E-Discovery Standards in Federal and State Courts after the 2006 Federal Amendments[1]

Table of Contents

I. Introduction

Discovery of information in electronic form raises unique issues for rulemaking due to its ephemeral nature and potential volumes.[2] Thus, by the late 1990s, it was urged that the Federal Rules be amended to recognize "the [relevant] differences between electronic data and traditional documents."[3] It was presciently argued, however, that

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[2] Kenneth J. Withers, Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure, 4 NW. J. TECH. & INTELL. PROP. 171, at *64 (2006).
[3] Thomas Y. Allman, The Need for Federal Standards Regarding Electronic Discovery, 68 DEF. COUNS. J 206, 208 (2001).

without "a system of discovery control that fails to take account of the special needs and unique impact" of ESI, the effort is "destined to fail."[4]

The 2006 Federal Amendments

The 2006 Amendments to the Federal Rules of Civil Procedure ("the 2006 Amendments" or "the Amendments")[5] sought to address the issues by technologically neutral rulemaking. After a five year gestation period, spirited internal debate and Public Hearings and comment,[6] the final form of the Amendments involved relatively modest changes. Underlying the effort was a desire to promote procedural uniformity in the treatment of e-discovery issues regardless of the court involved.[7]

The verdict on the efficacy of the 2006 Amendments is mixed. To some, they are fine, having "fostered a more cooperative, just and efficient approach to discovery."[8] To others, the lack of uniformity and predictability on preservation obligations has forced a costly and inefficient race to the bottom and "encouraged expensive litigation ancillary to the merits of civil litigants' cases."[9] A third view is that the 2006 Amendments have already been overtaken by changing technology and are ill-suited for the emerging social media world.[10]

The Rules Committee is currently undertaking a comprehensive review of the civil rules in light of these concerns. Its Discovery Subcommittee has been assigned issues involving preservation and spoliation, which has already led to a Mini-Conference on the subject held at Dallas in September, 2011.[11] A second subcommittee, known as the Duke Subcommittee, is reviewing case management issues which arose at the Duke Conference and thereafter. At the most recent Rules Committee meeting held in Ann Arbor on March 22-23, 2012, both Subcommittees reported on their efforts and sought guidance on their respective projects.

In the author's opinion, proposals of any nature are unlikely to be adopted before the Spring of 2013.

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[4] Martin H. Redish, Electronic Discovery and the Litigation Matrix, 51 Duke L. J. 561, 628 (2001).
[5] *See* Amendments transmitted to Congress by Chief Justice Roberts on April 12, 2006 (hereinafter "TRANSMITTAL OF RULES TO CONGRESS"), 234 F.R.D. 219, 221-251 (2006).
[6] Withers, *supra,* at *67-71 (describing the 2000 Mini-Conference(s), solicitation of input by the Committee and the 2004-2005 evolution of draft rules, followed by open comment and public hearings in San Francisco, Dallas and Washington, D.C.)
[7] The rules were needed so that "similar situated litigants" would not be treated differently because of the local rules then emerging. TRANSMITTAL OF RULES, *supra*, 234 F.R.D. at 273.
[8] Borden et al., Four Years Later: How the 2006 Amendments to the Federal Rules Have Reshaped The E-Discovery Landscape and Are Revitalizing the Civil Justice System, 17 RICH. J.L. & TECH. 10, *4 (2011).
[9] Hardaway, *et. al*, E-Discovery's Threat to Civil Litigation: Revaluating Rule 26 for the Digital Age, 63 RUTGERS L. REV. 521, 522 (2011).
[10] Andrew C. Payne, Twitigation: Old Rules in a New World, 49 WASHBURN L.J. 841 (2010).
[11] *See* Minutes, Mini-Conference on Preservation and Sanctions, Dallas, Tex., Sept. 9, 2011, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Materials/Notes%20from%20the%20Mini-Conference%20on%20Preservation%20and%20Sanctions.pdf.

State Enactments

The 2006 Amendments provided exemplars for States seeking to address e-discovery in their civil rules. As of February, 2012, some thirty states have based e-discovery rules in whole or in part on the 2006 Amendments,[12] including, most recently, North Carolina and Connecticut. Two other states – Florida and Massachusetts – are considering similar rules and the District of Columbia has proposals pending approval by its Court of Appeals.

Of the remaining states, Texas, Idaho and Mississippi have adopted the approach to ESI pioneered by Texas in 1999. Oregon has enacted only minor clarifying amendments[13] and Pennsylvania is considering a distinctive approach emphasizing proportionality.[14] Utah has recently refocused its earlier e-discovery rules to emphasize early disclosure and proportionality.[15] The remaining states have not yet acted comprehensively.[16]

One issue has been whether a state should adopt amendments applicable to all civil actions or merely make "an alternative framework" available by agreement or, for good cause, a court order. Only Arkansas has chosen the latter route.[17]

Approach of this Memorandum

Part II of this Memorandum describes the sources of e-discovery standards, including the 2006 Amendments, federal judicial decisions, best practice guidance and local and model rules. Part III discusses the applications of these standards to key e-discovery issues, highlighting the uniformity emerging in practice on many issues and the influence. Throughout the Memorandum, we update the reader on proposals for further

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[12] Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Utah, Vermont, Virginia, Wisconsin and Wyoming.

[13] ORE. RULES OF CIVIL PROC. (ORCP) 43 (2012)(authorizing requests for ESI).

[14] Gina Passarella, Approaching the Bench: Pa. Judiciary Faces New EDD Rules, Sept. 2, 2011 (quoting draftsman as seeking to avoid unnecessary complications caused by trying to be "sure [that] every single piece of paper that could have some relevance has been found"), copy at http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202513056682.

[15] Utah added e-discovery rules at an earlier date, which remain unchanged. The new amendments are found in Rules URCP 26 & URCP 37 (2011).

[16] Colorado, Delaware, Georgia, Hawaii, Illinois, Kentucky, Missouri, Nevada, New York, Rhode Island, South Dakota, Washington and West Virginia. Illinois acknowledges information in electronic form and New York has adopted, administratively, rules relating to early conferences and preparation for same. (See Appendix).

[17] ARK. RULES OF CIVIL PROC. (ARCP), Rule 26.1. *See* Newbern, Watkins & Marshall, Jr., 2 Arkansas Civil Prac. & Proc. § 21:18 (5th ed)(describing the "optional" rule adopted in Arkansas and noting that "parties must [either] agree to follow it or the court must so order on motion for good cause").

rulemaking. As has been noted," circumstances may have arrived where there is a need to address "imbalance[s] that [have] emerged in practice."[18]

The Appendix to the Memorandum summarizes the e-discovery rulemaking activity in individual states and the District of Columbia. The format for and links to individual Rules are available in the Appendix or, separately, in a Thomason Reuters "50 State" survey.[19]

II. Sources of Standards

The primary sources of e-discovery standards as currently applied in federal and state courts include the following.

The 2006 Amendments

The 2006 Amendments treat "electronically stored information" ("ESI") as a distinct category of discoverable information,[20] different from "documents." The ESI terminology was utilized in Rules 16, 26, 33, 34, 37 and 45, as well as Form 35, now Form 52.[21]

A major emphasis of the Amendments is on enhanced opportunities for early resolution of e-discovery issues by agreement. Rule 26(f) spells out key issues for "meet and confer" treatment. In addition, Rule 16(b) encourages attention to the need to manage and resolve e-discovery issues as part of the case management process. A "two-tiered" approach to ESI discovery is suggested for production of information from sources which are inaccessible because of undue burden or cost.

There are major gaps, however. The Amendments did not describe the contours of the duty to preserve[22] nor spell out uniform standards for dealing with spoliation. Both topics were left to the courts to handle under their inherent powers,[23] subject only to a limited "safe harbor" in what is (now) Rule 37 (e) for rule-based sanctions for ESI losses caused by "routine, good-faith" system operations.

Federal Decisional Law

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[18] Hon. Mark Kravitz, To Revise, Or Not to Revise: That is the Question, 87 DENV. U. L. REV. 213, 220-221(2010).
[19] 50 State Statutory Survey, Civl Laws/Civil Procedure Electronic Discovery, 0020 SURVEYS 4 (2011).
[20] *See, e.g.*, Thomas Y. Allman, The Need for Federal Standards Regarding Electronic Discovery, 68 DEF. COUNS. J. 206 (2001)(citing an urgent need to amend the Federal Rules to "treat the discovery of electronic records differently from traditional documents" in order to help "impose order").
[21] Report of the Parties' Planning Meeting.
[22] ADVISORY COMMITTEE MINUTES, Rules Committee, April 14-15, 2005, at 39-40 ("there [was] no occasion even to consider" whether a preservation rule would be an authorized or wise exercise of Enabling Act authority), copy available at http://www.uscourts.gov/rules/Minutes/CRAC0405.pdf.
[23] Chambers v. NASCO, 501 U.S. 32, 46 (1991)(the sanctioning scheme of the rules does not displace "the inherent power to impose sanctions").

A primary source of guidance for courts, including state courts, has been decisions by Federal Magistrate and District judges.[24] Appellate decisions on any of the topics have been relatively rare, which is not surprising given the general lack of interlocutory appeals in discovery matters.

In particular, the *Zubulake* decisions from the Southern District of New York have played an important role in regard to preservation, spoliation, cost-shifting and accessibility. For example, the leading intermediate appellate court in New York State has adopted *Zubulake* standards in regard to both preservation[25] and cost-shifting,[26] rejecting existing state precedent on the ground that *Zubulake*, is, *e.g.*, "moving discovery, in all contexts, in the proper direction."[27]

Other Persuasive Authority

Another important source of guidance has been the *Sedona Principles*[28] issued by a Sedona Conference® Working Group ("WG1").[29] These fourteen "best practice" recommendations cover a variety of topics, including many not dealt with by the Rules.[30] Thus, for example, Principle 12, dealing with the role of metadata, has been particularly useful to courts.[31]

The *Principles* have been supplemented by cutting edge Commentaries on *Search and Retrieval,*[32] *Quality Assurance,*[33] *Legal Holds*[34] and *Proportionality,*[35] together with the *Sedona Guidelines on Managing Information,*[36] the *Sedona Glossary*[37] and the *Sedona Cooperation Proclamation,*[38] among other publications.

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[24] Klickstein & Fergus, Navigating E-Discovery in the Massachusetts State Trial Courts, 24 JOURNAL OF TRIAL & APPELLATE ADVOCACY 35, 40-41 (2009)("intra-state procedural uniformity in practice" is not uncommon in states which do not necessarily adopt or follow the federal rules).
[25] Voom HD Holdings v. Echostar, __ A.D. 3d ___, 2012 WL 265833 (N.Y. A.D. 1 Dept. Jan. 31, 2012).
[26] U.S. Bank v. Greenpoint Mortgage, __A.D. 3d, 2012 WL 612361 (N.Y. A.D. 1 Dept. Feb. 28, 2012).
[27] *Id*, at *4.
[28] Best Practices Recommendations & Principles for Addressing Electronic Document Production (2nd Ed. 2007), copy at http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf.
[29] Thomas Y. Allman, The Sedona Principles (2nd Ed): Accommodating the 2006 E-Discovery Amendments, 2008 FED. CTS. L. REV. 2 (2008).
[30] The Principles provide "best practice" guidance regarding preservation/spoliation in Principles 1, 2, 3, 5, 6, 7, 9, 11 and 14.
[31] *See, e,g.*, Morris v. Scenera Research, 2011 WL 3808544 (N.C. Super. Business Court Aug. 26, 2011).
[32] Use of Search and Information Retrieval Methods in E-Discovery, 8 SEDONA CONF. J. 189 (2007).
[33] Achieving Quality in the E-Discovery Process, 10 SEDONA CONF. J. 299 (2009).
[34] Legal Holds: The Trigger & the Process, 11 SEDONA CONF. J. 265 (2nd Ed, 2010).
[35] Proportionality in Electronic Discovery, 11 SEDONA CONF. J. 289 (2010).
[36] The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age (2nd Ed. Nov. 2007), copy at http://www.thesedonaconference.org/content/miscFiles/Guidelines.pdf.
[37] The Sedona Conference ® Glossary: E-Discovery & Digital Information Management (3rd Ed. 2010).
[38] 10 SEDONA CONF. J. 331 (2009); *see also* 10 SEDONA CONF. J. 339, 363 and 377 (2009).

The 2006 *Guidelines for State Trial Courts* developed by the Conference of Chief Justices[39] and the 2007 *Uniform Rules Relating to the Discovery of [ESI]*[40] have also contributed to the evolution of uniform principles in certain instances.[41]

Local Rules, Pilot Projects & Model Rules

Local Rules, standing orders and "guidelines" by individual courts have also helped "filled the gaps." At least forty-one of the Federal Districts[42] and numerous state courts have adopted local rules or Standing orders to guide e-discovery efforts. The recently amended Default Standards of the District of Delaware[43] and the ESI guidelines issued by the Delaware Court of Chancery[44] and those issued by the Nassau County [N.Y.] commercial court[45] have been particularly influential.

Targeted "pilot" projects have also suggested possible innovative solutions. For example, the Standing Order of the Seventh Circuit Electronic Discovery Pilot Program is notable for dealing with the scope of preservation obligations.[46] The Southern District of New York has implemented a pilot program focusing on complex cases.[47] The Western District of Pennsylvania is experimenting with routine use of "Electronic Discovery Special Masters."[48]

Model Orders for specific types of litigation have also been influential. Thus, a model order for patent litigation ("FCAC Model Order) issued by the Chief Judge for the Federal Circuit,[49] containing a number of innovative provisions, has already had an impact on cases.[50] In addition, it has caused the Eastern District of Texas to issue a tailored version applicable to its cases.[51]

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[39] Copy available at http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf. *See also* Richard Van Duizend, Guidelines for State Courts regarding Discovery of [ESI] – What? Why? How?, 35 W. ST. U. L REV. 237 (Fall, 2007).

[40] The *Uniform Rules* can be found at http://www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.htm.

[41] *See* ARCP 26.1("Electronic Discovery")("supplemental and optional" rule which applies to cases if parties agree or the court orders it for good cause).

[42] For a list of 41 Federal District Courts with local rules addressing e-discovery, *see* http://www.ediscoverylaw.com/promo/current-listing-of-states-that/.

[43] Del. District Court Default Standard (2011), copy at http://www.ded.uscourts.gov/.

[44] Del. Ct. Chancery Guidelines, copy at http://www.delawarelitigation.com/uploads/file/int50(1).pdf.

[45] Tener v. Cremer, 2011 WL 4389170 (N.Y. A.D. 1 Dept. Sept. 22, 2011)(Nassau County Guidelines and other guidance are useful given that "the [New York] CPLR is silent on the topic").

[46] Seventh Circuit Electronic Discovery Pilot Program, Statement of Purpose and Preparation of Principles (October 2009), copy at http://www.ilcd.uscourts.gov/Statement%20-%20Phase%20One.pdf.

[47] Pilot Project Regarding case management Techniques for Complex Civil Cases, October, 2011, copy at http://www.nylj.com/nylawyer/adgifs/decisions/110211pilotrules.pdf.

[48] Monica Bay, A Growing Trend: Use of E-Discovery 'Special Masters," LTN News, Nov. 23, 2011, copy at http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202533274953&slreturn=1.

[49] *See* E-Discovery Committee, An E-Discovery Model Order (2011), copy at http://www.patentlyo.com/files/ediscovery-model-order.pdf

[50] DCG Systems v. Checkpoint Technologies, 2011 WL 5244356, at *2 (N.D. Cal. Nov. 2, 2011); *see also* In re Google Litigation, 2011 WL 6113000, at *3 (N.D. Cal. Dec. 7, 2011)..

[51] *See* Article, http://www.ediscoverylaw.com/2012/03/articles/news-updates/eastern-district-of-texas-adopts-its-own-model-order-regarding-ediscovery-in-patent-cases/

Impact of Ethical Principles

The conduct of e-discovery is rife with ethical implications[52] for both outside and inside counsel.[53] Counsel has an ethical obligation to acquire the requisite skills and knowledge[54] to advise on e-discovery, confidentiality of client information and privilege reviews,[55] and the maintenance of an appropriate relationship with courts and counsel while balancing cooperation and advocacy.[56] Courts have not been hesitant to refer counsel to disciplinary authorities for review of discovery misconduct.[57]

III. Key Issues

The current standards applicable to e-discovery in federal and state courts are best assessed in terms of specific issues.

(1) Electronically Stored Information

The 2006 Amendments defined "electronically stored information" ("ESI") in Rule 34(a) to include material "stored in any medium from which information can be obtained."[58] EDI is distinguished from "documents" and includes ephemeral or transitory information whose production "requires no greater degree of permanency from a medium than that which makes obtaining the data possible."[59]

This distinction has been adopted by many states, but not all. California, for example, defines "electronic"[60] capabilities separately from its definition of ESI.[61]

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[52] For a discussion of the relationship between rules of civil procedure and those governing professional conduct, *see* Andrew Perlman, the Parallel Law of Lawyering in Civil Litigation, 79 FORDHAM L. REV. 1965 (2011)(summarized in Howard M. Erichson, Civil Procedure and the Legal Profession, 79 FORDHAM L. REV. 1827 (2011)).

[53] ABA MODEL RULES OF PROF. COND. 3.4(b)(a lawyer shall not "unlawfully obstruct" access to evidence or "unlawfully alter, destroy or conceal a document or other material having potential evidentiary value" or "counsel or assist another person" to do so).

[54] ABA MODEL RULES OF PROF. COND. 1.1.

[55] Cardenas v. Dorel, 2006 WL 1537394, at *7 (D. Kan. June 1, 2006)(outside counsel must exercise some degree of oversight over client's employees charged with executing search).

[56] The Sedona Conference ® Cooperation Proclamation, 10 SEDONA CONF. J. 331(2009)(calling for development of practical tools to facilitate cooperative, collaborative, transparent discovery and arguing that cooperation does not conflict with advocacy).

[57] In re Estrada, Esq., 143 P.3d 731 (Sup. Ct. N.Mex. Sept. 28, 2006)(suspension for violation of state equivalent of Model Rule 3.4); *see also* Qualcomm v. Broadcom, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), vacated as to outside counsel sanctions, 2010 WL 1336937 (S.D. Cal. April 2, 2010)(reference to California disciplinary counsel).

[58] Prior to the 2006 Amendments, "documents" were defined inclusively to contain "data or data compilations from which information could be obtained.

[59] Columbia Pictures v. Bunnell, 245 F.R.D. 443, 44 (C.D. Cal. 2007)(finding the scope of Rule 34(a) to embrace Server Log Data found in Random Access memory (RAM)).

[60] *See* Cal Code Civ Proc § 2016.20(d)("'Electronic' means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities").

Tennessee defines ESI as information which is "stored" in an "electronic medium and [which] is retrievable in perceivable form."[62] North Carolina defines ESI to include "reasonably accessible metadata that will enable the discovering party to have the ability to access such information as the date sent, date received, author and recipients."[63]

However, Illinois (which acted before the Amendments) provides that a party may request discovery of "documents," which is defined as including "retrievable information in computer storage."[64] Oregon also provides that the definition of "designated documents" include "ESI.[65] Texas authorizes discovery of "data or information that exists in electronic or magnetic form."[66]

States without targeted e-discovery amendments routinely treat information in electronic form as discoverable, and the author is unaware of any instance where the differing definitions have presented an issue.

(2) Scope of Discovery

Rule 26(b)(1) permits discovery of any non-privileged material "that is relevant to any party's claim or defense" of a party, with the option to order discovery of any matter relevant to the "subject matter" of the action. In contrast, the scope of discovery in most states extends to the subject matter of the action.[67]

A party's responsibility for production of ESI turns on whether it has possession, custody or control of the information. Information held by a foreign parent, for example, is typically not found to be under the "control" of its independent US subsidiary,[68] although the opposite is often true if the foreign entity is a subsidiary of the US party.

Inaccessible Information

The 2006 Amendments added Rules 26(b)(2)(B) and Rule 45(d)(1)(D) to presumptively exempt ESI from the scope of discovery when identified as "not reasonably accessible because of "undue burden or cost."[69] A court may nonetheless

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[61] *See* Cal Code Civ Proc § 2016.20(e)("'Electronically stored information' means information that is stored in an electronic medium).
[62] TENN. RULE 26.02(1)(2009); *accord* Rule 1(3), Uniform Rules Relating to the Discovery of [ESI](2007).
[63] N.C. GEN STAT. 1A-1, Rule 26(1).
[64] ILL. R. CIV. P. 201(b); *see also* Rule 214 (a party may produce retrievable information in computer storage in printed form).
[65] ORCP 43(A)(2012)("any designated documents(including electronically stored information, writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations from which information can be obtained and translated, if necessary, by the respondent through detection devices or software into reasonably useable form)").
[66] TEX.R.CIV. P. 196.4 (1999).
[67] ILL. R. CIV. P. 201(b)("a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action").
[68] Ex parte BASF Corporation, 957 So.2d 1104 (Oct. 27, 2006).
[69] As separately discussed below, the "proportionality' principle, now in Rule 26(b)(2)(C), applies to all party –requested discovery, and may be invoked by motions for protective orders under Rule 26(c).

order discovery from inaccessible sources for "good cause," for which a series of optional factors are listed in Committee Note.[70] As with all other discovery, the limitations of Rule 26(b)(2)(C) also apply.

Most states adopting the Amendments have adopted the inaccessibility rule as party of their civil rules, albeit with some minor variations.[71] California requires a party to either raise inaccessibility by objection (and identify the "types or categories" of the sources)[72] or "promptly" seek a protective order in order to affirmatively raise the issue.[73] Alabama requires that the identification be made "to the requesting party."[74] In Ohio, a party need not identify sources not being produced.[75]

The inaccessibility distinction has also been applied[76] - or at least discussed - in states that have not formally adopted e-discovery amendments. In *Omincare v. Mariner*,[77] for example, the Delaware Chancery Court expressed the view that merely because ESI is "contained on Backup tapes instead of in active stores does not necessarily render it not reasonably accessible."

The two-tiered production limitation does not directly apply to preservation obligations, since a party must consider the possibility that a court might order discovery for good cause from such sources.[78]

Backup Media

The "two-tiered" approach added by the Amendments reflects *Zubulake I,*[79] where a similar limitation was applied to backup tapes "largely based on [inaccessibility

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[70] Committee Note, Rule 26(b)(2)(B)(2006)(listing seven "appropriate considerations").
[71] New Mexico refused to adopt the limitation. *See* Committee Commentary for 2009 Amendments, N.M. N.M. DIST. CT. R. C.P. CT. R. C.P 1-026 (ESI "should be subject to the same provisions" that currently govern discovery of "non-electronic information").
[72] CAL. CODE CIV. PROC. § 2031.210 (d)("By objecting and identifying information of a type or source or sources that are not reasonably accessible, the responding party preserves any objections it may have relating to that [ESI]"); *see* David M. Hickey and Veronica Harris, California Rules to Amend Inaccessible ESI*,* THE RECORDER, March 27, 2009.
[73] CAL. CODE CIV. PROC. § 2031.060(c)("party or affected person who seeks a protective order . . on the basis that the information is from a source that is not reasonably accessible because of undue burden or expense shall bear the burden of demonstrating [that fact]").
[74] ALA. R. CIV. P. Rule 26(b)(2)(A).
[75] OHIO CIV. R.26(B)(4)(2008)("A party need not provide discovery of [ESI] when the production imposes undue burden or expense").
[76] Brokaw v. Davol, 2011 WL 579039 (Super. Ct. R.I. Feb. 15, 2011)(applying Zubulake I because it is "the primary case on ESI discovery in courts throughout the United States").
[77] Omnicare v. Mariner Health Care, 2009 WL 1515609, at *7 (Chan. Del. May 29, 2009).
[78] Committee Note, Rule 26(b)(2)(B)(2006)(the identification of sources as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve"); *see also* Committee Note, Rule 37(f)(2006)(an important factor is "whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources").
[79] Zubulake v. UBS Warburg ("Zubulake I"), 217 F.R.D. 309, 318 (May 13, 2003)(a "distinction that corresponds closely to the expense of production"); *cf,* Texas R. Civ. P. 196.4 (1999)(information that is not "reasonably available to the responding party in its ordinary course of business"); *and see* In re

of] the media on which [ESI] was stored."[80] Under *Zubulake*, retrieval of information from backup media which is not in active use is not required, although sampling may be ordered to determine if possible discoverable evidence exists.

As similar result is achieved by application of Rule 26(b)(2)(B). Thus, in *General Electric v. Wilkins*,[81] the court did not find good cause to order reconstruction of backup tapes when the defendant was unable to "identify any particular document" he had reason to believe "was in existence that had not already been produced." The court concluded that the defendant was merely "*hoping* to find a 'crucial," "highly relevant' or "material document" on the tapes rather than having any basis to believe that one would be found (emphasis in original).[82]

Courts in states without e-discovery rules follow a blend of *Zubulake* and the Federal Rule.[83]

Social Media

Discovery of information located "in the cloud," such as that held by social media, presents a number of practical challenges when faced with complying with requests for production of designated material posted by a party.[84] The provisions of the Stored Communications Act (SCA) may permit third parties to resist civil subpoenas on the grounds that some of the information designated by users as private is not accessible to the general public and thus protected.[85]

Courts routinely avoid this morass, however, by compelling parties to grant permission to access such information,[86] such as by furnishing passwords or taking other steps,[87] since information available through those means is neither privileged nor is there any right of privacy barring such access if it is relevant to the claims or defenses

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Weekley Homes, LP, *supra*, 295 S.W.3d 309 (S.C. Tex. 2009)("[w]e see no different in the considerations that would apply when weighing the benefits against the burdens of electronic-information production").

[80] Helmert v. Butterball, *supra*, 2010 WL 2179180, at *8 (E.D. Ark. May 27, 2010)(applying Zubulake principles to find good cause for production).

[81] GE v. Wilkins, 2012 WL 570048, at *3 (E.D. Cal. Feb. 21, 2012).

[82] *Id.*, at *6.

[83] Makrakis v. DeMelis, 2010 WL 3004337, at *2 (Superior Ct. (Suffolk) Mass. July 13, 2010)(permitting plaintiffs to sample, at their expense, to determine if a further search is warranted); *cf* Brokaw v. Davol, *supra*, 2011 WL 579039 (Superior Ct. (R.I.), Feb. 12, 2011)(denying request to restore inaccessible backup media because releant information likely in hard copy archive files).

[84] In Squeo v. Norwalk Hospital, *supra*, 2011 WL 7029761, at * 2 (Superior Ct. Conn. Dec. 16, 2011), court worked through the necessity of authorization by surviving relatives of a decedent to secure copies of messages posted on AOL, Facebook and MySpace).

[85] Crispin v. Christian Audigier, 717 F. Supp. 2d 965, 971 (C.d. Cal. 2010).

[86] *See* Glazere v. Fireman's Fund, 2012 WL 1197167, at *3 (S.D. N.Y. April 5, 2012).

[87] McCann v. Harleysville, 78 A.D. 3d 1524, 910 N.Y. S. 2d 614 (App. Div. 4th Dept. Nov. 12, 2010); *see* Kozinets & Lockwood, Discovery in the Age of Facebook, 47- AUG ARIZ. ATT'Y 42 (2011).

involved.[88] Some commentators argue that some adjustment in the language of control may be necessary in regard to the latter.[89]

Hague Convention on Evidence

Information stored or found outside the United States is typically not subject to direct access via subpoena, although production from party to US litigation can be ordered by federal[90] and state[91] courts despite the existence of The Hague Convention or personal data protection[92] or other forms of "blocking statutes." The Supreme Court held in *Aereospatiale* that the Hague Convention on Evidence is neither the exclusive remedy for seeking information from foreign jurisdictions nor is it a method whose use must always be attempted first.[93]

The authentication and use of ESI found on social media has generated considerable case law,[94] as has related issues of the impact of the use of employer owned facilities, control policies and potential issues involving privacy

Rulemaking Re Scope

There has been substantial concerns expressed that the fluidity and vagueness of the inaccessibility distinction warrants further rulemaking with specificity. The Rules Committee, through its Discovery Subcommittee, floated a discussion draft amending Rule 26 (b)(1) to formally limit the scope of discovery for ESI at its Ann Arbor Meeting in March, 2012. Under this proposal, discovery of ESI would not extend to matter not "routinely used by the responding party" or might list excluded sources and limit the number of custodians, search terms, time frames and metadata required to be produced.

The Rules Committee did not discuss or evaluate the competing proposals and the author does not anticipate any definitive action, one way or the other, before the Spring of 2013. It bears recalling that an additional several years or more would then be required before any rules would go into effect, even if they met no serious hurdles along the way.

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[88] Davenport v. State Farm, 2012 WL 555759, at *1 (M.D. Fla. Feb. 21, 2012).
[89] *See* Alberto G. Araiza, Electronic Discovery in the Cloud, 2011 DUKE L. & TECH. REV 8 (2011)(suggesting that amendments are needed to define "control" of information in the cloud so that it applies only to ESI and metadata over which a party has "exclusive or substantial control).
[90] AccessData v. Alste Technologies, 2010 WL 318477 (D. Utah Jan. 21, 2010)(personal information about German customers ordered produced in US litigation despite German Data Protection Act (GDPA)).
[91] *See* WSalgado v. Mobile Services Int'l., 2011 WL 6224521, at *1(Del.Chan. Nov. 30, 2011)(emails within system of UK employer were "available to [Columbian] plaintiff and (presumably) subject to the Court's discovery orders").
[92] Columbia Pictures v. Bunnell, 245 F.R.D. 443, 452 (C.D. Cal. Aug. 24, 2007)(production of anonymous information is not personal information protected by Netherlands law).
[93] Societe Nationale Industrielle Aereospatiale v. US District Court, 482 U.S. 522, 543-544 (1987)(requiring particularized analysis of comity issues before requiring use of Hague Convention); *see also* Thomas Y. Allman, *et. al,* PLIREF-EDDBK s 12:2 at *12-10 ("These foreign laws are afforded little deference by U.S. Courts").
[94] *See, e.g.,* discussion at (7) Evidentiary Issues, below.

(3) Preservation

A common law duty to preserve information for another's use in litigation is widely enforced in federal[95] and state[96] courts once litigation commences or a subpoena is served.[97] However, the obligation may also arise when litigation is "reasonably foreseeable,"[98] and applies to plaintiffs as well as defendants.[99] While an action for damages is not generally available for breach,[100] some states do enforce parallel tort remedies.[101]

The Federal Rules did not - as urged by some[102] - spell out the contours of the duty to preserve in the 2006 Amendments,[103] but Rule 26(f) requires early discussion of "issues about preserving discoverable information." State rules also mandate, in some cases, that parties engage in early discussion of preservation issues.[104] California incorporated such a requirement in a new rule,[105] as have states adopting rules for use with specialized divisions or courts, such as Arizona (complex cases),[106] Delaware (complex cases)[107] and North Carolina (Business Court).[108]

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[95] *See, e.g.,* In re 'Agent Orange' Product Liability Lit., 506 F. Supp. 750, 751-52 (E.D. N.Y. Feb. 5, 1980)("[t]he government is under an additional obligation imposed by the Federal Rules of Civil Procedure to preserve documents request in Dow's notice to produce").

[96] Beard Research v. Kates, 981 A.2d 1175, 1185 (Del. Chan. May 29, 2009)("a party in litigation or who has reason to anticipate litigation has an affirmative duty to preserve evidence that might be relevant to the issues in the lawsuit").

[97] Caston v. Hoaglin, 2009 WL 1687927 (S.D. Ohio June 12, 2009 (document preservation subpoenas); *see also* The Sedona Conference® Commentary on Non-Party Production & Rule 45 Subpoenas, 9 SEDONA CONF. J. 197, 199 & 203 (Litigation Hold) (2008).

[98] Micron Technology v. Rambus ("Micron II"), 645 F.3d 1311 (C.A. Fed. (Del.) May 13, 2011)(litigation is foreseeable if "overcoming [potential] contingencies was reasonably foreseeable").

[99] *See e.g.*, Leon M.D. v. IDX Systems, 464 F.3d 951 (9th Cir. 2006)(affirming dismissal of complaint as sanction for intentional deletion of data in unallocated space on employee laptop).

[100] Miller v. Lankow, 801 N.W. 2d 120, 128, at n. 2 (S.C. Minn. Aug. 3, 2011).

[101] Tucker, The Flexible Doctrine of Spoliation of Evidence: Cause of Action, Defense, Evidentiary Presumption, and Discovery Sanction, 27 U. TOL. L. REV. 67 (1995); 3 CAINLAWDDR § S69.03 (2011 Update); *see, e.g.,* Boyd v. Travelers Insur., 166 Ill.2d 188, 652 N.E. 2d 267, 270-271 (Ill. S.C. 1995)(authorizing action for negligent spoliation); Kearney v. Foley & Lardner, 582 F.3d 896, 908-9(9th Cir. Sept. 18, 2009) (California has "nearly eradicate[ed] [tort claims]"); *c.f.* Howard Reg.Health System v. Gordon, 952 N.E. 182 (S. Ct. Ind. Aug 10, 2011)(no independent claim against a tortfeasor for spoliation of evidence).

[102] Thomas Y. Allman, Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments, 13 RICH. J. L. & TECH. 9, *12-13 (2007)(the Committee was urged to "deal directly with the ambiguities of preservation obligations in the ESI context").

[103] The rules do "not attempt to state or define a preservation obligation." TRANSMITTAL OF RULES TO CONGRESS, 234 F.R.D. 219, 334 (2006).

[104] *See, e.g.*, ALA. R. CIV. P. 26(f)(2010)("any issues relating to discovery of electronically stored information, including issues relating to preserving discoverable information").

[105] CAL. RULES OF COURT, RULE 3.724 (2010)(requiring meeting of parties to discuss any issues relating to the discovery of ESI, including "preservation," form of production , scope, methods of asserting privilege or confidentiality, how cost "of production" is to be allocated and other relevant matters).

[106] ARIZ. R. CIV. P. 16.3(b)(2010).

[107] Copy at http://courts.delaware.gov/superior/pdf/ccld_appendix_b.pdf.

[108] N.C. R. BUS CT Rule 17.1(r)("The need for retention of potentially relevant documents, including but not limited to documents stored electronically and the need to suspend all automatic deletions of electronic

The Committee Notes to Rule 37(f), Rules 26(f) and Rules 26(b)(2)(B)[109] describe the preservation duty, as do the Sedona Conference® Principles, developed and issued contemporaneously with the Amendments. [110] Michigan states in its amended Rules that "[a] party has the same obligation to preserve [ESI] as it does for all other types of information[111] and California notes that its Rule 37(e) counterpart "shall not be construed to alter any obligation to preserve information."[112] Utah explicitly acknowledges the use of inherent power to remedy failures to preserve "in violation of a duty."[113]

The duty to preserve requires a potential producing party to undertake reasonable and good faith efforts to identify and preserve potentially discoverable evidence.[114] In *Zubulake v. UBS Warburg* ("*Zubulake IV"),* the court announced that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." [115] Other formulations exist, but *Zublake* is by far the dominant source of precedent for federal and state courts.

Triggering the Duty

A wide variety of pre-litigation events[116] have been held to provide sufficient notice of potential litigation to trigger the duty in federal[117] and state courts.[118] The onset of possible litigation need not be "'imminent, or probable without significant contingencies.'"[119] A party must act when it "first [knows] litigation [is] on the horizon."[120] Thus, the only "safe" policy is to take action as soon as possible, complying

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documents or overwriting of backup tapes which may contain potentially relevant information. The parties shall also discuss the need for a document preservation order.").

[109] TRANSMITTAL OF RULES TO CONGRESS, 234 F.R.D. 219, 313, 333, 370-373 (2006).

[110] The Sedona Principles "flesh out" the duty in many of the fourteen Principles. *See, e.g.,* Principle 1, 2,3, 5, 6, 7, 9, 11, and 14.

[111] MCR 2.302(B)(5); *see also* Staff Notes, OHIO CIV. R. 37(F)(2010)(the duty to preserve is "addressed by case law and is generally left to the discretion of the trial judge").

[112] *See, e.g.,* CAL. CIV. PROC. §§ 1985.8(l)(2); 2031.060(l)(2); 2031.300(d)(2) & 2031.310(j)(2); 2031.320(d)(2).

[113] URCP Rule 37(i)(Failure to preserve evidence).

[114] Principle 5, Sedona Conference® Best Practices Recommendations & Principles (2nd Ed. 2007).

[115] Zubulake v. UBS Warburg ("Zubulake IV") , 220 F.R.D. 212, 218 (S.D. N.Y. 2003); *accord*, Danis v. USN Communications, 2000 WL 1694325, *38 (N.D. Ill. Oct. 20, 2000)(although not intentionally destroyed to avoid disclosures, the failure to place clear procedures and standards for preserving documents demonstrated bad faith and did not satisfy duties).

[116] Talavera v. Shah, 638 F.3d 303, 311-312 (C.A. D.C. March 29, 2011)(violation of a regulation can support an inference of spoliation if party is a member of the general class sought to be protected).

[117] Phillip Adams v. Dell, 621 F. Supp.2d 1173, 1191 (D. Utah March 30, 2009)(duty arose when other "computer and component manufacturers [first] were sensitized to the issue").

[118] Loukinas v. Roto-Rooter Serv. Co., 167 Ohio App. 3d 559, 569, 855 N.E.2d 1272 (1st D.C.A. (Ham.) June 23, 2006)("Even prior to the commencement of any litigation, a "plaintiff is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action").

[119] Micron II, *supra*, 645 F.3d 1311, at 1320.

[120] Oleksy v. GE, 2011 WL 4626015, at *3 (N.D. Ill. Oct. 3, 2011).

"with the most demanding requirements of the toughest court to have spoken on the issue" despite the burdens and expense involved from resulting "over-preservation."[121]

New York, in *Voom HD Holdings*, has recently adopted the position that the duty to preserve begins when litigation "is pending or reasonably foreseeable."[122] Florida, however, eschews a pre-litigation duty to preserve and relies primarily on evidentiary inferences to deal with intentional destruction of evidence when it is found to exist. [123]

Scope of the Duty

In federal courts, the scope of the duty to preserve is said to be governed by federal principles regardless of the basis for exercising jurisdiction.[124] Thus, a party must preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonable likely to be requested during discovery and/or is the subject of a pending discovery request.[125]

In *Zubulake IV*, the court rhetorically answered "no" to the question of whether a corporation, upon recognizing the threat of litigation, must preserve "every shred of paper, every e-mail or electronic document and every backup tape."[126] According to the court, a party need not preserve backup tapes maintained for disaster recovery, except for tapes storing documents of key players if the information is not otherwise available.[127]

However, it is clear that "the duty to preserve may include deleted data, data in slack spaces, backup tapes, legacy systems and metadata."[128] Much of this information may be available only through forensic intervention of hard drives as 'residual data' or in the 'slack space' at the end [of] active files."[129] It also includes metadata.[130]

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[121] Victor Stanley v. Creative Pipe, 269 F.R.D. 497, 523 (D. Md. Sept. 9, 2010).
[122] Voom HD Holdings v. Echostar Satellite, 2012 WL 265833, at *1 & *5 (N.Y. A.D. 1 Dept. Jan. 31, 2012)(applying Zubulake "standard" that once a party reasonably anticipates litigation, it must suspend its routine retention/destruction policy and put in place a 'litigation hold').
[123] Royal & Sunalliance v. Lauderdale Marine, 877 So.2d 843, 846 (Fla. 4th DCA. July 7, 2004)("we find [the] argument that there was a common-law duty to preserve the evidence in anticipation of litigation to be without merit"); *see also* In re Electric Machinery Enterprises, 416 B.R. 801, 874-875 (Bkcy Ct. M.D. Fla. Aug. 28, 2009)(refusing to apply sanctions to pre-litigation failure to preserve in light of authority that parties were under no duty to preserve evidence under Florida law); *see* Comment Before Supreme Court (Florida) re Amendments, Oct, 2011, copy at http://www.floridasupremecourt.org/clerk/comments/2011/11-1542_101411_Comments(Artigliere).pdf.
[124] Adkins v. Wolever, 554 F.3d 650, 652 (6th Cir. Feb. 4, 2009)(reversing application of Michigan law in federal action challenging loss of video footage of assault on prisoner).
[125] Wm T. Thompson Co. v. General Nutrition, 593 F.Supp. 1443, 1455 (C.D. Cal. 1984)).
[126] Zubulake v. UBS Warburg ("Zubulake IV"), 220 F.R.D. 212, 217 (S.D. N.Y. Oct. 22, 2003)("[s]uch a rule would cripple large corporations, like UBS, that are almost always involved in litigation").
[127] *Zubulake IV, supra*, 217- 218 (backup tapes which are "accessible" – actively used for information retrieval – are always subject to a litigation hold).
[128] Victor Stanley v. Creative Pipe, 269 F.R.D. 497, 524 (D. Md. Sept. 9, 2010)
[129] Kenneth J. Withers, We've Moved the Two Tiers and Filled in the Safe Harbor, 52-DEC FED. LAW 50 (Nov/Dec. 2005).
[130] The Committee Note to Rule 26, Subdivision (f)(2006) ("metadata" and other material not "apparent to the creator or readers" is discoverable and should be discussed early").

Limitations

Courts acknowledge that proportionality principles limit the duty to preserve,[131] as does the principle of reasonableness.[132] In *Rimkus v. Cammarata,*[133] the court noted that "[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done – or not done – was *proportional* to that case and consistent with clearly established applicable standards." (emphasis in original). Similarly, in *Pippins v. KPMG,*[134] a District Court noted that "preservation and production are necessarily interrelated" and that proportionality is "a factor in determining a party's preservation obligations."[135]

The recent Sedona Conference® *Commentary on Proportionality* stresses the role of proportionality in preservation analysis.

However, the likelihood that a court will approve (retroactively) decisions not to preserve based on proportionality assessments is far from assured.[136] One Court has cautioned, for example, that "[i]t seems unlikely, for example, that a court would excuse the destruction of evidence merely because the monetary value of anticipated litigation was low."[137]

To address this uncertainty, the Seventh Circuit E-Discovery Principles list examples of presumptively exempt sources of ESI for purposes of early dialogue. This includes "deleted," "slack," "fragmented" or "unallocated" data as well as ephemeral data, temporary files, metadata fields and or other ESI requiring "extraordinary" preservation efforts not utilized in the ordinary course of business.[138] As noted above, this approach has influenced rulemaking proposals designed to address scope of the duty to preserve.

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[131] *See* Thomas Y. Allman, Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments, 13 RICH. J. L. & TECH. 9, ¶26 (2007)("[J]ust as the duty to produce is tempered by the principle of proportionality, so should courts take the same approach in regard to preservation decisions").
[132] Victor Stanley v. Creative Pipe, 269 F.R.D. 497, 523 (D. Md. 2010)(assessment of reasonableness and proportionality should be at the forefront" of inquires as to whether a party fulfilled duty to preserve).
[133] 688 F. Supp. 2d 598, 613 (S.D. Tex. Feb. 19, 2010).
[134] 2012 WL 370321, at *11 (S.D. N.Y. Feb. 3, 2012).
[135] Utah has recently expanded the use of proportionality in terms of scope of discovery but does not explicitly acknowledge its application in regard to preservation. URCP Rules 26(b) and 37(b).
[136] Theodore C. Hirt, The Quest for "Proportionality" in Electronic Discovery – Moving from Theory to Reality in Civil Litigation, 5 FED. CTS. L. REV. 171 (2011)(noting difficulties in securing court assistance prior to initiation of litigation – and in Rule 26(f) discussions).
[137] Orbit One Communications v. Numerex, 271 F.R.D. 429, 436 at n. 10 (S.D. N.Y. Oct. 26, 2010)(arguing that reasonableness and proportionality cannot be assumed to create "a safe harbor" for a party obligated to preserve but "not operating under a court-imposed preservation order"); *accord* Pippins v. KPMG, *supra*, 2011 WL 4701849, at *5 & *8 (S.D. N.Y. Oct. 7, 2011)(refusing protective order).
[138] The Seventh Circuit provisions were quoted – but criticized - in a case involving deleted data as "encourage[ing] quick deletion as a matter of corporate policy, well before the spectre of litigation is on the horizon and the duty to preserve it attaches." Tener v. Cremer, 89 A.D. 3d 75, 931 N.Y. S. 2d 552, 556 (A.D. 1st Dept., Sept 22, 2011)(preferring to apply a "cost/benefit analysis" which "does not encourage data destruction because discovery could take place nonetheless").

(3.1) Preliminary Relief

Preservation orders or subpoenas[139] compelling preservation are often sought or agreed to[140] at the outset of litigation in Federal[141] or State courts.[142] While some courts treat a request as a motion for a preliminary injunction,[143] the better view is that a motion for a preservation order is "neither a motion for injunctive relief nor its functional equivalent," but a type of "discovery order."[144] The authority to act is implied in Rule 26(c), Rule 26(f), Rule 16(b) or Rule 37(b)(2)[145] and also falls within inherent powers of a court.[146]

This may include a "mirror-imaging order" issued as a "way to ensure" that the "status quo" is maintained.[147] The 2006 Committee Note to Rule 26(f) cautions, however, that "[t]he requirement that the parties [must] discuss preservation does not imply that courts should routinely enter preservation orders [over objection]."[148]

State courts are also prepared to act where a credible risk to preservation is shown to exist[149] Violations of preservation orders may be punished by contempt, as

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[139] Caston v. Hoaglin, 2009 WL 1687927 at *3-4 (S.D. Ohio June 12, 2009)(authorizing use of "preservation subpoena directed at third party to compel preservation); *see also* Tener v. Cremer, 89 A.D. 3d 75, 76, 931 N.Y.S. 2d 552 (Sup. Ct. App. Div. 1st Dept. N.Y. Sept. 22, 2011)(preservation demand letter accompanied subpoena for identity of persons using IP address at Bellevue Hospital).

[140] In re Toyota Motor Corp., 2010 WL 2901798 (C.D. July 20, 2010).

[141] Haraburda v. Arcelor Mittal USA, 2011 WL 2600756, at *3 (N.D. Ind. June 28, 2011)(ordering party to "abide by its preexisting duty will not increase its burden"); Pacific Centure v. Does 1-101, 2011 WL 2690142, at *5 (N.D. Calif. July 8, 2011)(ordering ISP to preserve subpoenaed information); *cf* Jardin v. Datallegro, 2008 WL 4104473 (S.D. Cal. Sept. 3, 2008)(refusing to order preservation).

[142] McMillen v. Hummingbird Speedway, 2010 WL 4403285 (C.C.P. Pa. Jeff. Co. Sept. 9, 2010)(ordering party not to delete or eliminate social media postings); Dodge, Warren & Peters v. Riley, 105 Cal. App. 4th 1414, 130 Cal. Rptr. 2d 385, 390 (4th Dist. Feb. 5, 2003).

[143] See Walsh v. Frayler, 26 Misc.3d 137(A), 2010 WL 956003 (N.Y. Sup. Ct. Suffolk Co. 2010).

[144] Columbia Pictures v. Bunnell, 245 F.R.D. 443, 448 (C.D. Cal. Aug. 24, 2007)(preservation orders fall within statutory jurisdiction of U.S. Magistrate Judges).

[145] Rule 37(B)(2) permits sanctions for disobedience of an order to "provide or permit discovery, including an order under Rule 26(f), 35 or 37(a).

[146] *See* Victor Stanley v. Creative Pipe, 269 F.R.D. 497, 519 (D. Md. Sept. 9, 2010)(orders to preserve issued *sua sponte* are orders to "permit discovery" whose violation can be sanctioned under Rule 37(b)(2)).

[147] United Factory Furniture v. Alterwitz, 2012 WL 1155741, at *4 (D. Nev. April 6, 2012)(citing to Playboy Enterprises, 60 F.Supp2d 1050 (S.D. Cal. 1999); *cf.* Voom HD Holdings v. EchoStar, 2012 WL 265833 (N.Y. App. Div. 1)(prompt imaging of key custodian accounts made little difference to the lower and appellate court).

[148] See TRANSMITTAL OF RULES TO CONGRESS," 234 F.R.D. 219, 328-329 (2006).

[149] Stein v. Clinical Data, Inc., 2009 WL 3857445, at *2 (Super. Ct. Suffolk Co. Oct. 9, 2009); McMillen v. Hummingbird Speedway, 2010 WL 4403285, at Order (Pa. Com. Pl., Jeff. Co. Sept. 9, 2010)(ordering party not to delete or eliminate postings prior to discovery); 1-800 East West Mortgage v. Bournazian, 2010 WL 3038962 (Mass. Super. Ct. July 18, 2010); *compare* Walsh v. Frayler, 26 Misc. 3d 1237(A), 2010 WL 956004 (N.Y. Sup. Suffolk Co. Feb. 24, 2010).

demonstrated in *Genger v. TR Investors*,[150] where the Delaware Supreme Court, in effect, held that the wiping of unallocated free space on a hard drive breached a preservation order.

Similarly, producing parties may wish to seek protective orders in response to unduly demanding requests for preservation.[151] Courts have not been receptive, however, to attempts to secure such relief prior to the commencement of litigation, and no explicit reference to the topic appears in Rule 26(c).[152] Consideration could be given to amending Rule 27 to permit pre-litigation orders relating to preservation issues.[153]

(3.2) Litigation Holds

Zubulake v. UBS Warburg (*"Zubulake IV")* famously held that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents" [154] and that "[o]nce the duty to preserve attaches, any destruction of documents is, at a minimum, negligent."[155] In *Zubulake V,*[156] the found that the obligations in Zubulake IV had not been met and authorized an adverse inference instruction to a jury, reportedly resulted in a $29M jury verdict.[157]

The Committee Comment to Rule 37(e), adopted shortly thereafter, makes explicit reference to use of "litigation holds."[158]

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[150] Genger v. TR Investors, 26 A.3d 180, 193 (Del. Supreme Ct. July 18, 2011)(affirming sanctions where party intentionally took affirmative steps to destroy or conceal information to prevent its discovery at a time that party was under an obligation to preserve).

[151] *See, e.g.,* Pippins v. KPMG, 2011 WL 4701849, at *8 (S.D. N.Y. Oct. 2011); *see also* Changes Made [to Rule 26(b)(2)(B)] after Publication and Comment, TRANSMITTAL OF RULES TO CONGRESS," 234 F.R.D. 219, 339 (2006)(protective orders challenging duty to preserve inaccessible information).

[152] Texas v. City of Frisco, 2008 WL 828055, at *4 (E.D. Tex. March 27, 2008)(declining to adjudicate reasonableness of demand for preservation since the court lacked jurisdiction).

[153] *Cf.* A. Benjamin Spencer, The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court, 79 Fordham L. Rev. 2005 (2011)(advocating amendment to permit pre-litigation preservation orders but relegating protective order relief to post commencement).

[154] Zubulake v. UBS Warburg ("Zubulake IV") , 220 F.R.D. 212, 218 (S.D. N.Y. 2003); *accord*, Danis v. USN Communications, 2000 WL 1694325, *38 (N.D. Ill. Oct. 20, 2000)(although not intentionally destroyed to avoid disclosures, the failure to place clear procedures and standards for preserving documents demonstrated bad faith and did not satisfy duties).

[155] Zubulake IV, *supra*, 220 F.R.D. 212, 220.

[156] Zubulake v. UBS Warburg ("Zubulake V") , 229 F.R.D. 212, 231-240 (S.D. N.Y. 2004).

[157] See Staying Ahead with Saul Ewing (April 2005), 2 ("the magnitude of the punitive damages award – which the jury reached after only 30 minutes of deliberation – likely stemmed, in part, from UBS's well-documented failure to preserve and timely produce relevant electronic discovery"), copy at http://www.saul.com/media/site_files/2431_pdf_793.pdf.

[158] Committee Note, Rule 37(f)(2006)("[g]ood faith . . . may involve a party's intervention to modify or suspend certain features of that routine operation" and also "[w]hen a party is under a duty to preserve information . . . intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold").

In *Pension Committee,*[159] issued six years after *Zubulake V,* the same court held that "after 2004, when the final relevant *Zubulake* opinion was issued, the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information" (emphasis in original).[160] Other failures constituting gross negligence[161] include the failure to identify and collect from all key players or to cease the deletion of email or fail to preserve the records of former employees or to fail to retain certain backup tapes.[162]

The leading state appellate court in New York has recently adopted *Pension Committee*,[163] as has other state courts.

However, not all courts and commentators agree that it is grossly negligent to fail to utilize a written hold[164] in the absence of evidence of any intent to impair the ability to litigate.[165] In *Haynes v. Dart*, the court held that the failure is "not per se evidence of sanctionable conduct."[166] As the current Chair of the Rules Advisory Committee has written, "[p]er se rules are too inflexible for this factually complex area of the law."[167] The reasonableness of a party's preservation efforts should be the prevailing consideration.[168]

Implementing a Litigation Hold

Typically, a hold notice is communicated to key custodians and to appropriate IT, records retention or other personnel with responsibilities for relevant data.[169] There may be "automated processes in place to track issuance of the litigation hold.[170] The legal hold identifies the parties involved and the information to be preserved, including

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[159] Pension Committee v. Banc of America Securities, 685 F. Supp.2d 456 (S.D. N.Y. Jan. 15, 2010, amended May 28, 2010)("*Zubulake* Revisited: Six Years Later").
[160] *Id*., at 465.
[161] *Id.,* at 471 ("after a discovery duty is well established [listing them] the failure to adhere to contemporary standards can be considered gross negligence").
[162] *Id*., at 466. The list of grossly negligent acts is restated at 471.
[163] Voom HD Holdings v. Echostar, __ A.D. 3d __, 2012 WL 265833 (N.Y. A.D. 1 Dept. Jan. 31, 2012); see Kessler and Johnston, Is the Gap Between Perfection and Negligence Closing?, Bloomberg BNA (Feb. 10, 2012), copy at http://www.fulbright.com/images/publications/20121214KesslerJohnsonRprt.pdf.
[164] Orbit One v. Numerex, 271 F.R.D. 429 (S.D. N.Y. Oct. 26, 2010); *accord*, Scalera v. Electrograph Systems, 262 F.R.D. 162, 178-179 (E.D. N.Y. Sept. 29, 2009); Kinnally v. Rogers, 2008 WL 4850116, at *7 (D. Ariz. Nov. 7, 2008)(absence or untimeliness of litigation hold is "not dispositive").
[165] *See, e.g.,* Culler v. Shinseki, 2011 WL 3795009, at *7 (M.D. Pa. Aug. 26, 2011)(no evidence that deletion of mailbox pursuant to routine practice was an intentional act designed to impair ability to litigate).
[166] Haynes v. Dart, 2010 WL 140387, at *4 (N.D. Ill. Jan. 11, 2010).
[167] Surowiec v. Capital Title Agency, 790 F. Supp. 2d 997, 1007 (D. Ariz. May 4, 2011).
[168] Victor Stanley v. Creative Pipe, 269 F.R.D. 497, 524 (D. Md. Sept. 9, 2010)("a litigation hold might not be necessary under certain circumstances, and reasonableness is still a consideration"); Guideline 5, Sedona Commentary on Legal Holds: The Trigger & The Process, 11 SEDONA CONF. J. 265, 270 (2010); *see also* at 280: "there is no per se negligence rule and if the organization otherwise preserves the information then there is no violation of the duty to preserve").
[169] Commentary on Legal Holds, 11 SEDONA CONF. J. 265, 267 (2010).
[170] *Id.*, 6-7 (recording communications regarding "endpoint" devices such as desktops, laptops and removable devices).

relevant time frames. It may not necessarily result in the immediate collection of the data placed on hold, since it may be "primarily prophylactic."[171]

Broadly worded keyword searches can sometimes be used to help identify and segregate ESI in dedicated archives.[172] There are also methods to access and sequester information remotes or resources can be dedicated to imaging and retaining "snap-shots" of active files.[173]

Discoverability

Some courts are prepared to treat litigation holds as privileged communications not subject to discovery.[174] In other courts, a preliminary showing of spoliation permits discovery of the details of the hold.[175] In any event, while litigation holds themselves may be protected, that is not true of the "details surround the litigation hold" such as "when to whom" and the "kinds and categories of ESI" included."[176]

Recipients of Litigation Holds

It is not unusual for parties to instruct their personnel to implement the litigation hold based on their knowledge of the subject matter and with assistance available, as needed. However, some courts hold that "it is insufficient, in implementing such a litigation hold, to vest total discretion in the employee to search and select what the employee deems relevant without the guidance and supervision of counsel."[177]

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[171] Thomas Y. Allman, Jason Baron and Maura Grossman, Preservation, Search Technology & Rulemaking, Dallas Mini-Conference (Sept. 9, 2011), 2, at n. 4; copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Thomas%20Allman,%20Jason%20Baron,%20and%20Maura%20Grossman.pdf.

[172] Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432 ("Zubulake V") (S.D. N.Y. July 20, 2004) (suggesting use of "a broad list of search terms" to identify materials subject to preservation); *accord* Sedona Conference® Best Practices Commentary on The Use of Search and Information Retrieval Methods in E-Discovery, 8 SEDONA CONF. J. 189, 200 (Fall 2007).

[173] *See, however*, Voom HD Holdings v. EchoStar, 2012 WL 265833 (N.Y. App. Div. 1) where the prompt imaging of key custodian accounts made little difference to the lower and appellate court, both of whom concluded that the partial continuation of an auto-delete system warranted findings of gross negligence and severe sanctions.

[174] Capitano v. Ford, 15 Misc. 3d 561, 831 N.Y.S. 2d 687 (S.C. Chaut. Co., 2007)(finding "suspension orders' issued to records management group to be privileged);

[175] Major Tours v. Colorel, 2009 WL 2413631, at *5 (D. N.J. 2009).

[176] Cannato v. Wyndham, 2011 WL 5598306, at *2 (D. Nev. Nov. 17, 2011)(providing detailed list of disclosures of facts "surrounding" the litigation hold); *see also* Hohider v. UPS, 257 F.R.D. 80, 83 (W.D. Pa. 2009)(raising issue of possible waiver of privilege by misrepresentations about litigation holds); Hon. Paul Grimm, et. al., Discovery about Discovery: Does the Attorney-Client Privilege Protect all Attorney-Client Communications Relating to he Preservation of Potentially Relevant Information?, 37 U. BALT. L. REV. 413 (2008).

[177] Voom HD Holdings v. Echostar, *supra*, 2012 WL 265833, at *5 (citing to Pension Committee, 685 F. Supp.456 at 473 which in turn relies on Adams v. Dell, 621 F. Supp. 2d 1173, 1194 (D. Utah 2009) and Zubulake V, 229 FR.D. 422, at 432).

However, errors in doing so are, in most cases, unlikely to have been the result of operating in bad faith.[178]

Retention Policies

When adopted and operated in good faith,[179] destruction of ESI pursuant to a neutral information management policy is appropriate.[180] In *Arthur Andersen LLP v. United States*,[181] the court noted that "[i]t is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances."[182] Informal policies may legitimately provide guidance and shield deletions from criticism.[183] The issue is whether such a policy is adopted or implemented for "legitimate business reasons such as general house-keeping."[184] The Sedona Conference® *Commentary on Email Management* found a variety of retention periods in effect, ranging from short to prolonged, and that entities often shift their practices over time.[185]

Responsibilities of Counsel

Counsel is said to have a "duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to litigation."[186] *Zubulake V,*[187] for

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[178] Victor Stanley v. Creative Pipe, 268 F.R.D. 497, 526 (D. Md. Sept. 9, 2010)(the more "logical inference is that the party was disorganized, or distracted, or technically challenged, or overextended, not that it failed to preserve evidence because of an awareness that it was harmful).

[179] Philip J. Favro, Sea Change or Status Quo: Has the 37(e) Safe Harbor Advanced Best Practices For Records Management?, 11 MINN. J.L. SCI. & TECH. 317, 320 (2010); *accord*, Ronald J. Hedges, The Information Governance Maturity Model, A Foundation for Responding to Litigation, ARMA INT'L J. (2011), at 5 ("[Rule 37(e) would shield [an entity with an integrated litigation hold process] from a sanction imposed under the rules for the unintentional loss of relevant ESI due to the routine operation").

[180] Genger v. TR Investors, 26 A.3d 180, 193 & n. 49 (S.C. Del. July 18, 2011)(acknowledging that "other state and federal courts have differed" in their approach to determine if routine destruction warrants sanctions).

[181] 544 U.S. 696, 704 (2005).

[182] *See also* Oppenheimer Fund v. Sanders, 437 U.S. 340, 362 (June 18, 1978)(a "defendant should [not] be penalized for not maintaining his records in the form most convenient to some potential future litigatnts whose identify and perceived needs could not have been anticipated"); *cf.,* Adams v. Dell, 621 F. Supp. 2d. 1173, 1193 (D. Utah March 30, 2009)("[w]hile a party may design its information management practices to suit its business purposes, one of those business purposes must be accountability to third parties").

[183] Velocity Press v. Key Bank, 2011 WL 1584720, at *3 (D. Utah April 26, 2011)(rejecting argument that two copies of emails produced from third-party sources were "removed from KeyBank's central server pursuant to its neutral document retention program before this date").

[184] Micron Technology v. Rambus ("Micron II"), 645 F.3d 1311, 1322 (May 13, 2011)(innocent purpose includes "simply limiting the volume of a party's files and retaining only that which is of continuing value" as motivated by general business needs, which may include a general concern for the possibility of litigation).

[185] See Guideline 3, Commentary on Email Management: Guidelines for the Selection of Retention Policy, 8 SEDONA CONF. J. 239, 240 (2007)(" a variety of possible approaches reflecting, size, complexity and policy priorities are possible").

[186] Telecom Int'l v. AT&T, 189 F.R.D. 76, 81 (S.D. N.Y. Sept. 27, 1999).

[187] Zubulake v. UBS Warburg LLC ("Zubulake V"), 229 F.R.D. 422, 432 (S.D. N.Y. July 20, 2004)("[o]nce a 'litigation hold' is in place, a party and her counsel must make certain that all sources of

example, mandates "active supervision" by counsel, consisting of "steps that counsel should take to ensure compliance with the preservation obligation."[188] "At the end of the day, however, the duty to preserve and produce documents rests on the party."[189]

Other courts have made it clear that in-house counsel have responsibility to advise the relevant departmental employees of responsibilities.[190]

There are ethical[191] implications when counsel participates in or has knowledge of a client's failure to preserve. Model Rule of Professional Conduct 3.4(a) specifies that a lawyer "shall not unlawfully [alter or destroy material] having potential evidentiary value" nor "counsel or assist" another to do any such act."[192] The definition of "unlawfully" and its application in terms of civil litigation are open for debate.[193] Analysis is particularly complicated when a "team" effort of inside and outside counsel is involved.[194] In addition, the threat of a pending or threatened malpractice claim is not far away in any such instance.

(3.3) Spoliation

Spoliation occurs when a failure to preserve renders discoverable evidence unavailable or damaged at a time when a time when a duty to preserve exists. "[S]poliation . . . is on a qualitatively different level than a simple discovery abuse,"[195] as

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potentially relevant information are identified and placed on 'hold'"); *see also* Cardenas v. Dorel, 2006 WL 1537394, at *7 (D. Kan. June 1, 2006)(outside counsel has duty to exercise some degree of oversight over client's employees charged with executing search to ensure client discharges obligations under discovery provisions).

[188] *Id*., 229 F.R.D. 422, at 433-434 (issuance of litigation hold; communications with key players , who should be periodically reminded; production of "copies of their relevant active files" and identification and storage of badkup media "in a safe place").

[189] *Id*. 436 (once the duty is made known to a party it is on notice and "acts at its own peril").

[190] Flagg v. City of Detroit, 2011 WL 4634245, at *4 (E.D. Mich. Oct. 5, 2011).

[191] ABA MODEL RULES OF PROF. COND. 3.4(b)(a lawyer shall not "unlawfully obstruct" access to evidence or "unlawfully alter, destroy or conceal a document or other material having potential evidentiary value" or "counsel or assist another person" to do so); In re Estrada, Esq., 143 P.3d 731 (Sup. Ct. N.Mex. Sept. 28, 2006)(suspension of one year imposed by counsel for violation of state equivalent of Model Rule 3.4).

[192] *See, e.g.,* Disciplinary Counsel v. Robinson, 126 Ohio St. 3d 371, 933 N.E. 2d 1095 (S.C. Ohio Aug. 25, 2010)(imposing one-year suspension as sanction for, *inter alia*, destruction of firm documents).

[193] Donald H. Flanary, Jr. and Bruce M. Flowers, Spoliation of Evidence: Let's Have a Rule in Response, 60 DEF. COUNS. J. 553, 554 (1993)(Rule 3.4 "also may include the violation of a discovery rule").

[194] Thomas Y. Allman, Deterring E-Discovery Misconduct with Counsel Sanctions: the Unintended Consequences of Qualcomm v. Broadcom, 118 YALE L. J. POCKET PART 161 (2009).

[195] Daynight LLC v. Mobilight, Inc., 2011 UT App. 28, 248 P.3d. 1010, 1012 (C.A. Utah Jan. 27, 2011).

addressed by Rule 37,[196] and is typically remedied by use of inherent powers under *Chambers v. NASCO*[197] or equivalent state authority.[198]

The traditional remedy for spoliation is to instruct a jury that it may draw adverse inferences about the missing information.[199] The evidentiary premise is that one who knowingly destroys evidence is more likely to have been threatened by the document than a party who does not.[200]

While most courts find that mere negligence is not enough to justify such an inference, as "it does not sustain an inference of consciousness of a weak case,"[201] others find the inference is justified "even for the negligent destruction of documents [or ESI]" because each party should bear the risk of its own negligence. [202] Where an adverse inference is not given, litigants are often "free to introduce evidence and make arguments regarding the circumstances surrounding" the destruction or alteration of the evidence at issue.[203]

A number of states also authorize tort recoveries for spoliation under their general tort principles.

Entitlement

The party seeking spoliation sanctions has the burden of establishing the elements of a spoliation violation. The classic articulation is that the party with control of the evidence must have had an obligation to preserve it; the evidence must have been destroyed with a 'culpable state of mind'; and it must be relevant to the party's claim or defense.[204] A showing of prejudice is typically a precondition to sanctions, especially

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[196] In re Hitachi, 2011 WL 3563781, at *6 (S.D. Cal. Aug. 12, 2011)(noting that sanctions are available under Rule 37(b)(2) only "[w]hen a court order has been violated." Some courts purport to apply Rule 37 to spoliation without tracking the language of the rules. *See, e.g.,* La v. Nokia, 2010 WL 4245533, at *3 (C.A. 2nd Dist. Oct. 28, 2010); Shimanovsky v. GM, 181 Ill. 2d 112, 692 N.E.2d 286, 290 (S.Ct. Ill. Feb. 20, 1998); Klupt v. Krongard, 126 Md. 179, 194, 728 A.2d 727(1999); Tuck v. Godfrey, 1999 UT App. 127, 981 P.2d. 407 (C.A. Utah 1999); *accord,* Turner v. Hudson Transit Lines, 142 F.R.D. 68, 72 (S.D. N.Y. Sept. 27, 1991)(the "inability [to comply with an order to produce] was self-inflicted").

[197] 501 U.S. 32 (1991).

[198] Slesinger v. The Walt Disney Company, 155 Cal. App. 4th 736, 66 Cal. Rptr. 3d 268 (2nd App. Dist. Sept. 25, 2007)(Civil Discovery Act "supplements, but does not supplant, a court's inherent power to deal with litigation abuse").

[199] Bass-Davis v. Davis, 122 Nev. 442, 134 P.3d 103, 107, 111 (Sup. Ct. Nev. May 11, 2007)(endorsing use of permissible inference instruction (as opposed to rebuttable presumption) where negligently lost or destroyed evidence because of "potential consequences to the non-spoliating party").

[200] Nation-Wide Check v. Forest Hills, 692 F.2d 21, 217 (1st Cir. 1982)(then Circuit Judge Breyer, J.)(citing 2 WIGMORE ON EVIDENCE § 291 (Chadbourn Rev. 1979).

[201] Univ. Medical Center v. Beglin, __S.W.3d ___, 2011 WL 5248303, at *6 (S.C. Ky. Oct. 27, 2011)(missing evidence instruction "*should not* be given" where loss was result of "mere negligence").

[202] Residential Funding Corp. v. DeGeorge Financial Corp., 306 F. 3d 99, 107, 108 (2nd Cir. 2002)(culpable state of mind requirement satisfied by a showing that evidence was destroyed "knowingly, even if without intent [to breach a duty to preserve it], or negligently")(internal citations omitted).

[203] Pirrello v. Gateway Marina, 2011 WL 4592689, at *10 (E.D. N.Y. Sept. 30, 2011).

[204] Zubulake IV, 220 F.R.D. 212, 220 (S.D. N.Y. 2003).

severe sanctions,[205] although its presence may be presumed if culpability is high.[206] Prejudice is intimately related to relevance.

Fault - the "Culpable State of Mind"

There is disagreement among the Circuits on the degree of culpability required to authorize spoliation sanctions. A majority of Circuits require that there be an "actual suppression or withholding of evidence,"[207] sometimes referred to as "bad faith,"[208] as compared to those Circuits which hold that mere negligence is enough to justify a finding of spoliation because each party should bear the risk of its own negligence. [209]

Some courts make the related argument that any sanctions based on inherent authority require a showing of "bad-faith. However, other courts assert that bad faith is only required where attorney fee shifting is involved.[210]

Most state[211] courts also require a showing of "bad faith"[212] or willful misconduct in order to impose a default judgment or dismissal.[213] In *Peal v. Lee*,[214] for example, the appellate court affirmed dismissal of a complaint for deletion of thousands of electronic files, which the court described as "the personification of bad faith." In *Gillett v. Michigan Farm Bureau*, however, a dismissal was affirmed even in the absence of a showing of bad faith where the trial court "simply concluded that plaintiff acted improperly in deleting information."[215]

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[205] Bull v. UPS, 665 F.3d 68,73 at n. 5 (3rd Cir. Jan. 3, 2012).
[206] Under Sedona Principle 14, spoliation findings should be considered "only if [the court] finds there was a clear duty to preserve, a culpable failure [to do so] and a reasonable probability that the loss of the evidence has materially prejudiced the adverse party."
[207] *Id*., 73. *See also* 80 ("[an] inference that [the party] intentionally withheld documents is not grounded in the record . . . negligence remains a reasonable explanation for everything that happened") & 81 ("[or] that her conduct was in bad faith").
[208] Micron Technology v. Rambus, 645 F.3d 1311 (Fed. Cir. May 13, 2011); Vick v. Texas Employment Comm., 514 F. 2d 734, 737 (5th Cir. June 12, 1975).
[209] Residential Funding Corp. v. DeGeorge Financial Corp., 306 F. 3d 99, 107, 108 (2nd Cir. 2002)(culpable state of mind requirement satisfied by a showing that evidence was destroyed "knowingly, even if without intent [to breach a duty to preserve it], or negligently")(internal citations omitted).
[210] *See* In re Hitachi, *supra*, 2011 WL 3563781, at *6-7 & 11 (S.D. Cal. 2011)(in the Ninth Circuit, the "bad faith" limitation on sanctioning power applies only to cost and [attorney] fee shifting and stating "destruction of evidence need not be in bad faith to warrant the imposition of an adverse inference").
[211] Beard Research v. Kates, 981 A.2d 1175, 1194 (Del. Chan. May 29, 2009)("while negligence alone" may support monetary sanctions, a " terminating sanction like a default judgment or a sanctions like an adverse inference, requires more").
[212] Barnett v. Simmons, 197 P.3d 12, 21 (S.C. Okla. Nov. 2008)(court seeking to impose sanction of dismissal for use of wiping software must "take into account varying degrees of willfulness); Gillett v. Michigan Farm Bureau, 2009 WL 4981193 (Mich. App. 2009).
[213] Nunez v. Professional Transit Management, 2011 WL 1998433, at *8 (C.A. Ariz. May 18, 2011)(affirming use of jury instruction permitting inferences without prior finding of bad faith).
[214] 403 Ill. App. 3d 197, 933 N.E. 2d 450 (1st Dist. July 30, 2010)(dismissal with prejudice authorized because of "deliberate, contumacious or unwarranted disregard of the court's authority," citing to Shimanovsky v. GM, 181 Ill.2d 112, 123, 692 N.E.2d 286 (1998)).
[215] Gillett v. Michigan Farm Bureau, 2009 WL 4981193, at *3 (C.A. Mich. Dec. 22, 2009).

Relevance

Relevance means "something more than sufficiently probative to satisfy Rule 401 of the Federal Rules of evidence." [216] It is sometimes framed in terms of establishing that "the spoliation prejudiced the non-spoliator's ability to present its case or defense."[217] Extrinsic evidence tending to show that missing information would have been unfavorable to the spoliator is often required.[218] In courts applying *Zubulake* and *Pension Committee*, the failure to use a written litigation hold permits a presumption of relevance without consideration of the contents of the missing evidence.[219] Other courts disagree[220] because, "[n]o matter how inadequate a party's preservation efforts may be," it does not justify judicial action "if no relevant information is lost."[221]

Prejudice

The degree of prejudice caused by the failure to preserve can be an essential element in both entitlement to spoliation and the sanction selected.[222] One court has said that "the court's decision to impose sanctions for a failure to preserve documents is guided by the level of culpability for the breach, resulting prejudice, and the ability to ameliorate any prejudice."[223] Another noted that "[a] court's response to the loss of evidence depends on both the degree of culpability and the extent of prejudice."[224] The

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[216] Riordan v. BJ's Wholesale Club, 2011 WL 124500, at *5 (N.D. N.Y. Jan 14, 2011)(adverse inference unwarranted because "the altered documents are not particularly relevant to this litigation").
[217] Cardoza v. Reliant Energy, 2005 WL 1189649, at *2-3 (Tex. App. 1st Dist. May 20, 2005)(establishing the presence of prejudice requires consideration, "of 'the destroyed evidence's relevancy'").
[218] McCargo v. Texas Roadhouse, 2011 WL 1638992, at *5 (D. Colo. May 2, 2011)("a reasonable possibility, based on concrete evidence rather than a fertile imagination that access to the lost material would have produced evidence favorable" to the movant's case).
[219] 915 Broadway Associates v. Paul, Hastings, Janofsky & Walker, 2012 WL 593075, at *8 (Supreme Ct. N.Y. Feb. 16, 2012)("because the evidence was destroyed, at the least, as the result of gross negligence, relevance can be inferred"); Ahroner v. Israel Discount Bank, *supra*, 79 A.D. 3d 481, 482 (App. Div. Dec. 7, 2010)("since the drive was destroyed either intentionally or as the result of gross negligence, the court properly drew an inference as to the relevance of the e-mails stored on the drive"); Philips Electronics N.A. v. BC Technical, 773 F. Supp. 2d 1149, 1157 (D. Utah Feb. 16, 2011)("BCT cannot reap the benefits of its actions by stating there is no evidence of relevance when it destroyed the very evidence needed to make such a determination")..
[220] Surowiec v. Capital Title Agency, 790 F. Supp.2d 997, 1007 - 1008 (D. Ariz. May 4, 2011)(citing Rimkus, 688 F. Supp.2d. 598 at 616-617); *see* Orbit One v. Numerex, 271 F.R.D. 429, 411 (S.D. N.Y. Oct. 26, 2010)(disagreeing with Pension Committee that sanctions are warranted for inadequate preservation efforts "where there has been no showing that the information was at least minimally relevant").
[221] Orbit One, *supra,* 271 F.R.D. 429, at *440-441 (S.D. N.Y. Oct. 26, 2011)(the alternative is to "preserve everything").
[222] See In the Matter of the Fort Totten Metrorail Cases, 2011 WL 6355547, at *5 (D.D.C. Dec. 19, 2011)(citing to Bonds v. DC., 93 F.3d 801, 808 (D.C. Cir. 1996).
[223] Haynes v. Dart, 2010 WL 140387, at *3 (N.D. Ill. Jan. 11, 2010).
[224] Rimkus Consulting v. Cammarata, 688 F.Supp.2d 598, 613 (S.D. Tex. 2010).

degree of prejudice can often "tip the scales in favor of or away from severe sanctions."[225]

In *Zubulake V,*[226] an adverse inference instruction was authorized "[b]ecause UBS's spoliation was willful [and] the lost information is presumed to be relevant." Sedona Principle 14 suggests, in contrast, that sanctions should be considered "only" if there is a "reasonable probability that the loss of the evidence has materially prejudiced the adverse party."

(3.4) Rule 37(e) & Rulemaking

Rule 37(e) was adopted as part of the 2006 Amendments to deal with inadvertent failures to preserve ESI due to the "routine, good-faith" operation of information systems. The author was an early advocate of such measures.[227] A counterpart to Rule 37(e) has been widely adopted by states adopting the 2006 Amendments.[228]

Unfortunately, federal courts have "all but read [Rule 37(e)] out of the rules."[229] Courts typically hold, citing to the Committee Note,[230] that the Rule *requires* that a completely effective litigation hold must be imposed once litigation can be reasonably anticipated.[231] Thus, "if you don't put in a litigation hold when you should there's going to be no excuse if you lose information" [232] because the rule "[only] protect[s] producing parties from sanctions before their litigation hold responsibilities arise."[233]

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[225] Northington v. H. & M. Intern'tl, 2011 WL 663055, at *14 (N.D. Ill. Jan. 12, 2011)(noting failure to establish whether and to what extent prejudiced by "any irretrievable loss of unique evidence").
[226] Zubulake V, 229 F.R.D. 422, 435 (S.D. N.Y. July 20, 2004).
[227] *See* Thomas Y. Allman, The Case for a Preservation Safe Harbor in Requests for E-Discovery, 70 DEF. COUNS. J. 417, 423 (2003)(suggesting prohibition on sanctions for failure to preserve in the absence of a finding they party "acted willfully or willfully failed to act").
[228] *See, e.g.,* CAL CODE CIV. PROC. § 1985.8(l); 2031.60(i); 2031.300(d); 2031.310(j); 2031.320(d)(2009); *accord* 12 OKLA. ST. § 3237(G) (2010) (applying limits on sanctions to those issued under inherent powers).
[229] Hardaway, *et. al*., E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age, 63 RUTGERS L. REV. 521, 566 (2011).
[230] Committee Note, Rule 37(f)(2006)("[g]ood faith . . . may involve a party's intervention to modify or suspend certain features of that routine operation" and also "[w]hen a party is under a duty to preserve information . . . intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold").
[231] Major Tours v. Colorel, 2009 WL 2413631, at *4 (D. N.J. Aug. 4, 2009); *accord,* Disability Rights v. WMTA, 242 F.R.D. 139, 146 (D.D. C. June 1, 2007)(rule requires a party to stop operation of a system that may automatically overwrite information).
[232] Panel Discussion, Sanctions in Electronic Discovery Cases: Views from the Judges*,* 78 FORDHAM L. REV.1, 30-31 (October, 2009).
[233] Rachel Hytken, Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?, 12 Lewis & Clark L. Rev. 875, 887 (2008); . *cf.* Escobar v. City of Houston, 2007 WL 2900581 (S.D. Tex. Sept. 29, 2007)(applying Rule 37(f) despite duty to preserve); Streit v. Electronic Mobility, 2010 WL 4687797, at *2 (S.D. Ind. Nov. 9, 2010("a showing of bad faith by the non-moving party is a requisite to imposing sanctions for the destruction of [ESI]."

Thus, Rule 37(e) does not provide a uniform "guidepost" rejecting sanctions for mere negligence, thus perpetuating a source of "angst" among parties planning for compliance and concerned about being branded as a "spoliator."[234] Since the principle originally sought to be established – "bad faith" as a precondition to severe sanctions - coincides with that in place in majority of Circuits, courts in those jurisdictions simply apply existing precedent without mentioning the rule.[235] According to testimony at the Dallas Mini-Conference in September, 2011, this inevitably results in over-preservation.[236]

After the 2010 Litigation Review Conference sponsored by the Rules Committee at the Duke Law School in May, 2010 ("the Duke Conference"), the Discovery Subcommittee was assigned the task of developing approaches for further comment. One possibility is use of a more precise culpability standard in Rule 37(e), as suggested by the author after the Conference.[237] Connecticut, for example, now requires an affirmative showing of "intentional actions designed to avoid known preservation obligations" to negate its counterpart to Rule 37(e).[238]

Current Proposals

The Subcommittee initially developed both detailed preservation rules and a "sanctions-only" approach for further discussion. After discussion, it concentrated on the latter as its preferred option – if anything is to be done at all.

The current draft submitted to the Rules Committee in March, 2012[239] distinguishes between curative measures (including payment of reasonable expenses) for y failures to preserve and sanctions. The former are available regardless of the culpability involved, but the latter are authorized only for willful or bad faith failures which "cause [substantial] prejudice in the litigation." The court would be authorized to

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[234] *See* Thomas Y. Allman, Adapting Rule 37(e): The decisive issue (March 16, 2012), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03_Addendum.pdf.

[235] *See, e.g.,* Brigham Young University v. Pfizer, 2012 WL 1302288, at *4-5 (D. Utah April 16, 2012)("The Federal Rules protect from sanctions those who . . . . discarded [requested materials] as a result of good faith business procedures").

[236] Notes of Mini-Conference (Sept. 2, 2011), at 2, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Materials/Notes%20from%20the%20Mini-Conference%20on%20Preservation%20and%20Sanctions.pdf.

[237] Thomas Y. Allman, Preservation Rulemaking After the 2010 Litigation Conference, 11 SEDONA CONF. J. 217, 2228 (2010).

[238] *See* Sec. 13-14 CONNECTICUT PRACTICE BOOK (2011)(eff. Jan. 2012)(copy at http://www.jud.ct.gov/Publications/PracticeBook/PB_070511.pdf (limiting sanctions lost "as the result of the routine, good faith operation of a system or process in the absence of a showing of intentional actions designed to avoid known preservation obligations"); *see also* Thomas Y. Allman, Change in the FRCP: A Fourth Way, 1 (September 4, 2011)(proposing modest changes), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Thomas%20Allman.pdf.

[239] Memo, Agenda Book (March 2012), at 249-278, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03.pdf.

consider "relevant factors" and the rule would be accompanied by a detailed Committee Note which would help address preservation planning.

As an alternative, the Subcommittee also proposed amending Rule 37(e) to incorporate a broadened approach which would address the identified concerns.

Currently, the Subcommittee and the Rules Committee are studying the issue. Given that some,[240] including the DOJ[241] - argued that any rulemaking would be "premature," no immediate action is anticipated.

(4) Discovery

The discovery rules are central to the litigation process and have long embraced discovery of information in electronic form. In addition to establishing ESI as a distinct form of discoverable information in the 2006 Amendments, Rule 34 and Rule 45 were amended to acknowledge the right to "test or sample" ESI controlled by the potential producing party or non-party. Provision was made for the establishment of the "form or forms" of production in those rules. Rule 33 was also amended to acknowledge the designation of of ESI in business records as alternatives to answers to interrogatories. Similar changes were made to state rules.[242]

One of the themes of the 2006 Amendments was to act in a technologically neutral manner, focusing on increased party negotiations and more efficient case management by the Courts. The Amendments also added specific requirements in Rule 26(f) and 16 for early discussion of key e-discovery issues, including the form or forms of production, the treatment of inadvertent production of privileged or work product and, in Rule 37, sanctions for the inadvertent loss of information. Other discovery rules, including Rule 30 (depositions) and 36 (requests for admissions), were not amended.

Responsibilities of Counsel

One of the underpinnings of the Rules was that counsel would play, as they always have, a key role in dealing with the unique problems of e-discovery. Rule 26(g) and similar state provisions require counsel to sign discovery papers, thereby certifying

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[240] Ltr., Milberg LLP & Hausfeld LLP to Hon. D. Campbell, Consideration of Rule Changes Regarding Sanctions, November 6, 2011 ("We do not deny that preservation in modern litigation is sometimes expensive [but] . . . any rule amendments regarding preservation and spoliation sanctions are premature"), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV%20Suggestions%202011/11-CV-G-TadlerButterfield.pdf.

[241] Ltr., DOJ to Hon. David Campbell, 2, Sept. 7, 2011 (also raising issues about the authority to enact rules dealing with pre-litigation conduct under 28 U.S.C. § 2072(a) & (c)), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Department%20of%20Justice.pdf;

[242] *See, e.g.,* Ohio Civ. R. 34 (A)(authority to serve a request to produce and copy) & (C)(authority to compel a non-party to produce documents, ESI or tangible things).

completeness of discovery responses as well as existence of a proper purpose in conducting the discovery.[243]

Rule 37 provides for sanctions against parties and their counsel, or either of them, upon the occurrence of certain failures to make discovery. Federal Courts also assert the authority to sanction counsel through the assertion of their inherent authority.[244] Similarly, state courts routinely sanction counsel for willful misconduct under both civil rules and inherent power.[245]

Increased Scrutiny

As e-discovery has evolved, courts have been required to increase their level of scrutiny of practices and policies in ways not seen in the hard copy world.

This section of the Paper deals with the key issues that have emerged.

(4.1) Direct Access

The amended Rules confirmed the right to "test" and "sample" discoverable information, [246] as opposed to relying upon the selection and production by the producing parties.[247] This "direct access"[248] is frequently sought in connection with employment,[249] trade secret[250] and matrimonial[251] disputes. Some threshold showing of actual, as

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[243] Rule 26(g)(attorney certifies belief after reasonable inquiry that discovery requests are complete, not interposed for improper purpose and not unduly burdensome) *with* ILCS S. Ct. Rule 137 (Illinois Supreme Court Rules)("not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation").

[244] Green (Fine Paintings) v. McClendon, 262 F.R.D. 284, 289 (S.D. N.Y. Aug. 13, 2009)("counsel failed to institute a litigation hold to protect relevant information from destruction")..

[245] Moreno v. Ostly, 2011 WL 598931 (C.A. 1st Dist (Calif) Feb. 21, 2011) (aff'g monetary sanction on attorney for misuse of discovery in regard to failures relating to preservation of text messages on cell phone).

[246] *See* Committee Note, Rule 34, Subdivision (a)(2006)("[c]ourts should guard against undue intrusiveness resulting from inspecting or testing such systems" which should not be regarded as constituting a "routine right of direct access").

[247] *Cf.* Menke v. Broward County School Board, 916 So.2d 8, at *10 (Fla. Sept. 28, 2005)("we have never heard of a discovery request which would simply ask a party litigant to produce its business or personal filing cabinets for inspection by its adversary to see if they contain any information useful to the litigation"); *accord,* Sedona Principle 6 and Comment 6.a.("It is the responsibility of the production party to determine what is responsive to discovery demands").

[248] *See also* In re Weekley Homes, 295 S.W. 3d 309, 52 Tex. Sup. Ct. J. 1231 (Tex. 2009)(vacating order); Kenneth J. Withers and Monica Wiseman Latin, Living Daily with Weekley Homes, 51 THE ADVOC. (TEXAS) 23 at *29 (Summer 2010).

[249] In re Misty Jordan, 2012 WL 1089275 (C.A. Tex. April 3, 2012)(order compelling access to plaintiff's personal computer to search internet history for pornographic links).

[250] *See, e.g.,* New Hampshire Ball Bearings v. Jackson, 158 N.H. 421, 969 A.2d. 351 (S.C. N.H., March 18, 2009)(trade secret litigation); Bennett v. Martin, 186 Ohio App. 3d 412, 428 928 N.E. 2d 763 (C.A. 10th Dist. 2009)(finding abuse of discretion in failing to adopt an adequate protocol).

[251] Schreiber v. Schreiber, 29 Misc.3d 171, 181- 182, 904 N.Y.S. 2d 886 (Sup. Ct. Kings Co. June 25, 2010)(refusing blanket request for "unrestricted turnover of the computer hard disk drive").

opposed to speculative, "destruction of evidence or thwarting of discovery" is usually required given the issues of confidentiality or privacy involved.

The Texas Supreme Court, in *Weekley Homes,* while barring a forensic search for deleted email on employee hard drives, emphasized that the practice warranted general discouragement, "just as permitting open access to a party's file cabinets for general perusal would be."[252]

Typically, examination is undertaken pursuant to a court-ordered protocol at the cost of the requesting party, with protection for privacy and with a method of asserting privilege or work product concerns without waiver. Courts are concerned about overly intrusive attempts to seek "wholesale access" that exposes matters "extraneous to the litigation."[253] Some state courts, however, have granted direct access to media of opposing parties without noticeable concern about privacy.[254]

As a general matter, the concerns about expectation of privacy, and invasive or intrusive aspects of e-discovery have become more pervasive with the growth of communications via social media and the switch to Web 2.0 interactive use of the internet.[255]

(4.2) Local Rules/ Model Orders

At least forty-one of the Federal Districts and numerous state courts have formally adopted local rules or Standing orders which provide more fine-grained opportunities for e-discovery.[256] The Default Standards of the District of Delaware have been particularly influential.[257] State court guidelines of note are those of the Delaware Court of Chancery[258] and the Nassau County [N.Y.] commercial court.[259]

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[252] 52 Tex. Sup. Ct. J. 1231, 295 S.W. 3d 309, 317 (S.Ct. Tex. Aug. 28, 2009)(referencing with approval Committee Note to the effect that the rules are not "meant to create a routine right of direct access").
[253] Holland v. Barfield, 35 So. 3d 953, 956 (Fla. App. 5 Dist. May 7, 2010)(quashing order to produce all information on computer and mobile phone SIM card without regard to privacy rights).
[254] Jensen v. Eclinical Works, 2012 WL 676225, at *3-*5 (Superior Ct. Mass. Feb. 3, 2012)(ordering intrusive inspection, interviews and requiring producing party to pay retainer); *Cf.* Squeo v. Norwalk Hospital, 2011 WL 7029761, at * 4 (Superior Ct. Conn. Dec. 16, 2011)(making "one's private and personal information unrelated to this lawsuit" available to a stranger or his staff "would still be seriously invasive and worth of concern").
[255] Kerns, Pennsylvania Court Considers Appropriate Balance Between Electronic Discovery and Privacy, Privacy & Data Security L. 2010.01-8 (2010)("Somehow, the legal system must develop a balanced approach that uses the truth gathering potential of ESI without abusing a litigant's legitimate expectation of privacy").
[256] For a list of 41 Federal District Courts with local rules addressing e-discovery, *see* http://www.ediscoverylaw.com/promo/current-listing-of-states-that/.
[257] Default Standard (2011), copy at http://www.ded.uscourts.gov/.
[258] Copy at http://www.delawarelitigation.com/uploads/file/int50(1).pdf.
[259] Tener v. Cremer, 2011 WL 4389170 (N.Y. A.D. 1 Dept. Sept. 22, 2011)(citing to Nassau County Guidelines because "the [New York] CPLR is silent on the topic").

The Seventh Circuit Electronic Discovery Pilot Program is noteworthy for its list of presumptive preservation obligations.[260] Principle 2.04 (Scope of Preservation) spells out the contours of the duty to preserve[261] and lists types of ephemeral and other ESI which are presumptively not required to be preserved.[262]

Similarly, the Federal Circuit Model Order for patent litigation[263] incorporating limits on the timing and limits on the allowable number of custodians and the Eastern District of Texas has adopted a "red-lined" version for its use with distinctive variances.[264] The Southern District of New York is also sponsoring a Pilot Project Regarding Case Management Techniques for Complex Civil Cases.[265]

(4.3) Case Management

Federal Courts have the ability to take charge of discovery through a variety of case management techniques. The authority to do so is implied under Rule 16(c), Rule 26(c),[266] Rule 37(b)(2)[267] or as an attribute of inherent judicial powers.[268] The 2006 Amendments, through enhancements to Rule 26(f) and Rule 16(b), sought to facilitate management of e-discovery by courts,[269] consistent with a goal of promoting "party-driven"[270] discovery, marked by "good faith" participation[271] and cooperation.[272]

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[260] Seventh Circuit Electronic Discovery Pilot Program, Statement of Purpose and Preparation of Principles (October 2009), copy at http://www.ilcd.uscourts.gov/Statement%20-%20Phase%20One.pdf.

[261] "Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control."

[262] The categories include, *inter alia*, "deleted" or "unallocated" data on hard drives, RAM, temporary files, frequently updated metadata, duplicative backup data and other forms of ESI requiring "extraordinary affirmative measures."

[263] *See* E-Discovery Committee, An E-Discovery Model Order (2011), copy at http://www.patentlyo.com/files/ediscovery-model-order.pdf; copy also at 7 Annotated Patent Digest § 41:46.50 (February, 2012).

[264] *See* Article, http://www.ediscoverylaw.com/2012/03/articles/news-updates/eastern-district-of-texas-adopts-its-own-model-order-regarding-ediscovery-in-patent-cases/

[265] Copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/Tab%20VI%20Appendix%20F%20SDNY%20Pilot%20Project%20for%20Complex%20Litigation.pdf.

[266] United Medical v. US, 73 Fed. Cl. 35, 37 & n. 1(Ct. Claims Sept. 8, 2006)(preservation order imposed "pursuant to Rule 16(c) and Rule 26 (c)" and "the court's inherent power" as part of the "case management" power of judges).

[267] Rule 37(B)(2) permits sanctions for disobedience of an order to provide or permit discovery, including an order under Rule 26(f), 35 or 37(a).

[268] American Legalnet v. Davis, 673 F. Supp.2d 1063, 1072 (C.D. Cal. Nov. 25, 2009)("courts have the implied or inherent power to issue preservation orders as part of their general authority 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases'"); *See* Victor Stanley v. Creative Pipe, 269 F.R.D. 497, 519 (D.Md. Sept. 9, 2010)(orders to preserve issued *sua sponte* are orders to "permit discovery" whose violation can be sanctioned under Rule 37(b)(2)).

[269] Lee H. Rosenthal, From Rules of Procedure to how Lawyers Litigate: 'Twixt The Cup and the Lip," 87 DENV. U. L. REV. 227, 236 (2010)(arguing for early involvement of judges in "the cases that need such supervision").

[270] In re Facebook, 2011 WL 1324516, at *2 (N.D. Cal. April 6, 2011)(ordering parties to meet and confer to develop an ESI protocol).

At the state court level, the progress towards change has been more deliberate. Most states neither mandate voluntary early disclosures without document requests nor mandate that counsel meet in advance of scheduling conferences. In many states, the holding of the scheduling conference itself is at the discretion of the Court. On the other hand, a number of states have added creative measures requiring early preparation for e-discovery discussions,[273] and authorizing more comprehensive post-conference orders than are found in federal courts.[274]

Voluntary (Early) Disclosure

Rule 26(a) was amended to require disclosure of certain types of ESI without service of document requests.[275] Local federal rules often mandate early disclosures.[276] For example, the [Revised] Default Standard issued by the District Court of Delaware requires disclosure of the ten custodians "most likely to have discoverable information" as well as sources which contain "non-duplicative" discovery."[277]

Pre-Discovery Party Conferences ("Meet and Confers")

As amended in 2006, Rule 26(f) requires parties to meet and confer about "disclosure or discovery of electronically stored information, including the form or forms in which it should be produced," prior to preparing a "discovery plan" for the meeting with the Court pursuant to Rule 16. Parties are also directed to discuss "any issues about preserving discoverable information." [278]

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[271] Rule 37(f) requires counsel and parties to participate in "good faith" in the preparation of the "discovery plan" and Rule 16(f) requires good faith participation in the scheduling conference. In the absence of such conduct, sanctions are mandatory.

[272] Board of Regents v. BASF, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007) characterizes Rule 26(f) as requiring counsel to "cooperatively plan discovery with opposing counsel," a theme now embodied in the Sedona Conference® Cooperation Proclamation, 10 Sedona Conf. J. 331, 332 (2009)("Cooperative Discovery is Required by the Rules of Civil Procedure").

[273] *See, e.g.,* MD Rules, Rule 2-504.1(c)(2) (amended 2007)(order setting scheduling conference may require parties to confer in person or by telephone to confer prior to conference to narrow differences).

[274] MD Rules, Rule 2-504.1.

[275] Rule 33 was likewise amended to include ESI as sources of alternative discovery where equal burdens exist in deriving responses.

[276] *See, e.g.,* DEFAULT STANDARD (NO. DIST. OH), LR- Appendix K); Supplemental Order re Civil Cases Before Judge William Alsup, Northern District of California (2008), para. 13 ("parties must search computerized files, e-mails, voice mails, work files, desk files [and basic information should] be made available to the other side . . . as if it were a response to a standing interrogatory")(copy on file with author).

[277] Delaware Fed. Ct. Default Standard (2011), Para. 3, copy at http://www.ded.uscourts.gov/.

[278] Rule 26(f)(2)("In conferring, the parties must . . .discuss any issues about preserving discoverable information; and develop a proposed discovery plan [and] attorneys of record . . are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan").

This focus is consistent with Sedona Principle 3[279] which urges parties and their counsel to address issues by cooperative efforts, as reinforced by the Sedona "Cooperation Proclamation," which challenges parties to adopt a culture of cooperation in discovery, as endorsed by courts.[280] Indeed, some courts are prepared to order that parties conduct meet and confer or face appointment of Special Masters.[281] Increasingly, "[c]ourts expect parties to reach practical agreement[s]on search terms, date ranges, key players, and the like"[282] as well as the treatment of metadata and the contents of load files.

One of the problems with Rule 26(f), however, is that parties are often unable, for tactical or practical reasons, to agree on preservation or discovery restrictions at an early stage.[283] An FJC study s concluded, for example, that in only 13% of cases had parties actually discussed preservation issues involving ESI at the Rule 26(f) Conference.[284]

States do not routinely require "meet and confer" conferences among parties, given the costs, especially in cases where ESI does not play a prominent role. Only Alaska,[285] Arizona (complex cases),[286] Arkansas,[287] California,[288] Delaware (complex cases),[289] New Hampshire,[290] North Carolina (Business Court),[291] Wisconsin[292] and Utah[293] have acted to require it. In Alabama, however, the court may order parties to meet and confer if discovery of ESI will be sought.[294]

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[279] Sedona Principle 3 provides that parties "should confer early in discovery regarding the preservation and production of [ESI] when these matters are at issue in the litigation and seek to agree on the scope of each parties rights and responsibilities."
[280] The Sedona Conference ® Cooperation Proclamation, 10 SEDONA CONF. J. 331(2009); *see* Steven S. Gensler, Some Thoughts On the Lawyer's E-Volving Duties in Discovery, 36 N. KY. L. REV. 521, 555 (2009)(a lawyer need not relinquish a legitimate position that serves the client's interest).
[281] SEC v. Collins & Aikman, 256 F.R.D. 403,415 (S.D. N.Y. 2009).
[282] Thomas Allman, Conducting E-discovery After the Amendments: The Second Wave, 10 SEDONA CONF. J. 215, 216-217 (2009); *see also* In re Facebook, 2011 WL 1324516 *1 at n. 1 (N.D. Cal. April 6, 2011).
[283] *See, e.g.,* Geraldine Soat Brown [MJ], Reining in E-Discovery, ABA Litigation, Summer 2011, 3 ("rarely have I seen any report of a Rule 26(f) conference that included a serious discussion of ESI, what should be preserved, and what is reasonably accessible"), copy at http://apps.americanbar.org/litigation/litigationnews/trial_skills/012412-tips-reining-in-ediscovery.html.
[284] Emery G. Lee III, Early Stages of Litigation Attorney Survey, March 2012, at 5, n. 8, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03_Addendum.pdf.
[285] ALASKA R. CIV. PROC. 26(f)(2010).
[286] ARIZ. R. CIV. P. 16.3(b)(2010).
[287] ARCP Rule 26.1(b)(1)(parties "shall confer" and discuss, *inter alia*, issues relating to preservation, form of production, period of production, etc.).
[288] CAL. RULES OF COURT, RULE 3.724 (2010)(requiring meeting of parties to discuss any issues relating to the discovery of ESI, including preservation, form of production , scope, methods of asserting privilege or confidentiality, how cost of production is to be allocated and other relevant matters).
[289] Copy at http://courts.delaware.gov/superior/pdf/ccld_appendix_b.pdf.
[290] N.H. SUPER. CT. R. 62(c).
[291] N.C. R. BUS CT Rule 17.1).
[292] WIS. STAT. Stat. § 804.01(2)(e).
[293] URCP Rule 26 (2010).
[294] ALA. R. CIV. P. 26(f)(2010)("any issues relating to discovery of electronically stored information, including issues relating to preserving discoverable information"); *accord,* TENN. R. CIV. P. 26.06(E)(3) ("in any case in which an issue regarding the discovery of [ESI] is raised or is likely to be raised").

In Texas, the Supreme Court requires "early discussion" among parties directed "toward learning about an opposing party's electronic storage systems and procedures."[295] A Delaware court has also endorsed "early and, if necessary, frequent communication among counsel" and cautioned that it "is not likely to be sympathetic" in handling disputes where this was not done.[296]

Pretrial Court Conferences ("Scheduling Conferences")

Rule 16(b) and its state counterparts contemplate early conferences with the court to schedule or discuss discovery issues, including those unique to e-discovery. The "tools already exist" to accomplish the task,[297] given that Rule 16(e) lists sixteen separate techniques and the fact that courts also may appoint Special Masters pursuant to local programs[298] or on an ad hoc basis,[299] to facilitate e-discovery.[300] There is pushback, however, where the appointment is not coupled with adequate protection for privacy so as to avoid limit intrusiveness.[301]

Parties wishing to "determine" their "potential preservation obligations" are said to be authorized to do so via use of a protective order.[302] In *Pippins v. KPMG,*[303] a party sought to be relieved (unsuccessfully) of the burden of preservation of hard drives during of former employees during the pendency of an action.

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[295] In re Weekley Homes, 295 S.W. 3d 309, 315, n. 6, 52 Tex. Sup. Ct. J. 1231 (2009); *accord* Barbara Brokaw v. Davol, 2011 R.I. Super. LEXIS 23, at *6 (Superior Ct. R.I. Providence, Feb. 15, 2011).

[296] Beard Research v. Kates, 981 A.2d 1175, at text with n. 66 (for those. Chan. Del. May 29, 2009)(noting that it would, absent party agreement, apply an approach "it deems reasonable, taking into account" insights from the Chief Justice Guidelines and the Sedona Principles).

[297] *See* Hon. Paul W. Grimm, The State of Discovery Practice in Civil Cases: Must the Rules Be Changed To Reduce Costs and Burden, or Can Significant Improvements Be Achieved Within Existing Rules?, 12 SEDONA CONF. J. 47, 50 (2011)(noting that courts "seldom receive proposed discovery plans" that reflect meaningful efforts to drill down on the issues to be discussed at Rule 26(f) conferences despite the Rule "26(c) toolkit").

[298] *See, e.g.*, the Electronic Discovery Special Master's program initiated in November, 2011 by the Alternative Dispute Resolution Implementation Committee (W.D. Pa.), copy at http://www.pawd.uscourts.gov/pages/ediscovorey.htm.

[299] Cannata v. Wyndham, 2012 WL 528224, at * 4 (D. Nev. Feb. 17, 2012).

[300] In re Intel, 258 F.R.D. 280 (D. Del. June 4, 2008).

[301] In re Art Harris, 315 S.W. 3d 385 (C.A. Tex. Aug. 6, 2010) & In re Howard K. Stern, 321 S.W. 3d 828, 845-846 (noting that the court "gave the special master and forensic examiner 'carte blanch authorization to sort through [the party's] electronic storage device"); *cf*. Monica Bay, A Growing Trend: Use of E-Discovery 'Special Masters," LTN News, Nov. 23, 2011, copy at http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202533274953&slreturn=1.

[302] Changes Made [to Rule 26(b)(2)(B)] after Publication and Comment, TRANSMITTAL OF RULES TO CONGRESS," 234 F.R.D. 219, 339 (2006). In connection with changes to Rule 37(f) after Public Hearings, the Report to Congress explained that the Committee had been concerned that the initial language "would invite routine applications for preservation orders, and often for overbroad orders." *See* TRANSMITTAL OF RULES TO CONGRESS," 234 F.R.D. 219, 328-329 (2006).

[303] *See, e.g.,* Pippins v. KPMG, 2012 WL 370321, at *11 (S.D. N.Y. Feb. 3, 2012)(District Judge)(denying motion for protective order under Rule 26(c) after concluding that burden or expense of preserving hard drives does not "outweigh[s] its likely benefit").

States also mandate discussion of key e-discovery topics with courts in early planning conferences.[304] They typically encourage meetings with the court at the discretion of the court or on motion of parties.[305] Topics relating to e-discovery are often one of the subjects of such hearing, and preparation is encouraged.

In New York, for example, discussions about e-discovery are to be held when the court "deems appropriate"[306] and practitioners are required to be prepared to discuss client information architecture.[307]

The Duke Subcommittee

As a result of issues raised at the Duke Litigation Review Conference in 2010, a number of potential case management enhancements are being considered by the Duke Subcommittee of the Rules Committee, chaired by the Hon. John Koeltl.[308] At the March, 2012 Meeting of the Rules Committee, the Subcommittee presented a series of "Rules Sketches" proposing alternative language responding to a number of disparate concerns.[309] This included proposals incorporating concepts of proportionality,[310] limits on discovery requests, "cooperation"[311] and increased availability of cost-shifting,[312] among others.

The Subcommittee is considering more explicit provisions in Rule 26(c).[313] The author has suggested a reference to use of protective orders relating to burdens associated with preservation and the need to resolve preservation issues identified during the rule 26(f) process.[314]

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[304] *See, e.g.*, VA. SUP. CT. R. 4:13 (2010)("issues relating to the preservation of potentially discoverable information"); *See also* TENN. R. CIV. P. 26.06(E)(4)("steps the parties will take to segregate and preserve relevant electronically stored information") and ARCP Rule 26.1(d)(court may issue orders governing discovery, including preservation of information.

[305] Wyoming permits a court to "direct the attorneys" to appear before it "for a conference on the subject of discovery." WYO. R. CIV. PROC. RULE 26(f)(2010).

[306] N.Y. CLS UNIFORM RULES, TRIAL CTS. §202.12.

[307] UNIFORM RULES FOR THE NEW YORK STATE TRIAL COURTS, SEC. 202.12(b); *accord*, SEC. 207.70 (g)(Commercial Division cases)(Counsel should "promptly and diligently familiarize themselves with their clients' information systems to the extent they may be relevant to the issues in dispute" in order to permit "meaningful participation in the conference and compliance with discovery obligations").

[308] *See* Duke Conference Subcommittee Rules Sketches, Agenda Book Addendum (2012), 1, at Addendum 7 of 156 (citing the themes emerging from the Duke Conference review of the Amendments), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03_Addendum.pdf.

[309] Agenda Book Addendum (2012), at 7-47, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03_Addendum.pdf.

[310] *Id.* 20-21.

[311] *Id*. 37-38.

[312] *Id.* 34 – 36.

[313] *Id.*, 7, 34-36 of 156.

[314] *See also* Memo, Thomas Y. Allman to Hon. John G. Koetl, Additional Issues for Duke Subcommittee, March 27, 2012 (copy on file with author).

(4.4) Computer-Assisted Review

The 2006 Amendments did not address the process for preserving, identifying, collecting, culling, review or retrieving discoverable information from masses of potentially discoverable non-privileged ESI. Instead, the amended rules encourage parties to meet and confer to discuss the process[315] and encourage courts to participate in facilitating, through entry of scheduling and protective orders, agreements (or best practices) deemed appropriate.

In doing so, courts often stress the benefits of and need for cooperation, citing the Sedona Conference® *Cooperation Proclamation*.[316]

One of the topics for discussion is the identification and handling of information which may be privileged or subject to work product protection. The review process typically involves vendors or "Discovery Services Companies"[317] to assist in collection, culling and review of such information. Since 2008, Rule 502 of the Federal Rules of Evidence has also been available to authorize binding orders, based on agreements of the parties or otherwise,[318] as advocated by commentators, courts[319] and counsel.[320] This topic is discussed in more detail below, at Section 4.6.

In addition, the review process itself – especially as it relies on computer assisted review – is often a focus of agreements and challenges in ways that were not applied to manual or "linear" review. The issue is typically raised "after the fact" when a party seeks to argue that information was not produced that should have been, according to the requesting party.[321] Increasingly, however, courts are being asked to review planned approaches prior to or during their use, either through a motion to compel or in the context of protective order motions.

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[315] Romero v. Allstate, 271 F.R.D. 96, 109 (E.D. Pa. Oct. 21, 2010).

[316] *See* Sedona Conference® Cooperation Proclamation, 10 SEDONA CONF. J. 331 (2009), *citing* Bd. Of Regents v. BASF, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007)(the "overriding theme of recent amendments" is to promote "open and forthright sharing of information" with the aim of expediting "case progress, minimizing burden and expense, and removing contentiousness as much as practicable").

[317] The District of Columbia Court of Appeals Unauthorized Practice of Law Committee has recently opined on the ethical issues relating to Discovery Services providers. *See* Opinion 21-12 (DC CA Rule 49)(January 12, 2012, copy at http://www.dccourts.gov/internet/documents/21-Opinion-21-12.pdf.

[318] Explanatory Note to Rule 502, Subdivision (b) (As Revised 2007)("a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken 'reasonable steps').

[319] *See* Victor Stanley v. Creative Pipe, 250 F.R.D. 251, 256-257, 259-260, 262-263 (D. Md. May 29, 2008)(noting use of retrieval methodology to effectuate a privilege review); *accord*, Covad v. Revonet, 2009 WL 1472345 (D.D.C May 27, 2009)(announcing intent to use FRE 502 to keep cost of privilege review to the minimum).

[320] Milburg LLP and Hausfeld LLP, E-Discovery Today: the Fault Lies Not in Our Rules, 4 FED. CTS. LAW REV. 1 (2011)(arguing that review costs can be minimized by adopting effective clawback provisions).

[321] Surowiec v. Capital Title Agency, 790 F. Supp.2d 997, 1010 (D. Ariz. May 4, 2011)(awarding Rule 37 sanctions where an "unreasonably narrow search" using only Plaintiff's name and escrow number" was "inexcusable").

Case Law - General

Historically, parties were deemed responsible for the production of requested documents and tangible things and scant attention was paid to "how" they went about the process. The Federal rules assumed that appropriate methods would be utilized and the 2006 Amendments made not changes in that regard. Sedona Principle 6, for example, stresses the presumptive reliance on the party to determine the most appropriate method of producing ESI.

To the extent courts commented at all, the test was one of reasonability. Some case law emphasized that the need for a "diligent" search involving a "reasonably comprehensive search strategy."[322]

Keyword Search

The use of "keyword" methodology has traditionally been a method of identifying responsive and non-responsive ESI and segregating privileged information. According to the Sedona Conference® *Best Practices Commentary on The Use of Search and Information Retrieval Methods in E-Discovery,*[323] however, care is needed to ensure that the terms used in the search are not overly inclusive or too narrow. Input from knowledgeable ESI custodians on the use of words and abbreviations can be helpful to assure accuracy in retrieval and elimination of "false positives."[324]

Some courts have argued that early discussion of the keywords is essential. The case of *In Re Serequel Products Liability Litigation* stressed that "while key word searching is a recognized method," its use "must be in a cooperative and informed process" not one "under[taken] in secret."[325] The court in that case found sanctions to be warranted where there was "no dialogue to discuss the search terms, as required by Rules 26 and 34."[326]

When parties are unable or unwilling to agree on appropriate search terms, both federal[327] and state courts[328] are increasingly willing to act to specify the terms to be used. Some courts are reluctant to order "do-overs," however, when parties do not take

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[322] Velocity Press v. Key Bank, 2011 WL 1584720, at *3 (D. Utah, April 26, 2011)(concluding that the details furnished by counsel as to search terms and the investigation show it was "reasonable" [citing Treppel v. Biovail, 233 F.R.D. 363, 374 (S.D. N.Y. 2006)]).
[323] 8 SEDONA CONF. J. 189 (Fall 2007); s*ee also* The Sedona Conference® Commentary On Achieving Quality in The E-Discovery Process, 10 SEDONA CONF. J. 299 (Fall 2009).
[324] *See* William A. Goss v. Am. Mftrs. Mutual Insur., 256 F.R.D. 134, 135 (S.D. N.Y. March 19, 2009)(decrying "seat of the pants" efforts by lawyers without input or quality control).
[325] 244 F.R.D. 650, 662 (M.D. Fla. Aug. 21, 2007)
[326] *Id*., 664.
[327] *See, e.g*., Clearone Communications v. Chaing, 2008 WL 920336, at *2 (D. Utah April 1, 2008)(approving use of search terms but cautioning that revisit may be needed if "a surprisingly small or unreasonably large number of documents" are identified as potentially responsive).
[328] Mosley v. Conte, 2010 WL 3536810 (Supreme Ct. (New York Co.) August 17, 2010)(ordering use of specific keyword searches).

advantage of offers to consult on search terms.[329] Special Masters have been empowered to approve and limit search terms - and to allocate costs relating to their use.[330]

Predictive Coding

More recently, the use of "predictive coding" and other types of "latent semantic indexing"[331] are said to offer the possibility of greatly increased accuracy as compared to other alternatives, including manual review. Jason Baron has described the process as:

> "Reduced to its essence, 'predictive coding' and its equivalents (i) start with a set of data, derived or grouped in any number of variety of ways (e.g., through keyword or concept searching); (ii) use a human-in-the-loop iterative strategy of manually coding a seed or sample set of documents for responsiveness and/or privilege; (iii) employ machine learning software to categorize similar documents in the larger set of data; [and] (iv) analyze user annotation[s] for purposes of quality control feedback and coding consistency."[332]

Magistrate Judge Peck's recent quasi-advisory opinion on the use of predictive coding in the case of *Da Silva Moore v. Publicis Groupe,*[333] as subsequently affirmed, is instructive. Central to Judge Peck's reasoning[334] was a statement that predictive coding "can (and does) yield more accurate results than exhaustive manual review."[335] The court left ample room for subsequent challenges to the accuracy of the process, measured after production and review by the challenging party.

Judge Peck's ruling is also noteworthy on several other fronts. The Court held that Evidence Rule 702 and *Daubert* "simply are not applicable to how documents are searched for and found in discovery." The opinion also highlighted that it was not deciding "[w]hether [a] Court, at plaintiff's request, [can or should] order the defendant

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[329] In re Nat'l Assn. of Music Merchants, 2011 WL 6372826 (S.D. Cal. Dec. 19, 2011).
[330] Cannata v. Wyndham, 2012 WL 528224, at *4 (D. Nev. Feb. 17, 2012).
[331] Jason R. Baron, Law in the Age of Exabytes: Some Further Thoughts on 'Information Inflation' and Current Issues in E-Discovery Search, 7 RICH. J.L. & TECH. 9, at ¶ 32 (2011)(describing variations of techniques based on "latent semantic indexing," currently known as "'predictive coding,' 'clustering' technologies, 'content analytics,' and 'auto-categorization,' among many others").
[332] *Id.*
[333] 2012 WL 607412 (S.D. N.Y. Feb. 24, 2012).
[334] The opinion was "affirmed" in a cautionary decision by the District Judge. *See* http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1335147855556&Peck_Decision_on_Use_of_Predictive_Coding_Upheld_in_NY_Federal_Court=&et=editorial&bu=LTN&cn=LTN_20120430&src=EMC-Email&pt=Law%20Technology%20News&kw=Peck%20Decision%20on%20Use%20of%20Predictive%20Coding%20Upheld%20in%20N.Y.%20Federal%20Court.
[335] *Id*. at *30, citing to Maura Grossman and Gordon Cormack, Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review, 17 RICH. J. L. & TECH. 11, at 48 (Spring 2011)(describing comparisons between technology-assisted review and manual review).

to use computer-assisted review to respond to plaintiffs' document requests."[336] That issue is reportedly before the Northern District of Illinois at this time.

The Opinion concludes with the comment that it "does not mean" that computer-assisted review "must be used in all cases."[337]

There have been a number of interesting comments on the effect of the opinion. One argument is that it "opens the door" to further erosion of the attorney work product protection. Another focuses on the fact that "relevance ranking" - at the heart of the process – both facilitates and embodies proportionality.

Quality Assurance

The assurance of accuracy is a theme of both the Sedona Conference *Commentary on Achieving Quality*[338] and of *Da Silva*, including sampling as a means of verifying accuracy.[339] One court has opined that "[c]ommon sense dictates that sampling and other quality assurance techniques must be employed to meet requirements of completeness."[340]

(4.5) Form of Production

Rule 26(f) was amended[341] to emphasize that the form or forms of production – including any request for specific metadata (per the Committee Note)[342] should be discussed at the "meet and confer." Courts have been unsympathetic to parties who do not take the opportunity to do so.[343]

Under amended Rule 34(b), if an agreement is not made, production of ESI must made in a "form or forms in which it is ordinarily maintained or in a reasonably useable form."[344] Under Rule 45 the same options exist.

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[336] *Id.*, at *28, n. 10.
[337] *Id*., at *39-40.
[338] The Sedona Conference® Commentary On Achieving Quality in the E-Discovery Process, 10 SEDONA CONF. J. 299, 302 (Fall 2009)(purpose of Commentary is to raise awareness of "greater use of project management, sampling, and other means to verify the accuracy of what constitutes the 'output' of e-discovery").
[339] *Id*. at 302.
[340] *See* In re Seroquel Products Liability Litig., 244 F.R.D. 650, 662 (M.D. Fla. 2007).
[341] Rule 26(f) requires discussion in the "discovery plan" of any issues regarding production of ESI, "including the form or forms in which it should be produced."
[342] Metadata is referred to in the Committee Note to Rule 26(f), where it is defined as information "describing the history, tracking or management of an electronic file." The focus there, however, is on review for privilege and the need for discussion of review mechanics by the parties at the "meet and confer."
[343] Kentucky Speedway v. NASCAR, 2006 WL 5097354 (E.D. Ky. Dec. 18, 2006)("the issue of whether metadata is relevant or should be produced is one which ordinarily should be addressed by the parties in a Rule 26(f) conference").
[344] Rule 34(b)(2)(E)(ii).

Making the Choice

The choice usually is between "native" or "imaged" formats, which have well-defined advantages and disadvantages.

Production in a form in which information is "ordinarily maintained" is widely assumed to refer to production in the "native" format, *i.e.*, the form in which the information is created and maintained.[345] Production of spreadsheets, sound recordings, animated content and other complex electronic presentations, which are dependent upon hidden formulae and the like, are often accomplished in "native" or "quasi-native" file.

A static or "imaged format" such as searchable PDF or TIFF[346] is typically deemed to be a "reasonably useable" form.[347] It is typically used for email and other document-like production. Imaged formats are easier to redact[348] and often the default form suggested by local rules and protocols.[349]

Both forms involve production with "load files" which facilitate use of review platforms, provide for searchability and furnish any other metadata fields required or agreed upon.[350] Application metadata (intrinsic to primary data which moves with it and includes embedded data)[351] and system metadata, maintained separately, can facilitate the efficient sorting of the primary information.[352] Since metadata must be affirmatively removed to create static images, involved some extra costs, some courts

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[345] W. Lawrence Wescott II, The Increasing Importance of Metadata in Electronic Discovery, *supra*, 14 RICH. J. L. & TECH. 10 at n.17 (2008), citing to Maryland District Court Suggested Protocol, at 3. *See* copy at http://www.mdd.uscourts.gov/news/news/esiprotocol.pdf.

[346] A New York appellate court has defined "picture" or "static" forms of production as including "portable document file (PDF) or tagged image file format (TIFF) [which] limits the information provided to the 'actual text or superficial content.'" *See* Irwin v. Onodaga County, 72 A.D. 3d 314, 895 N.Y.S. 2d 262, 268 (App.Div. Feb. 11, 2010).

[347] Nat'L Day Laborer v. USICEA, *supra,* 2011 WL 381624 at *6 (S.D. N.Y. Feb. 7, 2011)[Subsequently Withdrawn](listing, as common fields for inclusion in typical load files: Identifier, file name, custodian, source device, source path, production path, modified date, modified time, time offset value; additional fields for email messages: to, from, cc, bcc, date sent, time sent, subject, time received, attachments; separate fields for OCR copies of paper records: Bates Begin, Bates End, Attach Begin, Attach End).

[348] Chevron v. Stratus Consulting, 2010 WL 3489922 (D. Colo. Aug. 31, 2010)(searchable PDF not a reasonably usable form because the respondents were on notice that authorship would be at issue).

[349] Suggested Protocol for Discovery of [ESI] in the District of Maryland ("[i]f the parties are unable to reach agreement on the format for production, ESI should be produced to the Requesting Party as Static Images," with any subsequent production in Native File format requiring a showing of "particularized need for that production."), copy available at http://www.mdd.uscourts.gov/news/news/esiprotocol.pdf.

[350] *See* Aguilar v. ICE, 255 F.R.D. 350 (S.D. N.Y. 2008)..

[351] W. Lawrence Wescott II, The Increasing Importance of Metadata in Electronic Discovery, 14 RICH. J. L. & TECH. 10 at *4-5 (2008)(application metadata "moves with the file when it is copied (as opposed to the free-standing nature of system metadata").

[352] The Sedona Conference Principles, Principle 12, Comment 12.a. Metadata (2nd Ed. 2007); *see also* Craig Ball, Going Native Without Bates Numbers and Making it Work, LTN, March 1, 2011, http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202483457782 (system metadata is "essential for classifying and sorting large volumes of ESI").

default to mandating native formats if the issue of the costs of production is raised as an issue.[353]

Parties often agree or are ordered to produce reports generated from databases or social media – as opposed to production of the raw data[354] in light of the need of the producing party to retain control over proprietary software and the complexities involved.[355]

Searchable Form

The Committee Note to Rule 34(b) and the Report to Congress[356] stress the importance of maintaining the ability to search ESI, which has come to be seen as favoring the choice of "native" formats.[357] Sedona Principle 12, as revised in 2007, provides that "the choice should "[take] into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and needs of the case."[358]

In the leading case of *Aguilar v. Immigration and Customs Enforcement*,[359] Magistrate Judge Maas traced the evolution of Sedona Principle 12 away from a mild presumption against production of metadata to a one where "even if native files are requested, it is sufficient to produce memoranda, emails and electronic records in PDF or TIFF format accompanied by a load file containing searchable text and selected metadata."[360] *Aguilar* is also significant for its integration of the limiting principles of

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[353] *See, e.g.,* Romero v. Allstate, 271 F.R.D. 96, 107 (E.D. Pa. Oct. 21, 2010)(rejecting blanket argument that production in native format is unduly burdensome).

[354] 150 Nassau Associates v. RC Dolner, 2011 WL 556290, at *5(N.Y. Sup. Ct. N.Y. County, Feb. 9, 2011)(refusing to order production of data in "raw, electronic or 'native' form" in absence of showing of that the party is withholding information).

[355] *See, e.g.,* In re Facebook PPC Advertising Litigation, 2011 WL 1324516, at *4 (N.D. Cal. April 6, 2011)(ordering parties to either review database at Facebook or accept offer of Facebook to provide a laptop loaded with proprietary software and the database – "or any other [compromise] that they may devise."); *see also* Aguilar, *supra*, 255 F.R.D. 350, 362-363 (S.D. N.Y. Nov. 21, 2008).

[356] TRANSMITTAL OF RULES TO CONGRESS," 234 F.R.D. 219, 353-354 (2006).

[357] Committee Note, Rule 34, Subdivision (b)(2006)("the option to produce in a reasonable usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation").

[358] Sedona Principle 12 (2nd Ed. 2007); *see* Thomas Y Allman, The Sedona Principles (Second Edition): Accommodating the 2006 Amendments, 3 FED. CTS. L. REV. 63, *73-*74 (2009)(Principle 12 has evolved into a list of factors which could shape the decision to produce in native format).

[359] 255 F.R.D. 350 (S.D. N.Y. Nov. 21, 2008)

[360] *Id*., 356 (citing to Comment 12b Illus. i). Some courts over-emphasize the evolution of Sedona Principle 12 and use it as a reason for a reflective preference for native format without examining the need in the particular case. *See, eg., Romero v. Allstate Insur*., 271 F.R.D. 96, 107, n. 7 (E.D. Pa. Oct. 21, 2010).

ESI – relevance, inaccessibility and proportionality – to requests for (and denial of) excessively burdensome blanket demands for metadata fields whose use is not needed.[361]

Principle 12 has been interpreted to reject requests to produce non-searchable PDF or TIFF image formats without the basic load files needed to accommodate review.[362] *Aguilar* refers, for example, to production of imaged formats with a "corresponding load file containing metadata fields and extracted text." [363] The revised Default E-Discovery Guidelines of the Federal District Court of Delaware specifies specific metadata fields to be included in load files, which differ slightly from those advocated by others.[364]

States

States that have amended their rules to embrace e-discovery have generally followed the same pattern in proving for "form or forms" of production. Maryland suggests PDF, TIFF, or JPEG files in contrast to native form such as Microsoft Word, Excel, etc.[365] Even states which have not acted to adopt amended Rule 34 tend to follow the federal formula, albeit not always clearly.[366]

North Carolina now defines ESI to include reasonably accessible metadata that enables a party to have "the ability to access such information as the date sent, date received, author, and recipients." However, "other metadata" need not be produced unless the parties agree or a court order based on good cause issues requiring its production.[367]

Organizational Issues

Rule 34(b)(E)(i) provides that a party "must produce *documents* as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request." It is followed by two sections, (ii) and (iii) dealing solely with *electronically stored information*." (emphasis added).

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[361] *Id*., 360 ("because the cost of this additional discovery [restoration of backup media to seek missing metadata] is unquestionably high and the likely benefit low, the [party] will not be required to review and produce any data regarding emails in [its] backup tapes").
[362] *See, e.g.,* Jannx Medical Systems v. Methodist Hospitals, 2010 WL 4789275, at *4 (N.D. Ind. Nov. 17, 2010)("[p]laintiff does not argue that production of electronic data in .pdf form maintains for Defendants the ability to search the information electronically"); In re Netbank, Inc. Securities Litigation, 2009 WL 2461036 (N.D. Ga. Aug. 7, 2009).
[363] 255 F.R.D. 250, 353, n. 2 (defining TIFF and PDF, load files and native formats); *cf*. Nat'L Day Laborer v. USICEA, [subsequently withdrawn], 2011 WL 381624 at *1, *3-4, *6 & n. 25 (even with native format production, load files may be necessary for some types of system metadata to ensure adequate loading).
[364] [Revised] Default Standard for Discovery, District of Delaware (2011), copy at http://www.ded.uscourts.gov/ (listing metadata fields).
[365] Committee Note, MD. RULE 2-504.1(c).
[366] *See, e.g*., Dartnell v. HP, 33 Misc. 3d 1202(A), 2011 WL 4486937 (Sup. Ct. Monroe Cty. Sept. 13, 2011)(citing case law interpreting the CPLR to be "virtually parallel to the Federal provision" and ordering production in native format without explanation despite prior production in hard copy).
[367] Rules Civ. Proc. G.S. § 1A-1, Rule 26 (2011).

Some courts have held that (i) is equally applicable to ESI, despite differences in volumes and in terminology.[368] The opinions on this topic are muddled and confusing.[369]

(4.6) Privilege Waiver

At least two issues involving waiver of protection based on the attorney-client privilege and work product have emerged as electronic communications, especially email, has become the preferred method of consultation.

Waiver through Use of Employer Facilities

The first potential issue arises when employees communicate with their counsel using computer facilities or devices furnished by employers. Some courts have found it reasonable for the employee to expect that the email sent over an employer laptop would remain private, especially where the employer policies and warnings are ambiguous.[370] However, other courts have concluded that any use of employer facilities waives the privilege where the warnings are clear.[371]

The 2006 Amendments did not deal with this issue, which largely remains for state-by-state development in the state courts. It is intimately related to the degree to which privacy rights, if any, exist in a given state.

Many of cases – especially those involving governmental employees – invoke privacy concerns involving federal statutes relating to intrusion upon communications and the degree to which governmental units must secure search warrants. In the case of state and federal employees, constitutional guarantees such as the Fourth Amendment may also apply.

Waiver by Inadvertent Production

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[368] Quality Investment Properties v. Serrano Electric, 2011 WL 1364005, at *3 (N.D. Cal. April 11, 2011)(rejecting argument that because it stores information electronically, the production in electronic form complies with the requirement).

[369] *See, e.g.,* Innis Arden Golf Club v. O'Brien & Gere Engineers, 2011 WL 6117908 (Super. Ct. Conn. Nov. 18, 2011)(ordering preparation of a "load file" in the belief it will address lack of indexing of ESI produced).

[370] NERA v. Evans, 2006 WL 2440008 (Mass. Super. Ct. 2006)(to do otherwise would require employees to carry two laptops when traveling); Stengart v. Loving Care Agency, 201 N.J. 300, 990 A.2d 650 (S.Ct. N.J. March 30, 2010)(drawing on common law and public policy concerns for "reasonableness-of-privacy standard" standards and remanding for sanctions on counsel who accessed without notification to counsel); *cf*. ABA Op. 11-460, 2011 WL 3892767, 2011 WL 3892767 (2011)(no duty under Model Rule 4.4(b) to notify when privilege communications found on ex-employee laptop are turned over to outside counsel).

[371] Fleischerv. Spirit Finance, 2010 WL 5138692 (Ariz. Super. Maricopa Co. Nov. 1, 2010)(distinguishing Stengart et al); Holmes v. Petrovich Development, 191 Cal. App. 4th 1047, 1069, 119 Cal. Rptr. 3d. 878 (C.A. 3rd Jan. 13, 2011)(noting use of work computer rather than home computer despite company warning of "no right of privacy"); *cf*., City of Ontario v. Quon, __U.S. __, 130 S. Ct. 2619 (2010)(review of text messages); *see also* Ciocchetti, The Evesdropping Employer, 48 AM. BUS. L, J. 285 (2011).

The second issue focuses on waiver of the right to assert that information is privileged or constitutes work produced when production is made to an adversary in discovery. The federal courts were badly split over the circumstances under which such waiver occurred despite the fact that the production was inadvertent, and the 2006 Amendments did not purport to resolve the conflict. However, Rule 26(b)(5)(B) was added to clarify that notification by a producing party claiming privilege or protection after production triggered a duty to "return, sequester, or destroy" the information, pending resolution of the waiver issue by a court.

Rules 26(f) and 16(b) were also amended to encourage parties to consider entering into agreements governing the waiver issue which could be adopted as court orders. One example would be stipulated court orders whereby all claims of privilege are reserved despite inadvertent or careless production. State courts, including those influenced by the 2006 Guidelines issued by the Conference of Chief Justices, also focused on encouraging enforceable agreements designed to prevent an inadvertent waiver of privilege.[372]

However, questions existed about the enforceability of such agreements, especially as against non-parties in subsequent state and federal actions involving the same matter.

In 2008, after considerable "behind the scenes" activity, including a request from the relevant Congressional Committee for a proposal,[373] Congress filled the gap by concurring in adoption of Federal Evidence Rule 502 ("FRE 502)[374] to address both the waiver issue and the impact on other proceedings. FRE 502(b) provides, for example, that production in a federal proceeding does not constitute a waiver in any federal or state litigation if (1) the disclosure was "inadvertent" and (2) the holder too "reasonable steps to prevent disclosure" and (3) reasonable steps were "promptly taken to rectify the error."[375]

While a finding of "inadvertence" is typically easy to identify - a lack of intent to waive – courts are badly split on how to assess the reasonableness of steps undertaken to prevent disclosure. In *Mt. Hawley*, for example, the sheer number of inadvertently disclosed emails was deemed sufficient to support a conclusion that reasonable precautions had not been taken despite the extensive use of review technology.[376]

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[372] Morris v. Scenera Research, 2011 WL 3808544 (N.C. Super.), at *8 (Business Ct., Sup. Ct. N.C. Aug. 26, 2011).
[373] Noyes, 66 WASH. & LEE L. REV. 673 (2009)(describing process and public hearings).
[374] Act of Sept. 19, 2008, PL 110-322, 122 Stat. 3537.
[375] N.D. EV. RULE 510 (harmonizing other rules with N.D. R. Civ. P. 26(b)(6)(B)).
[376] Mt. Hawley Insur. v. Felman Production, 2010 WL 1990555 (S.D. W. Va. May 18, 2010); *obj. denied*, 2010 WL 2944777), at *3 (S.D. W. Va. July 23, 2010)(citing "ridiculously high number of irrelevant materials and the large volume of privileged communications produced"); *cf*. Datel Holdings v. Microsoft, 2011 WL 866993 (N.Cal. March 11, 2011)(reasonable precautions were taken since "unbeknownst to defendant, [software used in the review process] suffered a software failure" without a "sufficiently obvious clue[s]").

Commentators have criticized *Mt. Hawley* for demanding "near- perfection" in preproduction precautions in light of the intent of FRE 502 to "reduce the anxiety and costs associated with privilege review."[377]

FRE 502 also clarifies that non-waiver agreements bind parties and non-parties in federal and state cases alike when entered as court orders. [See FRE (e) & (d)] This permits courts to order – even over objection – entry of provisions to permit waiver-free production that does not require proof of inadvertent production or precautions as established by FRE 502(b).[378] There may, nonetheless, be limits on discretion of a court to compel a party to affirmatively withhold from conducting its own privilege review.[379]

Similar issues generally apply to the civil rules of state courts.[380] The finding that the subject matter of a communication is privileged is, of course, a necessary pre-condition to determining that waiver may have occurred. Reasoned debates about email involving copies to or from inside or outside counsel remain major problems.[381]

Analogues to FRE 502 have has been adopted by a number of states[382] and is under consideration in a number of others. Arizona, Arkansas, Florida, Iowa, Louisiana, Maryland, New Hampshire, Oklahoma, Tennessee, Texas, Virginia and Washington have enacted rules roughly corresponding to FRE 502.[383] Arkansas[384] and Oklahoma,[385] acknowledge non-waiver for disclosures made to governmental entities, an approach dropped from the final version of the federal rule. Arizona expressly deals with the impact of disclosures made in other federal or state courts.[386]

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[377] *See* Grimm et al., Federal Rule of Evidence 502: Has It Lived Up to Its Potential?, 17 Rich. J. L. & Tech. 8, *2 & *50 (2011)("Rule 502 will never reach its intended goal" of "encouraging use of computer analytical review methodology if courts demand near-perfection in preproduction precautions").

[378] Rajala v. McGuire Woods, 2010 WL 2949582, at *7 (D. Kan. July 22, 2010)(entering clawback order over objection which bars waiver even if producing party "had not taken reasonable care to prevent disclosure" since to do otherwise would defeat purpose of relieving burden of "an exhaustive pre-production privilege review"); *see* Noyes, *supra*, at 677, 756-757.

[379] *See* Noyes, *supra*, 747, n. 391 (quoting author at Public Hearings: "I don't want 'quick peek' to be mandatory in all federal cases").

[380] 12 OKLA. ST. § 3226(5)(2010)("[t]his mechanism" does not alter the standards governing whether the information is privileged or subject to protection as trial preparation material or whether such privilege or protection has been waived).

[381] *See, e.g.*, Oracle v. Google, 2011 WL 5024457, at *7 (N.D. Cal. Oct. 201, 2011)(email directed to Google executive but copied to attorney was not clearly shown to have been made for the purpose of obtaining or providing legal advice).

[382] *See, e.g.,* ARIZ. R. CIV.P. 16 (b)(iii)(requiring discussion of "adopting any agreements the parties reach for asserting claims of privilege or of protection as to trial preparation materials after production"). *See* N.D. EV. RULE 510 (harmonizing other rules with N.D. R. Civ. P. 26(b)(6)(B)).

[383] 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).

[384] A.R.C.P. 26(b)(5)(D) and A.R.E. 502 (selective non-waiver for production made to state agencies).

[385] 12 OKLA. ST. St. § 2502(F)(selective non-waiver of attorney-client or work product matter furnished to governmental agencies).

[386] ARIZ. R. EVID. 502(c)(if disclosure is made in federal court or another state without a court order governing waiver, it is not a waiver if it would not be waived in the other forum).

(4.7) Sanctions

Compliance with discovery obligations is governed by Rule 37 and its state counterparts.[387] The 2006 Amendments made no changes to Rule 37, other than to add a rule (Rule 37(e)) limiting sanctions for losses of ESI involving "routine, good-faith" system operations.[388]

Rule 37(a), for example, requires that "the loser [and/or counsel] pays" for the costs of securing an order to compel discovery unless the failure to comply was substantially justified or it is unjust to impose the costs.[389] If a party fails to comply with such a court order, Rule 37(b) provides a range of sanction options from evidentiary options to outright dismissal or default. Monetary sanctions for expenses incurred, including attorney's fees, may also be imposed.[390] However, sanctions must be "just" and a court should consider whether lesser sanctions would be more appropriate for the particular violation.[391]

Moreover, counsel may be sanctioned under Rule 26(g)(1) or its state counterparts[392] for failure to adequate interact with clients in the discovery process when they execute certifications deemed, retroactively, to have not been prepared after a reasonable inquiry.[393] In *Qualcomm*, a harsh sanction against outside counsel initially posited as based on Rule 26(g) was set aside by the Magistrate Judge several years later because exhaustive hearings failed to demonstrate that they had acted with bad faith, deemed to be prerequisite for sanctions under the residual authority cited, the courts inherent powers.[394]

Increasingly, as noted in Section 4.4, the methodology employed in executing discovery obligations is a focus of motions seeking sanctions for alleged inadequacies. [395]

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[387] *See, e.g*, Cal. Code Civ. Proc. § 2023.010 (misuse of the discovery process).

[388] The rule, intended to deal with failures to preserve, is typically ignored or rejected once the duty to preserve attaches due to a poorly worded Committee Note which implies that the rule is inapplicable in the absence of a perfectly implemented litigation hold. *See* Section 3.3, above.

[389] Stingley v. City of Chicago, 2009 WL 3681984, at *3 (N.D. Ill. Nov. 3, 2009)("Fee shifting when the judge must rule on discovery disputes encourages their voluntary resolution").

[390] Rule 37(b)(2)(C)(2007).

[391] Bonds v. DC, 93 F.3d 801 (C.A.D.C. 1996)(*citing* Insur. Corp. v. Compagnie des Bauxites de Duinee, 456 U.S. 694, 707 (1982).

[392] VA Code Ann. § 8.01-271.1 & Sup. Ct. Rules, Rule 4:1(g)("signature of the attorney constitutes a certification that the request, response or objection is "not interposed for any improper purpose, such as to harass or to cause unnecessary delay" and "is not "unreasonable or unduly burdensome or expensive").

[393] Play Visions v. Dollar Tree Stores, 2011 WL. 2292326, at *8 (W.D. Wash. June 8, 2011)(counsel "did not take an active role in guiding his client in searching for records"); *but compare* Qualcomm v. Broadcom, 2010 WL 1336937, at *5-6 (S.D. Cal. April 2, 2010)(vacating sanctions under Rule 26(g) since responses were certified by counsel after "a reasonable, although flawed, inquiry and were not without substantial justification")..

[394] Qualcomm v. Broadcom, 2010 WL 1336937 (S.D. Cal. April 2, 2010)(noting that after two years of review, it had concluded that while outside counsel made mistakes sanctions may only be imposed under a court's inherent authority if there is a finding that counsel acted in bad faith).

[395] Chambers v. NASCO, 501 U.S. 32, 46 (1991)(the sanctioning scheme of the rules does not displace "the inherent power to impose sanctions"); Slesinger v. The Walt Disney Company, 155 Cal. App. 4th 736, 66

Sanctions lie against a party which acts "willfully in failing to timely and adequately respond" to document requests.[396] In addition, sanctions have been imposed upon parties[397] and counsel[398] for a wide variety of failures, including inadequate inquiries by counsel prior to certifying discovery requests and responses.

The fact that civil rules provide sanctions for the same conduct does not exclude reliance on inherent power.[399]

(5) Proportionality

Rule 26(b)(2)(C)(i-iii) provides that a court must "limit the frequency or extent of discovery" when discovery sought is "unreasonably cumulative or duplicative," available elsewhere, or when the burden or expense of "the proposed discovery outweighs its likely benefit," taking into account a number of listed factors.[400]

This "proportionality" principle is an important element of the "good cause" requirement added as Rule 26(b)(2)(B) in the 2006 Amendments. Under that rule, inaccessible information need not be produced absent a showing of good cause "considering the limitations of Rule 26(b)(2)(C)." It is "simply not enough to establish good cause," however, by arguing that a party is a large company with "considerable resources."[401]

Fed. R. Civ. P. 26(g) also requires that counsel certify, *inter alia*, that discovery requests and responses are consistent with rules, meet proportionality tests and are not interposed for an improper purpose.[402] In *Mancia v. Mayflower Textile*,[403] the court held that the rule applied to bar "kneejerk discovery requests" and "boilerplate objections." Courts have ordered parties to engage in "cooperative discussion to

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Cal. Rptr. 3d 268 (2nd App. Dist. Sept. 25, 2007)(Civil Discovery Act "supplements, but does not supplant, a court's inherent power to deal with litigation abuse").

[396] Surowiec v. Capital Title Agency, 790 F. Supp.2d 997, 1010 (D. Ariz. May 4, 2011)(awarding Rule 37 sanctions in the form of fees and expenses where an "unreasonably narrow search" using only Plaintiff's name and escrow number" was "inexcusable").

[397] Amber Chapman v. General Board, 2010 WL 2679961, at *8 (N.D. Ill. July 6, 2010)(party did not unreasonably delay in providing the digital information it agreed to produce).

[398] Greene v. Netsmart Technologies, 2011 WL 2225004 (E.D. N.Y. Feb. 28, 2011)(Magistrate recommended that counsel share in sanctions since "something was amiss" involving counsel's "failure to oversee the document retention and collection").

[399] Gorelick et al, Destruction of Evidence, §3.5 Discovery Sanctions - Under Courts' Inherent Power Absent a Court Order (2010).

[400] *See* Rule 26(b)(2)(C)(i), (ii) & (iii)(2007). These include the "needs of the case, the amount in controversy, the parties resources, the importance of the issues at stake" and the "importance of the discovery in resolving the issues.

[401] Thermal Design v. Guardian Building Products, 2011 WL 1527025, at *1 (E.D. Wisc. April 20, 2011)("[c]ourts should not countenance fishing expeditions simply because the party resisting discovery can afford to comply").

[402] Counsel certification under Rule 26(g) involves the assertion, "formed after a reasonable inquiry," that a discovery request, response or objection is "neither unreasonable nor unduly burdensome or expensive").

[403] 253 F.R.D. 354, 364 (D. Md. Oct. 15, 2008)(suggesting use of phased discovery).

facilitate a logical discovery flow" in order to ensure that discovery is proportional to the specific circumstances of [a] case."[404]

The doctrine of proportionality is emerging as the *de facto* limitation of choice in regard to excessive discovery demands, in contrast to the more traditional argument that the information sought is not relevant.[405] Sedona Principle 2 has long suggested use of the "proportionality standard" for assessing the "cost, burden and need" for ESI.[406] The Sedona Conference® *Commentary on Proportionality* puts it even more succinctly, namely that discovery should come from the "most convenient, least burdensome, and least expensive sources." [407]

The principle has also been applied to limit demands for excessive or repetitive use of keywords when a request "outweighs [its] likely benefits."[408] Similarly, proportionality principles were applied to eliminate the necessity of conducting a "costly privilege review of the 95 million pages of documents recovered from the unallocated space files" after a forensic examination of a computer system.[409]

There is also emerging authority that proportionality is applicable to the execution[410] of preservation responsibilities, since "[p]reservation and production are necessarily interrelated."[411] The Sedona *Commentary*[412] notes that the "burdens and costs of preservation" of potentially relevant information should be "weighed" when determining the "appropriate scope of preservation." It is seen by some as requiring "impossible comparisons between discovery value and cost"[413] and in *Orbit One*

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[404] Tamburo v. Dworkin, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010)(referencing the Sedona Commentary, Cooperation Proclamation and the Seventh Circuit's Electronic Discovery Pilot Program).
[405] Gordon Netzorg and Tobin Kern, Proportional Discovery: Making it the Norm, Rather than the Exception, 87 DENV. U. L. REV. 513, 527 (2010)("[t]he default rule for discovery should start with proportionality, and a recognition that not all conceivably-relevant facts are discoverable in every case").
[406] Sedona Principle 8 suggests that "disruption of business and information activities" is one of the factors to be weighed in assessing the "costs and burdens"); Sedona Principle 5 suggests that it is "unreasonable to expect parties to take every conceivable step to preserve all potentially relevant [ESI]").
[407] 11 SEDONA CONF. J. 289, 291 (2010).
[408] In re Nat'l Assn. of Music Merchants, 2011 WL 6372826, at *3 & 4 (S.D. Cal. Dec. 19, 2011)(allowing a further search only if the requesting party is "willing to bear the cost of running the searches and conducting the review").
[409] I-Med Pharma v. Biomatrix, 2011 WL 6140658, at *1, *3 ((D.N.J. Dec. 9, 2011)("overbroad search terms made the likelihood of finding relevant information that would be admissible at trial 'minimal'").
[410] Rimkus v. Cammarata, 688 F. Supp. 2d 598, 613 (S.D. Tex. Feb. 19, 2010)("Whether preservation or discovery conduct is acceptable in a case depends [in part] on whether what done – or not done - was *proportional* to that case and consistent with clearly established applicable standards")(emphasis in original); *accord*, Victor Stanley v. Creative Pipe, 269 F.R.D. 497, 523 (D. Md. 2010)(assessment of reasonableness and proportionality should be at the forefront of inquires as to whether a party fulfilled the duty to preserve relevant evidence).
[411] Pippins v. KPMG, 2012 WL 370321, at *11 (S.D. N.Y. Feb. 3, 2012), adopting 2011 WL 4701849, at *8 (S.D. N.Y. Oct. 2011)(the application of the proportionality principle "flows from the existence" of the principle in Rule 26(b)(2)(C)(iii)).
[412] The Sedona Conference Commentary on Proportionality in Electronic Discovery, *supra*, 11 SEDONA CONF. J. 289, 294 (2010).
[413] Scott Moss, Litigation Discovery Cannot be Optimal But It Could Be Better: The Economics of Improving Discovery Timing in a Digital Age, 58 DUKE L. J. 889, 890 (2009).

Communications,[414] the court cautioned it cannot be presumed to create a safe harbor absent an explicit "court order" spelling out its application.

The "proportionality" principle is also incorporated into a number of state rules,[415] as are counterparts to Rule 26(g).[416] In Utah, for example, a requesting party must meet the burden of satisfying the standards of proportionality which are set forth in the rule.[417] Thus, a party must demonstrate that requested discovery is both "relevant to the claim or defense of any party" and that "the discovery satisfies the standards of proportionality."[418] The amended rule also provides for tiers of standard discovery which are "presumed to be proportional to the amount and issues in controversy."

California explicitly acknowledges proportionality as a basis for the issuance of protective orders[419] while Arkansas emphasizes that the principle applies "even [to discovery sought] from a source [of ESI] that is reasonably accessible."[420]

Pennsylvania, in proposed e-discovery rules currently pending before its Supreme Court, suggests that proportionality - not detailed rules or federal case law - should be the key limitation on discovery of ESI.[421]

(6) Cost Allocation (Shifting)

Under the Supreme Court decision in *Oppenheimer Fund*,[422] the presumption is that discovery costs will be borne by producing parties.[423] The traditional "American rule" is also that each party bears its own attorney fees. Nonetheless, it has long been

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[414] Orbit One v. Numerex, 271 F.R.D. 429, 436, at n. 10 (S.D. N.Y. 2010).
[415] MINN. R. CIV. P. 26.02(b)(3); Tex. Civ. P. Rule 192.4; Cal. Code Civ. Proc §2031.310(g)(4) (2010); Iowa R. Civ. P. 1.504(1)(b)(3); K.S.A §60-226(2011).
[416] *See, e.g.,* K.S.A. §60-226(f)(2010)(B)(iii)(counsel certification that a discovery request or response or objection is "neither unreasonable nor unduly burdensome considering [listing factors]"); Rahofy v. Steadman, 2010 WL 4997097 (C.A. Utah Dec. 9, 2010)(noting similar Utah rule under which "an attorney's signature certifies that the objection is made for a proper purpose"); *c.f.*, Estate of Dorothy Manuel, 187 Cal. App. 4th 400, 405 (C.A. 2nd Distr. Aug. 10, 2010)("California has no parallel statute").
[417] The Committee Note to URCP Rule 37 provides that the "new Rule 26 standard of proportionality is the "principal criterion" on which motions to compel or for protective orders should be evaluated.
[418] URCP 26(b)(1)-(3)(2011).
[419] CAL. CODE CIV. PROC. § 2031.060(f)(4)("likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues").
[420] ARCP 26.1(Arkansas "Limitations on Discovery").
[421] *See* Proposed Pa. Rule 4011, Explanatory Comment, copy at http://www.courts.state.pa.us/NR/rdonlyres/61B0D4F4-F4A6-445B-8A6B-9169CC4BEF07/0/rec249civ.pdf. The Notes to the Proposed Rule indicate that there is "no intent to incorporate the federal jurisprudence surrounding the discovery of electronically stored information" and that the "treatment of such issues is to be determined by traditional principles of proportionality under Pennsylvania law."
[422] 437 U.S. 340, 358 (1978)(a party "may invoke the district court's discretion under Rule 26(c) to grant orders protecting [the party] from 'undue burden or expense' in [complying with discovery] including orders conditioning discovery on the requesting party's payment of the costs of discovery").
[423] *See, e.g.,* Bradley T. Tennis, Cost-Shifting in Electronic Discovery, 119 YALE L. J. 1113 (March, 2010).

understood that Rule 26(c), providing for protective orders, contains ample authority for courts to shift costs in response to "unduly burdensome e-discovery requests."[424]

Sedona Principle 13 advocates shifting the costs of "retrieving and reviewing" ESI when it is not "reasonably available to the responding party in the ordinary course of business" in the absence of "special circumstances."[425] Also, a party issuing a subpoena may be required to bear some of the costs of the producing party, although the Sedona Conference® *Commentary on Non-Party Production*'s[426] does not indicate a basis for cost-shifting over objection.[427]

It has been estimated, however, that discovery costs account for about 50% of all litigation costs in most litigation - and up to 90% of the costs in the top 5% of the most expensive ones.[428] When e-discovery is involved, the sheer volumes involved and the necessity of retaining e-discovery vendors and counsel to help process and review for relevancy and privilege can drive up the costs exponentially.[429]

The 2006 Amendments

The 2006 Amendments acknowledged, in Rule 26(b)(2)(B), the authority to "specify conditions" when ordering production from inaccessible sources for "good cause."[430] This distinction appears to have been based on the initial *Zubulake* opinion, where the court listed an elaborate seven factor test to govern the exercise of discretion in connection with cost-shifting.[431]

The *Zubulake* court limited cost-shifting to inaccessible sources of ESI[432] and, even then, "only [to] the costs of restoration and searching." The court opined that the producing party should "always bear the cost of reviewing and producing electronic data [and not the costs of attorney review]"[433] and listed seven factors to apply, "weighted more-or-less in the following order."[434]

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[424] Wiginton v. CB Richard Ellis, 229 F.R.D. 568, 570 (N.D. Ill. 2004)(citing and comparing the "marginal utility," Rowe and Zubulake tests and producing a modified version for use in that court).
[425] *See* Comment, Sedona Principle 13 (2nd Ed. 2007)(cost-shifting may also be considered when "the aggregate volume of data requested [is] disproportionate").
[426] 9 SEDONA CONF. J. 197, 198-199 (2008).
[427] Last Atlantis Capital v. AGS, 2011 WL 6097769 (N.D. Ill. Dec. 5, 2011).
[428] Nicola Faith Sharpe, Corporate Cooperation Through Cost-Sharing, 16 MICH. TELECOMM. & TECH. L. REV. 109, 110 (2009).
[429] Redish and McNamara, Back to the Future: Discovery Cost Allocation and Modern Procedural Theory, 79 GEO. WASH. L. REV. 773, 779 (2011)(discovery costs are conceptually, economically, and morally distinct from other costs of litigation).
[430] Committee Note, Rule 26(b)(2)(B)(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 reasonable accessible").
[431] Zubulake v. UBS Warburg (Zubulake I), 217 F.R.D. 309, 322 & 324 324 (S.D. N.Y. May 13, 2003).
[432] Zubulake v. UBS Warburg (Zubulake III), 216 F.R.D. 280, 284 (S.D. N.Y. July 24, 2003)("[i]t is worth emphasizing again that cost-shifting is potentially appropriate only when inaccessible data is sought").
[433] *Id.* at 289-290.
[434] The factors were: 1. Extent of tailored request; 2. Availability from other sources; 3. Total cost of production compared to am't in controversy; 4. Total cost of production compared to resources available to

Many courts routinely apply *Zubulake.*[435]

In one patent case where privilege review was a "daunting task," however, the costs of review and preparation of a privilege log were accumulated for further discussion and possible shifting.[436] The recent proposed Model Order for patent cases provides that 'the discovering party shall bear all reasonable costs of "disproportionate ESI production requests."[437]

In one decision, for example, a court ordered a requesting party to pay a fixed percentage of "e-discovery compliance costs" for the use of search terms in excess of set number, including "[a]ll costs fairly attributable to the searches, negotiations, document review, copying, including time devoted by law firm employees and client employees."[438]

One emerging issue is whether courts should also be prepared to allocate the costs stemming from unreasonable and unwarranted (and costly) preservation demands.[439] In *Treppel v. Biovail*, the Magistrate Judge opined that a court may condition an order of preservation on a requesting party "assuming responsibility for part or all" of the expense of preservation of information that is "costly to retain" but of "only marginal relevance."[440]

State Decisions

A number of states have adopted provisions similar to Rule 26(b)(2)(B) as part of their E-Discovery provisions.[441] In Texas, the requesting party must be ordered to "pay the reasonable expenses of any extraordinary steps required" if a party is required to

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each party; 5. Relative ability of each to control costs and incentive do so; 6. Importance of issues; 7. Relative benefits to the parties of obtaining the information. (217 F.R.D at 324).

[435] *See, e.g.,* Helmert v. Butterball, 2010 WL 2179180, at *10 (E.D. Ark. May 27, 2010)(refusing to shift costs since "a court should consider cost-shifting only when digital data is relatively inaccessible, such as in backup tapes"); *see also* Peskoff v. Faber ("Peskoff III"), 244 F.R.D. 54 (D.D.C. August 27, 2007).

[436] Chemie v. PPG Industries, 218 F.R.D. 416, 422 (D.Del. Oct. 8, 2003); *see also*, in terms of costs associated with subpoena compliance from backup tapes, Goshawk v. American Viatical, 2010 WL 5250360 (N.D. Ga. Oct. 4, 2010(Report of Special Master), *adopted and ordered*, 2010 WL 5087844, at *2 (N.D. Ga. Dec. 6, 2010)(acknowledging that party may seek to recover attorney fees in connection with privilege review of material from backups subject to subpoena).

[437] See ¶3, E-Discovery Committee, An E-Discovery Model Order (2011), copy at http://www.patentlyo.com/files/ediscovery-model-order.pdf.

[438] Cannata v. Wyndham, 2012 WL 528224, at *5 (D. Nev. Feb. 17, 2012)(ordering appointment of a Special Master to supervise use of search terms with authority to allocate costs of e-discovery).

[439] *See* Allman, Preservation and Spoliation Revisited, *supra*, April 9, 2010, at 21& n. 111(noting the potential for high costs since "it may be necessary to purchase or reallocate storage media and there can be substantial costs of outside counsel, consulting experts and the like"); copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Thomas%20Allman,%20Preservation%20and%20Spoliation%20Revisited.pdf.

[440] 233 F.R.D. 363, 373 (S.D. N.Y. Feb. 6, 2006).

[441] Michigan Staff Comments, MCR 2.302 (2010)(a court may "shift the cost of discovery to the requesting party"); Commentary, LA. C.C.P. ART. 1462 (2010)(trial court may "shift all or part of the cost or burden of producing electronically stored information to the requesting party when considering a motion to compel").

produce electronic data which it cannot retrieve "through reasonable efforts."[442] Anecdotal evidence exists that the clause is effective in reducing unwarranted or excessive demands.

In New York, the leading intermediate appellate court in New York State has rejected the "requester pays" doctrine in favor of the *Zubulake* approach[443] in light of the absence of statutory provisions. The court opined that *Zubulake* is "moving discovery, in all contexts, in the proper direction."[444] It explicitly rejected case law said to provide presumption "in favor of requiring that the costs of e-discovery, potentially including attorney's fees, be borne by the requester."[445] However,[446] California apparently still requires that the reasonable costs of translating data compilations into a useable form be at the requesting party's expense.[447]

North Carolina has recently amended its rules to explicitly authorize cost shifting.[448]

Taxing of Costs

Other sources of authority to impose some forms of e-discovery costs exist in favor of the prevailing party under Fed. R. Civ. P. 54(d)[449]and, more generally, under 28 U.S.C. § 1920(4).[450] A recent Congressional amendment to the latter, authorizing reimbursement for "copies of any materials," not just for copies of "papers, has been argued to mean that electronic data processing services are also recoverable,[451] a position rejected by the Third Circuit in *Race Tire.*[452]

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[442] TX Rules of Civil Procedure, Rule 196.4.
[443] U.S. Bank v. Greenpoint Mortgage, __A.D. 3d, 2012 WL 612361 (N.Y. A.D. 1 Dept. Feb. 28, 2012).
[444] *Id*, at *4.
[445] Robert W. Trenchard, Two Roads Diverge in Managing E-Discovery Costs: The Big Difference that Federal and New York Responses Can Make, 11/16/2009 N.Y.L.J. S6 (col. 1); *see also* Assn. of the Bar of the City of New York, Manual for State Trial Courts Regarding Electronic Discovery Cost-Allocation (Spring 2009), http://www2.nycbar.org/Publications/pdf/Manual_State_Trial_Courts_Condensed.pdf.
[446] Toshiba America v. Superior Court, 124 Cal. App. 4th 762, 770, 21 Cal. Rptr. 3d 532 (C.A. 6th Dist. 2004)(statute reflects legislative determination that burden is on producing party from the outset and is not dependent on showing of undue burden or expense, in contrast to federal rules).
[447] CAL CODE CIVIL PROC. §§ 1985.8(g)(subpoenas); 2031.280(e).
[448] Rule 26(b)(3)("Specific Limitations on [ESI]")("The court may specify conditions for the discovery, including allocation of discovery costs"), available at http://www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H380v4.pdf.
[449] Fed. R. Civ. P. 54(d)(1)("Unless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney fees – should be allowed to the prevailing party.").
[450] 28 U.S.C. 1920(4)("A judge or clerk of any court of the United States may tax as costs . . . (4) fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case").
[451] In re Ricoh Co. Patent Litigation, 661 F.3d 1361 (Fed. Cir. Nov. 23, 2011).
[452] Race Tires America v. Hoosier Racing Tire Corp., ___ F.3d ___, 2012 WL 887593 (3rd Cir. March 16, 2012), rev'g 2011 WL 1748620, at *8 (W.D. Pa. May 6, 2011)(only conversion of native files to default format and transfer of VHS tapes to DVD involved "copying"); *see also* Cordance v. Amazon, 2012 WL 1194311 (D. Del. April 11, 2012)(applying Race Tire to reduce Amazon Bill of Costs).

In *Tibble v. Edison*,[453] a lower court in another circuit earlier affirmed an award of $530,000 for the costs of "utilizing the expertise of computer technicians in unearthing the vast amount of computerized data sought by Plaintiffs in discovery."[454] The court rejected the argument that reliance on an e-discovery vendor was simply for the convenience of the party.

Some courts distinguish between permissible costs attributable to "scanning" and those non-recoverable costs relating to de-duplication, preparation of TIFF and bates numbering, which they analogize to "creating" a new document.[455] Recently, in a comprehensive opinion rejecting a liberal interpretation by a lower court, the Third Circuit adopted the view that since the preliminary work of selection and review of documents for production was not deemed to be covered as taxable costs, only the narrow topic of scanning and preparation of material for production as ESI is taxable today.[456]

The costs of production of ESI in New York must be allocated to a requesting party when a subpoena is served upon a non-party.[457]

Requester Pays

Corporate defense interests have long advocated enactment of a "requester pays rule" under which a party submitting broad discovery should be responsible for compliance costs.[458] Under this logic, a sense of fairness[459] or an acknowledgment of the de facto *quantum meruit* involved[460] is necessary in order to reduce the incentive to make overly broad requests.[461]

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[453] Tibble, *supra*, 2011 WL 3759927, at *6 (C.D. Cal. Aug. 22, 2011).
[454] *Id*. at *6.
[455] Mann v. Heckler & Koch Defense, 2011 WL 1599580, at *8-9 (E.D. Va. April 28, 2011); Farrar & Farrar Dairy v. Miller-St. Nazianz, 2012 WL 776945, at *5 (E.D. N. C. March 8, 2012)(mere fact that scanning was done to make electronic document searchable does not bar treatment as exemplification).
[456] Race Tires America v. Hoosier Racing Tire Corp, ___ F.3d ___, Case No. 11-2316 (3rd Cir. March 16, 2012).
[457] Tener v. Cremer, 2011 WL 4389170 (N.Y.A.D. 1 Dept. Sept. 22, 2011)(citing to CPLR 3111 and 3122(d).
[458] LCJ, et. al, Reshaping the Rules of Civil Procedure for the 21st Century (May 2, 2010), 56 (advocating amendments to Rule 26 and Rule 45 so that party seeking discovery pays "the reasonable costs incurred" in responding to a request or subpoena and allowing costs as taxable under Rule 54(d)), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Reshaping%20the%20Rules%20for%20the%2021st%20Century.pdf.
[459] Hardaway, Berger and Defield, E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age, 63 RUTGERS L. REV. 521, 596 (2011)(" [e]qual cost-sharing between the requesting party and the producing party is the fairest and most efficient way to address the skyrocketing and debilitating costs of e-discovery"); *see also* Explanatory Comment, Pa. Sup Ct. [Proposed] Recommendation 249 (2011)(courts should consider tools which "fairly allocate discovery burdens and costs").
[460] Redish and McNamara, *supra*, 79 GEO. WASH. L. REV. 773, 85-786 (recovery of fair value of services rendered to help minimize use of unfairly broad demands as a weapon to force party to settle or abandon cases).
[461] *See generally* Edited Transcript, 5th Annual Judicial Symposium on Civil Justice, George Mason Judicial Education, December 5-7, 2010, 7 J. L. ECON. & POL'Y 211 (2010).

To others, however, "the most effective way to control litigation costs is for a judge to take charge of the case from its inception and to manage it aggressively through the pretrial process by helping shape, limit, and enforce a reasonable discovery plan, resolve disputes that the parties cannot settle on their own, and keep the case on a tight schedule to ensure the most expeditious disposition of the case by motion, settlement for trial."[462]

Currently, a Subcommittee of the Rules Committee, chaired by the Hon. John Koeltl, has the responsibility to assess the need for further rulemaking. At the March 2012 Meeting of the Rules Committee, the Subcommittee reported that it was "not enthusiastic about cost-shifting, and does not propose adoption of new rules."[463] Instead, the Subcommittee, noting that the authority to engage in cost shifting is "not prominent on the face" of the rules, is considering inclusion of more explicit provisions in Rule 26(c).[464]

(7) Evidentiary Issues

The Federal Rules of Evidence to provide distinctive rules to deal with the authentication or admissibility of ESI. Instead, courts rely upon, e.g., FRE 901 ("Authenticating or Identifying Evidence")[465] or FRE 803 ("Exceptions to the Rule Against Hearsay").[466] Some Commentators have expressed frustration and argued for yet further amendments to the FRE.[467]

Judge Grimm, in *Lorraine v. Markel,*[468] identified five evidentiary hurdles to the admission of ESI: (1) relevance (2) authenticity and (3) if offered for substantive truth, the hearsay rule (4) the "best evidence" rule (5) and the balance between the probative value and the danger of unfair prejudice.

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[462] Hon. Paul W. Grimm, The State of Discovery Practice in Civil Cases: Must the Rules Be Changed to Reduce Costs and Burden, or Can Significant Improvements Be Achieved within The Existing Rules, 12 SEDONA CONF. J. 47, 49-50, (2011)

[463] Addendum to Agenda Materials (March 2012), page 7 of 156, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03_Addendum.pdf.

[464] *Id.*, at 34-36 (and suggesting a subtle approach to excusing previously shifted costs as part of the the taxation of costs process).

[465] See Indian Rules of Evid., Rule 901 (as a condition precedent, "authentication or identification" is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims")

[466] Jonathan D. Frieden and Leigh Murray, The Admissibility of electronic Evidence Under the Federal Rules of Evidence (hereinafter "Survey"), 17 RICH. J. L. & TECH. 5, at *2 (2010)(noting that the application of "traditional evidentiary principles will nearly always lead to the correct result).

[467] Jonathan L. Moore, Time for an Upgrade: Amending the [FRE] to Address the Challenges of [ESI] in Civil Litigation, 50 JURIMETRICS J. 147 (2010).

[468] 241 F.R.D. 534, 538 (D. Md. May 4, 2007); *see also* Grimm et al, Back to the Future: Lorrine v. [Markel] and New Findings On the Admissibility of [ESI], 42 AKRON L. REV. 357 (2009) .

The authenticity hurdle, while a low bar, is intimately tied up with the skepticism due to "the mere fact that evidence is susceptible to alteration."[469] Judge Grimm has recently written, for example, that it is "problematic" to rely upon information from the internet despite cases holding that the "on-line world has matured" in recent years.[470]

A number of cases, in both the civil and criminal context, have dealt with authentication of information such as e-mail, text messaging and networking sites like Facebook. Distinctive information contained in the material is often sufficient to justify conditionally submitting [the information] to the jury for its ultimate finding of whether the matter in question is what its proponents claim it to be.[471]

However, given that the "provenance of such electronic writings can sometimes be open to question" not all courts have been satisfied.[472] E-mail and text messages are not self-authenticating. Thus, the mere fact that email purports to come from an individual with a valid email address is not sufficient. A classic example is the recent decision in *Jimena v. UBS AG Bank*, where a person bilked by a Nigerian bank transfer scam sought to sue the Bank on the basis of an e-mail purporting to be from a bank executive.[473] Database and other computer generated information is also susceptible to concerns.[474]

Moreover, it is important to realize that the hurdle of the hearsay rule is not per se surmounted by the mere fact that the communication method is routinely in use in a business context. The court in the BP *Oil Spill* cases rejected the view all email produced in discovery was exempt from the hearsay ban by FRE 803(6)[475] as "the modern equivalent of the interoffice memorandum" and required individual attention to the hearsay exceptions for each email.[476]

Admissibility of ESI produced abroad also presents special challenges.[477]

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[469] Survey, *supra*, at *11 & *14.
[470] Osunde v. Lewis, 2012 WL 883129, at *4, n. 6 (D. Md. March 15, 2012).
[471] Tienda v. State, 358 S.W. 3d 633, 640-641 (C.A. Tex. Feb. 8, 2012)(collecting alternative methods of establishing prima facie authentication consistent with "Federal Rule 901 and its various state analogs").
[472] *Id*., at 641-642; *cf*. Griffin v. State, 419 Md. 343, 19 A.3d 415 (C.A. Md. April 28, 2011).
[473] 2011 WL 2551413, at *3 (E.D. Calif. June 27, 2011)(granting summary judgment because while only a prima facie evidence of authenticity is required, Rule 902 requires some guarantees of trustworthiness which are not evident in general email addresses that can be personalized by anyone).
[474] In re Vee Vinhnee, 336 B.R. 437 (9th Cir. Bankcy. Pnl. Dec. 16, 2005)(requiring complete evidentiary foundation for introducing electronic business records despite absence of objection); U.S. v. Safavian, 435 F. Supp.2d 36 (D.C.C. May 23, 2006)(refusing to admit emails as non-hearsay statements).
[475] Applying to records prepared in the course of a "regularly conducted activity of a business."
[476] In re Oil Spill, 2012 WL 85447 (MDL No. 2179, E.D. La. Jan. 11, 2012)(requiring parties to stipulate as to admissibility of email and email strings and submit remaining specific issues for determination).
[477] *See* Kenneth N. Rashbaum, et al, Admissibility of Non-US Electronic Evidence, 18 RICH. J. L. & TECH. 9 (2012).

APPENDIX
State-by-State Summaries

The discussion below is current as of April 2012, but the reader interested in a particular state would be wise to check and verify. Citations to the various amended rules – the form of which varies from jurisdiction - are referenced in the Appendix and a comprehensive list of the formats for all WESTLAW versions are available in a "50 State" survey provided by Thomson Reuters.[478]

In addition to the links and summaries below, useful information, including links, is also available through the periodic updates published by KL Gates,[479] Kroll[480] and Navigant.[481]

1. **Alabama.** E-discovery amendments ("ARCP Rule __" or "Ala. R. Civ. P. Rule ____") became effective on February 1, 2010. The Committee Comments are particularly thorough. *See* J. Paul Zimmerman, *A Primer on the New Electronic Discovery Provisions in the Alabama Rules of Civil Procedure,* 71 Ala. Law. 206 (2010). *See also* Ex parte Cooper Tire & Rubber, 987 So.2d 1090, 1104, 1009 (S.C. Ala. Jan. 18, 2008)(applying FRCP 26(b)(2)(B) to subpoena of emails prior to enactment of Alabama Rules); Ex Parte BASF Corporation, 957 So.2d 1104 (2006)(rev'g order to compel production of documents from BASF AG).

2. **Alaska.** E-discovery amendments ("AK R RCP Rule ___" or "Alaska R. Civ. P. ____" became effective on April 15, 2009. Email prior to the amendments was discussed in Ealy and Schutt, *What – If Anything – is an Email*?, 19 Alaska L. Rev. 119 (2002). The revised rules are available at http://www.state.ak.us/courts/sco/sco1682leg.pdf.

3. **Arizona.** E-discovery amendments ("AZ St. RCP R ____" or "Ariz. R. Civ. P. ___") became effective on January 1, 2008, including requirements for early conferences governing medical malpractice cases and those assigned to the Complex Civil Litigation Program. *See* http://www.supreme.state.az.us/rules/ramd_pdf/r-06-0034.pdf. Unlike many other states, Ariz. R. Civ. P. 26.1(2010) requires extensive early disclosure of electronically stored information. *See* Schaffer and Austin, *New Arizona E-Discovery Rules*, 44-FED Ariz. Att'y 24 (February 2008). Arizona has also modified its Family Court procedures to include the e-discovery rules previously adopted for civil proceedings. *See* http://www.supreme.state.az.us/rules/2008RulesA/R-07-0010.pdf. Effective January 1, 2010, the state adopted a version of Evid. Rule 502 ("AZ St. Rev.

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[478] 50 State Statutory Survey, Civl Laws/Civil Procedure Electronic Discovery, 0020 SURVEYS 4 (2011).
[479] http://www.ediscoverylaw.com/2008/10/articles/resources/current-listing-of-states-that-have-enacted-ediscovery-rules/ (current through October, 2008).
[480] KrollOnTrack provides both a visual aid (map) and details at:
http://www.krollontrack.com/library/staterules_krollontrack_july2010.pdf
[481] Navigant Consulting, Status E-discovery – Party Production Rules (2009 – 2010),
http://www.navigantconsulting.com/downloads/e-disc_procedures-byState.pdf

Rule 502") with nuanced amendments dealing with uniformity of impact of disclosures in sister states.

4. **Arkansas.** Unique among the states, Arkansas has incorporated its core e-discovery amendments "meet and confer," form of production, two-tiered production and safe harbor in a single "supplemental and optional" rule, A.R.CP 26.1, which applies to cases if parties agree or the court orders it. The Rule is based on the *Uniform Rules*. *See* In Re: Electronic Discovery and Adoption of Rule of Civil Procedure 26.1, 2009 Ark. 448, 2009 Ark. LEXIS 609 (S.C. Ark. Sept. 24, 2009)(adopting draft proposal effective Oct. 1, 2009). Separately, the Supreme Court amended A.R.C.P 26 in January, 2008 to provide for a presumption against waiver if a party making an inadvertent disclosure acts promptly. A.R.C.P. 26(b)(5)(D). At the same time, the Court amended A.R.E. 502 (lawyer-client privilege) to cross-reference the new provisions on inadvertent production and to establish a rule of "selective waiver" that disclosure to a government agency does not constitute a general waiver. The "explanatory Note" acknowledges that this is minority view among the federal circuits. *See also* R. Ryan Younger, *Recent Developments*, 61 Ark. L. Rev. 187 (2008).

5. **California.** In June 2009, the California Legislature adopted Assembly Bill 5 (the "Electronic Discovery Act") involving amendments to the California Code of Civil Procedure (hereinafter "CCP") which largely incorporate the basic principles of the 2006 Federal Amendments. The 2009 bill (essentially identical to the 2008 version vetoed in a budget dispute between the Governor and the Legislature) took effect immediately. The legislation was initially recommended by a 2008 Report of the California Judicial Council, copy at http://www.courtinfo.ca.gov/jc/documents/reports/042508item4.pdf. California employs a unique concept of non-exclusive "misuses" of the discovery process for which sanctions may be imposed. *See* Cal. Civ. Ctrm. Hbook. & Desktop Ref. §21:28 (2011). *See* CCP §2023.010 (listing misuses) and CCP §2023.030 (sanctions for misuse). There is disagreement over whether these provisions apply to spoliation absent a court order, in contrast to §§ 2031.300 (roughly equivalent to FRCP Rule 37(a) & 2031.310 (roughly equivalent to FRCP Rule 37(b)) [both of which – in contrast to §§ 2023.010 & 2023.030 – were subsequently modified to include a safe harbor provision] Under amended CCP §2031.210(d), a party may object to discovery of ESI on the grounds that it is from a source that is not reasonably accessible and must include in its objection the type or category of the source. CCP §2031.310(d) & (2) acknowledge and regulate burdens of resolving any objections based on ESI from a source that is not reasonably accessible. Modified provisions analogous to FRCP 37(e) are included in CCP §§ 1985.8(l)(subpoenaed person); 2031.060(l); 2031.300(d); 2031.310(j); and 2031.320 (d). They extend the exemption from sanctions to subpoenaed non-parties and attorneys and provide that they are not to be "construed to alter any obligation to preserve discoverable information." The exemptions appear to apply the prohibition to sanctions exercised under inherent powers. The Electronic Discovery Act continued existing language mandating payment by a "demanding party" of the "reasonable expense" of translating "any data compilations" into "reasonably usable form" [CCP §§1985.8(g)(re subpoenas)(Sec. 2) & 2031.280(e)(Sec. 17)] and added a reference to setting conditions for good cause production "including allocation of the expense of discovery." *See* CCP

§§1985.8(f)(re subpoenas)(Sec. 2), 2031.060(e)(Sec. 9), 2031.310(f)(Sec. 21). The continued applicability of Toshiba v. Superior Court, 124 Cal. App.4th 762 (C.A. 6th Dist. Dec. 3, 2004)(holding that the predecessor of 2031.280(e) required the lower court to consider cost-shifting of costs of recovering data from backup tapes) is open, as no reported decisions have applied the case since the Electronic Discovery Act. In August, 2009, the Judicial Council of California amended Cal. Rules of Court 3.724 so as to mandate early discussion of key e-discovery issues in preparation for case management conferences. *See generally* Barrad and Holland, *Spotlight on E-Discovery: The Cutting Edge*, 51 Orange County Lawyer 18 (2009) and Garrie and Hon. Maureen Duffy-Lewis, E-Discovery: Federal Rules versus California Rules – the Devil is in the Details, 63 Consumer Fin. L. Q. Rep. 218 (Fall-Winter 2009). In June, 2011, the California Judicial Council closed a comment period on certain "clean-up" amendments deemed appropriate to cover gaps in the earlier effort. *See* Invitation To Comment (Leg11-01), copy at http://www.courts.ca.gov/documents/LEG11-01.pdf.

6. **Colorado**. A public hearing was held in January, 2011 about a limited pilot program involving complex business and medical malpractice cases in the Denver. *See* article at http://www.lawweekonline.com/2011/01/streamlined-med-mal-and-business-claim-pilot-program-on-supreme-court-agenda/. Following the hearing, at which significant opposition was expressed, especially by the medical defense bar, a subcommittee of the Supreme Court has been convened to review and, if needed, modify them. *See* blog at http://hhmrlaw.blogspot.com/2011/02/colorado-civil-access-pilot-project.html. The proposed Rules, adapted from the ACTL/IAALS Pilot Rules, are to be found at http://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/Proposed/2010%20Proposed/Civil%20Access%20Pilot%20Project%20Rules%20Committee%20Final.pdf. The Supreme Court website lists the topic as open and (as of April 24, 2011) stops at the announcement of the Public Hearing. *See* http://www.courts.state.co.us/Courts/Supreme_Court/Rule_Changes.cfm (with links to explanatory article, written comments relating to the public hearing and recording of comments).

7. **Connecticut.** The Connecticut "Practice Book," which provides Rules for Practice in the Superior Court, has been amended effective January 1, 2012, by a comprehensive series of e-discovery Amendments, with a number of creative and unique provisions. *See e.g.,* Sec. 13-14, at 108-109 Connecticut Practice Book (2011) (limiting sanctions from "routine, good-faith operation" of systems or processes "in the absence of a showing of intentional actions designed to avoid known preservation obligations"); copy at http://www.jud.ct.gov/Publications/PracticeBook/PB_070511.pdf.

8. **Delaware.** Effective May 1, 2010, The Superior Court established a Commercial Litigation Division, which will handle cases above $1M in controversy or as designated. The court has adopted an Appendix B, E-Discovery Plan Guidelines, copy at http://courts.delaware.gov/superior/pdf/ccld_appendix_b.pdf. The Guidelines require preparation of an "e-Discovery Plan and Report" which may include objections to production from inaccessible sources of ESI and provide "safe harbors," including one for destruction of ESI not ordered to be produced when a party acts in compliance with

an e-discovery order. On January 19, 2011, the Court of Chancery issued Guidelines for Preservation of [ESI], directed at parties, in-house and outside counsel, which also noted that while sanctions may apply when relevant ESI is lost, it would consider "the good-faith preservation efforts of a party and its counsel." The Court stated that it "is continuing to monitor" electronic discovery and has not proposed any specific rules or guidelines which apply generally to the topic. The Guidelines are available at http://www.delawarelitigation.com/uploads/file/int50(1).pdf. [By contrast, the District Court of Delaware has issued a Revised Default Standard governing e-discovery in its Court, copy available at http://www.delawarelitigation.com/files/2012/01/Electronic-Standard-for-Discovery.pdf.] The state Chancery court has rendered a number of decisions on preservation and spoliation of ESI which appear to reject the application of *Zubulake* and *Pension Committee* strict liability for severe sanctions. *See* Beard Research v. Kates, 981 A.2d 1175 (Ct. Chan. Del. May 29, 2009)(spoliation opinion); see also 8 A.3d 573 (Ct. Chan. Del. April 23, 2010)(merits opinion incorporating spoliation sanction), *aff'd.* ASDI, Inc. v. Beard Research, 11 A.3d 749 (S.C. Del. Nov. 23, 2010). In Genger v. TR Investors, 26 A.3d 180 (S.C. Del. July 18, 2011), The Supreme Court affirmed a Chancery Court contempt finding (at 2009 WL 469062), including a sanction of $3.2 million for the intentional destruction of information in unallocated space by use of a wiping software at a time the party was under a duty to preserve information imposed by court order. The Superior Court has refused to render either a default judgment or an adverse inference instruction where a moving party failed to demonstrate "intentional or reckless destruction or suppression of evidence." Cruz v. G-Town Partners, 2010 WL 5297161, at *10 (Sup. Ct. New Castle Co. Dec. 3, 2010).

9. **District of Columbia.** The District of Columbia Court of Appeals has stayed the requirement that the Superior court conduct its business according to the Federal Rules (D.C. Code § 11-946) to enable the Superior Court and its advisory committee time to revise the local rules. As of November, 2010, revisions were approved by the Superior Court and transferred to the Court of Appeals for final approval.

10. **Florida.** Since 2009, the Florida Supreme court has had a rule dealing with complex litigation under which parties must discuss and include, if a case management conference occurs, some aspects of ESI production. *See* Rule 1.201, at http://www.floridasupremecourt.org/decisions/2009/sc08-1141.pdf. In January 2011, Florida adopted Civil R. P. 1.285 providing for assertion of privilege as to inadvertently disclosed materials, combining an equivalent to Fed. R. Civ. P. 26(b)(5)(B) with a process for determining if the privilege has been waived. In late 2011, the Supreme Court of Florida published a proposal by a Florida Bar Committee for comment which provides for e-discovery amendments based on the 2006 Federal Amendments. See Case No. SC11-1542, copy at http://www.floridasupremecourt.org/decisions/probin/sc11-1542_PublicationNotice.pdf. The Committee had expressed concern (but took no action) about the possibility that Florida common law does not require pre-litigation obligations, which has draw comment prior to the anticipated Supreme Court action in March, 2012. *See, e.g.,* Comment Before Supreme Court (Florida) re Amendments, Oct, 2011, copy at http://www.floridasupremecourt.org/clerk/comments/2011/11-1542_101411_Comments(Artigliere).pdf. *See* Gayer v. Fine Line Construction, 970

So.2d 424, 426 (C.A. 4th Dist. Nov. 28, 2007)("a duty to preserve does not exist at common law" citing to Royal & Sunalliance v. Lauderdale Marine, 877 So. 2d 843, 846 (C.A. 4th Dist. July 7, 2004); *see also* Robert H. Thornburg, *Electronic Discovery in Florida*, 80 Fla. Bar J. 34 (Oct. 2006), http://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/F3CEE9EEFD8CF899852571F5005A3E37 (asserting that no pre-litigation duty exists until "the lawsuit is served")(at text associated with n. 26); accord, In re Electric Machinery Enterprises, 416 B.R. 801, 874-875 (Bkcy Ct. M.D. Fla. Aug. 28, 2009)(refusing to apply sanctions to pre-litigation failure to preserve in light of authority that parties were under no duty to preserve evidence under Florida law); *cf* Martino v. Wal-Mart Stores, 908 So. 2d 342 (S.Ct. Fla. July 7, 2005) and Coleman (Parent) Holdings v. Morgan Stanley, 2005 WL 4947328 (Cir. Ct. March 1, 2005)(AMENDED ORDER)(citing to Martino, *supra*); *see also* Wm. Hamilton, Florida Moving to Adopt Federally-Inspired E-discovery Rules (Sept. 20, 2011), posted at http://ediscovery.quarles.com/2011/09/articles/rules/florida-moving-to-adopt-federallyinspired-ediscovery-rules/print.html (arguing that "traditional Florida spoliation remedies are in play when a party intentionally destroys relevant information to thwart the judicial process – whether before or during litigation"); Michael D. Starks, Deconstructing Damages for Destruction of Evidence, 80-AUG Fla. B. J. 36 (July/August 2006)(noting that both sanctions and tort damages are available under Florida law, although Martino "destroyed the first-party spoliation tort"). The Starks article also notes that "the adverse inference concept is not based on a strict legal 'duty' to preserve evidence" but arises in any situation where damaging evidence is in the possession of a party, which "either loes or destroys the evidence." (at 40).

11. **Georgia**. Status unknown. For a decision from a state trial judge which refused to apply *Zubulake* cost-shifting factors, *see* PST Services v. Anodyne Health Partners, 2004 WL 5311742 (Ga. Super. Ct. Dec. 9, 2004). *See also* Note, *Electronic Discovery in Georgia: Bringing the State Out of the Typewriter Age,* 26 Ga. U. L. Rev. 551 (2010).

12. **Hawaii**. Current Status unknown. A 2009 article reported that as of October 2009, the Hawai'i Supreme Court has convened a special committee of judges, attorneys and law professors to new e-discovery rules." Kimura and Yamamoto, *Electronic Discovery: A Call for a New Rules Regime for the Hawai'i Courts,* 32 Hawaii L. Rev. 153, 169, n. 121 (2009).

13. **Idaho.** Idaho amended its Rules of Civil Procedure in 2006 modeled on Tex. R. Civ. P. 196.4, but made the cost-shifting of the reasonable expense of any extraordinary steps a matter of discretion, not mandated as in Texas. As in the case of Texas, the responding party must produce information reasonably available and must state an objection in order to assert that the information cannot be retrieved through reasonable efforts. See I.R.C.P. rule 34(b)(2010).

14. **Illinois.** The Civil Practice Act, now part of the Code of Civil Procedure, delegates to the Illinois Supreme Court the authority to regulate discovery in Illinois. Rules 201 thorough 219, plus rule 224, regulate civil discovery in Illinois courts. Illinois includes "retrievable information" in "computer storage" as within the definition of "documents"

in Supreme Court Rule 201(b) and Rule 214 requires its production in printed form. Opinions dealing with ESI issues include *Vision Point of Sale v. Haas*, 2004 WL 5326424 (Cir. Ct. Ill., 2004)(direct access; cost allocation); *Peal v. Lee*, 403 Ill. App.3d 197, 933 N.E. 2d 450 (C. A. Ill. 2010)(failure to preserve electronic evidence) and *Thornton v. Dieringer*, 2011 Ill. App. Unpub. LEXIS 3079 (C.A.. Ill. 2011)(rejecting premature appeal from discovery sanctions). Differences between Illinois rules and those underlying the 2006 Amendments are said to require reconciliation before enactment of Illinois e-discovery rules. Jeffery A. Parness, *E-Discovery in Illinois Civil Actions*, 95 Ill. B. J. 150 (March 2007)(emphasizing role of discussions pursuant to Fed. R. Civ. P. 26(f) to deal with preservation); *see also* Wetzel, *Spoiling an Illinois Personal Injury Plaintiff's Spoliation Claim for Routinely Maintained Items*, 28 S. Ill. U. L. J. 455 (Winter 2004). Illinois acknowledges a pre-litigation duty to preserve which is enforceable by sanctions issued under Rule 219(c) if a party fails to take "reasonable measures to preserve the integrity of relevant and material evidence." *See* Shimanovsky v. General Motors, 181 Ill. 2d 112, 692 N.E. 2d 286, 290 (Feb. 20, 1998)(permitting sanctions despite fact that Rule 219(c) limits sanctions to violations of court orders). Also, while stating that there is no general duty to preserve, the Illinois Supreme Court permits recovery of damages for negligent spoliation. Boyd v. Travelers Insurance, 166 Ill.2d 188, 652 N.E. 2d 267, 270-271 (Jan. 19, 1995)("[t]he general rule is that there is no duty to preserve evidence" but such a duty may arise under some circumstances and "can be stated under existing negligence law without creating a new tort"). The two remedies are recognized by perceptive courts as "separate and distinct." Adams v. Bath and Body Works, 358 Ill. App.3d 387, 393, 830 N.E. 2d 645 (App. Ct. 1st D. 2005); *see also dissent*, Andersen v. Mack Trucks, 341 Ill. App.3d 212,221 793 N.E.2d. 962 (App. Ct. 2nd D. 2003); *cf.* Miller and Collier, *Avoiding the Innocent Spoliation of Evidence*, 24-May CBA Rec. 40 (May 2010)(implying that a sanctionable duty to preserve requires existence of Boyd factors). In Stoner v. Wal-Mart, 2008 WL 3876077 (C.D. Ill. 2008), damages were said to be possible for negligent spoliation if the underlying action were lost and the jury concluded there was a "reasonable probability" of a different result absent the spoliation. *See also* Zuckerman, *Yes, I Destroyed the Evidence – Sue Me? Intentional Spoliation of Evidence in Illinois,* 27 J. Marshall J. Computer & Ino. L. 235 [27 JMARJCIL 235] (Winter 2009).

15. **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 State E-Discovery Rules: Comparison to Other State E-Discovery Rules and to the Federal E-Discovery Rules,* 51-APR Res Gestae 17 (April 2008).

16. **Iowa.** The Iowa Supreme Court amended the Iowa Rules of Civil Procedure effective May 1, 2008 based on the 2006 Amendments. Effective on June 1, 2009, the Supreme court adopted Iowa R. Evid. 5.502 of the Iowa Rules of Evidence based on the Federal Evidence Rule 502. In late 2009, Iowa appointed a Task Force for Civil Justice Reform to "develop a plan for a multi-option civil justice system." See Order, Dec. 18, 2009, at http://www.iowacourts.gov/wfdata/files/Committees/CivilJusticeReform/121809OrderreApptstoTaskForceCivJustReform.pdf.

17. **Kansas.** The Legislature adopted and the Governor signed legislation to amend the Kansas Rules to largely mirror the Federal Amendments. *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).

18. **Kentucky**. There are indications that the Supreme Court of Kentucky may soon undertake a review of the need for e-discovery rules. In addition, the Kentucky Supreme Court rendered a particularly thoughtful opinion outlining the proper parameters of a missing evidence instruction during 2011. *See* Univ. Med. Ctr. V. Beglin, __ S.W.3d __, 2011 WL 5248303 (Ky. Sup. Ct., Oct. 27, 2011).

19. **Louisiana.** In 2007, the Legislature passed and the Governor signed Act 140 (2007 La. ALS 140), a limited e-discovery bill, with comments, which included non-waiver due to inadvertent production, now located at La. C.C.P. Art. 1424(D)(scope of discovery). It also amended Art. 1460 (option to produce business records) and Art. 1461 (production) (providing direct access and with extensive comments). A copy of the enrolled bill is at 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 2008, the Legislature added a counterpart to Rule 37(e) at La. C.C.P. Art. 1471(B)(2010). In the 2009 session, further amendments (SB 65) which would have increased the threshold in the safe harbor bill failed as the result of a tie vote in the Senate. In the 2010 Session, the Legislature added La. C.C.P. Article 1462(B)(2) based on Fed.R.Civ.P.26(b)(2)(B) and also a sentence to Article 1462(C) to require a producing party to identify the means which must be used to access ESI being produced. The amendments take effect on January 1, 2011 and August 15, 2010, respectively.

20. **Maine.** The Supreme Judicial Court adopted e-discovery effective August 1, 2009. Copy available at http://www.courts.maine.gov/rules_forms_fees/rules/MRCivPAmend7-08.pdf. Minor corrections were quickly made with the same effective date. The Advisory Committee Notes are quite informative, especially in regard to defining "routine" and "good faith" in Rule 37(e).

21. **Maryland.** The Court of Appeals adopted e-discovery rules 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. The safe harbor provision speaks in terms of limitations on sanctions for information "that is no longer available." (Md. R. Civ. P. 2-433(2010). Also, Rule 2-402, dealing with scope of discovery now provides for non-waiver due to inadvertent production of privileged information coupled with authority to courts to bind non-parties by issuing court orders based on agreements (Md. R. Civ. P. 2-402(e)(3). *See generally* Lynn Mclain, *The Impact of the First Year of the Federal Rules and the Adoption of the Maryland Rules: Foreword*, 37 U. Balt. L. Rev. 315 (2008).

22. **Massachusetts**. The Standing Advisory Committee on Rules of Civil Procedure of the Supreme Judicial Court Rules Advisory Committee has completed work on a draft of e-discovery rules and sought comment until May 13, 2011, with submittal to the Court to follow after review and consideration. A copy of the proposals is found at http://www.mass.gov/courts/sjc/docs/Rules/comment-civil-proc-rules-051311.pdf and the Reporters Notes are found at http://www.mass.gov/courts/sjc/docs/Rules/reporters-notes-comment-civil-proc-rules-051311.pdf The proposed rules draw on both the 2006 Amendments and the Uniform Rules, and the Reporter Notes cross-reference to aspects of the CCP Guidelines Thus, a party must object to raise inaccessibility of ESI as a defense to production under Rule 26 and the safe harbor amendment to Rule 37, for example, applies to all sanctions, not just rule-based sanctions (electronic data has long been recognized as subject to discovery as a document, which is defined to include "data compilations"). *See* 49 Mass. Prac. Discovery § 7:1 (Electronic Discovery – Generally). For an excellent summary of Massachusetts case law, especially in regard to preservation and spoliation, *see* Barry C. Klickstein & Katherine Young Fergus, *Navigating E-Discovery in the Massachusetts State Trial Courts*, 14 Suffolk J. of Trial & App. Advocacy 35 (2009). A Boston-area pilot project testing some of the ACTL pilot rules is underway.

23. **Michigan.** The Michigan Supreme Court adopted e-discovery provisions in December 2008 modeled on the 2006 Amendments, with staff comments. *See* http://www.icle.org/contentfiles/milawnews/rules/mcr/AMENDED/2007-24_12-16-08_UNFORMATTED-ORDER_AMENDMENT.PDF. The full text is to found at http://coa.courts.mi.gov/rules/documents/1chapter2civilprocedure.pdf. A pithy summary is at Randy E. Davidson, *Digital Legal Authority: Michigan Court Rules in the Digital Age*, 88 MI Bar Jnl. 30 (July 2009). The "safe harbor" provisions were inserted in both the general discovery provisions (at MCR 2.302(B)(5) and at the general sanction provision (at MCR 2-313(E)). However, in the former provision, the clause is preceded by a statement that the party has the same obligation to preserve ESE as it does for all other types of information. An excellent summary of this provision and the nuanced effect of Michigan spoliation practice is provided in Dante Stella, *Avoiding E-Discovery Heartburn*, 90-FEB Mich. B.J. 42 (2011). A case alluding to the Michigan safe harbor is Gillett v. Michigan Farm Bureau, 2009 WL 4981193 (Mich. App. 2009).

24. **Minnesota**. The Minnesota Supreme Court acted to 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).

25. **Mississippi.** The Mississippi Supreme Court adopted an e-discovery rule in 2003 modeled on the Texas approach of limiting initial production of data or information that exists in electronic or magnetic form to that which is "reasonably available." A copy of the Order is at http://www.mssc.state.ms.us/rules/ruleamendments/2003/sn104790.pdf

26. **Missouri.** Status unknown.

27. **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).

28. **Nebraska**. The Supreme Court adopted minimal amendments to confirm the discoverability and form of production of ESI effective in July, 2008. *See* http://www.supremecourt.ne.gov/rules/pdf/Ch6Art3.pdf.

29. **Nevada.** Status unknown.

30. **New Hampshire.** The Rules of the Superior Court were amended by the Supreme Court in 2007 to require, in N.H. Super. Ct. R 62(I)(C) that parties shall "meet and confer personally" prior to the "Structuring Conference" to discuss scope of discovery including, as to ESI, accessibility, cost-sharing, form of production and the need for and extent of litigation holds or other mechanisms to prevent destruction of the information as well as agreements re privilege waiver. http://www.courts.state.nh.us/rules/sror/sror-h3-62.htm. N. H. Rules of Evidence Rule 511 provides in a pithy rule that a claim of privilege is not "defeated" by "disclosure" made inadvertently during discovery. A pilot project is in place to test the Pilot Rules which include a blend of the American College recommendations and the 2006 Amendments, as well as to test the impact of a non-waiver rule. *See* http://www.courts.state.nh.us/superior/civilrulespp/Pilot-Rules-Report.pdf. In 2009, the Supreme Court provided a comprehensive review of the status of discovery relating to preservation and the management of spoliation inferences at trial levels in the context of affirming New Hampshire Ball Bearings v. Jackson, 158 N.H. 421, 969 A.2d 351 (S.C. N.H. March 18, 2009).

31. **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.

32. **New Mexico.** By Supreme Court Order No. 09-8300-007, effective May 15, 2009, New Mexico modified a limited number of its provisions to conform to the 2006 Federal Amendments, while explicitly noting its intention not to adopt a two-tiered approach to first-party production of ESI [except in Rule 45 for third party subpoenas] nor to apply a safe harbor to the routine, good faith loss of that information. *See* Order, reproduced in April 20, 2009 issue of the New Mexico Bar Bulletin, copy at http://www.nmbar.org/Attorneys/lawpubs/BB/bb2009/BB042009.pdf.

33. **New York.** The New York legislature has not enacted amendments to existing civil procedure legislation to deal specifically with e-discovery despite urgings that the CPLR be amended to deal with preservation, production and inadvertent production. *See* Report, Explosion of Electronic Discovery in All Areas of Litigation Necessitates Changes in CPLR (August, 2009), copy available at nycbar.org, or directly at http://www.nycbar.org/pdf/report/uploads/20071732-

ExplosionofElectronicDiscovery.pdf. In February 2010, a report prepared for the Chief Judge and the Chief Administrative Judge advocated a number of steps to be taken without relying upon legislative action. A copy of the Report may be found at http://www.nycourts.gov/courts/comdiv/PDFs/E-DiscoveryReport.pdf. The Report was also reproduced by PLI in 2011 (*See* 208 PLI/NY 183). In 2010, the Uniform Civil Rules for Supreme and County Courts were amended to require discussions at preliminary conferences of specified e-discovery issues such as "retention," plans for implementation of a data preservation plan and individuals responsible for preservation as well as "proposed initial allocation" of costs. NY CLS Unif Rules, Trial Cts. §202.12 (c)(3). A similar rule exists for the Commercial Trial Courts (§202.70(8)(b)). In August, 2010, both of these rules were further amended to also require heightened counsel preparation. *See* http://www.dos.state.ny.us/info/register/2010/aug18/pdfs/courtnotices.pdf. [§§202.12(b) & 202.70(g)] Nassau County has developed its their own guidelines. *See* Melissa A. Crane, Electronic Discovery: Comp. of New York and Federal Practice, 804 PLI/Lit 173 (2009); Vesselin Mitev, *New E-Discovery Rules Help County Courts Manage Cases*, New York Law Journal, February 19, 2009, available at http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202428391982. A report in 2010 identified a lack of uniformity in pre-litigation preservation doctrines applied in Federal and State courts. *See* Advisory Group to the New York State – Federal Judicial Council, Harmonizing the Pre-Litigation Obligation to Preserve Electronically Stored Information in New York State and Federal Courts (September, 2010), http://www.courts.state.ny.us/publications/pdfs/PreLitReport.PDF. In 2012, the leading intermediate appellate court in New York State resolved any debate by adopting the *Zubulake* standards in regard to both preservation[482] and cost-shifting,[483] rejecting existing state precedent on the ground that *Zubulake*, is, *e.g.*, "moving discovery, in all contexts, in the proper direction."[484] This apparently also rejects the argument that a "requester pays" rule exist in New York state cases. *See* Robert W. Trenchard, *Two Roads Diverge in Managing E-Discovery Costs: The Big Difference that Federal and New York Responses Can Make*, 11/16/2009 N.Y.L.J. S6 (col. 1). A Joint Committee has issued a manual dealing with cost disputes unique to ESI. *See* Joint E-Discovery Subcommittee of the Assn. of the Bar of the City of New York, Manual for State Trial Courts regarding Electronic Discovery Cost- Allocation (Spring, 2009), http://www2.nycbar.org/Publications/pdf/Manual_State_Trial_Courts_Condensed.pdf.

34. **North Carolina.** The General Assembly passed and the Governor has signed amendment to the General Statutes amending the Rules of Civil Procedure, effective October 2011, to accommodate electronic discovery. A copy of Session Law 2011-199 (H380) is at http://www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H380v4.pdf Amended Rule 26 defines ESI to include "reasonably accessible" metadata that will enable a party to have certain ability to access date sent, received, author and recipients but other metadata is not included unless agreed or ordered for good cause [Rules Civ. Proc., G.S. § 1A-1, Rule 26 (2011)]; and other detailed enhancements from the 2006 Federal Amendments provisions for early discussion, discovery plans, objections to

[482] Voom HD Holdings v. Echostar, __ A.D. 3d ___, 2012 WL 265833 (N.Y. A.D. 1 Dept. Jan. 31, 2012).
[483] U.S. Bank v. Greenpoint Mortgage, __A.D. 3d, 2012 WL 612361 (N.Y. A.D. 1 Dept. Feb. 28, 2012).
[484] *Id*, at *4.

requested form and cost allocation. The ESI safe harbor was adapted unchanged. The North Carolina Business Court, part of the trial division (see http://www.ncbusinesscourt.net/) has, since 2006, operated with "Amended Local Rules" (July 31, 2006) which included provisions designed to encourage discussion by parties of disputed e-discovery issues at an early case management meeting prior to meeting with the Court (NC R. Bus Ct Rule 17.1) and prior to filing motions and objections relating to ESI. (NC R. Bus Ct 18.6(b)). The procedural rules governing discovery are those supplied by the North Carolina Rules of Civil Procedure as "supplemented by the Guidelines adopted by the Conference of Chief Justices." *See, e.g.,* Bank of America v. SR Int'l Bus. Machines, 2006 NCBC 15, 2006 WL 3093174, at *18 (N.C. Super. 2006).

35. **North Dakota**. Amendments based on the 2006 Amendments became effective March 1, 2008. *See* http://www.court.state.nd.us/rules/civil/frameset.htm

36. **Ohio.** The Supreme Court adopted rules based largely on the 2006 Amendments, with significant modifications. 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 are at http://www.sconet.state.oh.us/RuleAmendments/documents/2008%20Amend.%20to%20Appellate,%20Criminal%20&%20Civil%20as%20published%20(Final).doc.

37. **Oklahoma**. Effective November 1, 2010, Oklahoma enacted a mixture of court rules and statutory enactments based on – but not identical to – the 2006 Amendments. The discovery provisions are found in Section 3226 of Chapter 41 (Discovery Code), at http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?citeid=440624. Similarly, Rule 37(e), broadened to apply to inherent power, is included in Section 3237, at http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?citeid=95008. Rule 5 of the District Courts, governing the possible entry of "orders addressing the preservation of potentially discoverable information" is found in the Appendix to Chapter 2 of Title 12, with the inference being that it was adopted by the Supreme Court. *See* http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=458104. Under Section 2016 of Title 12, Chapter 39, "[i]n the absence of specific superseding legislation, the procedures for conducting pretrial conferences shall be governed by rules promulgated by the Supreme Court of Oklahoma." The legislature, in Section 2502 (Attorney-Client Privilege), Chapter 40 of Title 12 ("Civil Procedure"), has also adopted a modified version of FRE 502(b) dealing with non-waiver of inadvertent disclosures *and*, unlike FRE 502, including a provision authorizing selective non-waiver of attorney-client or work product matter to governmental agencies. The provisions are found at 12 Okla. St. § 2502 (E) & (F).

38. **Oregon.** On December 11, 2010, the Oregon Council on Court Procedures promulgated an amendment to Rule 43 of the ORCP regarding electronic discovery, a copy of which is found at http://legacy.lclark.edu/~ccp/Promulgated_Amendments_12-11-10.pdf. Under the Amendment, electronically stored information is discoverable as a form of documents, and, in the absence of a specific requested form, must be produced in

the form in which it is maintained or in a reasonably useable form. The proposals went into effect on January 1, 2012.

39. **Pennsylvania**. The Supreme Court published for Comment the Proposed Recommendation No. 249, with a June, 2011 deadline. The Proposal makes minimal changes to accommodate electronically stored information, while including ESI in the types of discovery covered by Rule 4011 limiting the scope of discovery for material sought in bad faith which would cause unreasonable annoyance, embarrassment, oppression, burden or expense. In an "Explanatory Comment" the recommendation states that "there is no intent to incorporate the federal jurisprudence surrounding the discovery of [ESI]" and that discovery of ESI is "to be determined by traditional principles of proportionality under Pennsylvania law." The Comment also suggest sthat parties should consider "tools" and agreements covering ESI. For a copy of the Proposal, *see* http://www.courts.state.pa.us/NR/rdonlyres/61B0D4F4-F4A6-445B-8A6B-9169CC4BEF07/0/rec249civ.pdf. Some commentators have criticized the failure to incorporate provisions from the 2006 Amendments designed to speed up ESI production. *See, e.g*, Leonard Deutchman, Pros and Cons of Pennsylvania's Proposed E-Discovery Rules Changes, LTN Law Technology News, May 11, 2011, copy at http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202493468574&Pros_and_Cons_of_Pennsylvanias_Proposed_EDiscovery_Rules_Changes&slreturn=1&hbxlogin=1. The draftsman is quoted as defending it. *See* Gina Passarella, Approaching the Bench: Pa. Judiciary Faces New EDD Rules, Sept. 2, 2011, copy at http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202513056682. Pennsylvania has robust case law on the spoliation inference. *See, e.g.,* McHugh v. McHugh, 186 Pa. 197, 40 A. 410 (1898)(explaining that spoliation gives rise to a presumption that a party's conduct may be attributed to knowledge that the truth would operate against the party).

40. **Rhode Island**. Rulemaking status unknown. In Barbara Brokaw v. Davol, Inc., 2011 R.I. Super. LEXIS 23, at *6 (Superior Ct. R.I., Providence, Feb. 15, 2011), the court applied Rule 26(b)(2)(B) and its interpretive case law to a dispute about accessing backup media because "ESI is still a novel means of discovery in [RI] state courts."

41. **South Carolina.** In Jan. 2011, the Supreme Court adopted and sent to the Legislature Amendments to Rules 16, 26, 28, 33, 34, 37 and 45 of the rules of Civil Procedure, which have now become effective. *See* http://www.desaballard.com/resources/Proposed-SCRCPEDiscoveryAndNoteToRule2028.pdf.

42. **South Dakota**. Status unknown.

43. **Tennessee.** The Supreme Court adopted Amendments effective on July 1, 2009 which borrow from the *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information* issued by the Conference of Chief Justices (2006). *See* the analysis in Lawrence C. Maxwell, New Rules for E-Discovery, 45-JUN Tenn. B.J. 12 (June, 2009). Tenn. R. Civ. P. 26.02(5) mirrors the federal rules in allowing a party to claw back privileged information, but does not provide whether the privilege or

protection that was asserted was waived by production. Effective July 1, 2010, Tenn R. Evid. Rule 502 provides for limitations on waiver due to inadvertent disclosure of privileged information or work product, based on Fed. R. Evid. 502(b).

44. **Texas.** Texas included a rule dealing with the request of electronic or magnetic data as part of its reform of the discovery provisions of the Texas Civil Procedure code in 1999 (Tex. R.Civ.P. 196.4). *See generally*, Nathan L. Hecht and Robert H. Pemberton, A Guide to the 1999 Texas Discovery Rule Revisions (Nov. 1998), copy at http://www.adrr.com/law1/rules.htm. It permits an objection to production of electronic data which is not "reasonably available" to the responding party in "its ordinary course of business." If ordered to produce, the rule requires payment of the reasonable expenses of any extraordinary steps required retrieving and producing the information. The Texas Supreme Court interpreted the rule by harmonizing it with Fed. R. Civ. P. 26(b)(2)(B) in the case of In re Weekley Homes, LP, 295 S.W.3d 309 (2009); *see also* Kenneth J. Withers and Monica Wiseman Latin, Living Daily with Weekley Homes, 51 The Advoc. (Texas) 23, (2010)(discussing Supreme Court of Texas gloss on Rule 196.4). Texas also enacted a provision at the same time providing that production of privileged information when a party does not intend to waive the claim is not a waiver if a party acts to make the assertion within 10 days of actual discovery that production was made. Tex. R. Civ. P. 193.3(d). Texas did not include a safe harbor provision in its more limited approach to e-discovery.

45. **Utah**. The Utah Supreme Court approved a set of e-discovery rules based on the 2006 Amendments, effective on November 1, 2007. The power to sanction failure to preserve by using inherent powers is expressly acknowledged as part of Rule 37. In addition, a party must "expressly make any claim that the source is not reasonably accessible" and is required to describe the source and any other information that will enable other parties [seeking discovery] to assess the claim." See URCP Rule 37. The Utah Supreme Court declined to acknowledge an independent tort for spoliation in 2010 in a comprehensive opinion summarizing the status of the "twelve jurisdictions [which] have recognized and retained the tort of spoliation of evidence in some form." Hills v. UPS, 2010 UT 39, 232 P.3d 1049, 1055 (S.Ct. May 14, 2010). In 2011, effective November 1, a comprehensive revision of the discovery rules went into effect under which, *inter alia*, the standard of discovery under Rule 26 was established as relevance to the claim or defense "if the party satisfies the standard of proportionality" as set forth in the amended rule, with the burden of establishing proportionality and relevance "always" placed on the party "seeking discovery." URCP 26(b)(1)-(3)(2011). Thus, under the provisions for protective orders - now part of Rule 37 – a party seeking discovery has the burden of "demonstrating that the information being sought is proportional" when a protective order motion "raises issues of proportionality." URCP 37 (b)(2).

46. **Vermont.** Vermont promulgated rules based on the 2006 Amendments in May, 2009, with provisions for a discovery conference which must be followed by an order identifying preservation issues (V.R.C.P Rule 26(f). The Reporter's notes to the safe harbor provision (V.R.C.P. 37(f)) define "good faith" as precluding "knowing continuation" of an operation resulting in destruction of information.

47. **Virginia**. Effective January 1, 2009, the Civil Rules were revised to include the 2006 Federal Amendments, except for the safe harbor provisions and "meet and confer" obligations. For an excellent summary by a sitting judge of electronic discovery issues prior to enactment of the new rules, *see* Hon. Thomas D. Horne, *Electronic Data: A Commentary on the Law in Virginia in 2007*, 42 U. Rich. L. Rev. 355 (2007). A version FRE 502 was included in 2010. See VA Code Ann. § 8.01 – 420.7; see also Rule 4:1.

48. **Washington.** Effective on September 1, 2010, Washington adopted a modified version of FRE 502, styled ER 502. It includes a selective non-waiver provision for disclosures to state agencies in addition to non-waiver for inadvertent disclosure and establishing the controlling effect of court orders and agreements. It also reflects on the impact interstate impact of non-Washington waivers.

49. **West Virginia**. Status unknown.

50. **Wisconsin**. On April 23, 2010, a divided Supreme Court of Wisconsin adopted e-discovery amendments at http://www.legis.state.wi.us/statutes/Stat0804.pdf. On November 10, 2010, over a strongly worded dissent, the Court replaced one section with Wis. Stat. § 804.01(2)(e), which mandates a conference of parties as condition to serving request to produce ESI or to using it to respond to an interrogatory. Reported decisions on case law on ESI iare limited, although the Chief Justice eloquently articulated the distinctive issues as early as 2004. In re John Doe Proceeding, 2004 WI 65, 272 Wis. 2d 208, 680 N.W. 2d 792 (S. C. 2004)(Abrahamson, C.J. concurring). *See also* Sankovitz, Grenig & Gleisner III, What You Need to Know: New Electronic Discovery Rules, 83 Wisconsin Lawyer (July 2010).

51. **Wyoming**. The Wyoming Supreme court amended its Civil Rules to conform to the 2006 Amendments in (similarly numbered) Rules 26, 33, 34, 37 and 45, at http://courts.state.wy.us/CourtRules_Entities.aspx?RulesPage=CivilProcedure.xml.