State E-Discovery Rulemaking after the 2006 Federal Amendments: An Update

(as of September 2, 2009)

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Introduction

Many states have adopted state-wide provisions to address some of the unique procedural issues involved in e-discovery. In addition, a number of "commercial" or "business" courts within states, as well as local courts, have adopted specialized rules on the topic.[2]

As of September 2009, twenty-three states have adopted statewide e-discovery procedural rules which mirror or reflect the 2006 E-Discovery Amendments to the Federal Rules of Civil Procedure ("2006 Amendments").[3] In addition, several states have adopted, typically as a separate measure, an analog to the Federal Evidence Rule 502 dealing with waiver of the attorney-client privilege or work product protection.[4]

Recent Action

In June, 2009, California adopted comprehensive e-discovery legislation based on an earlier version vetoed during the previous legislative cycle.[5] While largely based on the 2006 Federal Amendments, it contains a

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[2] A comprehensive study of the e-discovery measures adopted by local state or federal courts or by specialized business courts is beyond the scope of this Paper. One of the stated reasons for adoption of the Federal Amendments was to forestall increasing numbers of diverse local rules. *See* Report of May 27, 2005, as revised July 25, 2005 (the "Advisory Committee Report), at 23, *available at http:// www.uscourts.gov*/rules/Reports/ST09-2005.pdf ("[w]ithout national rules adequate to address the issues raised by electronic discovery, a patchwork of rules and requirements is likely to develop.").

[3] The twenty three states which have enacted some form of general provisions on a statewide basis are, in alphabetical order: Alaska, Arizona, California, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, North Dakota, Ohio, Tennessee, Texas, Utah and Virginia.

[4] *See, e.g.*, Iowa rule 5.502, effective June 1, 2009, available at http://www.iowacourts.gov/wfData/files/CourtRules/40209RptreIREvid5_502,5_615,5_803,4&7.pdf; compare

[5] As signed, the final act can be found at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-0050/ab_5_bill_20090629_chaptered.pdf For an analysis of the terms of the final bill, see David M.

number of unique features applicable to California procedure. The California legislative action was followed closely by adoption of amendments to the California civil rules governing case management conferences.[6]

Pending Activity

An e-discovery legislative proposal has been introduced in the New York General Assembly,[7] where it is stalled. However, the New York lower and commercial courts have *already* adopted, via administrative action, a number of rule changes designed to require early discussion of e-discovery issues.[8] This dichotomy – stalemate at the state level, but specialized action at the local or specialized level – is a phenomena not confined to New York.

The Wisconsin Supreme Court has been petitioned to adopted e-discovery amendments,[9] and it is unknown what the timing or possible public input is on the topic.

The remaining states and the District of Columbia continue to hesitate, in some cases with obvious skepticism about the need to act. Some appear to be awaiting the accumulation of practical experience under the 2006 Amendments before acting, while others appear to reject the idea that any need exists. The former Dean of the Willamette University College of Law has described the decision by the Oregon Council on Court Procedures to avoid consideration of e-discovery amendments as "at the very least - questionable."[10]

Hickey and Veronica Harris, *California Rules to Amend Inaccessible ESI,* The Recorder, March 27, 2009, at http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202429426048.

[6] Cal. Rules of Court, Rule 3.724.

[7] A copy of Assembly Bill A06000 is available at http://assembly.state.ny.us/leg/?bn=A06000&sh=t

[8] The Chief Administrative Judge has recently adopted a uniform preliminary conference rule for Supreme and County Courts (§202.12) which was effective immediately. *See* Administrative Order (undated), available at http://www.courts.state.ny.us/rules/Trialcourts/202-12_amend2.pdf. In addition, the Commercial Division of Nassau county has issued enhanced preliminary conference rules which supplement the state-wide e-discovery provisions already applicable to all commercial courts (§202.70, Rule 8(b). *See* Vesselin Mitev, *New E-Discovery Rules Help County Courts Manage Cases*, New York Law Journal, February 19, 2009 (provides details for Rule 8(b)), available at http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202428391982.

[9] *See* http://www.rcalaw.com/E-Discovery/Document-Control-Blog/Wisconsin-Judicial-Counsel-Proposes-E-Discovery-Amendments-to-Rules-of-Civil-Procedure.php

[10] Leroy J. Tornquist, *A Last vestige of Oregon's Wild West: Oregon's Lawless Approach to Electronically Stored Information,* 45 Willamette L. Rev. 161, 168 (Winter, 2008).

Perhaps the most balanced assessment of the rulemaking effort was made by the Special Reporter to the Federal Rules Advisory Committee, Richard Marcus, who responded to the question "[a]re [e-discovery] rules better [than inaction]?"[11] While conceding that there was "much force to the argument" that unique e-discovery rules were not needed, he concluded that "it [is] implausible that doing e-discovery without rules is really superior to having rules to provide guidance."[12]

Summary

The state enactments to date, while largely based on the 2006 Amendments, contain a number of innovations and some reflect the fact that certain federal requirements, such as mandatory "meet and confer" requirements, do not exist in state practice.

Despite these differences, a remarkable degree of uniformity in result exists between state and federal decisions on the same topic. A recent example is a Texas Supreme Court decision where the court, relying heavily on federal case law, reached a result under the unique Texas litigation which was consistent with the mainstream federal authorities.[13]

Generally speaking, the states which have acted can be classified into three broad groups:

- Those which adopted most of the provisions of the 2006 Amendments (Alaska, Arizona, California, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Maryland, Montana, New Jersey, North Dakota, Ohio, Utah and Virginia),[14]

- Those which have utilized concepts from the 2006 Amendments to make limited changes (Arkansas, Louisiana,

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[11] Richard L. Marcus, *E-Discovery Beyond the Federal Rules*, 37 U. Balt. L. Rev. 321, 340 (Spring 2008).
[12] Professor Marcus also addressed the issue of whether the rules are "so bad that they are worse than no rules at all." Ultimately, he rejected this possibility because of the "wide spread emulation of provisions of the Federal Rules Amendments in state court rules dealing with e-discovery." *Id*.
[13] *See In re Weekly Homes, LP,* 2009 Tex. LEXIS 630 (S.C. Tex. Aug. 28, 2009).
[14] The California provisions are sufficiently similar to the Federal Rules so that they fall into this category. *See* California Set to Enact Ediscovery Law (March, 2009), available at http://www.dlapiper.com/california-set-to-enact-e-discovery-law/.

Nebraska, New Hampshire and New York [Commercial and Supreme/County courts]),[15]

- Those which adopted the approach pioneered Texas which preceded the 2006 Federal Amendments (Idaho, Mississippi and Texas),[16] and

- Tennessee.[17]

Individual state summaries, arranged alphabetically are contained in the Appendix to this paper.

Analysis of Provisions

Almost all states[18] have adopted the Federal approach of describing "electronically stored information" (sometimes referred to as "ESI") as a category of discoverable material distinct from "documents" or "tangible things." The ability to seek to "test or sample" to secure such information, a new feature of the 2006 Amendments, is also widely recognized.[19]

However, since only a few states adopted the early disclosure requirements of FED. R. CIV. P. 26(a) before the 2006 Amendments, only few states were in a position to amend the equivalent of that rule to cover ESI. Thus, only Alaska, Arizona[20] and Utah have mandated early disclosures about ESI in the absence of discovery requests.

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[15] The Proposal of the Wisconsin Judicial Council (filed on April 23, 2009) would create e-discovery amendments borrowing from a number of key Federal Rule amendments. *See* http://www.rcalaw.com/E-Discovery/Document-Control-Blog/Wisconsin-Judicial-Counsel-Proposes-E-Discovery-Amendments-to-Rules-of-Civil-Procedure.php

[16] Texas permits objection to production of electronic data that is "nor reasonably available" and mandates payment of any extraordinary steps required, should its production be ordered. Idaho and Mississippi have adopted similar provisions with the payment discretionary with the court.

[17] While essentially based on the Federal Amendments, the Tennessee provisions blend concepts derived from the Conference of Chief Justices *Guidelines* with a variety of sources, such as *Zubulake* cost-shifting factors, the Uniform Rules, etc. with detailed suggestions for courts by the Advisory Commission along with excerpts from the Committee Notes to the 2006 Amendments.

[18] New Jersey defines electronically stored information as a type of "document," Idaho speaks of "data" and Mississippi and Texas refer to "data or "electronic or magnetic data."

[19] Louisiana allows access for good cause where a party believes production is not in compliance and includes a detailed Comment on the limits of "direct access," citing *In re Ford Motor,* 345 F. 3d 1315 (11th Cir. 2003).

[20] *See* Schaffer and Austin, *New Arizona E-Discovery Rules*, 44-FED Ariz. Att'y 24 (February 2008)(Arizona disclosure obligations are "far broader" than those of the federal rule).

Similarly, most states have not adopted the mandatory "meet and confer" requirements of FED. R. CIV. P. 26(f). Thus, only Alaska,[21] New Hampshire and Utah explicitly require an early conference on ESI discovery.[22]

However, given the recognition that e-discovery disputes can be reduced by early discussion of contentious issues, many states encourage discussions at the discretion of the court[23] or as part of a routine pretrial[24] or case management conference.[25]

As is the case with the 2006 Amendments, none of the states have defined the trigger or extent of the preservation obligations, which are generally treated as part of the common law.[26] Michigan provides, however, that "[a] party has the same obligation to preserve electronically stored information as it does for all other types of information."[27] California cautions that its safe harbor provisions "shall not be construed to alter any obligation to preserve discoverable information."

All states but Alaska and New Hampshire have included provisions essentially identical to FED. R. CIV. P. 34(b)[28] requiring production, absent agreement or a court order, in either the form in which the information is

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[21] Alaska refers only to disclosure or discovery of ESI but does not mention preservation issues.
[22] New Hampshire requires parties to meet to discuss "the need for and the extent of any holds" to prevent the destruction of electronic information.
[23] Virginia, for example, allows a court "in its discretion" to order counsel to appear before it to discuss, *inter alia*, "preservation of potentially discoverable information, including electronically stored information and information that may be located in sources that are believed not reasonably accessible because to [sic] undue burden or cost."
[24] Utah added "preservation" as one of the topics which must be included in a discovery plan presented to the court. Minnesota and Iowa envision a "discovery" conference about electronically stored information and mention form of production and privilege agreements. Montana does the same, although the listed topics do not include claims of privilege.
[25] A "case management" conference may be held in New Jersey to "address issues relating to discovery of electronically stored information."
[26] *See* Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments,* 13 Rich. J.L. & Tech. 9 (2007).
[27] The Staff Comments to the Michigan provision note that "good faith" may be shown by an "attempt" to preserve information as part of a "'litigation hold.'" The proposed California legislation includes, as part of the "safe harbor" provisions incorporated in several amended statutes, a reminder that "[t]his subdivision shall not be construed to alter any obligation to preserve discoverable information." *See, e.g.,* Section 2031.060(i)(2), Assembly Bill No. 5 (December, 2008).
[28] *See* FED. R. CIV. P. 34(b)(E)(ii)(as renumbered in 2007)("If a request does not specify a form . . . a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms").

ordinarily maintained or in another reasonably usable form.[29] Alaska mandates production in the form or forms in which ESI is ordinarily maintained unless the form is not reasonably usable.

Most states also provide a mechanism for claiming and retrieving inadvertently produced privileged information in documents or electronically stored information.[30] Arkansas,[31] Louisiana, and Maryland include rules governing the substantive issue of waiver under those circumstances.[32]

Similarly, except for Nebraska, Mississippi, Texas and Idaho[33] all states have adopted[34] the "two-tiered" limitation[35] barring the necessity of production from sources which are identified as inaccessible because of "undue burden or cost," absent a court order issued for good cause.[36] Utah has enhanced the identification requirement by mandating that a party must "describe[e] the source, the nature and extent of the burden, the nature of the information not provided and any other information that will enable other parties [seeking discovery] to assess the claim."[37]

The California enactment does not include a presumption against production from inaccessible sources. Instead, the producing party must affirmatively object or seek a protective order when the existence of inaccessibility is sought to be used as a basis for non-production.[38]

All states except Texas[39] have resisted mandatory cost-shifting of extraordinary expenses relating to production from inaccessible sources.

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[29] Virginia requires that production in the form in which ESI is maintained need be made only "if it is reasonably useable in such form or forms."
[30] The Ohio Staff Notes refer to the provision as a "clawback" provision.
[31] Arkansas included a provision acknowledging the validity of selective waiver to governmental agency, a provision dropped from the comparable Federal Evidence Rule 502.
[32] For a current summary, see Note, *Look Before You Leap: A Guide to the Law of Inadvertent Disclosure of Privileged Information in the Era of E-Discovery,* 93 Iowa L. Rev. 627 (February, 2008).
[33] Mississippi, Texas and Idaho frame the distinction in terms of whether the information is "reasonably available to the responding party in its ordinary course of business."
[34] Louisiana includes the limitation in a Comment.
[35] Thomas Y. Allman, *The "Two-Tiered" Approach to E-Discovery: Has Rule 26(b)(2)(B) Fulfilled Its Promise?*, 14 RICH J. L. & TECH. 7 (2008).
[36] Maryland substituted direct linkage to the proportionality standard for the "good cause" standard.
[37] *See* http://www.utcourts.gov/resources/rules/urcp/
[38] *See* David M. Hickey and Veronica Harris, *California Rules to Amend Inaccessible ESI,* The Recorder, March 27, 2009, at http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202429426048.
[39] *See* Texas Civ. Proc. Rule 196.4 (mandating shifting of extraordinary costs associated with production).

Most states provide, as does FED. R. CIV. P. 26(b)(2)(B),[40] that a court may "specify conditions for the discovery," which is understood to include cost-shifting. Utah explicitly provides that "the court may specify conditions for the discovery, including allocation of the reasonable costs thereof."

The "safe harbor" provisions of FED. R. CIV. P. 37(e) have been adopted, with some minor variations, by Alaska, Arizona, California, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Montana, New Jersey, North Dakota, Ohio[41] and Utah.[42] The Maine Advisory Committee Note defines "routine" as meaning that "the operation [must] be in the ordinary course of business." California extends the prohibition to "any attorney of a party" who has failed to provide the required information.[43]

The Next Wave

Despite these rulemaking efforts at the Federal and State levels, the single greatest problem with e-discovery - excessive costs – continues to prompt concern. The Economist has estimated that e-discovery may have increased the costs of litigation in the Federal Courts by as much as 25%.[44] The Supreme Court noted in *Bell Atlantic Corporation v. Twombly*[45] that "the threat of discovery expense [could] push cost-conscious defendants to settle even anemic cases before reaching those proceedings."[46]

A fundamental paradigm shift is seen as crucial to resolution. As the Hon. Lee Rosenthal, Chair of the Standing Committee of the Judicial Conference has recently noted, "[l]itigation habits and customs learned in the days of paper must be revisited and revised. The culture of bench and bar must adjust."[47]

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[40] *See* Committee Note, Rule 26 (b)(2)(2006)("The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible.").
[41] Ohio adds five "factors" for a court to consider in deciding whether to impose sanctions [despite] the rule, including "whether and when any obligation to preserve the information was triggered."
[42] Utah adopted Rule 37(e) but adds that "nothing in this rule limits the inherent power of the court" to act if a party "destroys, conceals, alters, tampers with or fails to preserve: information "in violation of a duty."
[43] FED. R. CIV. P. 37(e) only explicitly bars sanctions "on a party."
[44] May, 2007.
[45] 550 U.S. 544, 127 Sup.Ct. 1955 (2007)
[46] 127 Sup. Ct. at 1967.
[47] Foreword, PLI *Electronic Discovery Deskbook,* p. xxxv (2009)(Litigation Law Library Series)(emphasizing the need to conduct electronic discovery so that it is proportionate to the reasonable needs of each case).

One evolving answer is to make better use of the tools which are at hand such as the opportunity to exchange information. As noted in *William A. Gross Construction Associates v. Am. Mfgrs. Mutual Insur. Company*,[48] "the best solution in the entire area of electronic discovery is cooperation among counsel."[49]

However, to some, the problem involves much more than exhorting counsel to cooperate with each other. The American College of Trial Lawyers (ACTL), in a report issued in conjunction with the Institute for the Advancement of American Legal System (AALS),[50] concluded that state and federal rulemaking has "accomplished little or nothing"[51] and has recommended a fundamental shift to "limited discovery proportionately tied to the claims actually at issue, after which there will be no more."[52]

Proposals to revise the Civil Rules of Procedure along these lines have already been prepared and submitted for consideration to the Utah Supreme Court Advisory Committee on Rules of Civil Procedure.[53]

It remains to be seen, therefore, if the paradigm shift anticipated by Judge Rosenthal will produce enough positive results in state and federal litigation to reduce the excessive costs of discovery. If not, a second wave of state and federal rulemaking may well be necessary. This topic, among others, will be addressed at a Conference to held by the Standing Committee of the Judicial Conference at Duke Law School in May, 2010.

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[48] 256 F.R.D. 134, 136 (March 19, 2009)(Peck, J.)(endorsing the Sedona Conference Cooperation Proclamation); *see also* Jonathan Redgrave, *Cooperation, Discovery, and translucency*, 56-May Fed. Law. 6 (2009)(noting that six separate decisions have endorsed and cited the Proclamation).

[49] *Nelson v. Farm, Inc.*, 2009 WL 939123 at *2 (D. Kan. April 6, 2009)(Waxse, J.)(courts look at quality as well as the contacts among counsel in evaluating whether moving party has satisfied its duty to confer).

[50] See Final Report (March 2009), available at http://www.ediscoverylaw.com/2009/03/articles/news-updates/american-college-of-trial-lawyers-releases-final-report-addressing-discovery-and-issues-impacting-discovery-encourages-public-comment-and-debate/.

[51] Final Report, at 10.

[52] *Id.*

[53] A copy of the "Simplified Civil Procedures" was submitted for discussion in anticipation of the May 27, 2009 Meetings. See http://www.utcourts.gov/committees/civproc/materials/2009-03-25.pdf.

APPENDIX

1. **Alaska**. The Alaska Supreme Court has adopted comprehensive e-discovery rule amendments which became effective on April 15, 2009. They include requirements of early disclosure and meetings to discuss ESI discovery (but not preservation) prior to a scheduling conference. *See* http://www.state.ak.us/courts/sco/sco1682leg.pdf.

2. **Arizona.** The Arizona Supreme Court adopted a comprehensive set of e-discovery rules which became effective on January 1, 2008. *See* http://www.supreme.state.az.us/rules/ramd_pdf/r-06-0034.pdf. Unlike other states, the amended Arizona Rules require early disclosure of electronically stored information and explicitly authorize a court to enter pretrial orders requiring measures to preserve documents and ESI. *See* Schaffer and Austin, *New Arizona E-Discovery Rules*, 44-FED Ariz. Att'y 24 (February 2008)(discussing implications of fact that Arizona disclosure obligations are "far broader" than federal rule). Arizona has also provided modifications to its Family Court procedures to accommodate electronically stored information. Effective January 1, 2009, the Arizona Supreme Court explicitly amended its Rules of Faimily Law Procedure to conform to the e-discovey rules previously adopted for civil proceedings. See http://www.supreme.state.az.us/rules/2008RulesA/R-07-0010.pdf

3. **Arkansas.** In January, 2008, the Arkansas Supreme Court adopted a rule allowing a presumptive claim of inadvertent production of privilege and work product information. A copy of the text is available at http://courts.arkansas.gov/rules/rules_civ_procedure/v.cfm. Separately, Arkansas also adopted Evidence Rule 502(f) including provisions holding that selective disclosure to the governmental does not operate as a waiver. http://courts.arkansas.gov/rules/rules_of_evidence/article5/index.cfm#2. *See* R. Ryan Younger, *Recent Developments*, 61 Ark. L. Rev. 187 (2008). On March 9, 2009, the Supreme Court issued a proposed rule for public comment, which would apply if ordered or if parties agreed, embodying most aspects of the Federal Amendments. Comments on the Rule are due by May 15, 2009. A copy of proposed Rule 26.1 is available at http://courts.arkansas.gov/court_opinions/sc/2009a/20090305/published/inre_Rule26.1.pdf

4. **California.** The California Legislature has adopted and the Governor has signed comprehensive e-discovery amendments to the Code of Civil Procedure based on provisions originally recommended in an April, 2008 Report prepared by the California Judicial Council, found at http://www.courtinfo.ca.gov/jc/documents/reports/042508item4.pdf. The legislation was originally vetoed in September, 2008 as part of a budget disputes but reintroduced in December, 2008 and passed and signed in June, 2009 as an emergency measure to take effect immediately. The legislation differs in a number of respects from the Federal Amendments, including the fact that it does not explicitly acknowledge that no duty exists to produce information from an inaccessible source. See the analysis at http://editorial.incisivemedia.com/c/143hrFEhZU5vA7WGB. The safe harbor provisions mirror Rule 37(e) but add that they apply to attorneys as well as parties and are not to be "construed to alter any obligation to preserve discoverable information." For the text of the final bill, see http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-0050/ab_5_bill_20081201_introduced.pdf. In August, 2009, the Judicial Council of California amended Cal. Rules of Court 3.724 to include discussion of key e-discovey issues in preparation for case management conferences. For full text and explanation, see http://www.courtinfo.ca.gov/jc/documents/reports/102408itema22.pdf.

5. **Colorado**. The Committee on Rules of Civil Procedure at its January, 2008 accepted a report from a Standing Subcommittee to the effect that there was no need for e-discovery rule amendments. See http://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Civil_Rules_Committee/01-25-08.pdf. Subsequently, the subcommittee reported that there had been massive expense in complying with the federal e-discovery rules and that it was impossible to justify the likely incremental costs of such rules in Colorado. The Civil Rules Committee adopted the recommendation to leave the present systems unchanged. (Undated copy of Subcommittee Report on file with author).

6. **Connecticut.** The Connecticut Supreme Court Rules Committee decided not to take any action on proposed e-discovery rules during its current cycle ending in June, 2009. See http://www.jud.state.ct.us/PB.htm.

7. **Delaware.** A credible source with access to the relevant Delaware Bar Committee membership reports that the State Rules Committee sees no need to act at this time.

8**. District of Columbia.** The District of Columbia Court of Appeals has stayed the deadline for compliance with the Federal Amendments to enable the Superior Court and its advisory committee time to revise the local rules.

9. **Florida.** Credible sources report that there is no movement towards adoption of e-discovery rules at this time.

10. **Idaho.** Idaho amended its Rules of Civil Procedure in 2006 modeled on Tex. R. Civ. P. 196.4, but made the cost shifting of reasonable expense of any extraordinary steps a matter of discretion, not mandated as in Texas. *See* http://www.isc.idaho.gov/rules/Discovery_Rule306.htm.

11. **Illinois**. Credible sources report that a subcommittee of the Judicial Conference is evaluating the adaptability of the 2006 Amendments to Illinois practice.

12**. Indiana.** The Indiana Supreme Court adopted E-Discovery Amendments largely replicating the Federal Amendments which were effective on January 1, 2008. *See* www.in.gov/judiciary/orders/rule-amendments/2007/trial-091007.pdf *See* Lisa J. Berry-Tayman, *Indiana Sate E-Discovery Rules: comparison to Other State E-Discovery Rules and to the Federal E-Discovery Rules,* 51-APR Res Gestae 17 (April, 2008).

13. **Iowa**. The Iowa Supreme Court amended the Iowa Rules of Civil Procedure effective May 1, 2008 based on the 2006 Amendments. *See* http://www.judicial.state.ia.us/wfdata/frame6210-1671/File58.pdf.
Effective on June 1, 2009, the Supreme court adopted Rule 5.502 to the Iowa Rules of Evidence based on the Federal Evidence rule 502.

14. **Kansas.** The Legislature adopted and the Governor signed Kansas Bill SB 434 to amend the Kansas Rules to largely mirror the Federal Amendments, effective July 1, 2008. The text is available on the Legislature website at http://www.kslegislature.org/bills/2008/434.pdf. *See* J. Nick Badgerow, *ESI Comes to the K.S.A.: Kansas adopts Federal Civil Procedure Rules on Electronic Discovery*, 77-AUG J. Kan. B.A. 30 (July/August 2008).

15. **Kentucky**. Credible reports indicate that the Guidelines for E-Discovery published by the Conference of Chief Justices are in use but no rule-making efforts are underway.

16. **Louisiana.** Changes in 2006 involved limits on production from inaccessible sources are handled as objections, per the Comments and the process for claiming inadvertent production includes a waiver rule. http://www.legis.state.la.us/billdata/streamdocument.asp?did=447007. *See* William R. Forrester, *New Technology & The 2007 Amendments to the Code of Civil Procedure*, 55 La. B. J. 236, 238 (2008). In the 2009 session, a coalition of interested parties presented further amendments (SB 65) which resulted in a tie vote in the Senate and no legislative action.

17. **Maine.** The Supreme Judicial Court of Maine adopted e-discovery amendments based on the 206 Amendments effective August 1, 2009. See http://www.courts.maine.gov/rules_forms_fees/rules/MRCivPAmend7-08.pdf. Minor corrections were quickly made with the same effective date http://www.courts.state.me.us/rules_forms_fees/rules/MRCivPAmend7-30.pdf. The Advisory Committee Notes are quite informative, especially in regard to defining "routine" and "good faith" in Rule 37(e).

18**. Maryland.** The Court of Appeals (the highest court) adopted e-discovery based on the provisions of the 2006 Amendments. *See* http://www.courts.state.md.us/rules/rodocs/ro158.pdf Instead of requiring "good cause" for production from inaccessible sources, a party requesting discovery must establish that the "need" outweighs the burden and cost of "locating, retrieving, and producing" it. Also, the amendment relating to disclosure of privileged material includes a substantive waiver provisions.

19 **Massachusetts**. Credible reports indicate that the Advisory Committee on Rules is monitoring experience with e-discovery under the Federal rules and in the state courts to determine the need for rules.

20. **Michigan.** The Michigan Supreme Court has adopted e-discovery provisions similar to the 2006 Amendments. See http://www.icle.org/contentfiles/milawnews/rules/mcr/AMENDED/2007-24_12-16-08_UNFORMATTED-ORDER_AMENDMENT.PDF.

21. **Minnesota**. The Minnesota Supreme Court adopted amendments to its Rules of Civil Procedure which largely mirror the 2006 Amendments. http://www.courts.state.mn.us/documents/0/Public/Rules/RCP_effective_7-1-2007.pdf. *See* Megan E. Burkhammer, *New Turns in the Maze: Finding your Way in the New Civil Rules*, 64-JUB Bench & B. Minn 23 (May/June 2007).

22. **Mississippi.** Mississippi adopted e-discovery amendments in 2003 to its Rule 26 ("General Provisions Governing Discovery").

23. **Missouri.** Credible reports indicate that the Judicial Rules Committee is considering the issue of the need for e-discovery rules.

24. **Montana.** The Supreme Court of Montana adopted amendments to its civil rules largely incorporating the 2006 Amendments in 2008. http://courts.mt.gov/orders/AF07-0157.pdf., as amended, 32-APR Mont. Law 23 (2008). *See* Montana Lawyer, *Court Issues Major Rule Changes on Civil Procedure and Court Records*, 32-MAR Mont. Law. 12 (March 2007).

25. **Nebraska**. The Supreme Court has adopted limited amendments to regarding discoverability and form of production of ESI effective in July, 2008. *See* http://www.supremecourt.ne.gov/rules/pdf/Ch6Art3.pdf.

26. **Nevada.** There are no known efforts to consider e-discovery rules.

27. **New Hampshire.** The Supreme Court has added a "scheduling conference" to its standing orders to discuss key e-discovery topics such as accessibility, costs, form of production and the need for and extent of litigation holds. http://www.courts.state.nh.us/rules/sror/sror-h3-62.htm.

28. **New Jersey.** The New Jersey Civil Rules, effective September 1, 2006, incorporate the provisions of the 2006 Amendments with certain minor exceptions. See http://www.judiciary.state.nj.us/rules/part4toc.htm

29. **New Mexico.** The Rules Committee has been working on series of proposed e-discovery amendments based on the Federal Amendments.

30. **New York.** Legislative action was initiated on February 23, 2009 by Assembly Bill A06000 dealing with substantive issues, parallel to the Federal Amendments. See http://assembly.state.ny.us/leg/?bn=A06000. The

bill is based on a N.Y. State Bar Association Report, copy available at http://www.nycbar.org/pdf/report/bar%20comm%20ediscovery%20ltr.pdf Inaccessible information, which does need not be produced without a court order, need not be identified. Moreover, the safe harbor provisions are not limited (as is Fed. Rule 37(e)) to rule based sanctions. Separately, Rule 8(b) of the statewide rules of the Commercial Division of the Supreme Court (§202.70) now requires consultations regarding e-discovery issues prior to conferences. The Commercial Division Judges of Nassau county have now enhanced issued a unique order, applicable only in that court, which enhances the requirements of that order. *See* Vesselin Mitev, *New E-Discovery Rules Help County Courts Manage Cases*, New York Law Journal, February 19, 2009 (provides details for Rule 8(b)), available at http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202428391982. In addition, the Chief Administrative Judge has apparently adopted an Administrative Order modeled on Rule 8(b) which is applicable in all Supreme and County Courts (§202.12) requiring discussions of e-discovery issues at the preliminary conference where the court deems appropriate. *See* http://www.courts.state.ny.us/rules/Trialcourts/202-12_amend2.pdf

31. **North Carolina.** A North Carolina State Bar Committee has proposed a number of innovative e-discovery amendments to the North Carolina Civil Rules, presumably to be considered at the next Legislative Session. See http://litigation.ncbar.org/Newsletters/Newsletters/Downloads_GetFile.aspx?id=6996. The North Carolina Business Court included provisions relating to discussion of disputed e-discovery issues in their rules. *See* http://www.ncbusinesscourt.net/new/localrules/ (Rule 18.6).

32. **North Dakota**. The Joint Procedure Committee adopted amendments based on the 2006 Amendments effective March 1, 2008. *See* http://www.court.state.nd.us/rules/civil/frameset.htm

33. **Ohio.** The Supreme Court adopted rules based largely on the Federal Amendments, with significant modification. The safe harbor provision includes factors for court use when deciding if sanctions should be imposed and the pre-trial discussion topics include the methods of "search and production" to be used in discovery. The rules can be found at: http://www.sconet.state.oh.us/RuleAmendments/documents/2008%20Amend.%20to%20Appellate,%20Criminal%20&%20Civil%20as%20published%20(Final).doc

34. **Oregon.** According to credible sources, the Council on Court Procedures has thus far not identified discovery as a subject of rulemaking during this cycle.

35. **South Carolina.** According to credible sources, the South Carolina Bar Association Practice and Procedure Committee has created a subcommittee to study and evaluate the issue of e-discovery amendments.

36. **Tennessee.** The Tennessee Supreme Court has adopted Amendments to the Rule of Civil Procedure to become effective on July 1, 2009, "subject to approval by resolutions of the General Assembly." Order, Jan. 9, 2009 at http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/TRCPamendments.pdf. The rules are unique, and borrow from the *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information* issued by the Conference of Chief Justices (2006). For more details, see the analysis in Baker, Donelson, *New E-Discovery Rules for Tennessee*, at http://www.bakerdonelson.com/Content.aspx?NodeID=200&PublicationID=585.

37. **Texas.** Texas was the first state to enact e-discovery rules, having added §§196.3 and 196.4 to its Civil Procedure code in 1999. It requires payment of reasonable expenses of any extraordinary steps required to retrieve and produce information which is not reasonably available to the responding party in its ordinary course of business.

38. **Utah**. The Utah Supreme Court approved a set of e-discovery rules based on the Federal Rules, effective on November 1, 2007. Unlike most other state enactments, preservation obligations are among the topics included in the pre-trial provisions, the power to sanction under inherent powers is expressly recognized and early disclosure requirements are mandated. In addition, the identification requirement for inaccessibility requires that a party must "expressly make any claim that the source is not reasonably accessible, describing the source, the nature and extent of the burden, the nature of the information not provided and any other information that will enable other parties [seeking discovery] to assess the claim." http://www.utcourts.gov/resources/rules/urcp/

39. **Vermont.** Accordingly to credible sources, the Rules Committee plans to take up consideration of e-discovery amendments.

40. **Virginia**. Effective January 1, 2009, the Civil Rules have been revised to include many, but not all of the provisions of the 2006 Amendments, not including the safe harbor provisions and "meet and confer" obligations. See http://www.courts.state.va.us/scv/amendments/2008_1031_4_1_rule.pdf.

41. **Washington.** A subcommittee of the Washington State Rules Committee proposed adoption of the provisions of the Federal Amendments. Credible sources report that the proposal has not yet been considered by the Supreme Court.

42. **Wisconsin**. The Wisconsin Judicial Council submitted a Petition for An Order adding a series of e-discovery amendments to the Wisconsin Statutes on April 23, 2009. *See* http://www.rcalaw.com/E-Discovery/Document-Control-Blog/Wisconsin-Judicial-Counsel-Proposes-E-Discovery-Amendments-to-Rules-of-Civil-Procedure.php. It is anticipated that public comments will be solicited, but no dates have been established as of July, 2009.