



## **PART 1**

**Note: Part 2 to follow in Oct. 29 issue**

# SPECIAL THANKS TO

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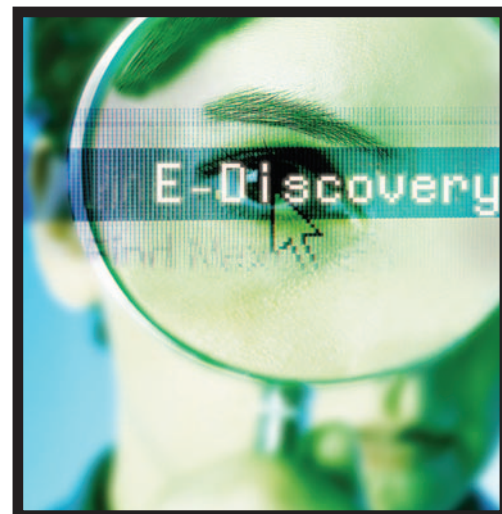
SPONSORSHIP  
OF THIS  
ROUNDTABLE

**H**UMAN BEINGS  
 HAVE BECOME  
 EXTREMELY PROLIFIC  
 AT GENERATING DATA.  
 BY MORE THAN ONE  
 ESTIMATE, EACH PERSON EACH YEAR  
 IS RESPONSIBLE FOR PRODUCING  
 800 MEGABYTES OF RECORDED  
 INFORMATION. MORE THAN 90 PERCENT  
 IS MAGNETICALLY STORED. OVER  
 THE YEARS, LAWYERS HAVE GOTTEN  
 PRETTY PROFICIENT AT FERRETING OUT  
 AND ANALYZING PAPER FILES AND  
 DOCUMENTS AND USING THEM TO  
 ACHIEVE GOOD RESULTS IN SETTLEMENT  
 DISCUSSIONS AND TRIALS. BUT NOW  
 IT SEEMS THAT WE'RE FACING A  
 WHOLE NEW WORLD. TO FIND OUT A  
 LITTLE MORE ABOUT NAVIGATING THIS  
 CHANGING WORLD OF DISCOVERY, TEXAS  
 LAWYER'S BUSINESS DEPARTMENT  
 HOSTED AN E-DISCOVERY ROUNDTABLE  
 IN DALLAS. WHAT FOLLOWS IS THE  
 DISCUSSION, EDITED FOR LENGTH  
 AND STYLE.

**MIKE ANDROVETT**, moderator, attorney, journalist and owner of **Androvett Legal Media & Marketing, Dallas**: . . . *I've asked the panelists today to introduce themselves . . . and talk to you a little bit about the nature of their work.*

**MARCY ROTHMAN**, partner, **Brown McCarroll L.L.P., Houston**: I started practicing in the late 1980s in Beaumont, Texas, and gained familiarity with the mass tort and the community exposure-type litigation that was so prevalent down there. In 1992, I moved back to Houston, where I'm from, to open a Houston office for the firm I was with at the time, and to supervise litigation on a statewide basis. What I think is relevant today is that over time, my experience segued into insurance coverage and some reinsurance matters that developed out of the large mass tort and mass commercial cases I was handling. E-Discovery was at the forefront in an early way. I worked for a *Fortune 500* company. They had a very prescient general counsel, and he understood the concepts involving metadata in the late '90s. As a consequence, we got e-educated early. Some of his panel counsel attend education and work with vendors on consolidating electronically stored information. That was how I got started. After that, to bring it full circle, the E-repository issues and the mass insurance cases that I started handling and the commercial litigation were all entrained with the analysis of electronically stored information. I've tried to keep that as a standard for the maintenance of documents in all of my cases. In terms of some national litigation, we've had the opportunity to work with a number of these issues. In summary, from about 1998 until today, I've been working with electronically stored information and litigating some of these issues. I've tried a "digital trial" against Lloyd's about a year and a half ago. It worked out very nicely, and perhaps we'll get to some of those issues.

**JOHATHAN SCOTT**, senior partner, director of litigation, **Scott & Scott LLP, Dallas**: We're a boutique business and technology law firm. Much of our work is in the technology area related to software, software licensing, software disputes and software litigation. We've also done a lot of federal and state court complex litigation, some of it involving data privacy and data breach. Some of the experience that I've had dealing with E-Discovery was in a class action case where federal regulations were being interposed by a municipal agency as an objection to producing critical electronic information. Later in that same case, we successfully sought spoliation sanctions against the municipal agency. For people that are not familiar with spoliation sanctions, that is where you go before the judge in federal or state court, and you make your case that the adversary has not preserved relevant information and you are therefore entitled to sanctions. What happened was this municipal defendant — not for the purpose of getting a strategic advantage, but essentially because they were cleaning up old records — failed to preserve relevant information. The consequences of that were devastating to the agency's case. The judge was prepared to give a spoliation instruction during trial that essentially would have given the jury the unfettered right to presume that the information that was not produced would have been detrimental to the municipal agency and proved the plaintiffs' case. Needless



to say, that case settled shortly after the court entered that order. So we've dealt with these issues. The 2006 amendments to the federal rules are helpful in that they create a framework for E-Discovery, but there are a lot of traps and a lot of places where you're looking at a liability risk. If electronic evidence is mismanaged or mishandled, it could be outcome determinative. So it's high stakes in these cases.

**MADELEINE JOHNSON**, principal, **Fish & Richardson P.C., Dallas**: We are also a firm in the technology space, but in perhaps a different way. Fish & Richardson is the No. 1 patent litigation law firm in the country and has the distinction of having represented clients in the past such as Thomas Edison and the Wright brothers, and more recently, industry giants and leaders like Microsoft and Texas Instruments. In addition to having a premier patent litigation and prosecution practice, our office here in Dallas has a top-notch commercial litigation practice and some of the greatest trial lawyers anywhere. My own practice is a somewhat unusual combination, as my career path has been quite unique. I do commercial litigation and intellectual property litigation on the civil side, but I also have a criminal defense practice in the white collar area. I was a federal prosecutor for a number of years. I was later appointed to the position of Dallas City Attorney and ran a legal department of approximately 90 attorneys for the ninth largest city in the country. At an earlier point in my career, I was a division chief at the Texas Attorney General's Office. One of my areas of oversight was responding to public information requests, which in a different context also involves issues of production and retention of information. . . . I also have a general counsel perspective from my days as City Attorney.

**ANDROVETT**: . . . *Fulbright & Jaworski conducts an annual litigation survey. They interview in-house counsel at companies nationally and internationally and they've surmised that the average U.S. company faces more than 300 lawsuits each year. Nearly two-thirds of the companies surveyed have conducted internal investigations. Large companies commit almost 20 million dollars a year to address litigation out of a total legal budget of 34 million dollars. The same survey found that only 15 percent of in-house counsel felt that they were well prepared to handle a difficult E-Discovery challenge as part of either a contested civil matter or a regulatory investigation. And according to a survey by the American Management Association and the E-Policy Institute, 66 percent of companies surveyed say they lack policies for saving, purging, and managing e-mail. I'd like you to*



## MADELEINE B. JOHNSON is

a principal in Fish & Richardson P.C.'s Dallas office, concentrating on commercial, white collar, intellectual property and public law litigation. Johnson previously served as Dallas City Attorney, where she gained national attention for her leadership on high-profile issues. As the city's top attorney, Johnson guided the city's response on a series of public corruption cases and took a tough stance in litigation involving safety concerns surrounding police patrol cars. Before her tenure as City Attorney, Johnson prosecuted bank and health care fraud, national security, public corruption and money laundering cases as an Assistant U.S. Attorney. Prior to joining the U.S. Attorney's Office, she served as a Division Chief for the Texas Attorney General's Office. At Fish & Richardson, Johnson has devoted her practice to intellectual property litigation and complex legal issues at the intersection of the business and technology worlds. She also led a high-profile internal investigation for the Dallas Independent School District.

*react to that first as a starting point. Do those findings surprise you at all?*

**ROTHMAN:** I'm not surprised by those findings at all. They substantially mirror my experience in talking with clients, prospective clients and members of industry. As I said earlier, I work in large measure with insurers, underwriters and re-insurers. One of the things that I think the Fulbright & Jaworski study says is that the insurance industry is the largest participant in big-stakes litigation of any sector of our economy right now. Seventeen percent of that industry has more than 50 pieces of litigation in excess of 20 million dollars in value. As a consequence they're embroiled in these disputes on a daily basis. Part of the discussion I'm having with some of the insurers is how to make them E-Discovery ready. Some of them are very proactive and some of them are not proactive at all but are deeply concerned. Some of it is a function of whether or not they have general counsel in-house. Some of it is a function of whether they have the budgets to accommodate some of these issues. The other side of the coin is not insurer-based, but industry-based. For example, I work with some of the major oil companies and some of the major oil companies describe their core businesses to me as very, very ESI [Electronically Stored Information] management ready. They are extremely sophisticated in the way they manage their information. I can talk all day about some of the programs that they use and some of the ways they deal with it.

But those are the core businesses. Occasionally, you'll talk to a giant and you'll see that their core businesses are very prepared, but their counsel's office feel less certain of how they'll respond internally, and they're working to get up to speed on that. I had a discussion last week with an assistant general counsel at a major *Fortune 500* company. One of the discussion topics that we touched upon was the notion that the core businesses are, in fact, sophisticated and their offices are working hard to make sure that they are able to integrate as E-Discovery matters and litigation points come along. The other context that I've seen starting to develop, but that has not developed completely, is the due diligence rooms for some of the transactional lawyers. I've seen those for about two years in real full bloom. Not every transaction uses them, and they're still doing things the old way. So I'm not surprised by those findings at all. They seem to be pretty consistent with some of the experiences that I have. I'll mention one other thing briefly. I was having a discussion with the vice president of a major franchise operation in the United States a couple of days ago, and one of the things that we were talking about was how to address their E-Discovery and electronically stored information concerns. What she said to me was, "We have your proposal on our desk. And I'm trying to get with our new CIO who is proactive and very strong." The

reality of it is that they're not quite sure what they're going to do, so keeping pace with the changes is difficult both for inside counsel and for outside counsel, as well.

**SCOTT:** It's not surprising to me at all to see statistics or surveys indicating that complex litigation is expensive. The fact that there is a burgeoning docket of litigation is also not surprising. Part of that has to do with the reality that every year, state, local, and federal lawmakers make more and more regulations

and create more private rights of action. And even when they don't create private rights of action, they create, in some instances, a standard that a creative plaintiff's lawyer is going to invoke, claiming that the court should apply that standard when determining whether or not the defendant acted reasonably. So it is not surprising at all. The other finding — that most companies feel like they're not prepared for an E-Discovery battle — is based on a number of things. Part of the reason is that when businesses generate electronic records, they're generating them for the purposes of running their business and generating business records. They're not generating these records with an eye towards whether these records themselves, or the manner in which the records are stored, are going to be responsive or tailored to discovery demands that we're going to get, for example, in federal court litigation. Sometimes what happens is that the systems

which are being used to store the information don't have the ability to tailor themselves to correspond with the expectations of the federal judge or the magistrate judge when it comes to production of evidence. You end up in a discussion with a federal district judge or a federal magistrate about discovery and find out that the judge or magistrate is not very sympathetic to your technological issues. The judge may say, "You know what? If you have that limitation on your system, too bad, produce more paper documents. Produce more electronic information. Get it from other sources." This would, of course, run up the cost, making the burden of collecting the information that much greater. So that's part of the problem, that more and more records are being generated in all kinds of forms. And what we're seeing with the savvy plaintiff's lawyer in federal court litigation, and even in state court, is that they're not just asking for records that are stored on the central servers of the business. They also want to know whether or not an employee is using a personal e-mail account to communicate about business matters. They want to know about instant messaging. They want to know all about these things. And the scope of what you need to look at in order to be responsive becomes broader, and the cost and the compliance burden become greater.

**For existing clients,  
as a value-added  
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— MADELEINE B. JOHNSON

**JOHNSON:** This is an area where being reactive is no longer an option. You can't wait until a lawsuit is filed or even threatened. That applies on the in-house side and well as for outside counsel. On the in-house side, . . . the larger the legal department, the more critical it becomes to make sure that there's somebody in-house who is intimately involved from the legal department with knowledge of your IT services. IT departments and legal departments really need to get to know one another. It's no longer possible for the law department just to say, "Well, we're relying on the IT department to do what needs to be done," or for the IT department to say, "Well, we didn't really know what we were supposed to do when we got a copy of those production requests or that subpoena." That's precisely what's going to get and has gotten a lot of companies in trouble. On the in-house side as well, I think training is critical. Training and putting compliance programs into place are both critical components. And part of training is cross-training. I'm talking about putting together lawyers, IT people, custodians of documents, and having them internally establish an on-going program so lawyers are getting a better understanding of how the IT systems work and what systems an organization has. And the IT people are getting a better understanding of what is going to be required when you're hit with subpoenas, document requests or a litigation hold letter. Everyone has to have some level of preparedness before the fact. That's the way you can avoid reinventing the wheel every time your organization must respond to such a request and run the risk of document retention and production not being properly handled . . . Custodians should be designated for individual departments to coordinate with the legal department and to coordinate with the IT department. And the larger your organization, the more critical it's going to be to give some forethought to how that is all put together. On the outside counsel's side, it is no longer an option to be passive about relying on a client: "Well, we sent the client the document request and, we'll see what we get back." Most outside counsel hopefully figured this out long before now. But with the adoption of the new E-Discovery rules, it is now mandatory and critical that you, as outside counsel, get more involved in understanding your client's systems. For existing clients, as a value-added service, you might consider offering an in-house program to assist clients in preparing for the brave new world of E-Discovery. . . . [P]utting together such a program can also be a way of cross-selling to, your clients of your

corporate department what your litigation group can do for them. It's a great way to get your foot in the door with such clients by saying, "We'd like to help you by putting on some training to make you E-Discovery ready." Then perhaps the next time that client has a big lawsuit, your familiarity with the client's IT systems might give you the edge in representing the client in that litigation. Finally, I guess I'll say that some of the worst horror stories that we've seen come out of this whole area of E-Discovery in terms of sanctions, have involved finger-pointing between clients and outside counsel about who was responsible for document

mismanagement. And judges aren't ultimately going to care. Everyone is responsible. You, as outside counsel, are responsible. Your client is responsible. In-house counsel, you need to make sure your outside counsel knows what they are doing and that when you are engaging them to handle litigation, you are sure that outside counsel has a familiarity in dealing with these E-Discovery issues. Outside counsel, you have an obligation to make sure that your clients understand, especially if it's a smaller client that doesn't have the resources to really do what needs to be done to get educated about what's required. You need to make

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Madeleine Johnson provided steely leadership as Dallas City Attorney, where she managed complex and sensitive issues while leading a staff of 90 lawyers in one of the largest metropolitan regions in the United States. As a federal prosecutor with the United States Attorney's Office in Dallas, she focused on complicated prosecutions involving bank and health care fraud, national security, public corruption and money laundering. Now, Ms. Johnson is a principal in Fish & Richardson's Intellectual Property, White Collar, Government and Securities Litigation Group.



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**MARCY L. ROTHMAN**, partner in the Houston office of Brown McCarroll L.L.P., uses a significant litigation background to formulate business solutions for her clients. When favorable solutions cannot be negotiated, she applies her ability to litigate complex matters fully. Rothman has a history of favorable results in civil trials, administrative proceedings, arbitrations, appeals and negotiated resolutions, including in class actions and mass tort and commercial cases. Her extensive first chair trial experience or lead counsel experience includes Complex Commercial Litigation, Insurance, Professional Liability, Energy and Environmental, Complex Multiparty Industrial Injury and Death, Catastrophic Losses, Product Liability, and many others. Rothman has participated in approximately 100 trials to verdict, two-thirds of which she has handled as first chair trial attorney. She has handled appeals and has successfully represented clients before the Texas Supreme Court and the United States Court of Appeals. A number of her cases have been reported in the federal and state court reporters or constitute "industry firsts."

sure you're educating them. But don't end up in the nightmare scenario of pointing fingers at each other. Get together up-front and make sure that there's a joint effort to be prepared and to comply.

**ANDROVETT:** *Sort of a rubber-meets-the-road question. The new rules really put a premium on early attention to E-Discovery issues. All of you said get in and be proactive. The scope of what we're talking about here isn't simply e-mails. It isn't the documents that I save to a server. It might be Blackberries, instant messaging and cell phone calls. Is one of the problems for your corporate clients that they simply can't keep track of this stuff? Or have we moved beyond that sort of initial phase?*

**JOHNSON:** I think there's some truth in that for some clients. Often times the knowledge about IT systems is contained almost exclusively within the IT department. But complete compartmentalization of this knowledge can have adverse consequences. For example, you mentioned instant messaging. There are companies and even law firms that I've heard are going to instant messaging as a way of communicating to avoid e-mails because the persons making such a decision think there's no record of IM. But this may not be the case. First, if the intent is not to preserve information in the first place, you better know whether that is the case. Second, if such messages are being retained, someone in legal needs to know about it because its existence may trigger retention responsibilities. It's critical if you're using technology like instant messaging that you understand how it works with your particular service provider and on your IT systems. So don't be changing your policies about communications without knowing what the ramifications are.

**SCOTT:** I would echo what Madeleine said and add that part of the problem is figuring out what it is that might be responsive to that case that hasn't come yet. As a litigator, what you see time and time again is that there are all kinds of arguments about how some information that you might consider to be tangential is somehow relevant to the case. It might go to state of mind or it might go to some other element that really doesn't look like it should be part of what is needed to prove the elements of the cause of action. Again, echoing what Madeleine said about policies, the new E-Discovery rules talk about the so-called Safe Harbor Provision in Rule 37. This has been interpreted by a lot of the commentators as being a free pass that allows businesses, if they have a routine electronic discovery policy, to not be sanctioned if the information is not available at the time that a discovery demand comes in. The problem with that is two-fold. One is that the safe harbor provision includes the term "reasonable." And of course, as everyone in this room would agree, any time the standard is "what's reasonable," that's going to be a fertile ground for litigation. Litigators

are going to argue over that endlessly. . . . Rule 37 and the new E-Discovery rules are only the starting point of the legal analysis. If you have clients in regulated industries, there are even more issues. For example, if you're a broker dealer and you're subject to NASD retention requirements, if you violate that retention requirement when destroying electronic information, you're going to have a really hard time arguing that you had a routine document destruction policy that met the standard of reasonableness under Rule 37.

So you have to look at all of these different aspects. You also have to look at any internal policies that the company has adopted. Say a company makes a policy that says, "We keep all of this information. We keep customer information for longer than the required statutory period." And now it's gone. That would be an indication that they acted unreasonably.

**ANDROVETT:** *Share with me your experiences on the Safe Harbor. A company says, "You know what? We've got a hard and fast rule. We destroy e-mails after 90 days and we do it routinely." How much does it help or hurt you if you come to find out they've got this great policy, but they're not really adhering to it?*

**ROTHMAN:** Speaking from experience, one of the biggest issues that I think exists out there is compliance with policies. How do you make sure that your employees, enterprises, engineers, for example in the case of an energy business, or your broker dealers, or whoever you've got, how do you make sure that they are complying with your policies?

How do you make sure that you don't have what's called a "rogue employee." I'm going to give you guys an example. Recently, I was speaking with somebody who is an engineer at one of the major oil companies, and he does not comply with his company's policies on maintenance of records. He doesn't destroy things from projects that he did years ago. Recently, one of his bosses called him up and, "What did we do back on such and such on project XYZ?" And low and behold, he had stored that information separately somewhere. He was able to call it up and provide something that was useful to the ongoing project. So the issue of policing rogue employees is a huge question. One of the ways that I've seen this issue addressed by a court is in a case out of Illinois, *Danis v. USN Communications* [2000 U.S. Dist. Lexis 16900 (N.D. Ill. 2000)]. In this case, the attorney actually went to a board meeting and instructed inside and outside board members and employees to collect and preserve relevant information. He advised the board of directors on what to do in terms of complying with these processes, what to do in terms of a litigation hold for the piece of litigation then pending, and the court applauded that, as you might expect, even when the attorney's instructions were not followed. That presents problems for those of us who are outside counsel and also who are in-house counsel. First, you see the solution. I can go to the board of

**I think the bigger issue is policing rogue employees advising directors to maintain information, and making sure that holds are in place.**

— **MARCY L. ROTHMAN**

directors and tell the outside board to maintain their hard drives and they won't be considered rogues. I can go to the president of an operating division, tell him that I need to take his hard drive and he won't be considered a rogue. How many of us have tried to do that? Is that something that's going to make us popular? However, what I'd suggest is that this isn't a popularity contest. My job as an outside counsel is to provide support and counsel for employees and in-house counsel for my clients. It's my job to go in and try to do those things and give them the best advice for the facts at hand. So the Safe Harbor, as my colleague on the panel said, shouldn't be taken as a given and I think the bigger issue is policing rogue employees, advising directors to maintain information, and making sure that litigation holds are in place. Mike asked us to provide helpful lists. One of the things that I was jotting down as he was asking this question was this: You've got to do a litigation assessment. You've got to determine what your resources are and figure out how you're going to draft, enforce and monitor your litigation holds. As a subsection on the scope of information, you've got e-mails, portable devices, user created data and backup systems that you have to consider. You've got to know what your client is using in these contexts so that you can understand what you're gathering and what you're trying to help them manage. To discuss text messaging, to discuss instant messaging, for those of us who are outside lawyers, what I do is I try to check myself against these inquiries when I'm preparing to meet with a client. Can I answer these questions for my own law firm? Can I answer these questions for the court as I go into the court and represent my client? So the likelihood is, and I agree with my colleague on the panel, that VOIP, voice mail and text messaging are all relevant areas to be mined or at least to be educated on in terms of what your client is doing with those sources of information? Essentially, the scope of the inquiry includes what types of information, what kind of business does my client have that's using that kind of information, what might the individual employees and the data collection points look like, and how do I go about managing that or suggesting strategies for managing all of that information? In terms of scope of information, there's so much out there, from my perspective, in the electronic age that it's difficult to wrap our minds around what could be out there. That has to be the first inquiry.

**ANDROVETT:** *Help identify some parameters. This notion of the litigation hold, which is not a new concept, has just been applied to E-Discovery. How much is too much? If you reasonably anticipate*

*there might be litigation, what we're talking about here is making sure that any possible relevant document is preserved and no destruction goes on. You've got a company that has followed your advice and they've got a very regular retention policy in place. As you're trying to advise your clients, how much is too much? Where is the line?*

**SCOTT:** The standard is going to be whether or not your client acted "reasonably." And so obviously from that perspective, we counsel clients to err on the side of preserving information that they have maintained in the regular course of business. There is nothing wrong with reviewing and adopting reasonable

policies as long as they're compliant with whatever the rules are with regard to the client's industry. But when you end up in a protracted discovery fight, what you want to be able to show the judge is all of the proactive things that your client did so that information would be reasonably retained. . . . [O]n the fringes, on the extreme, you could get to the point where you're retaining too much information, but there really is no penalty for that from a legal standpoint — you can only get yourself in trouble by taking too aggressive a position and saying to the client, "Let's take the most aggressive possible position with regard to what we're going to do with documents." And related to this,

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A proud  
participant in  
*Texas Lawyer's*  
e-Discovery Roundtable



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**JONATHAN C. SCOTT** is a

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pertinent issues in today's technology-centric

business litigation.

Mike, you asked me before about what happens when the client doesn't follow the policy. For example, a company says "We destroy e-mail after 90 days." Well, it becomes particularly problematic when later in the case, information surfaces that they said didn't exist. They lose a lot of credibility with the judge, and the judge is wondering if this is an indication that this litigant was withholding information for a strategic advantage. The other time in which it's problematic is where the litigation spans a long time period and a certain character of records. While they have those records from 10-20 years ago, they say that their policy is that any of the records that would be within the most relevant time frame of your litigation can't be produced. They can't find them. Again, you're likely to have to have that same sort of reaction, with the judge thinking they're playing games and they really do have those records. So it creates those kinds of issues that are problematic.

**JOHNSON:** When we talk about reasonableness, it really comes down in large measure to common sense, good judgment and your own sense of professional ethics. As Marcy said, it's not a popularity contest, and we're not always popular for a lot of reasons as lawyers. But in this area, you really do have to draw the line because the buck may stop with the legal department. In the final analysis when things break down, it's the lawyers who frequently get pointed at. We've all had experiences with that, maybe not in such an extreme

way. . . but we all get into situations where we know what we think is right as a lawyer, but we're under a lot of pressure to go against our best instincts. This is especially true when you're in-house or when you're outside counsel and you're dealing with a client that's giving you a lot of pushback. Just think of the *Arthur Andersen* case. Now, that's the worst-case scenario, but there was a case where allegedly everyone was trying to follow the document retention policy and everything was couched in terms of following the document retention policy. Even if you look at the infamous Nancy Temple e-mail, the e-mail was about, "Remember everybody, we have a document retention policy and we're supposed to be following it" — along those lines. Trying to bend over backwards to couch things in terms that make your client happy, in the long run may not help you or the organization. What happened to Arthur Andersen was tragic. And little vindication came from having had the case reversed by the Supreme Court. But that was a case where obviously the repercussions went way beyond civil sanctions — a whole company went down with a criminal prosecution. And even though the Supreme Court ultimately reversed, the damage was done. And it started with efforts to enforce the document retention policy. So just keep that in mind when questions come up about, "Do I really need to go this far?" Or, "Gosh, this individual in the company or this client really isn't

happy about the fact that we have to do this; or we're too busy right now or we've got a business to run, we can't be bothered with these things." When you get that kind of pushback, just say to yourself, "Arthur Andersen, Arthur Andersen." That's really what happened in that case. There was a lot of stuff going on and the lawyers were in a tremendously difficult situation getting pushback to try to find a way to deal with it. It was the after-the-fact coming in and trying to use the retention policy as a way of dealing with the prob-

lem that led to one of the greatest corporate tragedies in history.

**ROTHMAN:** I'd like to add one thing to that. I'd like to commend the *Zubulake* series of opinions to the readers of *Texas Lawyer* and also to the members of this audience who have not yet read those opinions. They are, in my view and in many people's view, the seminal jurisprudential guidance that we have right now in terms of what the courts think of electronically stored information and management. I've got in front of me the pronouncement of Judge Scheindlin, who wrote those opinions, on what must be retained. I'm just going to give this point to you quickly again in response to the request for lists. Judge Scheindlin says, "That a party must retain all relevant documents, but not multiple identical copies, in existence at the time the duty to preserve attaches and any relevant documents thereafter." That's a very, very broad set of phrases. And in *Zubulake 4*, there is a list of steps that counsel might take to ensure that a client complies with

its obligation to preserve relevant electronic information. I'm going to give them to you briefly: One, "Issue a litigation hold when litigation is reasonably anticipated. The hold should be periodically reissued to keep it fresh in the minds of the employees and especially the key players." Two, "Counsel should communicate directly to the key players and communicate the preservation duty clearly." Three, "Counsel should instruct all employees to produce electronic copies of their relevant active files, interview questions, and witnesses on their document management habits." And four, "Counsel must make sure that all backup tapes which the parties are required to retain are identified and stored in a safe place." That requires meeting with IT people and learning the systems. So those are some pieces of guidance that we've got from the courts in terms of what must be retained. The linchpin there is the term "relevant." And if we think back on our evidence rules from law school, relevance is the tendency to prove or disprove a matter in dispute. That's what's relevant. So the question of foreseeing capably what might be relevant in some piece of probable pending litigation can be difficult.

**ANDROVETT:** So we've got a legal system that has acknowledged electronic documents, they're discoverable. [There is] no ambiguity about that. We acknowledge that there's this huge volume of documents. And the rules seem to be saying, "Hey, lawyers, you don't get a pass. You have

**Rule 37 and the  
new E-Discovery  
rules are only the  
starting point  
of the legal  
analysis.**

— **JONATHAN C. SCOTT**

to be up on all of these issues so that you can follow the rules and proceed accordingly." One of the more fascinating aspects, at least to me personally, about the amendments is what's come to be known as "meet and confer." You get together within four months with the other side and it seems like what you're doing is establishing the lay of the land. The plaintiff's lawyer is saying, "What? We know you've got it out there. This is where we think you have it. And very specifically, this is what we want." And if you're counseling the defendant, you've done all of these prescreening meetings and you've created policies. And you're saying, "Okay. We know where the stuff is. We can reasonably anticipate they're asking for this. Miss or Mr. Client, what's burdensome?" We could spend probably 90 minutes just on that. But No. 1, have any of you participated in any meet and confers yet? And what is your general advice to lawyers and also to the IT folks? Because I can tell you when we get the vendors in here later this morning, they'll say, "You know, these lawyers ought to be bringing us to these meet and confers because we really know what should be asked and how it should be reacted to."

**JOHNSON:** Yes, I couldn't agree more with that. I think that you have to educate yourself beforehand. In a complex case, I wouldn't want to go forward with a meet and confer without having the benefit of a vendor on board or an expert that can be there with you, just like you have experts in other areas. . . I have had at least one such conference that went very well because I was dealing with attorneys who were reasonable. But of course, that's not always the case. Especially if you anticipate that somebody may not be that kind of an attorney by reputation, you might also want to consider sending a letter to opposing counsel once litigation has been filed, or even in anticipation of litigation, where you set out what you expect will be retained by your opposing counsel and by his or her client. That way, it makes it much more difficult to come in after the fact and claim ignorance. Of course, that's not really a good excuse these days anyway. But if you lay out ahead of time all of the steps that you think should be taken to preserve evidence, where they ought to be looking, where these things might be located, and actually get your vendor or IT person to sit down with you and help you draft that letter, send that letter out before you even have the meet and confer conference. Then you help eliminate the fallback on excuses. This approach also sets the stage better for the meet and confer conference. You don't want to go to the conference and have opposing counsel ambush you by acting like they don't really know what you're talking about. So educate opposing counsel in advance so they can't come in to a meet and confer and say, "Now, what's metadata?" It's just a

way of getting past the pretense that opposing counsel doesn't have a clue what you are talking about, which makes it difficult to have a meaningful discussion.

**SCOTT:** I would agree that using IT consultants to help you in this process is very, very important. But remember that ultimately if something goes wrong and information is not produced or information is not preserved, it's going to be the client and the lawyer that take the heat for it. *Qualcomm, Inc. v. Broadcom Corporation*, No. 05-CV-1958-B (BLM), 2007 WL 2296441 (S.D. Cal. August 6, 2007), a case out of the Southern District of California, is a perfect example of that. During the trial, it came to light that hundreds

of thousands of pages of electronic information were not produced to the adverse party. After that was disclosed, the court ordered both the attorneys and Qualcomm to show cause why they should not be severely sanctioned. The court made findings regarding what had occurred. At the end of the decision, the judge said that he thought that Qualcomm's lawyers were involved in clear misconduct. He indicated that after a hearing, there would be sanctions and, in addition, he was seriously considering whether a referral to the State Bar of California was appropriate for all of the attorneys that represented Qualcomm. Qualcomm brought in new counsel. After the judge's decision,

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Qualcomm's former attorneys filed an application asking the judge for permission to waive the attorney-client privilege. Apparently, Qualcomm's former lawyers want to be able to point the finger at their former client and say that it was the client's fault for not producing that information. That is a terrible circumstance to be put in — you're defending your license, you're defending your conduct, the client's pointing the finger at the attorney, and the attorney's saying, "I need to be able to point the finger at the client. It was their fault." So while vendors have an important role to play, the lawyers have to be involved and know what is going on because it's the lawyers who will have to explain to the court what happened. It's the lawyers who will have to tell the judge what was done and what role they played in interrogating the client to get the necessary information. In the old days, you might simply send the document requests to your client, saying "Send us whatever you have that's relevant." Well, those days are over. The 2006 amendments to the federal rules make it clear that compliance is a joint responsibility of counsel and the client.

**JOHNSON:** I couldn't agree more that it is ultimately the lawyer's responsibility. The vendors [however] can help you get up to speed and learn the issues, which is why they really can be of great assistance to you during the process. Most vendors are more than willing to come in and do an in-house presentation for you whether it's to your company or to a law firm. So take advantage of the fact that vendors are willing to bend over backwards to help educate you because they want your business, and that's not a bad thing.

**ROTHMAN:** Let me make a couple of comments on that. The first thing is that from my perspective, one of the initial inquiries is whether or not you've got a commercial dispute between two organizations who have core businesses to operate, or whether or not you have sort of the traditional plaintiff, lawyer, litigant on the other side, or whether you occupy a traditional defense or plaintiff position. Because if you've got two businesses that are litigating an issue, they have an interest in doing this process as efficiently as possible and making it work for both sides if there's a legitimate dispute. Both sides will incur cost; both sides will have similar issues to deal with. If you're dealing with a circumstance where there is a "traditional" plaintiff's lawyer versus a defense organization, you've got a different set of circumstances. You've got a circumstance where someone may be going to school more than trying to solve a business dispute. So, keeping that in mind, one of the concerns that I have going into newly-retooled federal scheduling conferences is what are the motivations of the parties going in and what is likely to be the result. Echoing some prior concerns, are people going to work together, is it going to be a cooperative effort, or is it going to be an occasion where you're going to be defending every single aspect of your client's enterprise server? So those are some of the questions. The biggest issues that I see the courts, the jurisprudence, and some of the institutes are advocating right now are clawback agreements.

**ANDROVETT:** *Clawback means you've sent it out and now you want it back.*

**ROTHMAN:** That's right, inadvertent disclosure of privileged issues. Whether you're going to have a quick peek protocol where everybody gets to look

at something and then decide how they're going to handle it. Those kinds of agreements are going to be really first and foremost. The courts, Judge Scheindlin and others, have encouraged us to confer. We're going to have to be in a position to defend our efforts to confer. I think transparency is really going to be something that the courts are going to scrutinize as they get more up to speed on what some of these issues are. In fairness to those of us who practice before the courts, sometimes the courts are getting up to speed as other people are. Let me commend to the audience and to the readers of *Texas Lawyer* what's called the Maryland Protocol. I'll describe what that is. The United States District Court for the District of Maryland has what's called a suggestive protocol for the discovery of electronically stored information. It provides in great detail some of the opportunities that we have as attorneys to address these issues before the court. It talks about what should be discussed. It talks about options for the kinds of agreements that counsel could enter into to streamline some of these processes. Although I haven't seen this carried out fully yet, the Maryland Protocol may provide some opportunities for cost issues and management of budget, which is also a concern for our clients. And the caption of the Protocol is *In re: Electronically Stored Information*. So that's something that I would commend to you. It's got a number of sections, including how to address litigation holds. So I commend Maryland Protocol to you at least for some guidance, if not as a script set of rules.

**ANDROVETT:** *So out of the meet and confer, one side says, "Well, we really got to look at this accounting data." And your client says to you, "I'd be more than happy to provide that data, but, we don't use that software anymore. We don't have access to that information anymore. To actually hire somebody to go retrieve that is just going to be enormous in terms of man hours and cost." Again, I guess I'm asking, What's the line? The rules have only been implemented since December of 2006, but they're starting to develop some rhyme or reason to what happens when a client says, "Whoa, this request is too much." Or, "I can't respond to this request."*

**SCOTT:** There really is no consistent standard. It's left to the discretion of the magistrate judge or the district judge. It's going to be highly fact dependent. And sometimes, even if the court doesn't express this, the court is going to look at how important the evidence really is, and in part, what is the ability of the party that's seeking the information to afford to have those expenses shifted to them. So if it's a David versus Goliath kind of case, say an individual plaintiff against big company, it may be the case that the court is going to be more willing to make the big company shoulder more of the expenses related to that production, even though the rules themselves don't necessarily say that it's based on financial means.

**ANDROVETT:** *Same with the size of the dispute? If the dispute is a \$100,000 and the cost to produce this legacy data is \$200,000, the judge may say that's just not reasonable?*

**SCOTT:** Again, that certainly is a factor the court will look at. But I think part of it is going to depend on whether the judge thinks that it's tangential information or whether or not the smoking gun or the critical piece of evidence in the case might be in there.

**JOHNSON:** While we're on this topic of cost considerations, one thing that I'd like to throw out for in-house counsel is the subject of litigation budgets. Some in-house counsel routinely request budgets up-front in litigation; others don't, and the degree of detail that's requested will vary from case-to-case and client-to-client. But one of the things that I really do think inside counsel should be considering is that when you're looking at who you're going to engage for a particular piece of litigation, particularly when it's a large complex case where discovery is going to be a significant component, you should be asking your candidates about costs and handling of E-Discovery. Don't wait until after the engagement. You should be getting information on this subject on two levels. First, get a feel for outside counsel's familiarity with E-Discovery issues and vendors. Do they have experience using Web-based databases and sharing databases with co-counsel? Secondly, cost. There are a lot of vendors out there today, and costs and cost estimates will vary. It's really difficult, like it is in a lot of areas of litigation, to give an up-front estimate of costs with litigation. But I think it's appropriate to be asking for some idea of what the costs might be involved in doing discovery of a case up-front, and to continue to refine this information after the engagement. How do the costs of a recommended vendor compare with costs of other vendors for standard work like scanning, OCR conversion, de-duping and any other processing costs? And the lowest price is not necessarily the best one to go with. There can be a trade off with the experience, reputation, the quality, the accessibility to and availability of vendors who might be slightly more expensive. But you ought to be able to get some idea up-front of what kind of costs you might be looking at — you don't want to be caught off guard, because this is an area where costs can run away very, very rapidly.

**ANDROVETT:** . . . *The rules seem to acknowledge that we're talking about technologies and sheer volumes that destroy the old paradigm of the senior partner delegating 15 associates to go to the warehouse and look at every document. That just doesn't happen anymore. When the vendor panel gets up here, one of the things they'll talk about is their ability to establish relationships between documents to refine the search and to produce the most relevant documents. But the other side of it says that it seems to me that a lot of stuff gets disclosed that maybe shouldn't get disclosed because no one can really reasonably look at every document. The rules provide for basically a give back, a free pass. What's happening in the interpretation of that rule?*

**SCOTT:** What I'm seeing is that the clawback, which is intended to avoid an inadvertent waiver of privileges somewhere in that electronic information, is generally being enforced by the courts. The only problem is that if you disclose privileged information and it gives the other side strategic advantage, the fact that they give you the document or the electronic information back after they read it is certainly not as effective as not producing it in the first place. That's the reason why when you're litigating a case and there's a large volume of electronic information, there's a concern there that you can't just rely on the clawback. That's an escape hatch. But that shouldn't

be the primary approach. Our view should not be, "We don't have to worry about privileges. We'll just send them all the electronic information that's relevant. And later on, we'll get the stuff back." Because, again, once they see it, it gives them a strategic advantage. The cat's out of the bag. There's no way to prevent them from using that in some other way. Obviously, they're not going to be able to offer that particular piece of electronic evidence. But if it gives them the key to something else or they can compose another discovery demand to get something else that was not privileged, it would be detrimental. ❖

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