Law Society of Ireland

Civil Litigation

Discovery in the Electronic Age:

Proposals for Change

Law Society of Ireland
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Introduction

1.1 In March 2007, the Litigation Committee of the Law Society established a Sub-Committee to enquire into, and make recommendations about, possible changes to the rules in civil discovery to take into account developments since the coming into effect of Statutory Instrument 233 of 1999. Since 1999 there has been continual exponential expansion in the volume of electronically stored information ("ESI") created in business, administration and other areas. In particular, email has proliferated. Many litigants and their professional advisers have encountered difficulties in applying the current discovery rules and law to ESI because of the difficulties in searching for and reviewing such material, and in some cases may not realise that such data may be discoverable.

1.2 This report attempts to set out in plain language the technical and practical issues connected with ESI, and also describes the experience of other jurisdictions where the law on discovery has been revised to take into account the expansion of ESI. The report makes recommendations, including some not specifically related to ESI. The report does not recommend radical change but, rather, use of and adaptation of the existing Superior Court rules, which have served well. Such recommendations could also be adopted in the Circuit Court.

1.3 The members of the Sub-Committee were Roderick Bourke, Lisa Broderick (co-opted), Michael Kavanagh (chairman), Dermot McEvoy, Frank Nowlan (nominated by Law Society Technology Committee), Amy O'Brien (co-opted), Niamh O'Brien (co-opted), Ronan O'Neill and Owen O'Sullivan. The Sub-Committee met five times and on 4th October 2007 the Law Society Litigation Committee approved and adopted this report.

1.4 The report will be provided to the Rules Committee of the Superior Courts, the Rules Committee of the Circuit Court, the presiding judge in the Commercial List of the High Court, the Bar Council and any other interested party. The Law Society Litigation Committee hopes that the report will help the courts, practitioners and litigants in this important aspect of civil justice.

2. The Need for Reform

2.1 Order 31 rule 12 of the Rules of the Superior Courts ("RSC") as substituted by SI 233 of 1999, was introduced in August 1999 against a backdrop of bulky and expensive discoveries, particularly in mid- to large-sized commercial litigation and product liability cases. The expansion of photocopying and word processing in every area of business and administration had caused much of the proliferation of paper and consequent size of discoveries and cost. Also, pleading at that time was often uninformative and the prevalence of orders for general discovery, where parties would be required to produce on discovery "every document which was relevant to the issues in dispute", where the issues in dispute often were not clear, led in many cases to excessive and wasteful discovery.

2.2 The 1999 rules reformed the long-standing rules in litigation in the Superior Courts which enabled a party to seek, in effect, blanket discovery. Although the rules had always provided that an order should not be made under the rule if, and insofar as, the court was of the opinion that it was not '*necessary*' either for disposing fairly of the cause or matter or for saving costs, in practice necessity had been regarded by the courts as being secondary to the relevance test set out in the *Peruvian Guano* rule[1] which provides that a document is relevant for the purpose of discovery if it contains information which may (not *must*) enable the party seeking discovery to advance its own case or to damage the case of its adversary or which may fairly lead to a train of inquiry which may have either of those consequences. Discovery was rarely limited on grounds of necessity and given that *Peruvian Guano* has such a wide ambit – encompassing both documents that would be directly or indirectly relevant to any issue in the dispute – the volume and costs of discovery in disputes escalated.

2.3 SI 233 of 1999 shifted the onus of proving the necessity of discovery onto the party seeking it. The 1999 rules require the party seeking discovery to provide a letter to the party against whom discovery is sought, specifying the "precise categories" of documents required and giving reasons why each category of document is required. The rules provide that, if discovery is not agreed, the notice of motion seeking discovery must specify the precise categories of documents being sought and, significantly, that the motion must be grounded on an affidavit verifying, among other things, that the discovery is necessary either for disposing fairly of the cause or matter or for the saving of costs. The affidavit must provide reasons why each category of documents is required. The 1999 rules therefore give greater prominence to 'necessity' than heretofore.

[1] *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Company* (1882) 11 QBD 55.

2.4 It took some years for the application of the 1999 rules to become clear. Initially, there was undue focus on technical compliance with the new requirements, which greatly played into the hands of parties seeking to resist making discovery. This was gradually reversed with the re-emphasis on the fundamental objective of discovery being "to provide a party with the necessary additional ammunition to enable [the litigant] to win his or her case[2]. Once discovery is agreed, or a court order made, the party giving discovery must provide discovery of all documents within the agreed or ordered categories in accordance with the principles in *Peruvian Guano*[3].

2.5 The main practical effect of the 1999 rules has been that parties must focus on what are the issues in dispute and what documents or categories of documents are necessary for disposing fairly of the cause or matter or for saving costs. Although "once it is established that documents are relevant it will follow in most cases that the discovery is necessary for the fair disposal of the issues"[4], the requirement to set out reasons on oath has required litigants and solicitors to think carefully about the categories of documents that are necessary for winning or defending a case. At minimum, the 1999 rules have made it more difficult for parties to seek to burden another party in a substantial dispute with a general demand for discovery which would require the other party to work out what documents may or may not be relevant and necessary for the purpose of the proceedings. The 1999 rules give some scope to a party to argue that there must be some proportionality between the volume of documents to be discovered and the degree to which they are likely to advance the applicant's case or to damage his opponent's case, in addition to ensuring that no party is taken by surprise by the production of documents at a trial[5].

2.6 A problem encountered in practice, which was not addressed by the 1999 rules, is that there is little guidance as to how documents are to be produced, i.e., whether they are to be produced and listed in accordance with categories (set out under each relevant category) or in some other way. Some documents may be relevant to more than one category and so practitioners often do not set out documents in the affidavit of discovery by category, but rather list them chronologically or in some other way. The rules do not provide guidance as to the listing of documents, other than the note to Appendix C, No. 10, which says that documents of the same or of a similar nature, when numerous, should, so far as possible, be grouped together and numbered or otherwise sufficiently marked so as to be identifiable. Of interest, Federal Rule 34 in the Federal Rules of Civil Procedure in the United States of America requires a party who produces documents for inspection to produce them "as they

[2] Geoghegan J in *Taylor –v- Clonmel Health Care Limited* [2004] 1IR 169 [pg 179].
[3] See recent Commercial Court patent decisions applying *Peruvian Guano* principles in *Schneider (Europe) GmbH v Conor Medsystems Ireland Limited* [2007] IEHC 63 and *Medtronic Inc & Ors v Guidant Corporation & Ors* [2007] IEHC 37
[4] Murray J in *Framus Limited –v- CRH PLC* [2004] 2 1IR 20.
[5] See relevant comments of Murray J in *Framus Limited* supra and those of Fennelly J in *Ryanair plc v Aer Rianta cp*t [2003] 4 IR 264.

are kept in the usual course of business or shall organise and label them to correspond with the categories in the request". In a later part of this report the Committee recommends that a similar rule be adopted in Ireland.

2.7 A more significant issue however is that technology has changed significantly since the introduction of the 1999 rules and a vast amount of information (much of it "documents" for the purpose of discovery) is now not recorded or stored on paper, but rather is electronically stored. The extent of use of email, the use of the internet and of mobile devices of various forms and the scale of proliferation of electronic documents could hardly have been contemplated at the time that the 1999 rules were formulated and there is now a need to take ESI into account in the rules for discovery.

3. Identifying Relevant Electronically Stored Information

3.1 The discovery of data or information stored in electronic form presents difficulties to both the party requesting and the party making discovery. This chapter describes the different types of ESI that may be discoverable and the particular difficulties that may arise in even modest sized cases in searching for and deciding whether such documents are discoverable.

3.2 *What is a "document"?*

The law of discovery does not require discovery of information other than that recorded in "documents". Given that so much information nowadays is no longer recorded in paper documents but is recorded instead in electronic form, the role and usefulness of discovery in civil litigation would be greatly reduced if only paper documents containing information were discoverable. "Document" is not defined in the rules of the Superior Courts ("RSC"). Delaney and McGrath[6] suggest that, in light of the broad interpretation placed on the word "document" by Henchy J and Kenny J *in McCarthy v O'Flynn*[7], it appears that a flexible attitude will be adopted by the court in respect of the types of documents which are discoverable. It is likely therefore that discovery of ESI in its various forms is already covered by implication in the rules regarding discovery but, whilst this may be the case, the rules should be amended so that the word "document" is defined and this is put beyond doubt. A satisfactory definition would also assist to make clear the extent of the obligation to give discovery.

3.3 As will be seen in chapter 4, which describes the law in other jurisdictions, the term "document" has been defined in different ways in those jurisdictions to include all forms of electronic data no matter how these are recorded or stored. It is noteworthy that some Irish legislation defines "document". For example, section 2(1) of the Harbours Act, 1986 defines "document" as including a disc, tape, soundtrack or other device in which information, sounds or signals are embodied so as to be capable (with or without the aid of some other instrument) of being reproduced in legible or audible form. Section 2 of the Criminal Evidence Act 1992 defines a document as including "… reproduction in a permanent legible form, by a computer or other means (including enlarging), of information in non-legible form". Section 22 of the Electronic Commerce Act 2000 does not define the word "document" but makes electronic evidence admissible in any legal proceedings as follows:

> "In any legal proceedings, nothing in the application of rules of evidence shall apply so as to deny the admissibility in evidence of –
>
> (i) An electronic communication, an electronic form of a document, an electronic contract, or writing in electronic form -

[6] Civil Procedure in the Superior Courts, second edition, at pages 299 and 300
[7] [1979] IR 127

(i) on the sole ground that it is an electronic communication, an electronic form of a document, an electronic contract, or writing in electronic form, or,

(ii) if it is the best evidence that the person or public body adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form …".

3.4 Later in this report, the Committee recommends the introduction of a definition of "document" for the purpose of the RSC.

3.5 *Types of data*

In 2004 a working party chaired by Cresswell J. in England and Wales listed five categories of data that can be stored on a computer:

(a) Active or on-line data: this is data that is directly accessible on a desktop computer. On-line storage is used in the active steps of an electronic record's life when it is being created or received and processed. Examples of data include material held on hard drives, filed documents and 'inbox' and 'sent' items on an email system.

(b) Embedded data: this is data that is not ordinarily viewable or printable from the application that generated it. Embedded data is a type of *meta data*, or "data about data". Word programmes usually store information about when data files are created, when edited, by whom and who has accessed them. As will be appreciated, this data could be highly relevant in some disputes. Other examples are formulae for spreadsheets and calculations that are programmed into a system but are not visible on a printed-out document.

(c) Replicate data (otherwise known as "temporary files" or "file clones"): this data is automatically created by the desktop computer. Many programmes have an automatic back-up feature that creates and periodically saves copies of a file as the user works on it. These are intended to assist recovery of data caused by computer malfunction, power failure, or when the computer is turned off without the user saving the data. Examples of such data include automatic saves of draft documents, temporary copies of opened email attachments and recovered files automatically available following computer malfunction.

(d) Back-up Data: this is data held on a storage system. On the most basic level it can consist of off-line storage in the form of a removable optical disk or magnetic tape media, which can be labelled and stored on a shelf (in contrast with near-line data which is directly and readily accessible from the computer). Most organisations use back-up data to preserve information in case of a disaster that would cause loss of data on the main site. This can take various forms ranging from copying information stored on the system

to a back-up system in the form of magnetic tapes or by sending files over the internet to a third party's computer (some companies even offer computer users free storage on their websites). The disadvantage with back-up systems is that usually the data is compressed, and can be difficult and costly to retrieve.

(e) Residual Data: this is data deleted from the user's active data and stored elsewhere in the database. Deleting a file or email removes it from the user's active data but the data is usually stored elsewhere in the database and can become fragmented or lost. The data can often be retrieved with sufficient expertise and time, although programmes exist which are designed to attempt to remove all traces of that which has been deliberately deleted from the system.

3.6 In the US, one federal court[8] has described categories of data in a different way as follows:

(a) "Meta-data" means

(i) information embedded in a Native File that is not ordinarily viewable or printable from the application that generated, edited or modified such Native File;

(ii) information generated automatically by the operation of a computer or other information technology system when a Native File is created, modified, transmitted, deleted or otherwise manipulated by a user of such system. Meta-data is a subset of ESI;

(b) "Native File(s)" means ESI in the electronic format of the application in which such ESI is normally created, viewed and/or modified. Native Files are a subset of ESI;

(c) "Static Images" means a representation of ESI produced by converting a Native File into a standard image format capable of being viewed and printed on standard computer systems.

3.7 Relevant ESI may also be stored in:

- Voicemail
- Mobile phone or personal digital assistant (Blackberry, Palm Pilot, etc.)
- Other systems not considered, or indeed not yet invented

[8] In a suggested protocol for discovery of electronically stored information in the United States District Court for the District of Maryland (pages 2 and 3).

- Public or private third party online systems, such as G-mail, Hotmail, YouTube, or countless others.

3.8 *Ignoring Relevant ESI and Documents*

As can be seen, therefore, documents relevant to agreed categories may be in many different places both within or outside an organisation or in the possession of employees, on their mobile phones or Blackberries, etc. The reduction in the cost of computers and their expanded application to most aspects of business and administration, and indeed to day-to-day life, means that computers and electronic media are everywhere throughout society. At present, therefore, a request or order to disclose all documents on an issue, without limiting the documents to be searched and discovered to take into account ESI, may include data from all or many of the above listed sources. Failure to discover all such data could be a breach of a party's obligation on discovery. However, in most cases, parties in practice do not disclose anything other than *active data* in response to a request for discovery. There is no legal basis for this exclusion (unless agreed) but often there is a tacit application of common sense by either or both parties. In many instances however, a party may not understand or be aware that many forms of ESI may be relevant. In some cases, only active data will be relevant and thus discoverable, but in other cases other types of ESI may be relevant and thus discoverable. Such data could conflict with, or tell a very different story from, the active data. The uncertainty about what is to be searched and disclosed, and the reality that in most cases data other than active data is often ignored, is unsatisfactory.

3.9 Active data, where it is in email or document form, may be relatively easily identified and reproduced (depending of course on the volume in question and on how many desk-top computers and other applications may hold the data). With reasonable familiarity with the active data stored and some computer skills, active data usually can be produced with relative ease and at a cost that is not disproportionate to the other types of discovery. However, active data can present its own problems when it is in the form of data stored in a database. Such data may be meaningless to the party receiving the discovery without the structure and supporting information (e.g. definitions of field names and relationships within the database or with another database).

3.10 Other categories of data are not easily gathered or analysed and in many cases there will be enormous volumes of metadata and other less accessible electronic data. Under the RSC, unless ESI such as meta data is not relevant to the issues in a case, ESI in an agreed or ordered category in the power or possession of the party giving discovery must be discovered, irrespective of how inaccessible such data may be. In giving such discovery, the biggest costs may arise in retrieving and reviewing the data to determine which documents

and data are relevant. Lawyers or other trained legal personnel would have to assess each piece of data and its possible relevance under the categories of discovery. Given the risk also that privileged information may be contained in a company's ESI, particular care is required in reviewing large volumes of such data to avoid subsequent inadvertent disclosure on inspection by the other side.

3.11 *Difficulties of searching for relevant ESI*

ESI has undoubtedly made more difficult the search for relevant documents in the discovery process, given the greater number of potential places where documents containing ESI (using the word "documents" in the broadest sense) may be stored, the greater number of such documents, and the difficulties of retrieval of those documents. In a simpler case where the agreed or ordered categories of discovery are limited and the volume of discovery is small, the greater challenge is not the volume, but making sure that all necessary searches are carried out. In bigger cases, however, the volume of potentially relevant ESI may be enormous, particularly in large businesses such as multinationals or in government institutions.

3.12 In the era of ESI, solicitors will be aware that the risk of relevant ESI (and, in particular, emails) not being identified during the course of a search can be high, due to the rather haphazard nature of storage of such material. For example, with email, this is often stored by individuals in inboxes or in their delete box, rather than in electronic folders dedicated to an issue or topic. In contrast, paper evidence is usually held in physical files, so checking for relevant paper evidence is generally easier because searches can be made of specified physical files.

3.13 The existence of multiple branches of the same organisation, possibly in different countries, all linked by computer systems, with dozens of users of the systems, increases the difficulties with ESI. A practical example of the difficulty is the proliferation of emails where an email within an organisation may be sent to numerous persons who may individually ignore, delete, open or reply to the email, leading to chains of correspondence throughout the organisation. The difficulty of searching for such documents, all of which may be relevant under a discovery agreement or order, is compounded by the fact that there may be numerous numbers of other emails between the same parties on the same day or days which may have to be examined and checked to ensure that a relevant email is not among them. In a complex case, this will require enormous manpower.

3.14 A further difficulty within organisations is that the proceedings may be issued and prosecuted some years after the relevant events when the persons who sent or received ESI may have left or moved within the organisation, thus making it difficult to get their practical assistance in

identifying documents that may be relevant. Also ESI may have been deleted and may only be retrieved with difficulty from storage.

3.15 Another difficulty is that in litigation commenced years after an occurrence, it may be very difficult to retrieve possibly relevant data from obsolete computer systems that were in use at the time of the occurrence.

3.16 *Duplicates*

Another issue to be faced is the extent of duplicate ESI. Emails are an abundant source of copies, as an email may be sent to many persons within an organisation and the same document may appear in dozens of sites around an organisation. Emails may be printed out too, so duplicate paper copies may exist in persons' files throughout an organisation. Programmes have been developed by forensic consultants to detect exact electronic duplicates of ESI and to cull or eliminate multiple copies of the same document. Strictly speaking however, under current Irish law, every copy of a relevant document, whether stored on a computer or in a paper file, in the power or possession of a party giving the discovery must be discovered unless the parties agree or the court orders otherwise, or unless the party is satisfied that additional copies contain no additional relevant information and so are not relevant under *Peruvian Guano*.

3.17 Organisations and forensic experts have devised means to overcome the difficulties of searching for potentially relevant ESI in litigation disputes. One of the most common approaches is to use 'keyword searching' where a programme searching for specified words relevant to the issues searches through emails or other forms of ESI to seek to identify documents containing any of those words in their addresses, subject title or body. Irrespective of the sophistication of the selection of keywords, such searches may not identify some potentially relevant ESI and, more likely, may identify large volumes of ESI that is irrelevant. Providing excessive discovery is not only burdensome to the party receiving it (documents discovered have to be reviewed) but can delay and add to the costs of the litigation. However, it may not be possible to avoid some element of excessive discovery in order to avoid the alternative of individually searching through very large volumes of computer records to locate all relevant documents.

3.18 Prior to the search for possibly relevant ESI, a party will need to consider a number of issues to ensure that this is carried out in the most cost effective manner. Whilst the detail of doing this is beyond the scope of this report, it is important to recognise the difficulties that can be encountered in gathering possibly relevant ESI and documents in an organisation or company where the computers and files containing these documents are in active use in the organisation's day-to-day business. Due to the enormous amount of litigation in the United States involving the disclosure of ESI, know-how and computer programmes have been

developed by consultancy firms in that country and elsewhere to assist practitioners and their clients in searching for, listing and producing for inspection large volumes of relevant ESI. At least two Irish legal support services firms provide this service, as do many international consulting firms, and more service providers may enter the market.

3.19 Chapter 4 sets out the experience in other jurisdictions. In some jurisdictions there is considerable guidance in the court rules on the extent of searching that is required in respect of ESI.

4. Reforms in Other Jurisdictions

4.1 The purpose of this chapter is to highlight how the discovery of ESI is reflected in the rules or in practice in other common law jurisdictions. The Committee has reviewed the relevant rules, practice/guidance notes and case law in respect of discovery in England and Wales, the US, Canada, Australia and New Zealand. Set out briefly below, under a number of headings, are the relevant provisions and where they apply in respect of each jurisdiction.

4.2 *United States* ("US")

On 1 December, 2006 new rules came into effect amending the Federal Rules of Civil Procedure in respect of discovery, to take into account ESI.

4.3 *Definition of a Document*

Prior to the 2006 amendments to the Federal Rules of Civil Procedure in the United States, the scope of discoverable ESI was dealt with on a case-by-case basis, which leads to uncertainty. Rule 34(a) as amended, states that "electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations stored in any medium from which information can be obtained)" is discoverable[9].

4.4 *Retention of Documents*

The US Federal Rules of Civil Procedure do not contain any specific reference to preservation of ESI, and so the issue of preservation is determined on a case-by-case basis. Rule 26(f) of the Federal Rules does however require discussion about preservation between the parties at the first "meet and confer" session. The authors of the Sedona Principles published in the US in June 2007[10] assert that amended Rule 37(f) could be construed as placing an onus on the preserving party to prevent information systems from causing a loss of discoverable information. The US courts appear to be very aware of the risk of relevant ESI being over-ridden, changed or lost, and a number of leading cases have underlined parties' responsibilities to take all reasonable steps to preserve such evidence once litigation is in prospect.

4.5 In the landmark 2004 US case *Zubulake v UBS Warburg*[11], brought by an employee against a large banking organisation, the court held that once litigation is reasonably anticipated,

[9] Fed. R. Civ. P. 34(a); In *Zubulake v UBS Warburg LLC,* 229 F.R.D. 422, 432-34 (S.D.N.Y. 2004).
[10] "The Sedona Principles: Second Edition, Best Practices Recommendations & Principles for Addressing Electronic Document Production (A Project of the Sedona Conference Working Group on Electronic Document Retention & Production (WG1)) published June 2007. The Sedona principles on ESI in 2004 were pivotal to the introduction of the amended Rules in the United States in respect of ESI discovery in 2006. These guidelines have further been cited by both Federal and State courts facing complex e-discovery issues in the United States. See *Williams v Sprint/United Management Co* (2005), 230 FRD 640.
[11] Civ 1243 (SAS)

lawyers must take "affirmative steps" in order to ensure that evidence is preserved. The court held that these affirmative steps must seek to achieve the following:

(a) identify sources of discoverable information

(b) put in place a litigation hold and make that known to all relevant employees by communicating with them directly

(c) reiterate the litigation hold instructions "regularly" and monitor compliance so that all sources of discoverable information are identified and retained on a continuing basis and

(d) call for employees to produce copies of relevant electronic evidence and arrange for segregation and safeguarding of any archival material (such as back-up tapes) that the party has an obligation to preserve.

These requirements appear to mean that it is not adequate for a lawyer simply to warn a large commercial or other client that documents should be preserved, but rather the lawyer should take steps to ensure that this obligation is understood and acted upon.

4.6 *Reasonable Searches*

Rule 26 (b)(2)(B) of the Federal Rules of Civil Procedure in the United States creates a two-tiered approach to the production of ESI. The relevant rule provides:

> "26(b)(2)(B)
>
> A party 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 the 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 of Rule 26(b)(2)(C). The court may specify conditions for the discovery".[12]

4.7 The federal courts evaluate whether the burden of searching can be justified on a range of grounds namely:

(a) the specificity of the discovery request

(b) the quantity of information from other and more easily accessed sources

[12] The Federal Rules allow a similar narrowing down of discovery in respect of non-electronic matter or documents on similar grounds (see last sentence of Rule 26 (b)(1)

(c) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources

(d) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources

(e) predictions as to the importance and usefulness of the further information

(f) the importance of the issues at stake in the litigation and

(g) the parties' resources.

4.8 This approach distinguishes between data that is reasonably accessible and data that is not, favouring the production of relevant information from sources which are easier to access (where possible). If parties are unable to reach agreement regarding necessity of discovery from sources that are difficult to access, a motion to compel discovery may be brought.

4.9 *Cost Shifting*

Cost shifting orders are generally made in situations where the court orders the disclosing party to search for and disclose certain electronic records which are not easily accessible or which are only accessible at great cost. The court may order the party seeking discovery to pay the costs of the exercise. Amended Rule 26(b)(2)(C) of the Federal Rules of Civil Procedure states that an order compelling production of documents may in certain circumstances come attached with conditions such as "payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible".

4.10 *Sanctions*

Case law from a number of US states demonstrates some preference for invoking the tort concept of "negligence" in respect of claims of spoliation of relevant data[13]. The 2007 US Sedona Principles contend that this approach is incorrect and that the courts should focus on "culpability and prejudice" when determining guilt or innocence where spoliation of relevant electronically stored information has occurred[14]. Sanctions range from negative inferences being drawn against the party who has failed to preserve documents, to monetary sanctions and findings of liability. Furthermore, the US Federal Courts have entered default judgment in certain cases where parties have failed to preserve relevant data[15].

4.11 *Responsibility of Counsel*

[13] *Residential Funding Corp. v. DeGeorge Fin. Corp*., 306 F.3d 99, 108
[14] Comment 14.b. pg 71
[15] *Carlucci v Piper Aircraft Corp*, 102 FRD 472

As seen above, the Federal Courts in the US have said that Counsel are under an obligation to supervise their clients in terms of preservation and production of electronically stored information. Indeed, a number of state courts have their own guidelines/rules that place an onus of supervision on Counsel[16]. Further, the "Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information (Guideline 2)" require Counsel to have an understanding of how electronic data is stored and retrieved.

4.12 ***Canada***

In Canada, the Rules governing discovery are codified by each province's own Rules of Civil Procedure. These Rules differ from province to province. Over recent years there have been calls for a national "best practices" set of standards or guidelines in Canada (not unlike the guidelines published by the Sedona Conference in the US in 2004[17]). On foot of these calls, the Sedona Canada Conference published its first "public comment draft" principles in February, 2007[18].

4.13 *Definition of a Document*

In Canada, the majority of the provincial Rules of Civil Procedure provide a definition of the word "document". These definitions either explicitly state that "electronic" documents are discoverable or they imply this by stating that documents "in any format" are discoverable[19].

4.14 *Retention of Documents*

The Sedona Canada Principles state that "Parties should take reasonable and good faith steps to preserve information relevant to the issues in an action. In common law jurisdictions the preservation obligation arises when a proceeding has already been filed, but can also arise when it is reasonable to expect the evidence may be relevant to future litigation"[20]. The Principles advocate a proactive approach to preservation, advising that the requesting party should communicate to the preserving party, at the outset of litigation, their requirements in terms of data preservation (in both paper and electronic form). In the Canadian case *Doust v Schatz*[21] the court stated that "*The integrity of the administration of justice in both civil and criminal matters depends in a large part on the honesty of parties and witnesses. Spoliation of relevant documents is a serious matter. Our system of disclosure and production of*

[16] In *Zubulake v UBS Warburg LLC,* 229 F.R.D. 422, 432-34 (S.D.N.Y. 2004), the court held that counsel is under obligation to identify with the client all potential sources of relevant discoverable data.
[17] "The Sedona Guidelines; Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age (A Project of the Sedona Conference Working Group on Best Practices for Electronic Document Retention & Production) September 2004 Public Comment Draft.
[18] The Sedona Canada Principles: Addressing Electronic Document Production, (A Project of the Sedona Conference Working Group 7 (WG7)) published February, 2007
[19] Alberta, Rule 186; British Columbia, Rule 1; Manitoba, Rule 30.01; New Brunswick, Rule 31.01; Northwest Territories and Nunavut, Rule 218; Ontario, Rule 30.01; Prince Edward Island, Rule 30.01; Saskatchewan, Rule 211.
[20] Comment 4.c, pg. 17
[21] (2002) 227 Sask. R. 1 (C.A.)

documents in civil actions contemplates that relevant documents will be preserved and produced in accordance with the requirements of the law".

4.15 *Reasonable Searches*

The Sedona Canada Principles state that "A party should not be required, absent agreement, or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information"[22].

4.16 *Cost Shifting*

The issue of cost shifting in respect of production of electronically stored information has not been resolved in Canada. Generally, cost shifting occurs when litigation has concluded (but for the issue of costs), the unsuccessful party usually bearing all or part of the successful party's costs. The authors of the Sedona Canada Principles opine that "it could be argued, in Canada, that the costs of producing accessible electronically stored information should be shifted in certain circumstances"[23]. The Sedona Canada Principles recognise that clarification may be required in respect of cost shifting "so that internal discovery costs are regarded as recoverable disbursement in appropriate cases"[24].

4.17 ***England and Wales***

The Woolf reforms embodied in the Civil Procedure Rules ("CPR") that came into effect on 26 April 1999 made substantial changes to discovery in civil litigation. Those reforms replaced general discovery with standard disclosure, under which the disclosing party must make a reasonable search for documents on which he relies or which may adversely affect his case, adversely affect another party's case or support another party's case.

4.18 The rules specify that reasonableness of searches may be judged by factors including the number of documents involved, the nature and complexity of the proceedings, the ease and expense of retrieval of any particular document and the significance of any document that is likely to be located during the search. The party must set out the extent of the searches carried out in his disclosure statement.

4.19 The rules permit a party to seek specific (wider) disclosure in an appropriate case requiring the other party to search for or disclose any document which may enable the party applying for disclosure either to advance its own case or damage that of the other party giving disclosure or lead to a train of inquiry having either of those consequences (in effect a *Peruvian Guano* type discovery).

[22] Principle 6, pg 25
[23] para 4, pg 38
[24] para 5, pg 38

4.20 *Definition of a Document*

The CPR define a document as meaning "anything in which information of any description is recorded". The CPR defines the word "copy", in relation to a document, as anything onto which information recorded in the document has been copied by whatever means and whether directly or indirectly[25]. The Practice Direction that supplements the CPR Part 31 refers directly to electronic disclosure[26].

4.21 Following the report of Cresswell J, the Admiralty and Commercial Courts in England published a practice direction on electronic discovery[27]. This sets out observations on the definition of a document as follows:

> "(1) Rule 31.4 contains a broad definition of a document. This extends to electronic documents, including e-mail and other electronic communications, word processed documents and databases. In addition to documents that are readily accessible from computer systems and other electronic devices and media, the definition covers those documents that are stored on servers and back-up systems and electronic documents that have been "deleted". It also extends to additional information stored and associated with electronic documents known as metadata. In most cases metadata is unlikely to be relevant".

The practice document also directs, in the context of case management, how parties should address issues arising in electronic discovery as follows:

> "(2) The parties should, prior to the first Case Management Conference, discuss any issues that may arise regarding searches for and the preservation of electronic documents. This may involve the parties providing information about the categories of electronic documents within their control, the computer systems, electronic devices and media on which any relevant documents may be held, the storage systems maintained by the parties and their document retention policies. In the case of difficulty or disagreement, the matter should be referred to a judge for directions at the earliest practical date, if possible at the first Case Management Conference".

4.22 *Retention of Documents*

The practice direction which supplements CPR Part 31 provides that parties should discuss, prior to the first Case Management Conference, any issues that may arise regarding preservation of electronic documents[28]. The CPR provide no further guidance in terms of preservation of documents (such as when the obligation to preserve commences, for example).

[25] CPR Part 31.4.
[26] Practice Direction - Disclosure and Inspection, para. 2A.1.
[27] See Paragraph E3.1A and E4.2A of the Admiralty and Commercial Courts Guide, 7th Edition, 2006.
[28] Para 2A.2.

4.23 *Disclosure Statement*

Relevant amendments to the CPR governing discovery of ESI in England and Wales (or "disclosure" as it is referred to in the CPR) took effect on 1 October, 2005. Following the amendments to the CPR, a paragraph was inserted into the disclosure statement (which is annexed to the Practice Direction which supplements CPR Part 31) whereby the disclosing party is now required to be more specific as to the searches that have been made by it of ESI.

4.24 The prescribed disclosure statement, which builds on the existing obligation to set out details of searches, sets out types of documents and media upon which electronic documents may be stored. The disclosing party is required to state whether searches of specific types of data have been carried out or not. The disclosure statement further requires disclosure about whether searches were undertaken by reference to key words or concepts. Searching by key words has the potential to lessen the burden and cost borne by the disclosing party, as seen above, although relevant information and documents may not be identified if they do not contain any of the key words used.

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4.25 The relevant section of the disclosure statement is as follows:

Disclosure Statement

"I, the above named claimant [or defendant] [if party making disclosure is a company, firm or other organisation identify here who the person making the disclosure statement is and why he is the appropriate person to make it] state that I have carried out a reasonable and proportionate search to locate all the documents which I am required to disclose under the order made by the court on the [ ] day of [ ]. I did not search:

(1) for documents predating [ ],
(2) for documents located elsewhere than [ ],
(3) for documents in categories other than [ ],
(4) for electronic documents.

I carried out a search for electronic documents contained on or created by the following [list what was searched and the extent of the search]:

I did not search the following:

(a) documents created before [ ],

(b) documents contained on or created by the claimant's/defendant's PCs/portable data storage media/databases/servers/back-up tapes/off-site storage/mobile phones/laptops/notebooks/handheld devices/PDA devices (delete as appropriate),

(c) documents created on or created by the claimant's/defendant's mail files/document files/calendar files/spreadsheet files/graphic and presentation files/web-based applications (delete as appropriate),

(d) documents other than by reference to the following keyword(s)/concepts [ ] (delete if your search was not confined to specific keywords or concepts).

I certify that I understand the duty of disclosure and to the best of my knowledge I have carried out that duty. I certify that the list above is a complete list of all documents which are or have been in my control and which I am obliged under the said order to disclose".

4.26 *Sanctions*

It has been acknowledged in England and Wales following *British American Tobacco Australia Services Ltd v Cowell and McCabe*[29] and *Douglas and others v Hello! Ltd*[30] that there is a substantial hurdle for a party to overcome in establishing that spoliation of data should lead to a party's case (or part of it) being struck out[31].

[29] 2002 VSCA 197
[30] 2003 EWHC 55 (Ch)
[31] "E-Disclosure: A Voyage of Discovery" June 2005, The In-House Lawyer, Davinia Gransbury

4.27 ***Australia***

The Australian Federal Rules[32] relating to discovery do not have specific requirements for electronically stored documents.

4.28 *Definition of a Document*

Order 1 Rule 4 of the Australian Federal Court Rules defines a document as including any record of information which is a document within the definition contained in the dictionary in the Evidence Act 1995 and any other material data or information stored or recorded by electronic means.

4.29 The Evidence Act 1995 provides that a document means any record of information and includes:

(a) Anything on which there is writing, or

(b) Anything on which there are marks, figures symbols or perforations having a meaning for persons qualified to interpret them, or

(c) Anything from which sounds, images or writings can be reproduced with or without the aid of anything else or

(d) A map, plan, drawing or photograph.

This definition of a document has been held by the court to be wide enough to include computer files, CD ROMs, tapes and other electronic storage devices.[33] The Australian Federal Court also held that it has power to order discovery of electronic storage devices which come within the definition of 'document' notwithstanding that they include a wide range of other irrelevant material[34] .

4.30 *Format of the Discovery*

The format of the discovery, unless the court orders otherwise, is a list of documents and an affidavit verifying the list[35]. The Australian Federal Court practice note on guidelines for the

[32] The focus of this review is the Australian Federal Rules.
[33] Sony Music Entertainment (Australia) Limited v University of Tasmania [2003] FCA 532 (30 May 2003). BT (Australasia) Pty Ltd v State of New South Wales & Anor (No. 9) [1998] 363 FCA (9 April 1998). NT Power Generation Pty Ltd v Power & Water Authority [1999] FCA 1669 (25 November 1999).
[34] Sony Music Entertainment (Australia) Limited v University of Tasmania [2003] FCA 532 (30 May 2003). Tamberlin J. "I consider that the CD ROMS which have been used by the respondents to store data recovered and other electronic records sought by the applicants in this case are records of information from which writing can be produced notwithstanding that it is likely that only part of them may relate to the relevant issues and are "documents" within the Rules".
[35] Order 15(2).

use of information technology in discovery provides that, if a party believes that it is appropriate to dispense with the verification of a hard copy list or to adopt some other means of verification, it should apply to the court for an appropriate direction.

4.31 *Responsibility of Solicitors*

There is a specific obligation in the Rules on the solicitor acting for the party providing the discovery. Order 15 Rule 6(8) provides that, where a party making a list of documents has a solicitor in the proceeding, the solicitor shall certify on the list that, according to his instructions, the list and the statements in the list are correct.

4.32 *Listing of Documents*

Order 15 Rule 6(3) provides that the list of documents shall enumerate the documents in a convenient sequence and as briefly as possible, but shall describe each document or, in the case of a group of documents of the same nature, shall describe the group, sufficiently to enable the document or group to be identified. The relevant Federal Court Practice Direction outlines that practitioners should consider, with a view to eliminating or reducing the burden of discovery, whether discovery should be given in the list of documents by general description rather than by identification of individual documents.

4.33 Order 15 Rule 6A provides that a party required to give discovery, who has in his custody, power or possession more than one copy, however made, of a particular document, is not required to give discovery of additional copies by reason only of the fact that the original or any other copy is discoverable.

4.34 *Case Management - Individual Docket System*

Case management has been in operation in Australia for many years. Case management procedures are used in the Federal Court of Australia in all cases. The Federal Court adopted the “individual docket” system as the basis of its listing and case management system throughout Australia. The general principle underlying the individual docket system is that each case commenced in this court is randomly allocated to a judge, who is then responsible for managing the case until final disposition. The “docket” judge makes orders concerning the way in which the case should be managed or prepared for hearing and deals with interlocutory issues including discovery. The court may direct that special procedures be used, including case management conferences.

4.35 *Production and Inspection*

In 2000 the Federal Court of Australia issued a practice note[36] to encourage the use of information technology during the discovery process in civil litigation. The parties are encouraged to consider, from the commencement of the discovery, the mechanics of exchanging, inspecting and presenting the discovery and the ways to use information technology to manage the discovery and the inspection process more efficiently. This practice note is not directed solely to discovery of electronic documents. However, it has particular relevance in the context of electronic discovery and certain sections of the guidance specifically relate to electronic data.

4.36 The guidance note also encourages the use of an agreed protocol for exchanging documents and indices in electronic format if parties believe that they will be discovering more than 500 documents between them. A helpful checklist is provided to assist the parties agree on a protocol. If parties intend to use a database to record and exchange discovery data, a list of fields is provided that could be included in such a database for both discovery and case management purposes.

4.37 *Reasonable searches*

A party making discovery is required to carry out a reasonable search of his documents.[37] The factors a party may have regard to when deciding on what is a reasonable search are - the nature and complexity of the proceedings; the number of documents involved; the ease and cost of retrieving a document; the significance of any document likely to be found; and any other relevant matter[38]. If the party does not search for a category or class of document, the party must include in the list of documents a statement of the category or class of document not searched for and the reason why[39].

4.38 The rules do not make a distinction between discovery of electronic and paper documents. However, issues such as the ease and cost of retrieving the document may be very relevant in the case of electronic documents. The Australian courts have ordered parties to restore and review backup tapes for relevant documents when the original electronic documents have been deleted. This was so even though the restoration and retrieval of relevant documents was time-consuming and costly.

[36] Guidelines for the use of information technology in discovery (see www.fed.govt.gov.au/how/practice-notes).
[37] Order 15 (5).
[38] The Federal Court practice note in respect of directions for the "Fast Track" list, in the context of limited discovery, set out what is required by a "good-faith proportionate search". The party makes a good-faith effort to locate discoverable documents, while bearing in mind that the cost of the search should not be excessive having regard to the nature and complexity of issues raised by the case, including the type of relief sought and the quantum of the claim. If requested by any party, a party must describe briefly the kind of good faith proportionate search it has undertaken to locate discoverable documents.
[39] Order 15 (6)

4.39 The practice direction of the Federal Court dealing with discovery states that, in determining whether to order discovery, the court will have regard to the issues in the case and the order in which they are likely to be resolved, the resources and circumstances of the parties, the likely cost of the discovery and its likely benefit.

4.40 *Retention of Documents – Sanction for Failure to Preserve when Litigation Contemplated*
In the case of *BAT v Cowell (as per rep for Ann McCabe)*[40], the Supreme Court of Victoria outlined that there must be some balance struck between the right of company to manage its own documents, whether by retaining them or destroying them, and the right of the litigant to have resort to the documents of the other side.

4.41 In this case the specific issue related to documents that were destroyed prior to proceedings being instituted. It was alleged that proceedings of that nature were anticipated and that the documents had been deliberately destroyed with the intent of defeating prospective litigants who, like the plaintiff, would seek damages from the defendant. The court found that the obligation to preserve documents extended to when litigation was contemplated but had not yet been commenced. It held that where one party alleges against the other the destruction of documents before the commencement of proceedings to the prejudice of the party complaining, "*the criterion for the court's intervention (otherwise than by drawing adverse inferences, and particularly if the sanction sought is striking out of the pleading) is whether that conduct of the other party amounted to an attempt to pervert the course of justice or, if open, contempt of court occurring before the litigation was on foot."*

4.42 ***New Zealand***
The New Zealand High Court Rules[41] relating to discovery do not have specific requirements for electronically stored documents. The High Court Rules Committee has carried out a review of the High Court Rules, including the rules on discovery. The proposed amendments to the Rules relating to discovery do not specifically deal with electronic discovery other than in respect of the definition of a document.

4.43 *Definition of a Document*
The present New Zealand definition of 'document' is defined in the High Court Rule 3(1)[42] and means a document in any form whether signed or initialled or otherwise authenticated by its maker or not; and includes:

(a) Any writing on any material

[40] VSCA 197 (6 December 2002).
[41] The focus of this review is the New Zealand High Court Rules.
[42] District Court Rule 3 (b).

(b) Any information recorded or stored by means of any tape-recorder, computer, or other device and any material subsequently derived from information so recorded or stored

(c) Any label, marking, or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means

(d) Any book, map, plan, graph, or drawing,

(e) Any photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced.

4.44 The Law Commission in its Report on Electronic Commerce Part One[43], looked at the definition of a document for the purposes of discovery[44]. In its view, there is "unlikely to be any circumstance in which a court would hold that electronically-generated information is not a "document" for the purposes of evidence or court procedure[45].

4.45 However, the Law Commission recommended that the definitions of 'document' in the legislation should be standardised to ensure that illogical or aberrant results did not arise. The Evidence Act 2006[46] introduces a new definition of a document which includes as part of that definition "information electronically recorded or stored, and information derived from that information". This is reflected in the proposed revision to Rule 3(1):

"Document" means:

(1) Any material, whether or not it is signed or otherwise authenticated, that bears symbols (including words and figures), images, or sounds, or from which such symbols, images, or sounds can be derived, and includes:

- a label, marking, or other writing that identifies or describes a thing of which it forms part, or to which it is attached
- a book, map, plan, graph, or drawing
- photograph, film, or negative.

[43] October 1998. The later Report by the Law Commission on General Discovery in 2002 did not consider the definition of a document.
[44] It is of the view that the definition puts emphasis on "information". It is the information "recorded or stored by means of …computer or other device" which is discoverable under the definition.
[45] Electronic files stored on back up tapes have been held to be discoverable.
[46] The Act came into force on the 1 August 2007.

(2) Information electronically recorded or stored, and information derived from that information".

4.46 *Format of the Affidavit of Discovery*

The format of the discovery is an affidavit and a schedule appended to the affidavit.

4.47 *Responsibility of Solicitors*

There is a specific obligation in the Rules on the solicitor acting for the party providing the discovery. Rule 296 provides that, as soon as practicable after a party becomes bound to comply with a discovery order, the solicitor who acts for the party in the proceedings must, to the best of the solicitor's ability, ensure that the party faithfully fulfils those obligations.

4.48 *Listing of Documents*

High Court Rule 298 (1)(a) provides that documents that are in the control of the party giving discovery, and for which the party does not claim privilege or confidentiality, may be identified by number.

4.49 In respect of the other categories of documents, including documents for which the party claims privilege or confidentiality or documents not in the possession of the plaintiff, Rule 298(2) provides that documents may be described as a group or groups if all the documents concerned are of the same nature. Otherwise it appears that the documents must be described separately.

4.50 Rule 298(3) provides that the schedule need not include copies of documents filed in court or correspondence that may reasonably be assumed to be in the possession of all parties.

4.51 *Production and Inspection*

Rule 293(4) provides that a discovery order may specify the kinds of documents that a party is to discover and the manner in which the documents are to be discovered. The proposed amendment to that Rule changes "manner" to "method of discovering the document".

4.52 Rule 310 provides that the court may, on application, make any order it thinks appropriate to facilitate the efficient inspection of documents. The court may require the person who is to produce the documents for inspection to arrange the documents in a stated manner or order or assist the party inspecting the documents to locate and identify particular documents or group of documents.

4.53 *Case Management*

Since 2000, case management was implemented nationally in the New Zealand High Court[47]. Under the case management system, cases are allocated to "tracks".[48] Each track has a defined timetable. Case conferences are held to monitor progress of the case. One of the aims of the case conference is to manage the discovery. Under Rule 294(1), if discovery of documents is appropriate for a proceeding on the standard track, the court must make a discovery order. An order must be made at the first case management conference unless there is good reason for making the order later.[49]

4.54 *Cost Shifting*

In the case of *Commerce Commission v Telecom Corporation of New Zealand Limited and Another* 2006 [50]the Court of Appeal looked at the issue of cost shifting and whether it had jurisdiction under the Rules to make such an order. Electronic documents had been deleted from Telecom's computer system and these documents were then only available from back-up tapes. The restoration of the tapes was expensive and Telecom sought cost-shifting on the grounds that even sample electronic discovery would be burdensome. The court held that, while the High Court Rules do not provide express rules relating to cost-shifting, Rule 46, which provides that all matters relating to costs of and incidental to a proceeding or a step in a proceeding are at the discretion of the Court, provided the necessary jurisdiction to make a cost shifting order.[51] The court felt that the important factor to take into account in making such an order is an analysis of why the material is now not easily available - had the state of affairs come about because of the discovering party's failure to preserve, when it knew it should have preserved the documents?

4.55 *Retention of Documents – Sanction for Failure to Preserve When Litigation Contemplated*

In the *Telecom* case, the documents were deleted when litigation was contemplated. In 2002, Telecom updated and consolidated its technology as part of which many file servers were decommissioned or redeployed and deleted data was not mostly kept. The court held that, by the middle of 1999, Telecom knew that these proceedings were afoot and they chose to move to a new platform without preserving the means of access to documents which could be relevant. The court stated that they were *"satisfied that Telecom should have archived, stored and maintained in an accessible form, information of the sort which is now sought. Its failure to do so must be laid at its door."*[52]

[47] 1 March 2001 in the District Court.
[48] Cases that receive a hearing date on filing are placed on the "immediate" track. Matters that need to come to hearing quickly are placed on the "swift" track. The remainder of cases are allocated to the "standard" track. There is also an "assigned" track for cases that require a particularly high degree of judicial management.
[49] Rule 294(2)
[50] [2006] NZCA 252
[51] A tort of spoliation was considered by the court, as was the *Zubulake* case.
[52] see observations in *Commerce Commission v Telecom Corporation of New Zealand Ltd & Anor* (2006) 18 PRNZ 251 (CA).

4.56 *Failure to Discover a Document and Discovery of Irrelevant Documents – Sanctions*

Rule 305 provides for the situation where the discovery process is impeded by discovery of irrelevant documents. If the court considers that a party has impeded the process of discovery and inspection by including documents in an affidavit that are not required to be included, the court may order the party to pay costs to a party or parties specified in the order.

5. Understanding the Obligation to Discover

5.1 Given the importance of the role of discovery in civil litigation in Ireland, it is important to ensure that parties understand fully, and discharge, their obligations to give discovery as agreed or ordered by the court. There is a large element of trust involved in the discovery process as, once a party in High Court litigation provides an affidavit of discovery in accordance with order 31, rule 12(2), it is very difficult for the opposing party to seek to "go behind" the deponent's averments as to the relevant documents in their power or possession. Usually, a court will only order further and better discovery where there are reasonable grounds for suspecting that there are other relevant documents in the possession of the party who made the affidavit or where there are reasonable grounds for believing that the person making the affidavit of discovery has misunderstood the issues in the case and has, in consequence, omitted documents[53].

5.2 In light of these factors, it is important that parties giving discovery fully understand their obligations. A particular problem arises where a litigant does not have professional representation. It may be difficult for such persons - and even for professionally represented persons - to understand that their obligation to give discovery includes discovery of documents that may damage their case or help their opponent's case or lead to a train of inquiry hearing such consequences. Clients from civil law jurisdictions may be completely unfamiliar with the concept of discovery because, in their jurisdictions, discovery is not part of the rules of civil litigation. All of these factors point to a need to ensure that the rules of court, particularly the model affidavit, make clear the extent of the deponent's obligation.

5.3 Making the extent of the obligation clear will remove or reduce the excuse available to litigants for giving inadequate discovery and thus increase the prospect that culpable persons will be liable to sanction if they fail to carry out their obligations. As observed by Kelly J. in *Balla Leasing Developments Limited –v- David Kealing*[54], the making of accurate and correct discovery relies to a very great extent upon solicitors who advise clients on the topic. A clearer statement of the deponent's responsibility in the affidavit of discovery would assist the client, and also the solicitor in carrying out his professional duty. It would also serve to protect a solicitor from unfair allegations by a client in a subsequent dispute about discovery that he or she was not aware of, or advised of, his/her obligations.

5.4 Accordingly, the Committee in the section of this report setting out its recommendations suggests that an amendment to the model affidavit in Part C of the rules should be made to spell out the extent of the parties' obligations in plain language which can be understood by a deponent before he or she swears the affidavit.

[53] As observed by Kenny J in *Sterling-Winthorp Group Limited –v- Farben Fabriken Bayer Aktiengesellschaft* [1967] IR 97.
[54] High Court Commercial 2005 No. 938P, 21 December 2006.

6. Spoliation

6.1 As seen in section 4 of this report, the term spoliation is used in the USA to refer to the withholding, hiding or destruction of evidence relevant to legal proceedings, and where it is found to have occurred, can lead to damaging inferences at trial against the party responsible. Documents or files that contain ESI can be copied, edited and deleted and as a result thus may lose evidential value or may even be omitted from the discovery or disclosure. In the US, parties have an explicit obligation to preserve documents and other tangible information and evidence once litigation is "reasonably anticipated"[55]. The consequence of this is that reasonable efforts to preserve materials that may be relevant to actual or anticipated litigation must be made. For example, in the circumstances of some cases it may be prudent to stop routine document destruction within an organisation until the parameters of the discovery that is likely to be required in the case has been established by the parties.

6.2 In Irish civil litigation there is no concept of spoliation as such, but a party giving discovery must discover documents that were, but are no longer, in its power or possession, as well as documents in its power or possession. The form of affidavit (Form 10 in Appendix C) prescribed by the Irish Rules of the Superior Courts requires the deponent providing discovery to state in his or her affidavit when documents no longer in the deponent's possession were last in his or her possession or power, and what has become of the documents, and in whose possession they now are. This requirement to state what has happened to relevant documents should yield information about relevant documents which have been destroyed or lost, but in practice a deponent swearing an affidavit of discovery may not know of documents including ESI that have been destroyed within a large organisation.

6.3 Practitioners may advise clients that in certain circumstances discovery should be applied for early and, indeed, exceptionally, before the institution of proceedings. This may be a means, where justified, of guarding against the possibility that ESI may be destroyed or rendered irretrievable at an early stage of proceedings. In even rarer circumstances, a party may consider an application for an *Anton Piller* order where there are good grounds to show that evidence will be unscrupulously removed.

6.4 The problem of possible loss of evidence is acute in respect of ESI, in particular, and other categories of documents in organisations where the organisation may have routine document destruction/deletion policies that provide that, after a certain passage of time, documents are automatically destroyed/deleted in order to free up space and storage. Such deletion of ESI is necessary given the tendency of vast amounts of emails and other electronic documents to accumulate within an organisation and within individuals' computers.

[55] *Zubulake v UBS Warborg* No 2 CIV 1243 SAS.

6.5 Ideally all destruction, deletion or even use of possibly relevant documentary or ESI evidence within an organisation would stop once litigation is in prospect (mere use of ESI may lead to its alteration). However, practically speaking, this may impose a tremendous burden upon an organisation, given that such documents including ESI may be in a wide range of locations within the organisation and in active use in day-to-day business activities, and the cost and inconvenience of halting such routine activities may be high.

6.6 The more practical solution is probably for solicitors and in-house lawyers acting for clients in anticipated litigation to advise their clients of the need to preserve relevant documentary evidence including ESI given the obligations of discovery, including to account in an affidavit of discovery for the loss or destruction of relevant documents. Large commercial, including multinational, organisations who experience litigation in the US also will be very sensitive to this topic in particular.

6.7 The Committee considers that it would be very difficult to legislate for steps to ensure preservation of relevant documents including ESI. The Committee considered whether an obligation should be imposed under Irish law that a party intending to sue in proceedings should write a "hold and retain" letter to the prospective defendant, in order to safeguard against the destruction of documents. The prospective defendant, who may intend to seek discovery, would do likewise in return. However, it must be assumed that parties will act in their own interests and be conscious that, if significant relevant documentary evidence (including ESI) is destroyed or made practically inaccessible when litigation is in prospect or in train, they will be obliged to aver to this in the affidavit of discovery and this could give rise to damaging inferences. Therefore, the Committee concluded that there would be no useful purpose in amending the rules to require parties intending to seek discovery to send a "hold and retain" letter in advance. The existing obligation to account for relevant documents no longer in a party's power or possession, combined with a heightened awareness of the possible relevance of ESI and the likelihood that parties receiving discovery will scrutinise affidavits of discovery to probe whether relevant ESI has been accounted for, is probably sufficient incentive for parties to take care to preserve ESI that may be relevant to apprehended or pending litigation. Also parties will be conscious too of the value, in their own interest, of warning the other side by letter in many cases where ESI is likely to be particularly relevant that relevant documents including ESI must be preserved pending discovery. This should encourage preservation of possibly relevant ESI.

7. Adapting discovery to ESI

7.1 The Committee considers that, in general, the obligation under current Irish law to give discovery of *all* documents within an agreed or ordered category is preferable to, for example, the (English) CPR which only require *proportionate* searches to be carried out in most instances, but require the party giving disclosure also to set out brief details of the searches carried out. Once the categories (i.e. boundaries) of discovery in a case are agreed, the Irish obligation is clear-cut and does not depend on subjective analysis of what is proportionate. Furthermore, the Committee considers that a rule requiring a party giving discovery to list details of searches done (as in the CPR) would encourage disputes about the extent of the searches.

7.2 As seen above, the 'request for discovery' procedure in the 1999 rules gives a party an opportunity to argue before discovery is agreed or ordered, that there must be some proportionality between the volume of documents to be discovered and the degree to which they are likely to advance the applicant's case or to damage the resisting party's case in addition to ensuring that no party is taken by surprise by the production of documents at a trial[56]. The resisting party may argue also that discovery of some categories or types of possibly relevant ESI, or indeed of conventional documents, is unlikely to be necessary for the purposes of disposing fairly of the litigation or for saving costs[57].

7.3 The 1999 rules do not set out any more detailed criteria by which such *necessity* may be judged. In contrast, as seen above, the English rules specify that reasonableness of searches for relevant documents may be judged by factors including the number of documents involved, the nature and complexity of the proceedings, the ease and expense of retrieval of any particular document and the significance of any document that is likely to be located during the search. As will be recalled, the US Federal rules permit a party to limit discovery of ESI on showing that the information is not reasonably accessible because of undue burden or cost.

7.4 The Committee considers that probably there is adequate scope in the rules introduced in SI No. 233 of 1999 to enable a court, in default of agreement, to limit the extent of searches for, and discovery of, ESI and other documents, where a litigant can demonstrate that it is likely that searching for and discovery of such material is not necessary for disposing fairly of the case or for saving costs.

[56] See relevant comments of Murray J in *Framus Limited* supra and those of Fennelly J in *Ryanair plc v Aer Rianta cp*t [2003] 4 IR 264.

[57] Case management conferences in the Commercial Court, and in other cases where ordered, can be an ideal means of debating and resolving issues of this nature.

7.5 A party responding in correspondence to a request for discovery should raise in such correspondence any concerns that they may have about the extent of ESI that may be included expressly or implicitly in the discovery sought, and set out any proposed limitations in the discovery of ESI and reasons to justify such limitations. Such party should also set out any proposed limitations on searches, or proposed use of key word searches for ESI, or proposed non-disclosure of duplicative documents. By doing this, the party seeking discovery can assess the reasonableness of the proposed limitation(s) on the discovery that may be given and, if necessary, the court can adjudicate on the issue.

7.6 The Committee considered whether the rules should be amended to create a presumption that some types of ESI shall *not* be discoverable unless otherwise expressly agreed or ordered. Such types of ESI might be metadata, replicate data, back up data or residual data. An alternative formulation might be that only active or on-line ESI would be discoverable unless otherwise expressly agreed or ordered.

7.7 The difficulty with presumptions of this type however is in formulating a universal definition in court rules of forms of technology which would be understood in the same way by all and remain valid over an indefinite period. For example, it would be very difficult to define “active data” or “on-line data” in a way that would be unambiguous and likely to remain accurate over a lengthy period.

7.8 The Committee considers that in the majority of cases the existence of ESI should not, in fact, give rise to undue difficulties for parties seeking or giving discovery. This is because in very many cases, meta data and back up or similar ESI will not be relevant even if the corresponding on-line data is relevant. For example, a letter stored in Word on a personal computer may be relevant under a category of discovery agreed or ordered by the court but its associated meta data may be irrelevant, unless for example the document had undergone changes (likely to be reflected in the meta data) which may be relevant to an issue in the dispute. In disputes where this may arise, such as where items of correspondence are of crucial importance, the party seeking discovery may highlight in the correspondence requesting discovery that such metadata be discovered but, in any event, the party giving discovery would be obliged to search for and give discovery of ESI such as meta data if it was relevant, under *Peruvian Guano* principles, to any of the issues in the dispute.

7.9 *Logistical issues in large discoveries*

A party responding to a demand for discovery in a big case with very large volumes of documents may not be in a position to say how much possibly relevant ESI exists, where it is, or how accessible or inaccessible it may be, or the extent to which there may be duplicative material. In such circumstances, the parties could agree (or the court could make an appropriate order) a two-tier approach, that is, that more limited discovery would be provided

in a first tranche of discovery, but that the party seeking discovery would be permitted to ask subsequently for further discovery if that party could show, following review of the initial discovery, that other discovery is likely to be relevant and necessary. The courts probably could make such orders under their inherent jurisdiction.

7.10 A variation of the problem associated with larger cases is where a party has been ordered, or has agreed, to discover a range of ESI and subsequently encounters great difficulties in searching for and reviewing that ESI because much of it is not reasonably accessible because of the undue burden or cost (a term employed in Rule 26(b)(2)(B) of the US Federal Rules), or is much greater in volume than previously believed. In such circumstances a party may be able to persuade the court in default of agreement with the other side that the agreed or ordered discovery should be varied and narrowed to take into account these difficulties if the party can demonstrate that the wider discovery is unlikely to be necessary for disposing fairly of the case or for saving costs. The courts probably could make such orders under their inherent jurisdiction.

7.11 However, in any case, the court rightly would be hesitant about limiting searches for relevant documents simply on grounds of difficulty or burden. Orders permitting more limited searches for possibly relevant documents, including ESI, could make it easier for organisations with bad filing and poorly organised technology to avoid their responsibilities to give discovery, whilst paradoxically organisations with good systems for filing and retrieving ESI could be at a disadvantage because they can more easily retrieve material. Nonetheless, in exceptional circumstances, such orders could be justified where the court was satisfied that the documents (including ESI) in question were unlikely to be necessary for disposing fairly of the litigation or for saving costs.

7.12 The Committee considered whether the rules should be amended to give a party making discovery a discretion (not requiring the other side's agreement or a court order) not to discover ESI otherwise discoverable, which that party identifies in the affidavit of discovery as not reasonably accessible because of undue burden or cost. In such circumstances, the deponent would be required to set out in the affidavit of discovery any limitation on the search for, and discovery of, possibly relevant ESI and set out the reasons why, in the deponent's opinion, such ESI was not reasonably accessible because of undue burden or cost and thus was not discovered. The difficulty with such a provision however would be that it would make it easier, and probably routine, to give narrower discovery than was agreed or ordered, and the practical onus would then be on the party seeking discovery to persuade the court that the wider (i.e. previously agreed or ordered) discovery should be made. This would be an unfair burden on the party entitled to the discovery.

7.13 In complex cases with difficult discovery issues, the use of case management conferences under the inherent jurisdiction of the court, or in the Commercial List under Order 63A rules

14 and 15 RSC, could help the efficient resolution of many of these issues. The use of technical evidence, on affidavit or otherwise, to address technical issues relevant to access to ESI and discovery might also assist the court.

8. **Format of Discovery**

8.1 There are distinct difficulties in the format of discovery and the production and inspection of discovered ESI in litigation. Even the listing of discovered documents in an affidavit of discovery may present challenges as, for example, the listing of hundreds of thousands of pieces of ESI in a large discovery could be unduly burdensome and would probably be of little or no use to the party receiving the affidavit of discovery.

8.2 Where a party discloses paper documents under Order 31 rule 12 RSC, that party is usually required to permit the other side to inspect the documents under Order 31 rules 17 and 18 RSC. In the case of discovered ESI, the right to similar inspection would arise. This may give rise to practical difficulties, however, as the computer system may contain other data that is not relevant but is confidential, or the system may be in daily use, or there may be a risk that original data would be interfered with on inspection. Inspection of "native files" (ESI in the electronic format of the application in which it is normally created, viewed, or modified) can give rise to these difficulties.

8.3 Native files may need to be converted into a static images format which is capable of being viewed and printed by a standard computer system. The two best known static images are Tagged Image File Format ("TIFF") or Portable Document Format ("PDF"). The receiving party may be content to receive a good electronic copy of the ESI (in TIFF or PDF), or a paper copy, or both. An electronic copy has the advantage usually of being searchable by the use of key words and search phrases, though there is ongoing debate among computer experts and lawyers as to the format of production of ESI that is easiest to use and is more accessible. For example, experts disagree as to whether it is more useful to provide documents in PDF form or by TIFF images. PDFs are generally more user-friendly and available to a wider audience because Adobe Reader is a free software package available on most, if not all, PCs worldwide. TIFFs (single-paged or multi-paged) would be advantageous for those using litigation support software, but perhaps less user-friendly and taking up larger files with larger space requirements on computer systems.

8.4 An additional issue is that some types of discovered ESI may require a particular database or programme to open and review it. Data contained in some proprietary databases may not be decipherable without access to suitable proprietary software, which may be expensive. However the data may be meaningless outside the context of the database.

8.5 If the party providing discovery has load files (data files that set out links between the records in a database and the document image files to which each record pertains), which make it easier for the other party to search those images, that other party may wish to use those search tools. This would be in ease of the party receiving the discovery, but arguably it goes beyond the obligation in the current rules, which in most cases simply may require inspection

of discovered documents or, under Order 31 rule 20 RSC, may require the provision of a copy of discovered business books. Accordingly, it could be argued that the party receiving discovery under the current rules has no right to receive a copy of ESI in such a convenient searchable form. A means of searching electronically can make the task of the reviewer much easier, particularly in large discoveries where it could be an enormous task to read every piece of ESI discovered in order to identify data of relevance to particular issues in the litigation. Providing discovery of ESI in searchable form would reduce the cost of such review and, in particular, help "smaller" less well financed litigants and law firms in dealing with discovery provided by larger opponents.

8.6 The Committee recommends that the rules be clarified to require that, if requested, ESI be provided on discovery in searchable form (including load files) if it is held in that form by the party giving the discovery and if it can be so provided by that party to the party receiving the discovery without significant cost to the party providing the discovery. Where the information can only be searched using proprietary software or by some other means only available at significant cost to the party receiving the discovery, if requested the party providing such discovery should be required to provide inspection and searching facilities of the relevant information on its own system to the party receiving the discovery, in a way analogous to an order for inspection of discovered documents under RSC. Where non-relevant confidential information (or indeed privileged information) exists on the system, this could be protected by limiting the inspection and searching facility to an independent expert, who would search for and produce the search results to the party receiving the discovery. The orders made by Kearns J. in *Walsh v Microsoft* (The High Court 2001 10952P) and by O'Sullivan J. in *McGrath v Trintech* (The High Court 2003 10331P*)* are examples where the court appointed an independent expert to search and extract electronic information from a party's computer. In *Mulcahy v. Avoca Capital Holdings Ltd* [2005] IEHC 136, Clarke J. addressed the terms of access by a plaintiff's experts to computer materials which are the property of the defendants*.* The costs of retaining an expert could be incurred in the first instance by the party receiving the discovery, but be costs in the cause.

9. Recommendations

The Committee makes six recommendations, the first two of these relating to ESI and the other four of more general application. The recommendations are as follows:

(1) *Order 31, rule 12 RSC should be amended to define "documents" as "documents including electronically stored information".*

In some jurisdictions, the definition of "document" in court rules sets out many different types of documents. In England and Wales, in contrast, a document is concisely defined in the CPR as meaning "anything in which information of any description is recorded". The Committee considers that it is preferable to have a more general definition of this nature, rather than an enumeration of many different types of document in a definition of "document", as technologies change. However, given the prevalence of ESI, it would be desirable to make it clear that "document" is not confined to paper documents and includes ESI. The word "document" implies a degree of permanency and the phrase "electronically stored information" implies a degree of permanency also, although by its nature, information technology in most instances will not be as durable as paper. The word "stored" makes it clear that "documents" would not extend to mere transitory electronic information that is not stored in some way.

(2) *Order 31, rule 12 should be amended to require that, if so requested, ESI be provided on discovery in searchable form if it is held in that form by the party giving discovery and if it can be so provided by that party to the party receiving discovery without significant cost to the party providing discovery. Where the information can only be searched using proprietary software or by some other means only available at significant cost to the party receiving the discovery, the party providing such discovery should be required, if so requested, to provide inspection and searching facilities of the relevant information, on its own system, to the party receiving the discovery. Where non-relevant confidential information exists on that system, this could be protected by limiting the inspection and searching facility to an independent expert, who would search for and communicate the search results to the party receiving the discovery. The costs of retaining such expert would be incurred at first instance by the party receiving the discovery but would be costs in the cause.*

This reflects the conclusion of section 8 of the report.

(3) *In very large discoveries, there could be merit in courts exceptionally ordering (in default of agreement) a two-tiered approach to the search for and discovery of relevant documents including ESI, where the likely volume of the ESI in a case is shown to be exceptionally large and would be very burdensome to collect and review.*

This would permit a party to limit the search for and discovery of documents including ESI within specified parameters, as agreed or ordered, but the party receiving such discovery subsequently could seek further and better discovery where it can show good cause, following review of such discovery, that such further and better discovery is likely to be necessary for disposing fairly of the case or for saving costs. Orders of this kind may not require an amendment to the rules as they would appear to be within the inherent jurisdiction of the courts.

This recommendation reflects a conclusion in section 7 of this report.

(4) *Similarly, in cases where a party has agreed, or has been ordered, to provide voluminous discovery and can subsequently show that, in light of the searches made and documents reviewed, the wider discovery is not reasonably accessible because of undue burden or cost, and is unlikely to be necessary for disposing fairly of the case or for saving costs, in default of agreement it should be possible for that party to obtain a variation of the original discovery agreement or order from the court. Orders of this kind may not require an amendment to the rules as they would appear to be within the inherent jurisdiction of the courts.*

This recommendation reflects a conclusion in section 7 of this report.

(5) *Order 31 rule 12 RSC should be amended to require that parties providing discovery shall list and provide documents for inspection in a manner corresponding with the categories in the agreement or order for discovery, or as they are kept in the usual course of business.*

There is uncertainty at present as to how parties shall list and provide documents for inspection. This change would make it clear that documents should be produced in an orderly manner, either in accordance with the categories, or in the order in which they were stored in the files where they were identified.

(6) *Order 31, rule 12 RSC should be amended to provide that the form of affidavit for discovery should include a statement by the deponent as follows:*

> *"I understand that the obligation on a party giving discovery is to discover all documents within his/her/its power or possession within the categories agreed or ordered to be delivered that contain information which may enable the party receiving the discovery to advance its own case or to damage the case of the party giving discovery or which may fairly lead to a train of inquiry which may have either of those consequences".*

The Committee believes that many litigants, including foreign litigants, fail to appreciate the extent of the obligation under discovery. An express statement of the obligation in the affidavit would put it beyond doubt that the deponent was aware of the extent of the obligation when swearing the affidavit.

Litigation Committee

Law Society of Ireland

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