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**A PRACTICAL GUIDE TO AVOIDING THE PITFALLS AND
EXPENSE OF PROTRACTED DISPUTES OVER
DOCUMENT PRODUCTION AND E-DISCOVERY**

PRESENTED BY:

**CYNTHIA E. RODGERS-WAIRE
WHITEFORD, TAYLOR & PRESTON, LLP
7 Saint Paul Street
Baltimore, Maryland 21202-1636**

**HOWARD K. UNIMAN
WOLFF & SAMSON PC
One Boland Drive
West Orange, New Jersey 07052**

**ROBERT O'BRIEN
LIBERTY MUTUAL INSURANCE COMPANY**

**FRANK J. TANZOLA
INTERNATIONAL FIDELITY INSURANCE COMPANY**

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A PRACTICAL GUIDE TO AVOIDING THE PITFALLS AND EXPENSE OF PROTRACTED DISPUTES OVER DOCUMENT PRODUCTION AND E-DISCOVERY

**Cynthia E. Rodgers-Waire
Baltimore, Maryland**

**Howard K. Uniman
West Orange, New Jersey**

**Robert O'Brien
Hamilton, Ohio**

**Frank J. Tanzola
Newark, New Jersey**

I. PURPOSE OF PAPER

The purpose of this paper and the related discussion is to offer practice tips to assist surety and fidelity claims representatives, consultants, experts and attorneys (the “Parties”) alike to minimize litigation expenses from the moment a claim is received by a surety or Fidelity Insurer. Often, at the time claims are made, particularly in construction-related situations, there is an urgency to address the pressing construction-related issues and evaluate the validity and scope of the particular claims. Almost immediately, the Parties prepare letters, emails, internal notes, memos, and records without realizing that several years later these communications will become the subject of an interrogatory and/or demand for inspection of all documents, including electronically stored information (“ESI”). Thus, we no longer can simply review the hard copies of these communications but now must possibly bear the burdensome task of retrieving and examining the data stored on the hard drives of our computers or handheld devices (*i.e.*, Blackberries, iPhones, etc.).¹ Welcome to the brave new world of technology.

Keeping a few guidelines in mind from the commencement of such surety bond and fidelity claims may reduce the amount of time and money incurred by the fidelity insurer and surety in having their counsel examining, analyzing, and segregating, quite literally, tens of thousands of pages of documents and ESI in order to protect privileged communications from disclosure in discovery and preventing disclosure of information, which potentially may be embarrassing to the parties.

II. DEFINING THE CHALLENGE

In virtually every litigation, a tension exists between conducting thorough pretrial discovery, and doing so in a cost effective manner. Even relatively small cases can involve examining thousands of pages of documents and/or ESI that may be deemed relevant for

¹ Fed R. Civ. P. 34 permits counsel to request the production of electronically stored information within a party’s “possession, custody, or control.”

discovery purposes under our Federal Rules of Procedure and their state counterparts. See e.g., Fed. R. Civ. Pro. 26, 34.² Almost any litigator will confess and any client will lament that substantial litigation costs are expended in dealing with privilege issues in the course of discovery including analyzing and categorizing documents maintained and/or created by the Parties before and during the pendency of litigation. Often, various privileges are asserted over a wide array of documents out of fear of waiving privilege, and consequently litigants spend enormous sums of money protecting documents which, in reality, may have little or no useful value in the litigation context.³ Discovery costs alone could potentially impact a litigant's strategy and affect its ability to appropriately contest even spurious claims.

Surety construction and fidelity claim matters are not immune from this tension.⁴ In fact, these types of cases, by their nature are very complex, and more often than not, involve numerous parties who are either directly or indirectly involved from the inception of the claims through the litigation process. For example, from the time a claim is asserted by an owner, subcontractor, supplier, and/or vendor against the surety's performance and/or payment bonds, the surety's direct response, or response made in conjunction with their consultants and attorneys, will generally trigger numerous external and internal communications and exchanges of documents between and among the Parties. This exchange may unwittingly lead to a costly dispute over whether such communications between the Parties must be turned over to their adversary during the course of pretrial discovery.

For example, the Parties frequently forward string emails, prepare several draft versions of documents, circulate the drafts for internal or external review, all of which lead to numerous duplicates sometimes containing a variety of often illegible or unkindly handwritten notes and comments. While some of these documents may be necessary, oftentimes these documents may be inadvertently forwarded to a person who breaks the privilege. Unless the Parties are very careful with these string emails and draft documents or they are properly and legally discarded, see *infra* litigation hold letters, significant expense may be incurred in reviewing and attempting to shield the data, documents, and/or notes/comments from disclosure. These concerns are equally applicable to the Parties' temporary internet files and metadata. To help minimize the financial impact in resolving these disputes, it is imperative that the Parties bear these considerations in mind as soon as a claim is received.

² It is well established that the Federal Rules of Civil Procedure allow for broad and liberal discovery of all relevant matters. Fed. R. Civ. P. 26(b)(1); *Pacitti v. Macy's*, 193 F.3d 766, 777 (3d Cir. 1999); see also Wright, Miller & Marcus, FEDERAL PRACTICE & PROCEDURE, CIVIL 2D § 2007 (noting that Fed. R. Civ. P. 26(b) allows for a "broad scope to discovery and this has been well recognized by the courts"). The state analogues to the Federal Rules similarly provide for broad and liberal discovery.

³ A party resisting discovery must state with specificity the objection and how it relates to the particular request being opposed because broad-based, non-specific objections are almost impossible to assess on their merits, and fall woefully short of the burden that must be borne by a party making an objection. *Roesberg v. Johns-Manville, Corp.*, 85 F.R.D. 292 (E.D. Pa. 1980). When there are thousands of documents involved, this becomes a massive undertaking. See § E.

⁴ For the purposes of this paper we refer to surety construction matters. However, the principles set forth herein are generally applicable to all types of fidelity and surety matters.

III. THE APPLICABLE PRIVILEGES

For the purposes of context, we briefly set forth and explain the types of privileges generally asserted in litigation.

A. *Attorney Client Privilege*

The attorney-client privilege serves public ends by promoting “frank communication between attorneys and their clients” and “an open atmosphere of trust.”⁵ Candid communications between a client, consultant, and counsel are necessary to assist counsel to better understand the facts of the case and to provide a legal opinion and devise legal strategy for the client. The attorney-client privilege protects these communications.

Generally, the attorney-client privilege “applies to communications from the client to the attorney when the communication is made for the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose.”⁶ A state will usually apply its own law on privilege to state-court actions; Rule 501 of the Federal Rules of Evidence likewise directs courts to look to state law in deciding questions of privilege when jurisdiction is based on diversity.⁷ When a district court is exercising diversity jurisdiction, the law of privilege that controls is that which would be applied by the courts of the state in which it sits.⁸

For the most part, however, discovery disputes do not arise out of the assertion of the attorney-client privilege for direct attorney to client only or client to attorney only communications. The disputes begin to arise when third parties are introduced into the equation. Federal courts recognize that “the attorney-client privilege extends to communications with one employed to assist the lawyer in the rendition of professional legal services.”⁹ A line of cases beginning with *United States v. Kovel*, recognize that the attorney-client privilege is not automatically waived if an otherwise privileged document is disclosed to a third party.¹⁰ Although the communications must be made in confidence for the purpose of obtaining legal advice from the lawyer, the Second Circuit in *Kovel* found that a derivative privilege also attaches to consultants who are necessary for the rendering of legal advice, holding that the attorney-client privilege extends to communications made by a client to an accountant for the purpose of obtaining legal advice from the lawyer.¹¹

⁵ *Hannan v. St. Joseph's Hosp. & Med. Ctr.*, 318 N.J. Super. 22, 27 (App. Div. 1999).

⁶ *People v. Greenberg*, 851 N.Y.S.2d 196, 200 (App. Div. 1st Dep't 2008)(quoting *Rossi v. Blue Cross & Blue Shield of Greater N. Y.*, 540 N.E.2d 703 (1989)).

⁷ F.R.E. 501 (“[I]n civil actions and proceedings, with respect to the element of a claim or defense as to which state law supplies the rule of decision, the privilege of a witness, person, government, state, or political subdivision thereof shall be determined in accordance with State law.”); *United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 965 (3d Cir. 1988).

⁸ *Maertin v. Armstrong World Industries, Inc.*, 172 F.R.D. 143, 147 (D.N.J. 1997).

⁹ *Samuels v. Mitchell*, 155 F.R.D. 195, 198 (N.D. Cal. 1994).

¹⁰ 296 F.2d 918, 922 (2d Cir. 1961)

¹¹ *Kovel*, 296 F.2d at 922; see also *HPD Laboratories, Inc. v. Clorox Co.*, 202 F.R.D. 410, 414 (D.N.J. 2001)(“[d]ue to the myriad complexities of modern litigation, attorneys and clients often rely on agents during the

Communications regarding business rather than legal matters are not protected by the privilege.¹² However, business and legal advice are often intimately intertwined in the corporate community. In distinguishing between these two, courts focus on whether “the communication is designed to meet problems which can fairly be characterized as predominately legal.”¹³ To satisfy this standard, the proponent of the privilege “must demonstrate that the communication would not have been made but for the client’s need for legal advice or services.”¹⁴

B. Work Product Doctrine

In *U.S. v. Nobles*,¹⁵ the United States Supreme Court explained that “attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the [work product] doctrine protect materials prepared by agents of the attorney as well as those prepared by the attorney himself.” The Supreme Court has described the doctrine as an “intensely practical one, grounded in the realities of litigation in our adversary system.”¹⁶

A document is only protected by the work product privilege if, considering the nature of the document and factual situation of the case, it can fairly be said to have been prepared or obtained in preparation for litigation.¹⁷ To merit work product protection, material must (1) be a document or tangible thing; (2) be prepared in anticipation of litigation; and (3) be prepared by or for a party.¹⁸ Thus, to remain protected from disclosure under the work product doctrine, the primary purpose of the document must be that it was prepared in anticipation of litigation.¹⁹ However, litigation need not be imminent. As long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation, a court will generally find that the privilege applies.²⁰ In limiting work product to materials prepared in anticipation of litigation, the drafters of Fed. R. Civ. Pro. 26 excluded materials assembled in the ordinary course of business, or for other non-litigation purposes.²¹ It should be noted that the work

course of legal representation... The law safeguards these communications to promote the full and free exchange of information and, in doing so, serves important public interests.”)(citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

¹² *Coleman v. Am. Broad. Cos., Inc.*, 106 F.R.D. 201, 205 (D.D.C. 1985).

¹³ *Leonen v. Johns-Manville*, 135 F.R.D. 94, 98 (D.N.J. 1990) (internal quotation marks omitted).

¹⁴ *Id.*

¹⁵ 422 U.S. 225 (1975).

¹⁶ *Nobles*, 422 U.S. at 238.

¹⁷ *Martin v. Bally’s Park Place Hotel & Casino*, 983 F.2d 1252, 1258 (3d Cir. 1993).

¹⁸ *SR Intern. Bus. Ins. Co. Ltd. v. World Trade Ctr. Props. LLC*, 2002 WL 1334821, at *4 (S.D.N.Y. June 19, 2002); see also Fed. R. Civ. Pro. 26(b)(3).

¹⁹ See *Sharp v. Govt. of the Virgin Islands*, 77 Fed. Appx. 82, 85-86 (3d Cir. 2003).

²⁰ *U.S. v. Rockwell*, 897 F.2d at 1255, 1266.

²¹ *Id.* at 85 (quotations omitted) (quoting Fed. R. Civ. P. 26 (b)(3) advisory committee note).

product privilege is not absolute and can be overcome by a showing of substantial need and undue hardship.²²

IV. PRACTICAL GUIDE FOR THE PARTIES TO ADMINISTER PAPER DISCOVERY IN A COST EFFECTIVE MANNER

When responding to document demands, counsel is sometimes required to analyze dozens of boxes of documents maintained by either the surety or the consultant to determine whether the documents contained therein are privileged. Each time a privilege is asserted over documents in the file, counsel needs to list the document on a privilege log. A typical privilege log should contain, among other things, the name of every document, author, recipient, dates, and subject matter. Courts have required in various degrees of specificity the following: 1) identity of the preparer; 2) recipients; 3) dates; 4) subject matter; 5) whether direct quotes or paraphrases of advice of counsel were identified; and 6) whether such quotes or paraphrases could be redacted, leaving non-privileged information. Where work product is being claimed some courts require certifications as to: 1) identity of the authors; 2) recipients; 3) dates; 4) purpose of the report; and 5) the dates and purpose of the relationship between the authors and plaintiff's counsel with sufficient particularity to sustain party's burden to show the applicability of the work product doctrine.²³

Thus, preparing a privilege log can be labor intensive, and expensive, and is the culmination of numerous hours expended in evaluating, synthesizing, analyzing and categorizing communications for privilege and non-privilege issues. There is also the possibility that a dispute will arise over the applicability of the privilege to each document listed on a privilege log. The disputes sometimes escalate to motion practice. Where there are tens of thousands of documents, the disputes may be streamlined if the Parties are cautious about the way they correspond with another, thereby potentially saving the surety money.

There are several issues that concern communication between the Parties, which repeatedly arise in litigation in connection with paper discovery. Below, we highlight those issues which appear most often and provide suggestions as how to potentially prevent them in the first instance. Of course, some disputes are inevitable. Nevertheless, as cases become more and more document intensive, it is important for the Parties to take certain precautions to ensure that privileged documents are not disclosed and the surety will not have to spend a great deal of money to ensure that they remain privileged.

A. *Communications Between And Among The Surety, Counsel And Consultants*

All too often, a claim is asserted on a bond and the Parties immediately engage in both written and oral communications to, among other things, establish the extent of the surety's liability and determine how to minimize it. Surely, open and frank discourse is necessary so that the surety can make appropriate decisions. Indeed, the law protects many

²² *In re Cendant Corp. Securities Litigation*, 343 F.3d 658, 662 (3rd Cir. 2003).

²³ *Canadian Imperial Bank of Commerce v. Boardwalk Regency Corp.*, 108 F.R.D. 737 (D.N.J. 1986), see also *Torres v. Kuzniasz*, 936 F. Supp. 1201, 1208-1214 (D.N.J. 1996).

of these discussions from disclosure as subject to the attorney-client privilege or Work-Product Doctrine. Nonetheless, the Parties need to be cautious as to how they approach these discussions because if not conducted properly, the surety's adversary may be entitled to know just how frank the surety's counsel and consultant were. In fact, some courts have concluded that a surety's investigatory file or report may be discoverable.²⁴ To qualify for protection under the Work-Product Doctrine, a party must establish by objective evidence that the "author of the document anticipated litigation at the time that the document was created, and would not have created the document in essentially the same way had the prospect of litigation not existed."²⁵

A common communication between the Parties is an email from the surety claims person to both counsel and a consultant requesting that: a) the consultant investigate a claim, determine construction costs, and calculate the cost to complete a bonded project; and b) counsel to advise and opine on validity of claim. Instinctively, one would argue that this communication is privileged because it was sent to the surety's attorney. However, the communication to the consultant will only be considered privileged if it was made for the purposes of obtaining legal advice. Arguably, in this scenario, the surety is asking the consultant for factual information. Fortunately, the hypothetical communication in this scenario is usually benign and does not regularly divulge anything of significance.

On the other hand, if counsel were to, in the case of an email, "reply to all" and provide his or her legal analysis to both the surety claims person and the consultant, an adversary may argue that copying the consultant on the communication abrogated the privilege. Of course, the discoverability of the document will depend on the exact nature of counsel's email. For instance, if counsel provides some preliminary advice, but follows-up with questions for the consultant so that counsel could complete his or her research, the surety may properly take the position that counsel was seeking the consultant's advice so that it may provide legal advice. The *Kovel* line of cases, referenced above, may protect some of these communications. Alternatively, if counsel responds only to the surety claims person and the surety claims person then forwards the message to the consultant asking factual questions

²⁴ *U.S. Fid. & Guar. Co. v. Braspetro Oil Serv. Co.* 2000 WL 744369 *8, 9 (S.D.N.Y. 2000) ("[D]ocuments that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation are not protected [under the work product doctrine]...the application of the work product doctrine to documents prepared by insurance companies during claims investigations is difficult because the nature of the insurance business is such that an insurance company must investigate a claim prior to determining whether to pay its insured, and thus pre-litigation investigation is the routine business of insurance companies") (internal quotations omitted) (*quoting Westhemeco Ltd. V. New Hampshire Insurance Co.*, 82 F.R.D. 702, 708 (S.D.N.Y. 1978)); *see also Mt. Vernon Fire Ins. Co. v. Tri 3 Bldg. Servs. Inc.*, 1998 WL 729735, *6 (S.D.N.Y. October 16, 1998) ("courts frequently presume that investigative reports prepared by or for an insurer prior to a coverage decision are prepared in the ordinary course of the insurer's business and are not afforded work-product protection"). "The retention of an attorney is one indicia of the anticipation of litigation [, but] it is not dispositive." *U.S. Fid. & Guar. Co.*, at *9. "[A]n insurance company may not insulate itself from discovery by hiring an attorney to conduct ordinary claims investigation." *Id.* Further, "[s]imply because an attorney participated in and supervised the process does not transform investigative documents into work product." *Id.* At 12. *see also SEC v. Credit Bancorp, Ltd.*, 2002 WL 59418, *3 (S.D.N.Y. January 16, 2002) ("for the [attorney-client] privilege to apply, the attorneys involved with the communication must be acting as attorneys").

²⁵ *Weber v. Padvano*, 2003 WL 161340 *4 (S.D.N.Y. January 22, 2003). *cf. U.S. v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) (Work-Product Doctrine will be applied to documents where "in light of the nature of the document and the factual situation in the particular case, the documents can fairly be said to have been prepared or obtained *because of* the prospect of litigation.")

about the project in light of counsel's communication, the privilege might be pierced if the document was not forwarded to assist with the provision of legal advice.

Assuming counsel's communication is properly provided to the consultant, problems may still arise if the consultant shares the communications with individuals in his or her office or sub-consultants. For example, if counsel's correspondence raises issues about design defects, and the consultant shows the correspondence to an in-house or sub-consultant architect whose sole function is to consult on construction issues, asking for the architect's opinion, the communication may lose the veil of privilege. The more prudent course of action would be for the consultant to ask the architect about the design issues without showing him or her counsel's communication.

Where a major project is involved, there is the potential for there to be dozens of these communications in a file. In order to avoid protracted disputes over these types of documents, the surety claims person should consider, where possible, sending separate correspondence to counsel and to its consultant. Where sending separate correspondence is not possible, the Parties should limit who views these communications. For instance, the consultant should designate a few people who will be part of the litigation team (*i.e.*, those who may be expected to testify or assist counsel so that it may provide legal advice). No one outside of the litigation team should have access to these communications. Another precautionary measure to avoid inadvertent disclosure is to indicate on correspondence that it is confidential and prepared in anticipation of litigation. Perhaps the best piece of advice when there is uncertainty about whether the information sought or requested is factual or legal in nature, is to avoid putting thoughts, advice or opinions in writing.

B. Multiple Versions Or Drafts Of Documents

Frequently, the Parties consult with one another when preparing documents in connection with claims. For instance, when a surety is called upon to take over a project, the surety and obligee will at times enter into a takeover agreement. As a general matter, takeover agreements are carefully crafted documents and normally are a collaborative effort between the Parties. Usually, this work is shielded from disclosure by the work product doctrine. However, when the surety claims person, counsel, and the consultant all provide their input, they will likely retain drafts and various versions of the takeover agreement and other documents, which often contain their handwritten notes and "track changes."²⁶

From a litigation standpoint, multiple files containing various drafts/versions of the same document with handwritten notes and track changes may present a challenge. Beyond making the file unnecessarily large, thereby increasing the amount of time and expense to review the file, the drafts may be discoverable.²⁷ Sometimes, previous versions of, or handwritten notes on, documents contain ideas or concepts that are later determined to be

²⁶ Track Changes is a feature in Microsoft Word that displays every change that has been made to a document.

²⁷ The discoverability of the drafts will depend, in large part, on who prepared, who viewed, and the substance of the drafts. See § E.1 above.

detrimental or not constructive to the surety's position. Consequently, if these documents must be produced in litigation, they may cause some real damage to a surety's case.²⁸

In order to minimize costs, possible disputes and disclosing potentially damaging information, we offer the following guidelines. First, we highly recommend that unless litigation has commenced, and the Parties are thereby obligated to maintain all relevant documents, the Parties should not save drafts of documents, or versions with notes and track changes, unless absolutely necessary. Not only will this minimize the amount of documents that need to be reviewed in litigation, but will also reduce the likelihood that the thought processes that went into preparing those documents will be disclosed. Second, the Parties should communicate their comments and suggested revisions to documents by phone or in person and not write notes or implement track changes on a document. Heeding this advice will preclude the possibility of disclosing these comments and suggestions in documentary discovery disclosures.

C. Communications With The Principal

Sometimes, when a claim is first asserted against a surety bond, aside from indemnity issues, the surety's interests are, at times, aligned with its principal's interests. In these situations, the principal and the surety, or their respective counsel, may exchange communications relating to case evaluation or mutually beneficial case strategy. If proper precautions are taken, courts may protect these communications from disclosure because of the so-called "common interest" privilege.²⁹

The common interest exception may be asserted with respect to communications among counsel for different parties if (1) the disclosure is made due to actual or anticipated litigation; (2) for the purposes of furthering a common interest; and (3) the disclosure is made in a manner not inconsistent with maintaining confidentiality against adverse parties.³⁰ It is not necessary for actual litigation to have commenced at the time of the transmittal of information for the privilege to be applicable.³¹ Indeed, communications need not only be among counsel for the clients. Communications between counsel for a party and an individual representative of a party with a common interest are also protected.³²

²⁸ For example, if the previous drafts or notes on the documents contain an issue that the Surety is aware of, but is not known to the obligee, and the documents are produced in litigation, the obligee may thereafter amend its pleading to add a claim for an issue it may have previously overlooked.

²⁹ See e.g., *United States v. McPartlin*, 595 F.2d 1321, 1336-37 (7th Cir. 1978), *cert. denied*, 444 U.S. 833 (1979); *Eisenberg v. Gagnon*, 766 F.2d 770, 787 (3rd Cir. 1985), *cert. denied*, 474 U.S. 946 (1985); *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965); *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964); *Western Fuels Ass'n v. Burlington Northern R.R. Co.*, 102 F.R.D. 201, 203 (D. Wyo. 1984); *In re LTV Secs. Litig.*, 89 F.R.D. 595, 604 (N.D. Tex. 1981); *In re Grand Jury Subpoena*, 406 F. Supp. 381 (S.D.N.Y. 1975); 2 Weinstein's Evidence § 502(b)(06) (1980).

³⁰ *Holland v. Island Creek Corp.*, 885 F.Supp. 4, 6 (D.D.C. 1995); see also *In re Bevill, Bresler & Schulman*, 805 F.2d 120, 126 (3d Cir. 1986).

³¹ *U.S. v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989), *cert. denied*, 502 U.S. 810, 112 S. Ct. 55, 116 L. Ed.2d 31 (1991).

³² *Id.*

Importantly, it is not necessary for every party's interest to be identical for the common interest privilege to apply. Rather, the parties must simply have a "common purpose."³³ Thus, as one court put it:

Whether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.³⁴

This is a significant point. While the principal and surety may share common ground on some issues, they also may take adverse positions to one another as the litigation progresses. For example, the Surety may assert a claim demanding that the principal deposit collateral security pursuant to the indemnity agreement executed by the principal. Moreover, the principal may, at a later date, stop cooperating with the surety or become insolvent.

Of course, when the relationship does break down, it may be difficult to argue that the parties actually shared a common interest. Accordingly, in order to support the assertion of a common interest privilege when a third party demands production of documents relating to communications between the principal and surety, it may be advisable for the surety and its principal to enter into a joint defense agreement. Essentially, a joint defense agreement sets forth the parameters of the surety's and principal's common interests and memorializes the agreement to maintain the confidentiality of their communications. The added benefit is that these agreements are typically enforceable.³⁵ As one commentator has noted:

The parties need not agree in writing to pursue a common interest; the doctrine permits an exchange of confidential information when the parties have clearly and specifically agreed in some manner to pool information for a common goal. Nonetheless, it is certainly prudent practice to execute a written agreement before significant communications are exchanged. This would eliminate any doubt about whether the parties to the discussion were pursuing a common goal with respect to the matters communicated. Without a written agreement, the party's burden of proving that a statement was made in the common interest will undoubtedly be more difficult.³⁶

³³ *U.S. v. McPartlin*, 595 F.2d at 1336; see also *United States v. American Telephone & Telegraph Co.*, 642 F.2d 1285, 1298 (D.C. Cir. 1980)(criticizing earlier opinions that employed a narrow definition of "common interests" and restricted the concept to situations in which the relationship of the parties was similar to that between co-parties in a suit).

³⁴ *In re Grand Jury Subpoenas*, 89-3 and 89-4, John Doe 89-129, 902 F.2d 244, 249 (4th Cir. 1990).

³⁵ *Minebea Co., Ltd. v. Papst*, 228 F.R.D. 13, 16 (D.D.C. 2005).

³⁶ 2 *Stephen A. Saltzburg, et al.*, FEDERAL RULES OF EVIDENCE MANUAL at 501-35-36 (8th ed.2002).

V. THE BASICS OF E-DISCOVERY

A. *Introduction*

Whether we like it or not, technology has changed our industry, like nearly every other industry, in dramatic ways. Two of the most common examples are: 1) how we communicate – both internally with our co-workers and externally with claimants, consultants and counsel; and 2) how we create, revise and maintain business records. Whether we grumble about the impersonal nature of email communication or not, there is no going back. Our worlds, both business and private, are now filled with electronic communications and electronically-created, revised, and maintained documents. Thus, it was only a matter of time before the legal discovery rules caught up, at least part of the way, with this new reality.

B. *What Is ESI?*

Electronically stored information, or ESI, encompasses all forms of electronic data. Any electronic data that is in the litigant's possession, custody, or control must be considered and evaluated as possible discovery material. While most people think immediately of email, there are many other forms of potentially discoverable ESI. Here are some typical examples of ESI:

- 1) email;
- 2) text messages³⁷;
- 3) voicemail messages;
- 4) documents;
- 5) spreadsheets;
- 6) temporary internet files;
- 7) metadata; and
- 8) "deleted" files.

Some of these types of ESI are familiar to all of us; others may be a complete mystery. It is important to be aware of all these different types of ESI as they create an electronic "paper trail" and insight into their author's thought processes and strategies, not something we necessarily want in the hands of an opponent in litigation. To the extent that this electronic "paper trail" contains embarrassing, damaging, or privileged information, it might result in a costly fight over production of such ESI in discovery, even when the actual information has little to no direct relevance to the legal issues in the case. For example, a temporary internet file is saved each time that you load a web page on your computer. While the purpose of such files is to increase the speed of internet browsing by allowing you to open up the same page much faster the next time around, it also creates a record of every internet site that someone has viewed and allows anyone else with access to that computer to view this record.

Metadata is another form of ESI of which many people are unfamiliar. It is information, usually hidden in a document, that provides information about the history of a document. As one court described it, metadata is "information describing the history, tracking, or

³⁷ *In Flagg v. City of Detroit*, 252 F.R.D. 346 (E.D. Mich. 2008), the court determined that text messages constituted ESI under a party's possession, custody, and control even though the communications were maintained by a non-party service provider.

management of an electronic document.”³⁸ Metadata can be very useful information, as it can reveal when a document was created and by whom, what revisions were made, the timing of those revisions, and the author of the revisions. Hidden comments provided by others may also be found in metadata. Courts are just beginning to look at discovery disputes arising over demands that metadata be produced.³⁹ However, an unwitting party may end up producing its metadata without even realizing it, either in a formal discovery or in electronic communications that occur before litigation is even instituted.

We must also be aware that the creation of a document in electronic, as opposed to paper format, may have the effect of keeping the document in existence in perpetuity. Electronic documents “deleted” from a desktop computer may actually be retrievable. Personal computers have areas where so-called “deleted” documents and emails may be stored. Moreover, most sophisticated businesses now have various systems in place for preservation of ESI for disaster recovery purposes. One unintended, and potentially negative, consequence of the widespread use of disaster recovery systems is that they may end up preserving data that the business and its employees sought to destroy.

While we all tend to think of ESI as the documents that we create in our offices, other electronic information, such as that found on the Internet, can also cause headaches in discovery. We have heard the news stories about the increasing number of employers using the Internet to screen prospective employees; however, in this age, we must also anticipate that adverse counsel will mine the Internet in search of information about expected witnesses, including claims representatives, consultants, and experts. The information may include information about other litigation in which the witness has been involved, or more personal information such as that found on blogs or social networking sites. This could result in unpleasant surprises at a witness’s deposition.

C. Why Is E-Discovery Such A Big Deal?

There has been an explosion of articles, books, and seminars on various issues involving e-discovery. A very lucrative cottage industry has sprung up to assist counsel and business organizations facing voluminous and complicated e-discovery requests.⁴⁰ You may think that e-discovery issues are a headache that only outside counsel has to deal with, but there are many reasons why everyone involved in surety and fidelity claims has to be aware of e-discovery issues. Here are some of the reasons why:

³⁸ *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 646 (D. Kan. 2005) (holding that the employer defendant in an age discrimination case had failed to show cause why it should not be required to produce electronic spreadsheets in the manner that they were maintained after employer had originally produced the spreadsheets absent metadata and with certain data locked from review).

³⁹ See, e.g. *Kentucky Speedway, LLC v. National Ass’n. of Stock Car Auto Racing, Inc.*, No. 05-138-WOB, 2006 WL 5097354 (E.D. Ky. Dec. 18, 2006) (holding that production of metadata for all documents produced was not warranted absent a showing of particularized need); *FSP Stallion 1, LLC v. Luce*, No. 08-CV-01155, 2009 WL 2177107 (D. Nev. July 21, 2009) (metadata is discoverable if relevant to a claim or defense).

⁴⁰ These outside vendors have become necessary as the IT departments of many companies lack the time, resources, and understanding of the issues to effectively deal with e-discovery in-house. See Michael A. Stover, Curtis E. Falany, and Kim McNaughton, *How To Minimize Unnecessary and Misleading Discovery Disclosures --- Documents and Depositions (Fundamentals of Electronic Discovery and the New Federal Rules)* (unpublished paper submitted at the Eighteenth Annual Northeast Surety and Fidelity Claims Conference in September 2007).

1. E-Discovery Now Takes Place In Nearly Every Case

Not too many years ago, it was a relatively easy thing to ignore the concept of e-discovery in surety and fidelity cases and produce all discovery documents in paper format, including printed copies of email. Most opposing counsel did not object because it also saved them the hassle and expense of producing ESI as well – a “don’t ask for, don’t produce” understanding that did (and still does) make a lot of economic sense in small, relatively simple litigation matters. Amendments to the Federal Rules implemented in December 2006 now force counsel to confront the issue of e-discovery in federal court litigation whether they want to or not. Amended Rule 34, addressing what used to be referred to as the production of documents, now specifically provides that a party can request electronically stored information.⁴¹ Amended Rule 26(a)(1)(B) requires a party, in its initial disclosures, to provide to all other parties a copy or description of “electronically stored information” that may be used to support its claims or defenses in the case. Many states have also followed the lead and adopted amended rules similar to the federal court’s new rules. Because of the new requirements, outside counsel needs to know, early in a case, specific information about a client’s computer systems, including how information is stored, what relevant information is accessible, what ESI retention policies the client has, and what efforts have been made to preserve relevant ESI. Counsel should also find out what ESI has already been conveyed to the opposing party prior to litigation. Obtaining all the necessary information necessarily require in-depth communications between outside counsel and various in-house personnel, frequently including IT personnel.

Even before the new federal rules took effect, there was an explosion of e-discovery disputes resulting in reported court decisions and though the issues have evolved, the disputes are not going away any time soon. Sureties have not been immune from the e-discovery dispute fray. In *Goodbys Creek, LLC v. Arch Ins. Co.*,⁴² an owner sued a performance bond surety for, among other things, breach of the covenant of good faith and fair dealing. The owner sought discovery of the surety’s underwriting files, all communications between the surety and the principal, and all documents related to the surety’s knowledge of the principal’s financial condition. The surety produced some of the requested documents and produced them as electronic TIFF images. The owner objected and filed a discovery motion, arguing that the documents were not searchable and should have been produced in their native format. Although the court denied some of the owner’s document requests as overbroad, it did order the surety to produce the underwriting file and other documents in their native format or provide the owner with software to allow the owner to search the TIFF images.⁴³

2. E-Discovery Drives Up Litigation Costs

There can be no question that the addition of ESI to discovery production has and will continue to increase the costs of litigation. First, the technology issues usually require IT personnel to become involved in retrieving the relevant ESI and putting the ESI in

⁴¹ Fed. R. Civ. P. 34(a)(1)(A).

⁴² 2008 WL 4279693 (M.D. Fla. September 15, 2008).

⁴³ 2008 WL 4279693 *3.

the proper format for production. The sheer volume of ESI produced in discovery, and the oftentimes haphazard way that ESI is stored, requires more counsel time devoted to discovery review and related issues. This is true for producing one's own discovery and reviewing discovery provided by an opponent. The prevalence of ESI has also provided other means of discovery abuse. As one court recently noted, the production of ESI has generated instances where unscrupulous lawyers have participated in a "data dump" in an effort to bury relevant, potentially damaging documents.⁴⁴

However, the new rules at least recognize that production of ESI can cause a significant, increased expense burden. Amended Rule 26(b)(2) allows a party to refuse to produce ESI that is not "reasonably accessible."⁴⁵ If the parties cannot come to an agreement on the production of information that the producing party considers inaccessible, a discovery motion usually ensues (which also generates its own additional litigation costs), and ultimately the court is forced to determine whether the requesting party's need for the discovery outweighs the burden and expense on the producing party.

The increased volume of discovery production of ESI, particularly ESI produced in native format with metadata, also increases the inevitability of inadvertent disclosures of confidential or privileged materials. There is simply too much information being produced that cannot all be manually reviewed. This danger also increases litigation costs as prudent counsel in large ESI cases are forced to enter into protective orders, negotiated with opposing counsel filed with and approved by the court, that contain so-called "claw back" agreements to protect against the consequences of such inadvertent disclosures.⁴⁶

3. Failure To Properly Preserve And Produce ESI Can Have Potentially Dire Consequences To Your Case

Along with the duty to produce relevant ESI is the duty to preserve relevant ESI that might otherwise be destroyed innocently, such as through routine computer operations or company document destruction policies, or not so innocently, such as through a deliberate effort to hide damaging evidence. A party has a duty to preserve evidence, including ESI, "when the party has notice that the evidence is relevant to litigation or when a party should have known the evidence may be relevant to future litigation."⁴⁷ In-house claims

⁴⁴ *Reedhycalog UK, Ltd. v. United Diamond Drilling Services, Inc.*, 2008 U.S. Dist. Lexis 93177 (E.D. Tex. October 3, 2008)(district court rejected the defendant's production of 750 GB of data in response to an interrogatory request that included such items as baby photographs, audio folders, and pornography).

⁴⁵ In one of the earliest and probably most famous cases involving e-discovery, *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) ("Zubulake I"), the court had to reach a determination as to what amount of "inaccessible" electronic data would be discoverable, and which party would bear the cost of production, ultimately developing a seven-factor test widely adopted in other jurisdictions for evaluation of whether the costs should be shifted to the requesting party.

⁴⁶ See *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008) (holding that the defendants had waived the attorney client privilege as to 165 privileged documents that were inadvertently produced to the plaintiff, citing the defendant's failure to take reasonable precaution to prevent the disclosure, including defendant's failure to pursue a "claw back" agreement).

⁴⁷ *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) ("Zubulake IV") (quoting *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001)); see also *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) ("The duty to preserve material evidence arises not only during litigation but also extends to

representatives must be aware of this duty to preserve because it may arise before outside counsel is even engaged. Once the duty to preserve arises, a party must “suspend its routine document and retention/destruction policy and to put in place a litigation hold.”⁴⁸ A company under an obligation to preserve relevant documents, electronic or otherwise, “cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy.”⁴⁹ The proper means to preserve relevant ESI is through a “litigation hold” communication to all key personnel within the organization and, potentially, to outside parties such as accountants and consultants.⁵⁰

The failure to properly preserve ESI can have significant consequences. For example, in *Mosaid Technologies Inc. v. Samsung Electronics Co., Ltd.*,⁵¹ the court affirmed the magistrate judge’s allowance of an adverse inference instruction to be given to the jury as well as an award of monetary sanctions against Samsung after it allowed emails to be destroyed that it knew could be relevant, stating:

The duty to preserve potentially relevant evidence is an affirmative obligation that a party may not shirk. When the duty to preserve is triggered, it cannot be a defense to a spoliation claim that the party inadvertently failed to place a “litigation hold” or “off switch” on its document retention policy to stop the destruction of that evidence. As discoverable information becomes progressively digital, e-discovery, including e-mails and other electronic documents, plays a larger, more crucial role in litigation.⁵²

In addition to adverse inference instructions to a jury, other sanctions for spoliation of evidence can include dismissal of an affirmative claim or granting of default judgment against the party, suppression of evidence, sanctions, and payment of an opponent’s costs and attorneys’ fees.

Similarly, a less than good faith effort to locate and produce all potentially relevant ESI and produce it in proper format can have similar costly consequences. For example, in *L.H. v. Schwarzenegger*,⁵³ the court awarded sanctions of both fees and costs arising from defendants’ delays in producing discovery responses and for the production of information from databases that had been converted to PDFs, which the court found to be a violation of Federal Rule 34 because PDFs were not a “reasonably usable form.” In proper

that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation”); *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).

⁴⁸ *Zubulake IV*, 220 F.R.D. at 218.

⁴⁹ *Lewy v. Remington Arms Co.*, 8836 F.2d 1104, 1112 (8th Cir. 1988).

⁵⁰ For more information on what should be contained in a litigation hold letter, see Michael A. Stover, Curtis E. Falany, and Kim McNaughton, *How To Minimize Unnecessary and Misleading Discovery Disclosures --- Documents and Depositions (Fundamentals of Electronic Discovery and the New Federal Rules)* (unpublished paper submitted at the Eighteenth Annual Northeast Surety and Fidelity Claims Conference in September 2007).

⁵¹ 348 F. Supp. 2d 332 (D.N.J. 2004).

⁵² *Id.* at 339.

⁵³ 2008 WL 2073958 (E.D. Cal. May 14, 2008).

circumstances, a court will require a party to reproduce its discovery responses in a different format, a very costly endeavor.

D. A Practical Guide For Cost-Effective Participation In E-Discovery

1. Educate Yourself About Your Company's Computer Systems

In order to protect your company from potentially catastrophic sanctions in litigation for failure to preserve and properly produce relevant ESI, you must become acquainted with your company's IT staff and knowledgeable about your company's computer systems and record retention.

2. Implement And Enforce Record Management/Record Destruction Policies

Take steps to make sure that your company has an adequate policy in place for storing ESI and destroying ESI as part of a routine process. There is no reason to create undue work and expense in litigation by retaining ESI longer than any applicable legal requirements for such retention. There is no sanction for destroying email and other electronically-stored documents on a routine basis as long as there was no anticipation that the ESI would be relevant in existing or reasonably anticipated litigation.

3. Timely Implement "Litigation Hold" Communications And Renew/Amend Such Communications As Circumstances Change

While it is imperative that the proper "litigation hold" communication be timely conveyed to all key personnel (including IT personnel), it is not sufficient to send out a "litigation hold" communication and then consider the task completed. New facts emerge as litigation progresses, which may require additional steps to be taken, such as additional types of ESI to be preserved or additional "key" personnel covered by the preservation hold. Also, company personnel turnover and newer employees may not be aware that a litigation hold is in place. In complicated matters, it is worth considering designating specific personnel (inside personnel, IT staff members) who are responsible for oversight of the prompt implementation of a litigation hold and follow up to ensure proper compliance with all discovery obligations.

4. Implement And Enforce Computer Use Policies

In order to make the review of ESI easier, the company should implement and enforce computer use policies such that all employees save data in the same manner and all data is maintained in the same manner. Discourage employees from retaining ESI on personal computers, home computers, or mobile devices in favor of saving all data to a network.

Any computer use policy should also prohibit employees from using company computers and other electronic devices for personal use. Employees should be reminded on a periodic basis that litigation or a regulatory action could result in their e-mails and other data on their company computers and electronic devices being produced in discovery.

5. Be Prepared To Work Closely With Outside Counsel To Avoid Running Afoul Of New E-Discovery Requirements

Every day, more decisions come out of the courts involving costly sanctions for violations of preservation and production requirements involving e-discovery. Frequently, there is media coverage of significant e-discovery incidents such as the extensive deposition examination of Microsoft's Bill Gates about the contents of various emails or the Detroit mayor's inappropriate text messages resulting in his resignation and criminal prosecution. The stakes have never been higher and ESI is seen as a great new opportunity for attorneys to find that elusive "smoking gun." In this context, it is more important for in-house claims personnel and outside counsel to work together closely to ensure that everyone is sufficiently familiar with the company's IT system, that the necessary evidence preservation communications are in place, that adequate efforts are being made to locate and produce all potentially relevant ESI, that ESI is produced in a non-objectionable format, and that inadvertent disclosures of confidential and privileged communications are kept to a minimum.

VI. CONCLUSION

Discovery is an inevitable and increasingly expensive component of litigation. Like it or not, e-discovery is here to stay and drive the costs of discovery even higher. Mechanisms must be put in place not only to avoid unnecessary and excessive discovery costs, but to avoid adverse judgments resulting from discovery sanctions rather than substantive issues. While it is impossible to avoid all discovery costs, with proper planning and organization, and with the thought of potential future litigation always in mind, mitigation of these costs is possible.

Biography of Cynthia E. Rodgers-Waire

Cynthia E. Rodgers-Waire is a partner with the law firm of Whiteford, Taylor & Preston, L.L.P. She received her B.A. from the University of Virginia in 1989 and her J.D., with honors, from the University of Maryland School of Law in 1992. After graduating from law school, Ms. Rodgers-Waire served as a law clerk to the Honorable Hilary D. Caplan on the Circuit Court for Baltimore City. Ms. Rodgers-Waire joined Whiteford, Taylor & Preston in 1997. She is admitted to the Bars of the State of Maryland, the District of Columbia, the Court of Federal Claims, and the United States District Courts for the District of Maryland and the District of Columbia. Ms. Rodgers-Waire practices in the areas of surety and fidelity law, construction law, bankruptcy, and general litigation. She is a former Vice-Chair of the ABA/TIPS Fidelity and Surety Law Committee and is a member of the ABA Forum on the Construction Industry.

Biography of Howard K. Uniman

Howard K. Uniman is Counsel to the firm of Wolff & Samson PC in West Orange, New Jersey, practicing primarily in the areas of fidelity and surety law and construction litigation. He received his Bachelor of Science Degree in Economics from the Wharton School of Business at the University of Pennsylvania in 1977, and a Juris Doctor Degree in 1985 from Seton Hall University School of Law where he served as the Associate Editor for the Seton Hall Law Review and authored several articles. Additionally while at Seton Hall, Mr. Uniman served as Director of the Juvenile Justice Clinic, Public Defenders Unit. After graduating from law school, Mr. Uniman served as a law clerk to the Honorable Herman L. Breikopf, Assignment Judge, Superior Court of New Jersey, Middlesex County, 1985-1986. Mr. Uniman joined Wolff & Samson in 1993 and is a member of the New Jersey State Bar Association and the Fidelity & Surety Law Committee of the Tort and Insurance Practice Section of the American Bar Association. He is admitted to practice in the States of New Jersey and Pennsylvania, the United States District Court, District of New Jersey and the U.S. Court of Appeals, Third Circuit. Mr. Uniman presented a paper at the 2006 Northeast Surety & Fidelity Claims Conference concerning the "The Takeover Agreement Between The Obligee And The Surety".

Biography of Robert O'Brien

Bob O'Brien is Assistant Vice President, Bond Claims for Liberty Agency Underwriters, a division of Liberty Mutual Surety and recently held this position with its predecessor, The Ohio Casualty Insurance Company, with whom he has been employed since 1987. Prior to his position as AVP, Mr. O'Brien served as Bond Claim Supervisor / Senior Bond Claim Analyst for Ohio Casualty. He graduated with a Bachelor of Science Degree in Business Administration in 1982 from the University of Florida. After graduation, Mr. O'Brien began his career in the insurance industry with GAB Business Serv. and Cramer, Johnson & Wiggins as an Independent Adjuster of property & casualty insurance claims for various insurers in South Florida. He has earned the Associate in Fidelity & Surety Bonding and Associate in Service designations.

Biography of Frank J. Tanzola

Frank J. Tanzola is Senior Vice President & Chief Claims Officer for International Fidelity Insurance Company, with whom he's been employed since 1991. Mr. Tanzola received a Bachelor of Arts degree in English from Lehigh University, Phi Beta Kappa, in 1983 and his J.D. from Georgetown University Law Center in 1986. After law school and before joining International Fidelity insurance Company, Mr. Tanzola was employed by the New Jersey law firms of Ribis, Graham & Curtin and Sills, Cummis et al. Mr. Tanzola is a member of the New Jersey State Bar Association and former Vice Chair of the NJSBA Fidelity and Surety Law Section. He is also a member and former Vice Chair of the Fidelity & Surety Law Committee of the Tort and Insurance Practice Section of the American Bar Association. Mr. Tanzola is admitted to practice in New Jersey and the United States District Court for the District of New Jersey.

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