E-Discovery
ROUNDTABLE

Part 1

(Part 2 on this topic will run in the Oct. 23 issue of Texas Lawyer.*)*

E-Discovery

ROUNDTABLE

SPECIAL THANKS TO

ANDROVETT LEGAL MEDIA & MARKETING

GARDERE, WYNNE & SEWELL LLP

THOMPSON & KNIGHT LLP

YETTER & WARDEN LLP

FOR THEIR SPONSORSHIP OF THIS ROUNDTABLE

E-DISCOVERY ROUNDTABLE

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

MIKE ANDROVETT, moderator, attorney, journalist and owner of Androvett Legal Media, Dallas: . . . I would like the panelists to introduce themselves and describe a little bit about the nature of their work. . . .

SHAWN M. BATES, partner, Yetter & Warden LLP, Houston: . . . We're a 23-lawyer litigation firm. We have a broad complex business litigation docket as well as patent and IP litigation. We also do securities litigation. . . . I handle contract, securities and business torts cases for our corporate [and] individual clients. . . . I was asked a couple of years ago to be the lawyer within our firm that is keeping up on these e-discovery issues and advising the firm on how to implement the forthcoming rules, e-discovery the best practices and that sort of thing. . . .

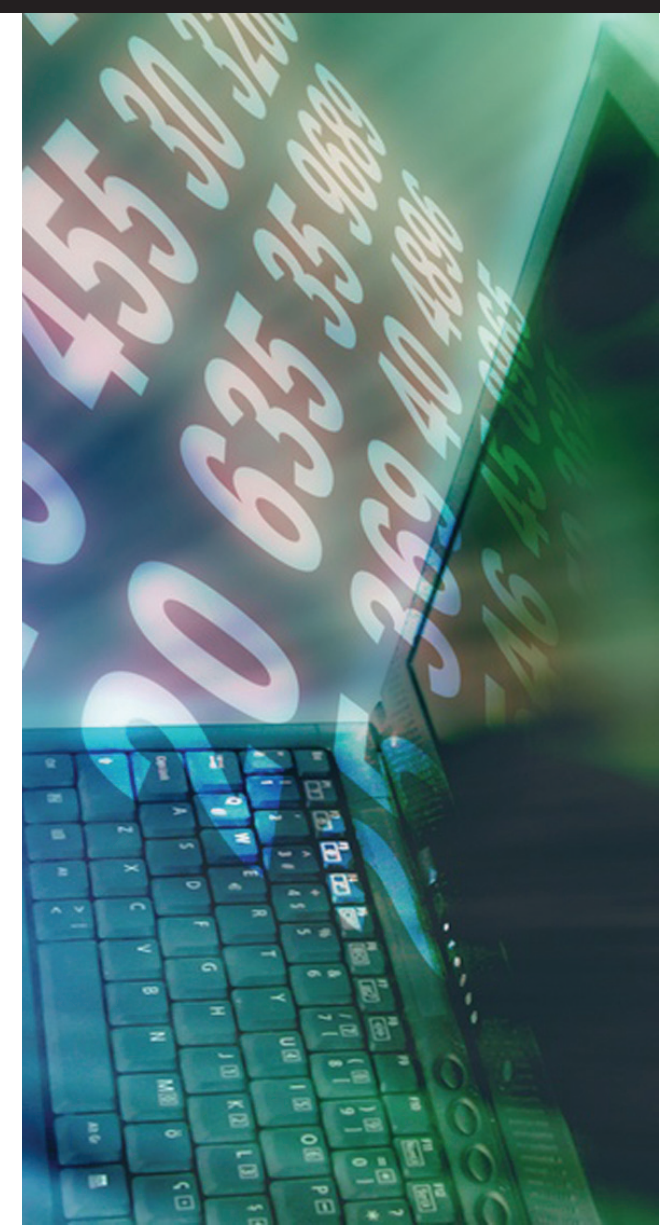
PETER VOGEL, partner, Gardere, Wynne & Sewell LLP, Dallas: . . . I've been in the computer industry, one way or another, since 1967 and was a programmer for a number of years and have a master's in computer science. And in my spare time, I practice law. But my law practice is limited to representing buyers and sellers of computer technology and Internet services. . . . [A]t Gardere, I'm the co-chair of our Internet and computer technology practice, and I am the chair of our electronic discovery and document retention team. . . . I have been active at the State Bar and was the founding chair of the computer section in 1990. . . . [S]ince 1997, I've been chair of the Texas Supreme Court Judicial Committee on information technology that's responsible for helping automate the court system in Texas and put Internet on the desktop of all 3200 judges. I serve as a court appointed mediator in many cases, as a special master in electronic discovery disputes, and have been an arbitrator for the past 20 years.

JANE POLITZ BRANDT, partner, Thompson & Knight LLP, Dallas: . . . I actually started at Thompson & Knight 18 years ago as a trial lawyer, and then gravitated toward doing IP work. . . . I have been asked by the firm to be the one that keeps . . . our clients aware of the changes in the electronic rules and electronic discovery as that occurs. And so I, too, chair an interdisciplinary committee on document retention and electronic discovery. I also am a member of DRI's e-discovery subcommittee, and I am the liaison between the discovery committee and their advisory committee. . . .

ANDROVETT: . . . [I]f you have a case where there's no electronically stored information as opposed to a case where you do, as a lawyer, as an expert, what's the difference? How does it affect how you work?

VOGEL: . . . I think I first raised that as an issue like in 1991 when I first gave a talk on electronic discovery. . . . [T]o me it's sort of more of a social issue with the phenomenon of the Internet and the proliferation of computers. When I was in law school more than 30 years ago . . . only the original signed document could be filed and you couldn't do Xeroxes. And today we have volumes and volumes of copies. So much is being filed at the courthouse; it's almost out of control. So it's not a wonder . . . that all the evidence is also electronic.

BRANDT: I think also, Michael, what we're seeing is that even if there are paper documents, . . . you're going to . . . take those paper documents and . . . convert them into some kind of electronic format for purposes of production. So the days of us taking ten boxes of documents, which may have been the documents that were responsive to the requests that were being made in the litigation, putting production numbers on them by hand, . . . making a copy and shipping the ten boxes or making those ten boxes available, are pretty much . . . going to be . . . a thing of the past. What a lot of us are now doing . . . is we're taking those documents [and] we're scanning them in. We are then putting them into some type of document management system and burning them to CDs or DVDs and producing them electronically. . . .



BATES: Mike, I would agree with Peter and Jane. . . . and I think the question . . . shouldn't be, What's the difference between the case where there's e-evidence, and there's not? But, How do you determine whether a case merits even going down that road? And as we talk . . . more about the rules and what they're going to require, I think we're all going to face the question of whether any given lawsuit is big enough or complex enough to merit even going down this road and opening this Pandora's box of collecting all the e-evidence and the associated cost and time.

ANDROVETT: When we talk about electronically stored information, . . . we're talking about any document that's stored on a server, right? E-mail. What other things?

BRANDT: We're talking about any kind of electronically stored information: . . . Word documents, Excel documents. We're talking about voice recordings to the extent those are stored. We're talking about e-mail, which is going to be, probably for all of us, the biggest nightmare to track and keep control of, [and] financial information. And the amended rule is written broadly enough so that it will encompass technological changes in the future. So virtually what they're trying to do . . . is to capture all types of electronic information as they exist now and as they will exist in the future. . . .

BATES: . . . The scope of that is extremely broad. . . . [S]omething as simple . . . as the chip inside of your smart phone, that's going to have data on it. That's going to be discoverable. And how many hundreds or thousands of those do you have in the hands of the employees of your clients? Instant

SHAWN M. BATES joined Yetter & Warden LLP after graduating from Georgetown University Law Center. He has focused his practice on complex business litigation and has first-chaired cases to verdict in jury trial, bench trial and arbitration settings. His experience includes representing plaintiff mining company in a fraud and negligence case against a worldwide engineering firm, resulting in a $137 million jury verdict and $101 million settlement; defending a Fortune 100 company in a $200 million fraud and conspiracy case, resulting in a nonsuit two weeks before trial; first-chairing an arbitration and obtaining a high-six figure award for the claimant against its investment advisor for professional negligence; and first-chairing prosecution of multi-million dollar contracts claims against two prominent wireless telecommunications, in both cases achieving full-value pretrial settlements. His article "Arbitration Clauses for Ongoing Relationships," was published in the Jan/Feb 2005 issue of *The Houston Lawyer* (which later named it Outstanding Legal Article for 2005). Bates was named a Texas Rising Star for 2005 and 2006, and was named one of Houston's Top Lawyers for 2006 by *H Texas Magazine*.

messaging: Many companies these days . . . are now prohibiting employees from having instant messaging on their desktop, but many of them do. That will have implications for those third-party vendors that store and control the instant messages. And that's . . . a fairly new development. Instant messaging is really taking off. If you have clients that are using that or opponents that are using IM, that's going to get a lot of attention in the future.

ANDROVETT: Help me understand. Plaintiff files a lawsuit against a major corporation. Plaintiff says, "I want every bit of digital data that you have." The judge says, "Fine, I'm going to allow that."

VOGEL: Well, I think you're starting a little bit too fast there. . . . under the Rule 26 conference, the parties have to disclose what electronic evidence they have. . . . [T]he nature of it is that whether it's paper or electronic, it's got to be relevant or lead to relevant evidence. So a broad question for everything that's electronic probably isn't going to fly any better than a request to a court that they wanted everything in paper. But the reality is . . . that there's going to be fundamental change, not just for defendants, but plaintiffs, when they bring lawsuits; they have to know what electronic evidence there is, and my experience has been that generally my clients don't know. And if they get sued, then the new rules require that we go immediately to the IT directors and figure out what e-mail exists and what electronic records are relevant and how they can be taken and put aside and protected and no longer destroyed. Because you're going to have spoliation issues right away. . . .

BRANDT: And I agree with what Peter is saying. Under . . . both rules 26 and 16 what we're going to see . . . ,as lawyers, [is] as soon as we know that there is . . . some kind of controversy, . . . we are going to have an obligation and a duty to . . . make sure that we're understanding what exactly our clients are maintaining and have in terms of electronic data. And then we've got to be able to, early on in the case, because this happens at your 16(f) conference, which in many cases in federal court really does happen within the first 120 days, . . . be able to talk intelligently with the Court and outline what we think is relevant and [what] can be produced and should be produced. . . . Form 35 is going to set out that you're . . . to have some kind of plan for the production of electronic information, and so your judge and the parties are all on the same page from the very beginning. . . .

BATES: . . . [O]ne thing we're all going to have to keep in mind is . . . repeat or institutional clients that bring us their litigation . . . will often understand that a lawsuit is on the horizon perhaps before they come to us. And so it may not be enough after these rules are in place for us to come in when they have been sued and to take all the steps required under the rules. We should all be thinking about advising those clients in advance, even if we're not handling something for them right now, that when they reasonably anticipate litigation, they need to start getting a handle on the e-evidence that's out there and preserving it perhaps before we, as the outside counsel, are even on the scene.

I think we're all going to face the question of whether any given lawsuit is big enough or complex enough to merit even going down this road and opening this Pandora's box of collecting all the e-evidence and the associated cost and time. — Shawn M. Bates

BRANDT: . . .Once we are put on notice that some kind of a dispute exists, there's going to be an obligation to preserve that data all the way back. Whether that data is accessible is a different question. . . . But the preservation order to preserve those e-mails from the beginning of time will . . . exist under the amended rules and the case law leading up to the amended rules. . . . [W]hen you talk to your clients about what they're doing by way of document retention and destruction policies, we need to all go back to the fact that what we really should be instructing our clients on is disaster recovery systems. That's what these really were meant to be. . . . So do you need e-mails from seven or eight or ten years ago for a disaster recovery system? Probably not. So, that's when we talk about starting to advise our clients now on what would be in their best interest, . . . focusing on what they really need for purposes of disaster recovery [will] help them should they get into a situation where they are in litigation and there is a "preservation," and then you've got to put a stop to any destruction that's going on under the policies.

AUDIENCE MEMBER: . . . Has any thought been given to perhaps avoiding disrupting the document retention policy with litigation holds and shift the costs of the extra expense of keeping all these documents beyond what was contemplated by the client?

BRANDT: . . . [I]f you read the comments to the rules, and mainly . . . 26 in relation with 16(f), and your conference that you're going to have with the Court, I think that once you get the litigation hold, you are going to have an obligation to try and preserve the documents that may be relevant to that dispute. . . . [O]f course, we're not going to have any case law on this for a while, but it will develop. But I think what . . . the advisory committee in drafting these rules and the judges and lawyers that were involved envisioned was those issues would be discussed very early on with the Court so that you could talk about . . . what the burdens were and whether or not costs should be shifted for purposes of dealing with these types of issues. But is there a cost shifting provision per se? Not in the current rules as they're drafted, no.

VOGEL: Let me respond to another issue that is sort of embedded in that question, and that is, this is an IT issue more than it is a legal issue. And that is the way . . . Microsoft Exchange, Outlook retains e-mails is it saves everything in one big clump. It doesn't save one person's mailbox independently. So if you are trying to put a corral around five individuals who may have e-mails that are relevant to a particular dispute, it's relatively

impossible, from an IT standpoint, to ferret out those five e-mail boxes. That is a real problem from the IT perspective because they're not capable of doing it. Microsoft did not design Exchange with that in mind.

BRANDT: And that's also something that we've discussed. And maybe Shawn can address this a little bit with me. [O]ne of the problems is when you go through the *Zubulake* [*Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003)] opinions from Judge Scheindlin leading up to the rules change, and she was involved in the rule changing committee, she's talking about the lawyer's obligation. And the lawyer's obligation that conflicts with what Pete is just explaining about how it really works in real life. . . . [S]he says you've got to go to the key players and make sure the key players are preserving the documents, but what Peter is saying . . . is technologically, it doesn't quite work that way. So there certainly is going to be an education process with the courts early on. And that's . . . what we're going to need to be doing in our 16(f) conferences.

BATES: Well, Jane, I think that's right. The education is going to be both with the courts and with all of us. Because . . . it's not going to be workable down the road to wait until you're sued [or] your client is sued, to start investigating how they handle their IT, how the city handles all of its IT, where the e-mails are, [and] what the options are for corralling the e-mails. You need to find that out ahead of time for your existing clients and educate yourselves so that when the hammer falls, you're already at Step 2. You know how they handle things . . . [and] the methods available for turning off the auto deletes, for preserving backup tapes and that sort of thing. We need to take it upon ourselves not only to educate the courts, but to educate ourselves going forward.

AUDIENCE MEMBER: . . . What about the individual sitting at their desk in their personal practice and . . . as soon as they get an e-mail, they look at it, read it, and they delete it. At the end of the day they dump their e-mail box. If the backups are running each night that e-mail may well no longer exist. With regard to a litigation hold, isn't the obligation not to just notify the IT department but notify all the individuals throughout the corporation?

BATES: You're absolutely right, . . . early on, you need to get with the key players in IT and find out the kind of things that we've been talking about. Then you need to get with the key players that have the relevant e-evidence, the people that have the project specific e-mails and documents, [and] the people in accounting that might have relevant financial data who were not necessarily involved in the project. . . . [W]e're talking about drawing a very broad circle using your typical broad discovery standard and identifying all the nooks and crannies, individual hard drives, mobile hard drives. The list is endless of all the places where this stuff might be hiding. You need to identify all that and . . . put a litigation hold on everybody. . . . I have a client that has the ability in their e-mail system to freeze . . . e-mail accounts so that those people cannot self-delete e-mails. . . . The litigation hold has to make it clear to everybody, not only involved in preserving the data, but that might be hiding the data, possessing the data, to make sure that it's not being destroyed. And that's really no different than it is with paper documents. . . . It's just that the universe might be a little bit bigger and the places where this kind of stuff can be hiding are undeniably much larger. . . .

VOGEL: I agree with Shawn's perspective on that, because . . . thinking back to those days when things were paper-based, we had to have

JANE POLITZ BRANDT is a partner in the intellectual property practice group at Thompson & Knight LLP. Her practice focuses on disputes relating to licensing, patent validity and infringement, unfair competition, trademark and copyright, trade secret disputes, and document retention. Over the last several years, her practice has primarily included intellectual property litigation filed in the United States District Court for the Eastern District of Texas. She is a frequent speaker and writer on E-Discovery and internet related issues such as record retention and preservation, internet legislation, and privacy. She serves as the chair of Thompson & Knight's recently formed interdisciplinary practice group on document retention and electronic discovery. Brandt received her juris doctor, with honors, from Louisiana State University and her bachelor of arts in political science, summa cum laude, from Louisiana State University in Shreveport. She is a member of the Defense Research Institute's E-Discovery Committee, serving as the committee's liaison to its diversity committee, and Madison's Who's Who of Executives and Professionals 2006-2007.

procedures in place to manage it, and it's really no different. The complicating issue . . . now that it is managed electronically is . . . you really need to talk to IT people. And IT folks, by and large, do not communicate well. . . . [M]y experience has been they don't . . . like to talk to non-IT people, as a rule. . . .

BRANDT: Particularly lawyers.

VOGEL: . . . So, if you're not precise in asking them something, you will get a programmed, imprecise response. And that's important that you know that Number 1, . . . Number 2, . . . you need to have a document retention policy in place that if an individual is . . . violating the policy, that somebody comes in periodically to see that they're not following the policy. . . . Because one of the worst things you're going to want to do . . . [is] be at a discovery dispute before a magistrate judge or a judge and have to explain why your client is not following their own policy. . . .

BRANDT: . . . [F]or the benefit of our readers, who may not necessarily be trial lawyers, a lot of this group may be a trial lawyer or know about trial work and understand what a litigation hold is. . . . [W]hat we're talking about is when you have a notification that a lawsuit or a claim is going to be made, there is an obligation that you tell your client that any documents and information, either hard copy or electronic, have to be protected from being destroyed. . . . And our obligation is going to be to make sure that . . . we go to the IT people of our client [and] have our client involved. . . . I personally think that under the new rules, . . . we're going to get to the point where we're going to have in-house IT people . . . testifying as to what they did to make sure a litigation hold was implemented timely and enforced. . . . [W]e need to be thinking in terms of who in our client's IT departments can fill that role. . . . When there's a litigation hold in place in a lawsuit, that [lawsuit] really trumps any destruction policy you have. . . . You have to put procedures in place to prevent that from occurring, and we have to follow up with it. So just telling them at the beginning of the lawsuit, "Don't destroy any documents," and not doing anything after that, you're still exposing yourself and your clients to sanctions for destroying documents. . . .

BATES: Jane, I want to join in on that last point. If *Zubulake* has taught us anything, . . . one of the biggest things for us is that you have to follow up. And Judge Scheindlin in . . . *Zubulake*, was clearly displeased with the outside counsel who did not, on multiple occasions, follow up with the in-house counsel and the in-house IT people to make sure that the evidence was being protected. Telling your in-house lawyer contact one time or drafting the litigation hold for him or her and leaving it at that, is a recipe for trouble down the road.

VOGEL: Let me . . . direct this to the transactional lawyers. . . . Because those of us that try cases know that inevitably the demand letter comes in, and we as trial lawyers may not find out for months or even a year, and transactional lawyers may know about it. So, I think that we have a burden now, as Shawn just pointed out in the *Zubulake* case . . . that we as lawyers have an obligation to educate our clients. And it's not just the trial lawyers, because we already know about it. But it's the transactional lawyers who, on a day-to-day basis, find out about demand letters, and then we don't find out about them until a lawsuit is filed. . . . [and] you have a 90-day hold. You might not find out about it for a year, and you're going to have a serious problem, particularly under the new rules. . . .

AUDIENCE MEMBER: . . . Would you feel that it is proper practice, when you're still in the due diligence stage, to notify the potential defendant of a potentiality of litigation so that you can start retaining that discovery? . . .

VOGEL: . . . I think that it is incumbent upon us, when we send demand letters, to be very specific about what electronic evidence ought to be retained. I think it makes a lot of sense to say, . . . if we know that there are five individuals, I want to make sure that all the electronic files for those five individuals are retained, because we think that they're going to be involved in this litigation. You're going to make your life a whole lot easier if you end up in litigation. I think that we're going to see more and more of those kinds of demand letters in the future. . . .

BRANDT: And to add to that, I think that the reality is . . . if you're doing an investigation because you think a claim may exist, that's when your preservation's going to kick in. . . . Those of us who have been doing discovery electronically for a number of years have realized that the cost of doing electronic discovery is staggering. . . . [H]ow to keep those costs under control, how to shift those costs, and who should bear those costs are all things that we're going to have to deal with. . . . [I]t comes to the point, unfortunately, and we've done this several times on several cases that I've worked on, is we are weighing the cost of producing the discovery that has been demanded electronically versus what it would cost us to settle. And we're . . . talking about six figures when we're talking about just doing the basic electronic discovery. And sometimes we have to make the decision, look, it's going to be cheaper for us to settle. . . . Right now there's not even a mechanism in the rules for us to go to the Court and say, . . . "If this is the discovery that they want, Judge, I'm happy to give it to them, but this is really burdensome and this is really costly on us, and they should have to pay for it or they should have to pay for half of it or whatever the Court deems is appropriate."

BATES: . . . I would say the calculus there is whether you want to wait while you're investigat-

It's important that you remember that preservation obligation exists, regardless of whether or not it's reasonably accessible. So we need to remember to tell our clients that they've got to preserve it, even though they might not have to produce it.

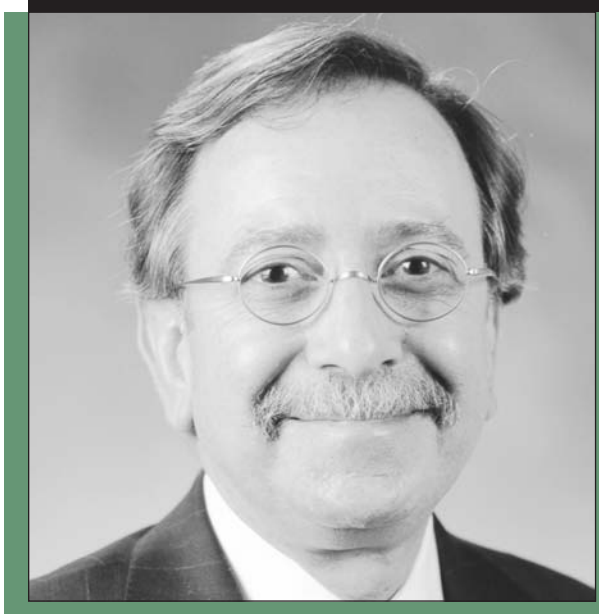
— Jane Politz Brandt

ing your case and run the risk that the defendant, through routine automatic deletion programs [and] document retention policies, is deleting information that may be relevant to your case because they're not aware that there's a lawsuit and they're not protecting it. If you notify them early, then . . . that stuff, presumably, is going to get preserved versus notifying them later and then maybe having to engage in some sort of a fight or an inquiry about whether evidence that was relevant was mishandled in some fashion or deleted. . . . [O]bviously, it's a tactical question about whether you want to put them on notice early for other reasons, but as far as e-evidence goes, there ought to be more protected and available for you to use in your case the earlier you notify them.

VOGEL: Let me address . . . an issue that's embedded in both what Shawn and Jane said, and that is . . . the accounting departments periodically replace accounting systems. And when those old legacy accounting systems are shut down and go away, about 99 percent of the time, the license goes away as well. So the manufacturer, or the owner of that license, restricts the use in the future. Five years down the line if you're supposed to be producing accounting records or an old Oracle database or something, you may not have a license to use it. You may not have a computer on which that software could even run. And you may not have the operating system to do that. So one of the pieces of advice that I think we need to start giving our clients is when they start acquiring licenses for computer software in the future, they ought to retain a license when they stop using it for the . . . limited purposes of discovery in the future. . . .

BRANDT: . . . I want to follow up on something that came to me as Peter was talking about accessing legacy data. I want everyone to understand that the new Rule 26, and it's going to be in 26(b)(2), it's a two-tier system. . . . Tier 1 is going to be governed by the lawyers, and you're going to have an obligation to produce information that is relevant and reasonably accessible. Tier 2 is going to be something that the Court is going to be involved in, and that's the information that is not reasonably accessible. That's what Peter talks about when he says "legacy data," when we move from one type of software to another type of software, and the old type of software may be where a lot of information was stored or retained. And you may not have that license. . . . [T]he determination of what is readily accessible is not really defined in the rules or in the comments to the rules. So, this is something that we're going to be ferreting out, again, with the judges. But it's going to be incumbent upon you to understand from your clients what they have stored up in hard drives, packed away in the closets or . . . the storage facility, and understand . . . the types of information that are on those types of hard drives and other types of stored information, . . . what it will take to get that information off . . . and if there are alternative methods to getting your opponent the same types of information without having to undergo this process and engage in this undue burden or expense. . . . [T]his is going to happen very . . . early on in your litigation. This is all going to be part of your 26(f) conference with the other side and your 16(f) conference with the Court. [W]e as lawyers have to come to the court prepared with our arsenal of why information that is in that storage is not reasonably accessible or may not even have relevant information on it.

BATES: Jane, the permutations of that reasonable accessibility issue are almost endless. I had a situation a few months ago where a client had some legacy data. It was a proprietary system that they had developed, a proprietary database. The



PETER VOGEL is a partner in the Dallas office of Gardere Wynne Sewell LLP and has been involved with the computer industry since 1967. For the past 28 years, Vogel has combined his masters in computer science and past experience as a mainframe programmer, systems analyst and management consultant together with effective legal skills negotiating contracts and in court. Vogel is chair of the electronic discovery and document retention group and co-chair of the Internet and computer technology practice at Gardere where he limits his practice to representing buyers and sellers of computer technology and Internet services. He often serves as special master in computer technology disputes, and assists clients with information technology issues in document retention policies. Since 1997, Vogel has been the chair of the Texas Supreme Court Judicial Committee on information technology and is an adjunct professor of the Law of eCommerce at the SMU Dedman School of Law.

computer was still there and some of the data was still there, but none of the people that knew how to run it, . . . work it or extract it were there . . . . [S]o we had to contact former employees. . . . [W]e didn't have to debate between the parties or fight over it, but I guess our question down the road would be, How far do you have to go to extract that kind of legacy data? And . . . How much effort do you have to make to access stuff like that? Do you have to go to former employees? . . .

AUDIENCE MEMBER: . . . Can you discuss also the importance of how that data is collected to avoid spoliation issues and chain of custody issues?

VOGEL: I don't think there's a one simple answer to a question about retaining data in such a way where there's no spoliation issues. It's the inherent nature, as I think we all have witnessed, . . . particularly under the new rules where parties can specifically require the format of the data. My sense is generally if you want to protect data, simply . . . putting it on a read-only media, like a CD, where you can sort of memorialize the way it was when it was saved is probably an easy way to do that. But, of course, if you've got tremendous volume, that's not very good. Another issue with CDs that probably most people don't pay much attention to is that the expected useful life of a CD is about seven years. . . . But the spoliation issue is an unbelievable problem because it is so easy to modify the contents of electronic information. And if you know what you're doing, it's easy enough to hide your tracks. . . . [I]t's not quite like a murder weapon that the police officer can put in a drawer and say this is the same one that I picked up next to the body. It's very complicated. How [do] we, as lawyers, go about selecting experts to help us? . . . What methodologies [do] they have to help preserve the evidence so that they can prove a chain of custody? . . . We have to be able to have some certainty to prove to the judge that the data has not been modified and there has been no spoliation.

ANDROVETT: . . . [W]hat I'm hearing is at some level, lawyers have to change a little bit the way they think about these cases and have to sort-of become IT professionals. And are we moving to a place where . . . a corporate defense team . . . is hiring an e-discovery expert or a court . . . is hiring a special master to mediate the e-discovery issues.

VOGEL: I think we're going to see more special masters retained. . . . It's to the advantage of the Court because . . . it's difficult for judges to understand the technology. . . . [T]he catch-22 on it is . . . you still have the spoliation, you have the issue of chain of custody that even the special master has to take into account. I had a case where I was a master a few years ago, and the debate was on 13 million lines of computer software code. And a computer science professor from A&M and a computer science professor from Harvard couldn't agree on anything. And they were looking at exactly the same code. . . . [O]ne of the issues I was concerned about on behalf of the Court was, Were they really looking at the same thing? . . . Luckily the case settled, so we didn't have to let a jury figure that one out.

BRANDT: . . . [W]e've been talking about preservation and trying to avoid spoliation. But what we really haven't discussed is how we are going to produce this information. . . . In what format are we going to be producing this information? Are we going to be producing this information in native format with metadata attached? Again, this is something we're going to be discussing early on in our cases. . . . What do we do when we produce information in native format? How do we protect ourselves from our opponents and our opponents manipulating that data? . . . [I]t is certainly cheaper to take your computer information, dump it on a CD, DVD, or a hard drive and produce it to the other side, but then how do you protect and make sure that that information is not being manipulated by the other side? . . . [H]ow do we want to go about [it]? . . . [W]hat risks do we want to take? And what protection can we place on the production of data? Whether we decide to produce it, . . . the rule is going to require us to produce it in a searchable format. But does that mean native? I was at a CLE where Judge Scheindlin was talking, and I asked her that very question, because I was struggling with it in a case. [I] was concerned about producing my . . . files in native format. And it wasn't code. . . . [Y]ou've got to give code in its native format because otherwise it's completely unusable. But I'm talking about other types of information, Word documents, Excel documents, financial information that doesn't necessarily have to be produced in a native format but in a searchable format under the new rules. And I said to her, "Does this rule contemplate that everything is being produced in native format?" And . . . she said "No." And I said, "What would you suggest that I do if that's how it's being requested?" And she said, "Well, I would fight it. And if you were in my court, I wouldn't allow it unless there was a very good reason." But we do have those opinions out there that are ordering parties to produce in native format. And we've got to think about how . . . we protect ourselves. . . . But we have to remember again, there are costs associated with doing that. . . .

VOGEL: Well, I want to change gears here a little bit, because Jane makes an excellent point with regard to the new rules. Since 1999, Texas State Rule 196.4, allows parties to ask specifically for certain formats. Unfortunately, to date there's only been one appellate opinion reviewing that, and it hasn't really clarified much. But I think the fundamental part . . . is that it's incumbent upon us as lawyers to ask meaningful, intelligent requests for production that actually describe what it is that you want. Just saying you want something electronic . . . is not going to get it. If you want . . . all the word

Because one of the worst things you're going to want to do . . . [is] be at a discovery dispute before a magistrate judge or a judge and have to explain why your client is not following their own policy. . . .
— Peter Vogel

documents, you're probably better off saying you want all the Word, Excel spreadsheets. . . . then . . . the other side is going to have a very difficult time in court ever saying, "Well, we didn't understand they really wanted Word. We thought they wanted it in a TIF format." Another issue . . . is metadata. Metadata is a phenomenon that Microsoft created because of the complexity of its Office suite so that it would leave behind information. . . . [I]f you want . . . metadata you're better off, in the state or in the federal rules, to make a specific request for that.

BATES: I just want to follow up on something Jane said about producing in native format and Judge Scheindlin's comment to her that the judge, "if it were her, [she] would fight that." It's important to note that the rule change, or the advisory committee notes to the rule change, state that the option to produce in some other format is not a license to produce it in a format that's not easily usable by your opponent at trial. I think the term in the notes is efficiently usable. So if we branch off from producing it in the native readily available format, many of us might like to take the opportunity to turn it into some format that's less usable or less searchable by our opponent. . . . and the advisory committee notes make it clear that that's not the point of giving you the option to produce it in non-native form. You do have to make it something that your opponent can efficiently use in the lawsuit.

VOGEL: . . . [I]n the United States, . . . e-mails are owned by the employer. . . . So asking for a request of that sort would only really, I think, effectively be done by subpoena. Now, the reason I brought this up is outside of the United States, this is not the case. For instance, in the EU and Canada, the e-mails are private and personal to the employee. So if you have communications in companies going to the EU or to Canada, it becomes a very perplexing problem about who has the right to those e-mails. It's not quite as simple as it may be if we're talking about just an action in Texas alone. But I think the fundamental issue, though, really is more like a subpoena concern. And that is if you subpoena a third party, that third party has to make a determination whether or not it's going to abide by the subpoena request. And under the new rules, specifically under the new rules under 45, the person requesting the subpoena has the right to make a request for electronic data.

BATES: . . . I want to note that under the new Rule 45, it's pretty clear that . . . if there's going to be significant cost associated with a third party producing e-evidence, the requesting party is going to have to pay that cost.

ANDROVETT: . . . The amendments to the Federal Rules of Civil Procedure . . . acknowledge that electronically stored information is different than a document. We sort of made drive-by references to the rules and the new rules, but I think we would be remiss if we didn't maybe try to put them in their own compartment. . . . Can the three of you go over the key provisions of the new amendments and what they will mean for lawyers and companies, your clients, [and] anyone who may find themselves in a case where the rules are relevant?

BATES: . . . I think one of the biggest impacts of the new federal rules is going to be Rule 26, or a combination of 26 and 16. The obligation that counsel will now have to confer in advance under Rule 26 when they're working out their discovery plan and their case management plan to confer about how e-evidence is going to be handled. . . .

ANDROVETT: Confer with the other side?

BATES: Yes, confer with your opponent in working toward framing out your case management plan and providing it to the court. The purpose there is to make sure that e-evidence is dealt with as early in the case as possible. And I don't think courts . . . under the new rules, [are] going to be

MIKE ANDROVETT is in business to make sure that his lawyer clients get positive news coverage and their law firms are marketed effectively through advertising and public relations. Androvett is the founder of Androvett Legal Media & Marketing, the largest public relations and advertising firm in the Southwest exclusively devoted to lawyers and the legal profession. Established in 1995, Androvett Legal Media serves the specialized needs of law firms in communications with outside audiences, including news media coverage, brochures and Web sites, and sophisticated advertising of all kinds. Androvett's firm assists lawyers in virtually all areas of practice while observing the highest ethical standards. Lawyers and their clients who receive media training from Androvett Legal Media are much better prepared to deal with reporters and TV camera crews. And, as a former chairman of the State Bar of Texas Advertising Review Committee, his expertise and experience is essential to firms seeking to comply with the state rules governing lawyer advertising. Androvett and his team take the mystery out of public relations and advertising by recognizing law firms' true goals and providing the know-how to make them happen. Androvett can be reached at mike@legalpr.com or 214-559-4630.

very tolerant of e-evidence issues popping up in the middle of a lawsuit when they should have been discussed in advance and framed out in the case management plan. And then under Rule 16, as part of the scheduling order, the same issues will arise. [T]he court will have the opportunity to actually specify, as part of the order, how e-evidence is going to be handled. I think communication is really one of the big goals behind the rules . . . to get all of us on both sides of the "V", talking as early as possible about how this many-headed hydra of e-evidence is going to be handled rather than let it pop-up later in a case when it could cause a lot of delay, a lot of trouble and a lot of expense.

BRANDT: I think that when you look at Rule 26 . . . [it] has a lot of different provisions in it. . . . [W]e've hit on a lot of these separate provisions without placing them with the particular rule. And a lot of what we've talked about has been in Rule 26 in combination with Rule 16. So what your obligations are going to be as you have your 26(f) conference with your opponent and then how that goes to your conference with the court and what needs to be included in that conference. One of the things that we haven't discussed that I think is worthy of discussing is preservation orders. Because when you . . . read Rule 26 and you read Rule 16(f) and the comments thereto, . . . an actual preservation order to preserve documents is not going to be something that the courts expect to be entering as a matter of course. [I]n fact, you can object to a preservation order. And if you do object to a preservation order, the rules say that the order has to then be narrowly tailored to the issues. So there is some protection there. The other thing . . . [is] about the legacy data and whether or not that's reasonably accessible. Under this two-tiered approach in Rule 26, where there's clearly information you're going to be producing because it is relevant, it is reasonably accessible, and it should be produced because it supports a claim of defense. But this legacy information or hard to access information, even though you might ultimately not have to produce it initially, does not relieve you of your obligations to preserve that data. It's important that you remember that that preservation obligation exists, regardless of whether or not it's reasonably accessible. So we need to remember to tell our clients that they've got to preserve it, even though they might not have to produce it. . . .

VOGEL: And what comes out of that scheduling conference, the new Form 35 with the report for the planning meeting includes . . . dealing with the electronic evidence . . . as well as what happens if you produce electronic information that you later determine was privileged and the other side should not have gotten. And the . . . the description of the callback and how you put a hold around that purportedly privileged evidence is handled in the new rules in such a way where, on a case-by-case basis theoretically, you should be able to be protected. . . . We'll have to stay tuned to see how the courts really deal with that.

BRANDT: . . . [T]hat's a very important rule. Because the advisory notes say this is procedural, yes, you can get it back. But remember, this is a procedural issue. So whether or not there has been a waiver still remains up in the air. And what the advisory committee specifically said is . . . we're going to cede that responsibility to the Federal Rules of Evidence Committee to do something with the Federal Rules of Evidence on that issue. . . . The advisory committee for the Federal Rules of Evidence . . . did meet back in May. They propounded a rule. But the earliest that that rule may go into effect . . . would be December of 2008. . . . [T]he advisory committee recognizes you may not be able to review all the information before it has to be produced, which is why they have this callback provision. . . . You can protect yourself . . . through that Rule 16 conference or in some other way by getting the court to enter an order. . . . [S]o the parties can agree that if a document is inadvertently produced that is privileged, they have the right to call it back. I've been putting that in protective orders for years, because I've been producing lots of electronic discovery in such a manner where it happens. You just can't go through everything, or it slips through the cracks, or you have so many different people looking at documents. . . .[T]he . . . proposed new Federal Rule of Evidence 502 also recognizes, as long as it's in a court order and the parties agree to it, . . . you're not going to be waiving your privilege. So between now and when we get it in the actual rule of evidence, my suggestion to you would be to make sure that you have something, whether it's a protective order, whether it's part of your scheduling order, [or] a discovery order, have it in something that is signed by the judge that says if a document is inadvertently produced, under Rule 26, you want the ability to call it back. . . .

BATES: I think Jane, a moment ago, was talking about the ongoing duty to preserve evidence. I think one of the more interesting rule changes is Rule 37, which many of you have probably heard contains a "safe harbor," where the rule says that you will essentially not be sanctioned if electronic information is lost as the result of a good faith operation of an electronic information system. The interesting part about that rule is . . . over the months since we've seen that verbiage, we've all been thinking about it and wondering what exactly does that mean. We know that once you reasonably anticipate litigation, you have to preserve your evidence. It's unlikely that this rule means that if evidence is accidentally lost by the routine operation of your electronic information system after the trigger date, after you knew litigation was coming, it's unlikely and no one really thinks that this safe harbor is protecting you from that. And in the converse, I don't think there was a big problem before this rule with people . . . or companies getting sanctioned for losing or disposing of data before they knew litigation was coming. So the question is what exactly does this safe harbor do, and is it really a safe harbor. . . .

VOGEL: I had a case a few years ago where my client was, as a third party, ordered to produce some electronic evidence. The computer system was in Los Angeles, and after an earthquake, the building had to be razed. So that was an excuse, an act of God, as to why it didn't have to be produced. It had nothing to do with computers. But as I indicated earlier, they're all going to fail. And I think that's a very good point that Shawn makes is that the safe harbor probably is practical because we know these things are going to fail, but that doesn't absolve us of the responsibility to make sure that our clients really do corral the relevant evidence and try and protect it. . . .

BRANDT: Peter made reference earlier this morning to the way in which discovery can be requested. And he talked about specifically request[ing] it the way that you want it. The way the rules . . . will work December 1 [is that] the requesting party can ask the form in which they want the discovery produced, . . . but the responding party does have the right to come in and object and then inform you, the requesting party . . . what format they will be producing the documents. Then you can go to the court, through a motion to compel [or] a motion for protective order, and the Court can decide (or in the kinder, gentler litigation, you can agree). . . . [I]f the requesting party does not ask how . . . they want the information, . . . the responding party has the right to produce it however they want to produce it, except they can't produce it in a form that's not searchable. . . . [Y]ou can't make it hard for the other side to go through the documents. It's going to have to be reasonably accessible, which the notes say means "searchable format." So that's kind of how [Rule] 34 is going to work in the context of the new amended rules.

VOGEL: I think that's an important point that Jane just made is "searchable" only means you can read it. In a case a few years ago, we got 52 CDs of documents. . . . [E]very single page in discovery was a separate TIF file with a unique Bates number on it, but there was no index of anything. Well, the judge wasn't amused by it either, and as a result, he sanctioned the party because they put it in a format where it could be accessed, but you couldn't read a 25-page document without opening 25 different TIF images. And you didn't necessarily know where it started and stopped. . . . [If] you can imagine having an index by Bates numbers and nothing else, . . . it sort of complies with the Rules, but I think . . . judges are going to find that very unacceptable.

BATES: I just wanted to follow up briefly on Rules 33 and 34 that Peter mentioned a moment ago. One of the things in 33 with regard to interrogatories is that you can direct your opponent to obtain the answer from electronic documents, just as you could with paper. The advisory committee notes point out one possible pitfall . . . which is, if you . . . don't direct your opponent to the specific files with enough particularity, the notes envision the recipient of that answer coming to you and saying, "I want direct access to your document system. I need to get into your accounting system . . . database and get this information, because you have not given me enough specificity on how I can obtain the answer." So the committee notes sort of give a hint that we need to be careful in exercising the right to tell someone to go look at our electronic information and make sure that we are specific enough that they can't come back with a request to actually get into your computer system. With regard to Rule 34 and document production, when you read the language, it seems to differentiate between documents and electronic information. And on first reading of that rule, you can envision where if an opponent just asked you for documents, you might say, "Well, you didn't ask me for the electronic information." It's important to note that the advisory committee notes weren't intending to differentiate and that if you request documents, it should be assumed you're talking about electronic information, unless the conduct of the parties in that case makes it clear that the parties have been differentiating between the two. . . . ❖