Staying in the Game

# E-Discovery with a Live Product

By Kelly E. Jones and Daniella D. DaCunzo

**In cases involving actively marketed products, counsel must not only reinforce litigation holds, but also keep track of changes and avoid disclosure of all things privileged.**

Despite the vast number of prescription and over-the-counter drugs involved in litigation today, only a small percentage of those lawsuits involve products that have been recalled or withdrawn from the market. A recalled or no longer marketed product allows counsel to sequester all potential litigation discovery materials at one point in time and give appropriately measured consideration to newly created documents. In contrast, preserving and collecting electronically stored information (ESI) in litigation presents counsel with special challenges when this information involves a "live" product, meaning a product currently on the market. A live or actively marketed product requires counsel to "stay in the discovery game" by continually supplementing discovery productions, often with imminent deadlines, without hindering a company's daily functions. This article will address some of the steps that counsel should consider when conducting discovery for "live" products.

Makers of actively marketed pharmaceutical and medical device products may face litigation while still in the process of modifying labels or designing an actual product at issue. In those cases, regulatory counsel must address regulatory issues at the same time as liability counsel reviews documents for discovery purposes. These activities, together with a company's ongoing manufacturing efforts, generate numerous documents and ESI, creating an enormous challenge. Counsel and a client must preserve relevant information and ensure that the collection process is as complete as reasonably possible. To ensure faithful adherence to the rules of ESI discovery, counsel must understand their duties and follow the steps outlined below.

## Rules of the Game: Discovery Under *Pension Committee* and *Zubulake*

Judge Shira Scheindlin, author of the significant e-discovery opinions in the *Zubulake* cases, has recently rearticulated counsel's e-discovery duties in *Pension Comm. of the Univ. of Montreal Pension Plan v. Bank of Am. Sec., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010), holding that parties must "participate meaningfully and fairly" in the discovery process. *Id.* at 463.

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This requires a client and counsel to produce, as well as to preserve, evidence, or face judicial sanction. *See id.* at 465–66. In the context of ESI, this requires counsel to become actively involved in a client's discovery process and to work to ensure that relevant information is preserved and collected. *See Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (*Zubulake V*). Counsel must actively participate throughout the collection and preservation process by ensuring that a client implements a litigation hold, identifying and communicating with personnel that manage the relevant data, and ensuring this data is retained and produced for the opposing party. *See id.*

Failure to meet these obligations will result in harsh penalties. In the discovery of electronically stored information, the failure to preserve and adequately search for relevant material "inevitably results in the spoliation of evidence," and a court can sanction counsel for even careless mistakes that result from a "pure heart and an empty head." *Pension Comm.*, 685 F. Supp. 2d at 464 (holding the failure to preserve, collect, and review evidence resulting in loss of relevant data was at least negligent). These sanctions can be quite severe and involve fines, adverse inference jury instructions, and other costs. *See, e.g.*, *Google, Inc. v. Am. Blind & Wallpaper Factory, Inc.*, No. C 03-5340 JF, 2007 WL 1848665, at *1, 5–6 (N.D. Cal. June 27, 2007) (evidentiary sanction and fine of $15,000 for willful indifference toward discovery obligations); *Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837, 2006 WL 1409413, at *9 (S.D.N.Y. May 23, 2006) (payment of costs of bringing motion and re-depositions for delinquent production of documents); *Zubulake V*, 229 F.R.D. at 439–40 (adverse inference instruction for failure to preserve e-mails after receiving adequate warnings). Therefore, it is important that counsel identify the moment when discovery duties arise and respond effectively.

E-discovery obligations present a challenge even with products that are no longer marketed and involve static information generated from a closed group of key players. Discovery challenges increase exponentially with litigation involving live products, as companies juggle compliance with ongoing regulatory demands, business obligations, and personnel with changing organizational responsibilities. These challenges require counsel to take extra steps to respond to changes as they occur and to ensure confidentiality and privilege issues are not compromised.

## Develop a Strong Offense and Defense—Anticipation of Litigation Triggers Counsel's Duties

The obligation to oversee a client's preservation of evidence begins with the anticipation of a lawsuit: "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Pension Comm.*, 685 F. Supp. 2d at 466 (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (*Zubulake IV*)). The beginning of this duty to preserve evidence often coincides with the commencement of a lawsuit. But, this duty "may arise even earlier if a party has notice that future litigation is likely." *Cache La Poudre Feeds, LLC v. Land O'Lakes Inc.*, 244 F.R.D. 614, 621, 622–23 (D. Colo. 2007) (holding that a party's duty to preserve was triggered by filing a complaint rather than by pre-filing correspondence); *see Goodman v. Praxair Servs, Inc.*, 632 F. Supp. 2d 494, 511 (D. Md. 2009) (finding that a duty to preserve was triggered by a letter threatening litigation). Thus, counsel must be prepared to initiate a litigation hold at very early stages of a conflict or face judicial sanction. *See, e.g.*, *Doe v. Norwalk Cmty. Coll.*, D. Conn. 2007 (finding defendants grossly negligent for failure to implement a litigation hold upon initial discovery of sexual assault allegations).

Once the duty to preserve begins, counsel must not only help implement a litigation hold but also continually monitor a client's document-gathering process. Implementing a litigation hold is "only the beginning" of counsel's duties in the discovery process. *Zublake V*, 229 F.R.D. at 432; *see also Cache La Poudre Feeds*, 244 F.R.D. at 630. Accordingly, it is insufficient to establish a litigation hold and merely communicate it to company employees. *See Cache La Poudre Feeds*, 244 F.R.D. at 630 (holding that counsel failed to discharge discovery obligations by directing employees to produce relevant information without overseeing and verifying their production). Instead, counsel has a duty throughout the discovery process to ensure compliance with a hold and to oversee and monitor a client's efforts to retain and produce ESI. *Zublake V*, 229 F.R.D. at 432; *see Pension Comm.*, 685 F. Supp. 2d at 473 (holding a counsel's instruction to plaintiffs, absent active supervision, failed to meet the standard for a litigation hold). Counsel must work with a client to identify appropriate custodians throughout the organization, communicate the hold to employees, interview potential custodians and IT staff, conduct diligent inquiry of information repositories, suspend routine deletion protocols, and frame and implement reliable collection methodologies. *See Pension Comm.*, 685 F. Supp. 2d at 473 n.67 (noting that attorney oversight includes "the ability to review, sample, or spot-check the collection efforts").

**It is important** that counsel identify the moment when discovery duties arise and respond effectively.

For actively marketed products, this ongoing obligation provides unique challenges throughout the litigation period. The "live" status of the relevant product requires vigilant monitoring of a legal hold, as the product continues to be marketed throughout litigation. Counsel must provide specific instructions on preservation of metadata and then continually monitor the performance of a client's personnel, verifying that a hold directive has been extended to terminated employees and to new hires. Attorneys should also implement procedures that track information and provide continuing reminders to a client. For example, counsel could track hold notice receipts and confirmations, on paper or electronically, and use a tickler system to implement a preestablished schedule to send reminder notices. Counsel could also work with a client to schedule frequent reminders to ensure compliance and

to establish a strong, good-faith argument that the client complied with its preservation obligations for a court.

To accomplish these tasks, attorneys should consider requiring ongoing certifications from custodians, communicating negative consequences for noncompliance, and utilizing audit and sampling procedures. For large-scale litigation, software products exist to assist attorneys with these efforts. These products electronically monitor the failure to receive a return confirmation, which in turn triggers an alert to the involved attorney to spur appropriate follow-up. Most software that manages legal holds includes a notification and follow-up component, as well as an electronic log. The efficiencies created by automation and automated documentation can be significant.

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### First Steps: Identify Key Players and Critical Teammates

Counsel's first steps of e-discovery are to identify the key players in a company's litigation and establish working relationships with critical teammates, namely IT personnel.

#### Know Your Players

The duty to preserve ESI requires identifying "key players" in litigation and ensuring that they preserve relevant documents. Counsel has the duty to ensure that all sources of potentially relevant information are identified and preserved. *See Zubulake V*, 229 F.R.D. at 432. Clients typically possess an overwhelming amount of ESI in the form of e-mails and other documents, but the duty to preserve documents and things for litigation is limited to materials held by and made for "key players," or those employees likely to have information relevant to the discovering party's claims or defenses. *See, e.g., Goodman*, 632 F. Supp. at 512, 516–17 (holding that a company's founder, CEO, and employee responsible for technical information were all key players to whom the duty to preserve extended).

Therefore, identifying and interviewing these key players is critical to ensuring all potential sources of relevant data have been inspected. *See In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 663 (M.D. Fla. 2007) ("Unless counsel interviews each [key] employee, it is impossible to determine whether all potential sources of information have been inspected."); *Goodman*, 632 F. Supp. 2d at 517 (noting that the defendants' failure to issue a litigation hold to key players resulted in the loss of important computer hardware). Counsel should inquire into key employees' personal practices for document management and retention, and periodically remind them of their obligation to preserve data. *See Zubulake V*, 229 F.R.D. at 433–34; *see also Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (requiring discussion between counsel and key players to satisfy minimum e-discovery duties).

The duty to interact with key players presents the immediate challenge of locating these individuals. Personnel can change quickly—especially in pharmaceutical or medical device companies, where employee turnover or intra-company repositioning is common. It is, therefore, vital for counsel to advise the initially identified key players participating in a litigation hold about policies and procedures and periodically update the list of relevant custodians. A client must preserve documents of employees who leave the company or transfer to a different part of the organization. *See Scalera v. Electrograph Sys., Inc.*, 262 F.R.D. 162, 176 (E.D.N.Y. 2009) (holding the defendants negligent, in part, for failing to preserve documents of a key employee who left the company); *Thompson v. HUD*, 219 F.R.D. 93, 100 (D. Md. 2003) (holding that former key employees' e-mail records should have been preserved even absent a preservation order).

The size of a corporation can also add to the challenge of identifying key players, as courts often require document collection from a large number of employees. Judge Scheindlin has cautioned that while the failure to collect records from key players constitutes gross negligence or willfulness, the failure to obtain records from *all* employees who had *any* involvement with the relevant issues could also constitute negligence. *Pension Comm.*, 685 F. Supp. at 465; *see Zubulake V*, 229 F.R.D. at 432 ("Unless counsel interviews each employee, it is impossible to determine whether all potential sources of information have been inspected.").

Ideally, counsel should communicate directly with all key players and instruct them to produce active files and makes sure that backup media are identified and safely stored. Depending on the dispute, however, it may not be reasonable to collect from all employees, for instance, if the relevant party is a multinational pharmaceutical or medical device company. Such a company will have extensive employee lists and may have numerous products on the market that have no relevance to the product being litigated. Judge Scheindlin and others have recognized this problem and allow counsel to be "creative" in conducting the search for relevant information. *See, e.g., Zubulake V*, 229 F.R.D. at 432 (providing the example of a systemwide, keyword search to supplement the process of interviewing key players). Courts will consider the parties' circumstances in each instance to determine the sufficiency of their efforts: "The adequacy of each search must be evaluated on a case by case basis." *Pension Comm.*, 685 F. Supp. 2d at 473 n.68. Counsel should, therefore, adopt reasonable strategies based on a client's resources for locating personnel and preserving relevant ESI.

Collaboration between counsel and client will help safeguard the process of identifying key players. Counsel should work with a client to empower the organization's general counsel or head of human resources to communicate a litigation hold to the proper individuals and ensure that the list of key personnel is up-to-date. Another method to safeguard the preservation process is to locate organizational charts or employee rosters within a company's database and use an electronic auditing system to track and update potential changes in key custodians. Whatever method counsel and client choose, communication must be firmly established between the information technology department, the human resources department, general counsel,

and outside counsel: the success of a preservation and collection effort depends on their coordination. *See In re Seroquel*, 244 F.R.D. at 662 (imposing sanctions for e-discovery failures on a party whose attorney was ignorant of both the document production team and how the production system worked).

### Identify Critical Teammates—IT Personnel

Counsel should also communicate with the data gatekeepers, that is, the IT personnel who manage the resources that store the relevant information. *See Zubulake V*, 229 F.R.D. at 432. IT personnel can help familiarize counsel with a client's document retention policies and data retention architecture and explain systemwide backup procedures and a company's policies regarding data deletion, recycling, and overwriting. *Id.*; *see also* Sedona Conference, Commentary on Achieving Quality in the E-Discovery Process 14 (2009), http://www.thesedonaconference.org/publications_html ("[IT personnel] will be informed on the subject of what ESI is online, near-online, and offline, what may be zipped or encrypted, and what may be found on backups, CDs, DVDs, virtual storage devices, servers, removable storage devices… and archives of all kinds."). Failure to communicate with IT personnel may not only make e-discovery obligations more difficult to perform, but a court may consider it negligence. *See Scalera*, 262 F.R.D. at 177 (holding defendants negligent for failing to timely communicate with IT personnel, even though a preservation duty was communicated to most key players); *Phoenix Four*, 2006 WL 1409413, at *6 (noting counsel's obligation to seek help from IT personnel when difficulties regarding server data arises). Counsel should, therefore, contact IT personnel as soon as e-discovery duties arise to avoid the loss of relevant evidence. *See Scalera*, 262 F.R.D. at 177.

Companies should also identify an employee to assist counsel in litigation. Today's companies house hundreds, if not thousands, of terabytes of information. That information is not always neatly organized for litigation, and data storage places a tremendous burden on both in-house and outside counsel to identify and preserve the myriad of different ESI repositories. This is no easy task if they are unfamiliar with modern computer architecture. As a result, many companies create the internal position of "discovery czar." Whether the designated person has a risk management, IT, or legal background, he or she should have broad IT comprehension. A discovery czar should have passwords to all databases and servers, as well as administrative rights to the servers. This discovery czar should also be added to the defense team to ensure that everyone updated on new information, search terms, and production efforts with any ongoing supplemental discovery process.

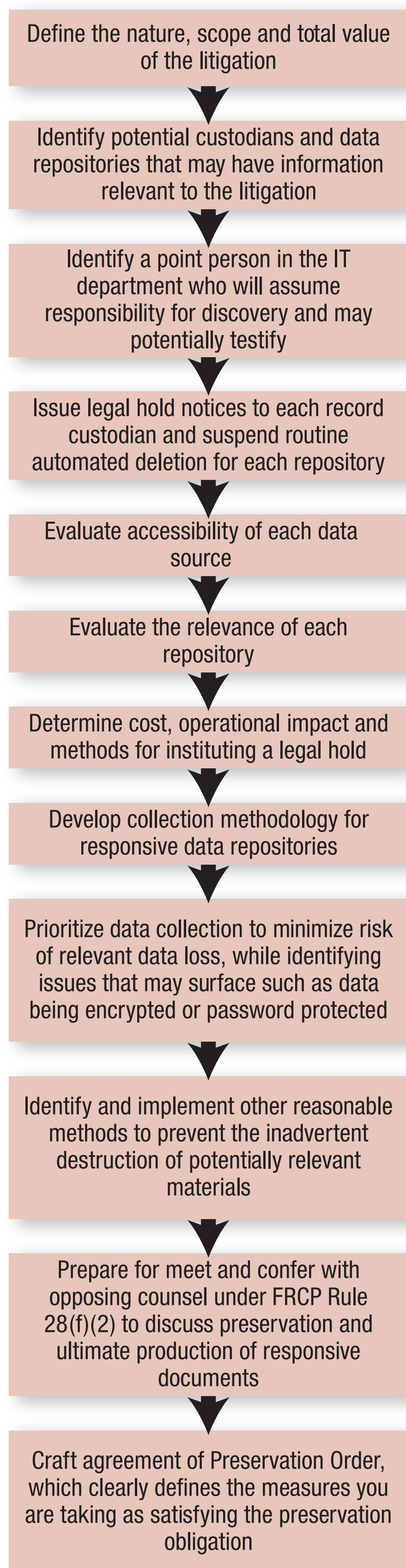
The plaintiffs in *Pension Committee* provide an example of the need for a well-informed discovery czar. Almost all the plaintiffs in that case failed to either carry out comprehensive searches for documents or supervise document collection processes. *Pension Comm.*, 685 F. Supp. 2d at 477. One plaintiff assigned critical collection duties to an employee with no experience conducting searches and provided no training, supervision, or contact with counsel during the search process. *Id.* at 483. Another plaintiff, lacking knowledge of the electronic filing system, had two employees perform searches without supervision or understanding of the extent of the search. *Id.* at 489. The court held that these failings constituted negligence or gross negligence and subjected the plaintiffs to monetary sanctions. *Id.* at 477, 497. Had the plaintiffs used a discovery czar to oversee and direct document collection, they may have avoided those sanctions. Not only can a discovery czar help ensure proper collection of materials, but should a dispute arise over the collection process, he or she can provide documentation and serve as a knowledgeable witness about a client's efforts to meet production duties. *See, e.g.*, *Pension Comm.*, 685 F. Supp. 2d at 477 (holding that the plaintiffs failed to adequately prepare records and witnesses in response to the court's request for discovery documentation).

## Second Steps: Create a Game Plan to Store and Retrieve Documents

It is imperative for an organization to demonstrate that it has taken the appropriate steps to ensure the integrity of the information covered by a legal hold. Once a party has identified the data relevant to its e-discovery duties, it must collect and process this data efficiently and effectively. *See Pension Comm.*, 685 F. Supp. 2d at 465. Parties are free to preserve e-data in many different ways. *See Scalera*, 262 F.R.D. at 171; *Cache La Poudre Feeds*, 244 F.R.D. at 628 ("[I]n the typical case, responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronic data and documents.") (internal quotations omitted). However, in producing those documents, parties must act in an open and cooperative manner. *See In re Seroquel*, 244 F.R.D. at 661–62 (holding the defendants' search of their repositories secretive and inadequate). An effective system of ESI documentation, therefore, should be both efficient and easily accessible.

ESI documentation is essential for drug and device companies facing litigation, as document collection duties will invariably involve large data environments. *See, e.g.*, *In re Seroquel*, 244 F.R.D. at 654 (noting the great challenge of e-discovery in litigation involving "development of a drug that spent many years in development by an international corporation and has been distributed worldwide"). A company's electronically stored information may exist in many locations, including remote offices and off-site servers that are maintained by third parties, and contract employees may have the responsibility of maintaining this ESI. In litigation, parties must prove effective managers of these complex data systems or else they become vulnerable to court sanctions. *See id.* at 661–62 (listing among the defendant's discovery failings an unclear method of de-duplication, late production of documents, and inadequate responses to technical issues).

Companies must, therefore, establish a thorough system to identify their stored documents. *See* Sedona Conference, Best Practice Guidelines & Commentary for Managing Information and Records in the Electronic Age 11 (2d ed. 2007), http://www.thesedonaconference.org/publications_html ("An organization should have reasonable policies and procedures for managing information and records."). Important data management steps include identifying repositories to control the flow of documents during litigation, and using data maps, disaster plans, and capital acquisi-




tion reports to identify valuable discovery information. Many pharmaceutical and device makers also keep substantial amounts of information in enterprises resource planning (ERP) environments such as the one developed by SAP.

A "content map" or "data map" helps identify repositories by recording the attributes of an organization's data repositories, such as the types of data, how such information is governed, and where related information may be copied. A data map should be up-to-date, a resource that sets out significant details of an organization's different active data creation and storage systems—e-mail, instant messaging, voicemail, network storage and file servers, application and file types, workstation distributions, remote user setup, and distribution of mobile devices—and backup protocols for each system involved in the litigation. Data maps should also include details on the names and roles of key data gatekeepers, the IT and records management personnel who manage and control a company's document creation and destruction technologies. Some organizations already have data maps of their computer systems. For those organizations that do not, counsel will have to interview record custodians and collect information about where and how the organizations store information and then use that information to craft a data map for the litigators.

It is also important to periodically update document searches to properly adhere to the ongoing obligation for supplemental production. To help satisfy this duty, parties can collect and preserve ESI by creating defensible copies of the evidence. It is possible to make copies of files or create images of entire disk drives, segregate and store the information in a protected repository, and at the same time eliminate cumulative information. Deduplication and date metadata will allow counsel to quickly identify new documents from ones that were previously collected to satisfy ongoing production obligations.

With live products, a useful way to ensure effective supplemental production is to record the MP5 or SHA1 hash value of all documents. In litigation involving actively marketed products, the same documents are often simultaneously edited by a client and prepared for production by counsel. A company needs the ability to consistently identify new and altered documents. Using the MP5 of SHA1 hash values, a company can create an exception report to determine if changes to documents may impact the litigation.

In helping to implement these collection and production strategies, attorneys should not worry about over-preserving. It costs only a few thousand dollars to build a large server to host a copy of the data created in a live "production" environment. As long as the directory format for data in the production environment is kept when copying data to the preservation server, most processing software can capture all the necessary fields to ensure a complete production. This process will also allow counsel to quickly tag the files already collected to identify new files. When it is time to collect, counsel can connect an encrypted USB device to the preservation server and transport the relevant content for review and production.

## Third Steps: Keep It Privileged and Confidential

Counsel can protect against inadvertent disclosures and limit turnover by identifying all counsel and executing nonwaiver agreements.

### Identify Counsel

Parties involved in the manufacture of pharmaceutical or medical device products should take care to avoid unwanted disclosure of documents. During the discovery for a live product, a company can generate many documents due to regulatory changes. Members of the organization typically will communicate with a variety of legal actors, such as liability attorneys, regulatory attorneys, and often, document counsel. In that environment, there is a real risk that some documents will may mistakenly receive responsive tags, resulting in inadvertent disclosure.

Although a party can move for the return of inadvertently disclosed information, a court may deny the request and find that the disclosure waived privilege. *See, e.g., Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 267–68 (D. Md. 2008) (holding that the disclosure of 165 documents to an opposing party waived any privilege or work-product protection); *Fig-*

*uras v. P.R. Elect. Power Auth.*, 250 F.R.D. 94, 98 (D.P.R. 2008) (holding the circumstances surrounding a disclosure waived any privilege regarding an inadvertently produced document); *Atronic Int'l, GMBH v. SAI Semispecialists of Am., Inc.*, 232 F.R.D. 160, 164 (E.D.N.Y. 2005) (finding that inadvertent disclosure of e-mails constituted waiver of attorney-client privilege).

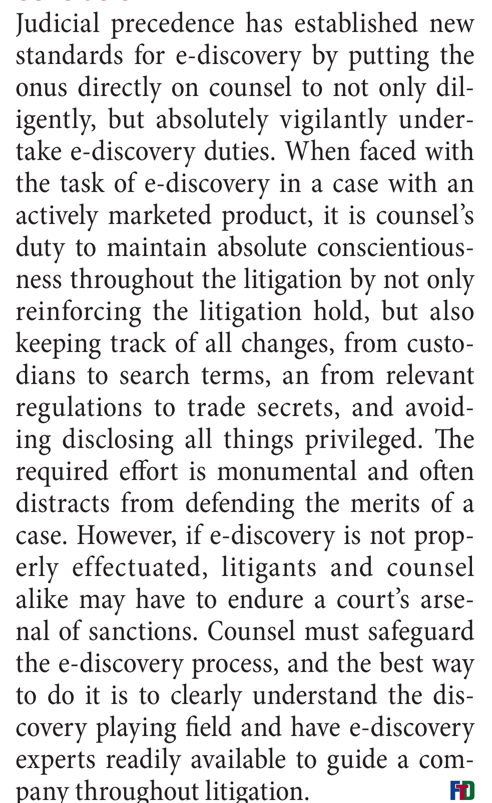
To prevent disclosure of documents containing attorney-client privileged or proprietary information, it is crucial to identify all counsel involved with a client and ensure that they maintain open communication with one another. A good prophylactic measure is to create a comprehensive list of attorney names, firm names, attorney domains, for example, "harrisbeach.com," and common contractions for all firms, such as "Harris Beach," and then enter these terms into the litigation document review platform. All documents in the platform can then be automatically "flagged" for all of the terms on that list. As new attorneys become involved in the litigation, counsel can perform another search to flag new documents for additional privilege review. Privilege reviewers can perform an additional final review to uncover any remaining documents tagged with privilege flag terms that escaped notice during earlier reviews.

#### Utilize Nonwaiver Agreements

Another important tool for protecting sensitive information is a nonwaiver agreement. Inadvertent production of privileged documents is likely to occur during discovery of electronically stored information. *See Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228, 232 (D. Md. 2005) (noting the volume and forms of e-material make privilege review difficult and time-consuming). To prevent inadvertent disclosures, parties can sign a nonwaiver agreement. This agreement is essentially a contract, often in the form of a court order, stipulating that inadvertent disclosure of privileged or proprietary information, trade secrets, or employee materials will not be considered a waiver. *See id.* ("agreements protect responding parties from the most dire consequences of inadvertent waiver by allowing them to 'take back' inadvertently produced privileged materials if discovered within a reasonable period, perhaps thirty days from production."). This agreement usually provides specific procedures by which the disclosing party can demand the return of the disclosed materials.

Although Federal Rule of Evidence 502(b) provides for the protection of inadvertent disclosure of privileged information or work product, parties should seek the additional protection of a nonwaiver agreement. To prevent an opponent from using mistakenly disclosed documents under Fed. R. Evid. 502(b), a disclosing party must satisfy three requirements: (1) the disclosure must have been inadvertent, (2) the party must have taken reasonable steps to prevent the disclosure, and (3) the party must have taken reasonable steps to rectify the error. Fed. R. Evid. 502(b); *see Amobi v. D.C. Dep't of Corr.*, 262 F.R.D. 45, 52 (D.D.C. 2009) (holding work product protection waived for an attorney memorandum because the disclosing party did not demonstrate reasonable efforts to prevent disclosure); *United States v. Sensient Colors, Inc.*, No. 07-1275 (JHR/JS), 2009 WL 2905474, at *3, 5 (D.N.J. Sept. 9, 2009) (finding a waiver of privilege for disclosed documents disclosed by a plaintiff who did not take reasonable precautions to rectify the error). Under Fed. R. Evid. 502(e), however, parties may execute a binding agreement on "the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection." Parties can take advantage of this provision by negotiating a nonwaiver agreement during the pretrial conferencing and discovery plan development stages of suits, which provides plenty of opportunity to seek a court order. *See* Fed. R. Civ. P. 16(b)(3)(iv); Fed. R. Civ. P. 26(f)(3)(D).

When drafting a nonwaiver agreement, attorneys must remember that it is not a license to indiscriminately produce documents. Courts may not honor nonwaiver agreements that are overly broad or contain "blanket" disclosure provisions. *See Sensient Colors*, 2009 WL 2905474, at *3 ("[S]uch blanket provisions, essentially immunizing attorneys from negligent handling of documents, could lead to sloppy attorney review and improper disclosure, which could jeopardize clients' case."). With e-discovery, creating a nonwaiver agreement may require the help of experienced e-discovery legal experts.



### Conclusion

Judicial precedence has established new standards for e-discovery by putting the onus directly on counsel to not only diligently, but absolutely vigilantly undertake e-discovery duties. When faced with the task of e-discovery in a case with an actively marketed product, it is counsel's duty to maintain absolute conscientiousness throughout the litigation by not only reinforcing the litigation hold, but also keeping track of all changes, from custodians to search terms, an from relevant regulations to trade secrets, and avoiding disclosing all things privileged. The required effort is monumental and often distracts from defending the merits of a case. However, if e-discovery is not properly effectuated, litigants and counsel alike may have to endure a court's arsenal of sanctions. Counsel must safeguard the e-discovery process, and the best way to do it is to clearly understand the discovery playing field and have e-discovery experts readily available to guide a company throughout litigation. FD