate the different directions and views the courts have regarding sanctions for spoliation. In *Sweet v Sisters of Providence Washington*,¹⁷⁴ the trial court did not issue a spoliation claim despite the loss of the patient’s medical records.¹⁷⁵ The patient, an infant, was born, circumcised, discharged, and returned several days later because of a blood infection caused by the circumcision.¹⁷⁶ The patient was admitted to the hospital and subsequently began having seizures.¹⁷⁷ The patient suffered brain damage due to a lack of oxygen.¹⁷⁸ The parents (Sweets) sued the hospital and physicians.¹⁷⁹

During discovery, it was determined that many parts of the medical record were missing.¹⁸⁰ The trial court “shifted the burden of proof to the hospital (Providence) on the issues of its duty and breach on the Sweets’ medical negligence claim.”¹⁸¹ However, the court refused to shift the burden of proof as to causation.¹⁸² The burden remained on the Sweets to establish that medical negligence was the legal cause of [the infant’s] injuries.”¹⁸³ The appellate court disagreed and remanded the case for review of the issue.¹⁸⁴

In *Rodman v. Ardsley Radiology, P.C.*, the plaintiffs sought a spoliation claim against the radiologist and the radiology group for loss of a mammogram film.¹⁸⁵ The patient had been to the clinic for regular mammograms during the course of several years, including 2003 and 2004.¹⁸⁶ In 2004, the plaintiff was diagnosed with

¹⁷² *Id.*

¹⁷³ *Id.* at 1382.

¹⁷⁴ *Sweet v. Sisters of Providence*, 895 P.2d 484 (Alaska 1995).

¹⁷⁵ *Id.* at 486.

¹⁷⁶ *Id.* at 487.

¹⁷⁷ *Id.* at 487-89.

¹⁷⁸ *Id.* at 489.

¹⁷⁹ *Id.* at 486-87.

¹⁸⁰ *Sweet v. Sisters of Providence*, 895 P.2d 484, 486-87 (Alaska 1995).

¹⁸¹ *Id.* at 490.

¹⁸² *Id.* at 491.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 497.

¹⁸⁵ *Rodman v. Ardsley Radiology, P.C.*, 25 Misc. 3d 1234(A), 2009 WL 4282871, at *5 (Sup. Ct. Westchester County 2009), *rev’d*, 914 N.Y.S.2d 304 (2011).

¹⁸⁶ *Id.* at *2.

breast cancer and underwent breast surgery, chemotherapy, and other treatment.¹⁸⁷ The plaintiff requested the 2003 mammogram to take to her surgeon to evaluate.¹⁸⁸ The radiology group had recently moved and could not find the film; in fact, the film was never found even after the lawsuit and discovery ensued.¹⁸⁹

The plaintiffs sued for negligence, citing the misread of the 2003 mammogram.¹⁹⁰ In addition, they asked the court to issue sanctions for the willful destruction of evidence.¹⁹¹ The trial court denied the spoliation claim asserting that there was no evidence of willful action on the defendants' part and that the film appeared to have been lost before the lawsuit commenced.¹⁹²

On appeal the court disagreed.¹⁹³ The court found that Rodman had not proved, despite the testimony of experts, that the missing film was pertinent to her claim.¹⁹⁴ In making its decision, the court noted:

The record indicates that the film was missing early on in November 2004, well before this litigation was commenced in June of 2005. There is no proof in the record that the film was lost after the defendants were placed on notice that the film might be needed for future litigation. Furthermore, the plaintiffs have failed to establish in their motion papers through their expert witness that the 2003 film is crucial to proving their case. While plaintiffs' expert mentions in his affidavit that he could not review the November 18, 2003 right breast mammography film because it was reportedly missing, he does not comment on its significance. He makes no attempt to show that the missing film is critical to the case or that the plaintiffs are prejudiced in any way by the film's loss or destruction.¹⁹⁵

Thus the court weighed two factors to determine appropriate sanctions: was the loss deliberate and what effect did that loss have on the case at hand.¹⁹⁶

In *Carmelina Baglio, v. St. John Queen Hospital*,¹⁹⁷ the court denied the motion by the plaintiff to strike the defendant's answers to discovery.¹⁹⁸ In this medical

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at *1.

¹⁹¹ *Rodman v. Ardsley Radiology, P.C.*, 25 Misc. 3d 1234(A), 2009 WL 4282871, at *6 (Sup. Ct. Westchester County 2009), *rev'd*, 914 N.Y.S.2d 304 (2011).

¹⁹² *Id.*

¹⁹³ *Rodman v. Ardsley Radiology, P.C.*, 80 A.D.3d 598 (N.Y. App. Div. 2011).

¹⁹⁴ *Rodman v. Ardsley Radiology, P.C.*, 25 Misc. 3d 1234(A) (N.Y. Sup. Ct. 2009).

¹⁹⁵ *Id.* at 16.

¹⁹⁶ *Id.* at 14.

¹⁹⁷ *Baglio v. St. John's Queens Hosp.*, 303 A.D.2d 341 (N.Y. App. Div. 2003).

¹⁹⁸ *Id.* at 342.

negligence case, the defendants lost the fetal monitoring strips of the infant's birth.¹⁹⁹ The trial court took the unusual stance stating:

[W]hile the fetal monitoring strips are clearly significant to plaintiff's case, there is other evidence that is available. Indeed, plaintiff's medical records and progress notes are included in the case file. Thus, the court cannot conclude that the loss of the strips prejudices plaintiff as to warrant the drastic sanction of striking St. John's answer.²⁰⁰

The appellate court firmly disagreed:

[W]e agree with the plaintiffs that the Hospital's negligent loss of the fetal monitoring strips warrants striking its answer. The plaintiffs' evidence demonstrated that "[t]he fetal monitoring strips are the most critical evidence to determine fetal well-being at the time of treatment, and in evaluating the conduct of health care providers with regard to obstetrical management thereafter." Further, under the facts of this case, the fetal monitoring strips would give fairly conclusive evidence as to the presence or absence of fetal distress, and their loss deprives the plaintiff of the means of proving her medical malpractice claim against the Hospital.²⁰¹

In contrast, the trial court in *Gotto v. Eusebe-Carter*²⁰² struck the defendant's hospital answer for loss of fetal monitoring strips.²⁰³ On appeal, the court noted:

The plaintiff did not clearly establish that the Hospital negligently lost or intentionally destroyed the fetal heart monitoring data for July 19, 1997, the date of Ryan's birth. The record fails to rule out the possibility that the central monitoring computer system utilized by the Hospital in its labor and delivery unit to electronically store fetal heart data onto an optical disk was properly operating, or the possibility that it malfunctioned on July 19, 1997, due to no fault of any of the parties involved in this action, and resulting in no fetal heart data being recorded or stored for that date.²⁰⁴

Thus, the plaintiff did not prove that the loss hindered her ability to try the case, even though the defendant did not account for the loss of the fetal monitoring

¹⁹⁹ *Id.*

²⁰⁰ *Baglio v. St. John's Queens Hospital*, No.177611997, 2001 WL 35985608 (N.Y. Sup. Ct. 2001).

²⁰¹ *Baglio*, 303 A.D. 2d at 342-343.

²⁰² *Gotto v. Eusebe-Carter*, 69 A.D.3d 566 (N.Y. App. Div. 2010).

²⁰³ *Id.* at 568.

²⁰⁴ *Id.*

strips.²⁰⁵ The appellate court then directed an adverse inference instruction against the hospital.²⁰⁶

In *Innis Arden v. Pitney Bowes*, mentioned above, the court emphasized the need to preserve evidence.²⁰⁷ The fact that Innis Arden allowed, or at the very least did not stop, the destruction of the soil samples was reckless.²⁰⁸ In its decision, the court noted that, “a severe sanction nevertheless is necessary, because overlooking the failure to preserve this evidence would have the effect of condoning this broad disregard for the need to retain raw scientific-sampling evidence and might not deter similar conduct in future” actions.²⁰⁹

In *Keene V. Brigham Hospitals*,²¹⁰ the court recommended sanctions as a legal remedy available.²¹¹ The case involved an infant that became septic several hours after birth, and now suffers from severe neurological deficit.²¹² During the course of litigation, it was determined that the hospital had lost the several hours of documentation about the care of the infant that would have explained the treatment and who was involved.²¹³ The appellate court was asked to review several rulings of the trial court, specifically, if a “default judgment on liability was properly entered as a sanction for the defendant's failure to produce in discovery relevant hospital records that it admittedly had lost.”²¹⁴ The court noted in its ruling:

The parties and the judge considered the situation as one arising under rule 37(b)(2)(C), which authorizes a judge, when confronted with a party who fails to obey an order to provide or permit discovery, to “make such orders in regard to the failure as are just, and among others ... [a]n order striking out pleadings or parts thereof ... or rendering a judgment by default against the disobedient party.” In view of the judge's determination that the defendant was unable (as opposed to unwilling) to produce the documents, this was not correct. Requests for discovery pursuant to Mass. R. Civ. P. 34(a), 365 Mass. 792 (1974), require production of documents that “are in the possession, custody or control of the party upon whom the request is served.” By these express terms, rule 34(a) does not demand production of documents that “were in” or that “should have been kept in” the party's possession. *Put simply, there can*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *See generally* *Innis Arden Golf Club v. Pitney Bowes, Inc.*, 257 F.R.D. 334, 342 (D. Conn. 2009).

²⁰⁸ *Id.* at 342-49.

²⁰⁹ *Id.* at 342.

²¹⁰ *Keene v. Brigham & Women's Hosp.*, 786 N.E.2d 824, 834-35 (Mass. 2003).

²¹¹ *See generally id.*

²¹² *Id.* at 826-27.

²¹³ *Id.* at 827.

²¹⁴ *Id.* at 826.

be no discovery violation, and hence no rule 37 sanction, when a party fails to produce documents it does not possess. (emphasis added)²¹⁵

The court went on to add:

In retrospect, the matter should have been disposed of under the doctrine of spoliation, which permits the imposition of sanctions and remedies for the destruction of evidence in civil litigation. The doctrine is based on the premise that a party who has negligently or intentionally lost or destroyed evidence known to be relevant for an upcoming legal proceeding should be held accountable for any unfair prejudice that results.²¹⁶

Thus, courts continue to inconsistently apply the concept of spoliation.²¹⁷ Rule 37 of the FRCP gives the court wide discretion in imposing sanctions.²¹⁸ As Ahunanya Anga points out in his paper, “[v]arious circuits employ different standards or approaches to determine whether sanctionable conduct exists.”²¹⁹ This leads to inconsistent application of the rule as one looks across state or federal jurisdictions.²²⁰

X. CONCLUSION

Beginning with the *Zubulake* case in 2004, courts began to evaluate discovery issues that involve ESI. The revised FRCP in 2006, and many state courts thereafter, further delineated processes for e-discovery, recognizing the distinct challenges of discovery in an electronic world. Nevertheless, issues remain regarding the application and the scope of discovery in our advancing electronic world.

While changes have been proposed to the FRCP,²²¹ further changes are required to specifically assist in e-discovery. This is especially important in healthcare cases, where there not only exists the electronic health record, but the myriad of information sources that are captured (and disposed of) in a rapidly changing environment.

The FRCP should be amended to clarify and assist both counsel and the courts. Specifically:

1. Meet and Confer – Failure to meet and confer and outline discovery requests should result in sanctions up to a finding of summary judgment for any party that does not participate. Healthcare plaintiffs and defendants must discuss the

²¹⁵ *Id.* at 832.

²¹⁶ *Keene v. Brigham & Women's Hosp.*, 786 N.E.2d 824, 832 (Mass. 2003).

²¹⁷ Ahunanya Anga, *Electronic Data Discovery Sanctions: The Unmapped, Unwinding, Meandering Road, and the Courts' Role in Steadying the Playing Field*, 50 SAN DIEGO L. REV. 621, 622-24 (2013).

²¹⁸ *Id.*

²¹⁹ *Id.* at 626.

²²⁰ *Id.* at 641.

²²¹ See generally Advisory Committee on Civil Rules, Portland Oregon, April 2014, USCOURTS.GOV, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf>

information that is and is not available, and whether any of the information is truly germane to the matter at hand. In addition, parties must consider what information was used in any quality or peer review and thus may be protected from review and use.

2. Legal hold and retention periods should begin only after action is commenced or upon notification by counsel that an action is being considered. Healthcare peer, quality, or other review must not trigger a duty to preserve ESI, otherwise all information would need to be preserved.

3. Production format must be discussed at the Meet and Confer and be established in a written document. Plaintiffs may request an industry standard format or must accept files in native format. Metadata cannot be requested until review of the initial discovery requests. There must be recognition that the format of ESI in a healthcare context may be limited by the product or system manufacturer. Information may not be readily available or in a readable format with expending considerable resources.

4. Sanctions. Further rule promulgation should be made to define when and for what reasons sanctions will apply. Severe sanctions should only be applied for blatant loss of information. Good faith and good policies and procedures for record retention and destruction should be a buffer to sanctions. Conversely, healthcare providers must take reasonable steps to ensure the availability and integrity of the medical information within their control.

Indeed as Judge Rosenthal observed, “electronic discovery is suddenly upon us,” including in cases involving healthcare. We must learn to manage expectations relating to increasingly electronic information, to maintain reasonable, yet just, litigation. Towards this end, we must clarify and focus the rules regarding discovery so that it does not overtake the whole of the litigation effort, and in that process loses sight of its purpose; a fair, just, and expedient resolution to the litigation. The costs of EHRs are already significant, but the cost to use them appropriately under e-discovery rules could be staggering.