E-Discovery in Federal and State Courts
After the 2006 Federal Amendments

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I. Introduction

The 2006 Amendments to the Federal Rules of Civil Procedure (“the 2006 Amendments” or “the Amendments”) addressed e-discovery issues in civil litigation by relatively modest changes, with much of the implementing detail relegated to the discretion of the courts and local rulemaking.

State E-Discovery Rulemaking

A total of twenty-nine states have enacted e-discovery rules based in whole or in substantial part on the 2006 Amendments. This is consistent with a desire to promote uniformity in the treatment of litigation in state and federal courts within a single state. An additional ten states have put in place either unique or limited rules focused on e-discovery and one state and the District of Columbia are awaiting approval of e-discovery amendments by their highest courts. The remaining ten states have not yet acted.

A number of states have commissioned Task Forces to assess potential reforms which directly impact e-discovery, and Minnesota and Iowa have issued Final Reports. Other states are testing the impact of “PAD Pilot Rules” [Proportional Discovery/Automatic Disclosure].

This Memorandum first describes the background to and principal features of the 2006 Amendments, followed by a summary of other influences on e-discovery

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3 As of December 1, 2007, the Civil Rules were revised to reflect “stylistic” changes which made no “changes in substantive meaning.” See Committee Note, Rule 1 (2007). Unless otherwise expressly noted, the current rules as “restyled” are utilized throughout this Memorandum.
5 Glenn S. Koppel, Toward A New Federalism in State Civil Justice, 58 Vand. L. Rev. 1167, 1179 (2005)(the Federal rules are to provide a “model of procedural uniformity to be followed by the states (intra-state uniformity)”).
6 Three states (Texas, Idaho and Mississippi) adopted the limited approach to ESI production pioneered by Texas prior to the 2006 Amendments.
7 Delaware, Nebraska, New Hampshire, New York, Oregon and Pennsylvania (2012) have acted since the 2006 Amendments. Illinois took action prior to the Amendments.
8 Massachusetts.
9 Colorado, Georgia, Hawaii, Kentucky, Missouri, Nevada, Rhode Island, South Dakota, Washington and West Virginia have taken no action relating to ESI.
11 See http://www.courts.state.nh.us/superior/civilrulespp/Pilot-Rules-Report.pdf (codifying the duty to preserve and counsel’s duty to inform the client of the duty and to implement a litigation hold). See also E-Discovery in New Hampshire, NH Discovery and Deposition, S. 14.2 (“NHCLE-PGDD s 14.2”).
jurisprudence. We then turn to key e-discovery issues in federal and state courts. The Appendix details rulemaking activity in each of the states and in the District of Columbia.

II. Background

Electronic data emerged as important to discovery in the 1950s and 1960s due to growth of databases managed by mainframe computers. The Rules Committee responded in 1970 by expanding the definition of “documents” in Rule 34 to include “data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.”

Prior to the adoption of widely available review software, it was not uncommon for a party to seek production of electronic data in the form of “print-outs.” When produced in electronic (“machine readable”) form, involving additional effort and expense, courts faced requests for payment of the costs incurred by utilizing a multi-factored analysis. Some cases also explored the duty to preserve potentially discoverable information in electronic form.

The explosive growth in unstructured, user-generated content – such as email – in the 1980s and 1990s followed from and contributed to the use of personal computers and the internet. As a result, courts routinely faced discovery disputes regarding access to storage devices and backup systems, as well as the sensitive issues involved in forensic examinations.

At the same time, compliance with preservation obligations for electronic data became problematic because of the risk of sanctions for inadvertent deletion of ESI, understandably prompting costly over-preservation. Resolution of contentious issues

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13 Amended Rule 34(a) required that requested information be “translated if necessary,” into a “reasonably usable form” by “detection devices.” 48 F.R.D. 487, 525-527 (1969-1970). The Committee Note stated that “in many instances, this means that respondent will have to supply a printout of computer data.” As late as 1996, Illinois mandated that “all retrievable information in computer storage” should be produced in “printed form.” ILCS S. Ct. Rule 214 (1996).
14 In National Union v. Matshushita, 494 F. Supp. 1257, 1262 (E.D. Pa. 1980), a District Judge famously noted that “[a] part from the possible expense, the manufacture of a machine-readable copy of a computer disc is in principle no different from the manufacture of a photocopy of a written document, a common enough method of responding to a request document production.”
such as spoliation sanctions\textsuperscript{20} was largely provided by lower court trial judges, and standards varied among the Circuits. Appellate decisions involving ESI were relatively rare given the lack of interlocutory appeals available in most discovery matters.\textsuperscript{21}

By the late 1990s, it had become apparent to many, including the author, that “the differences between electronic data and traditional documents” justified rule amendments dealing with the issues not adequately covered by existing rules.\textsuperscript{22} According to the Special Reporter for the Discovery Project then underway by the Rules Committee, preservation and the form of production were often mentioned as of particularly concern.\textsuperscript{23}

After several years of study, including a number of conferences on the topic,\textsuperscript{24} an initial draft of what ultimately became the 2006 Amendments was released for Public Comment by the Rules Committee in August 2004.\textsuperscript{25} These proposals were subsequently amended to reflect extensive public input,\textsuperscript{26} and in their final form, after Congressional acquiescence, became effective in December, 2006.\textsuperscript{27}

The 2006 Amendments

The changes in the Civil Rules due to the 2006 Amendments were modest and confined to the following areas:

A. Discoverability. The term “electronically stored information” (“ESI”) was included in Rules 34 & 45 (and elsewhere) to better describe the discoverability of electronic forms of information. Those two rules also provided a generic default standard for production of ESI without addressing the specific formats involved.

B. Meet and Confers. Rule 26(f) was amended to require discussion of preservation, the form of production and the handling of post-production claims of privilege or work product protection.


\textsuperscript{21} A classic exception has been appellate review of inappropriate and intrusive trial court orders. See, e.g., In re Ford Motor Co., 345 F.3d 1315 (11\textsuperscript{th} Cir. 2003).


\textsuperscript{23} Richard L. Marcus, E-Discovery Beyond the Federal Rules, 37 U. BALTIMORE L. REV. 321, 331 (2008) (“many said ‘tell us exactly what to do,’ . . . often focused on preservation or form of production issues”).

\textsuperscript{24} Id., 331-332 (describing mini-conference in October 2000).


\textsuperscript{26} 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)(describing the solicitation of input by the Committee and the public hearings in San Francisco, Dallas and Washington, D.C.)

\textsuperscript{27} TRANSMITTAL OF RULES TO CONGRESS, supra, 234 F.R.D. 219, 307-397 (2006)(containing text of Amended Rules 16, 26, 33, 34, 37 and 45, together with introductory and explanatory material, including text of associated Committee Notes and Changes Made After Publication and Comment).
C. Case Management. Rule 16 was amended to encourage courts to facilitate agreements on e-discovery issues and, when appropriate, resolve open disputes. Rule 26(b)(2)(B) was added to presumptively limit ESI production from sources identified as inaccessible because of undue burden or cost in the absence of “good cause.” A mandatory “clawback” process was added as Rule 26(b)(5)(B) to handle post-production claims of work product or privilege protection, pending resolution of the underlying claims.28

D. Sanctions. The Amendments ignored requests to describe the onset or contours of the duty to preserve,29 but provided a limited “safe harbor” in what is (now) Rule 37(e) from sanctions for ESI losses resulting from “routine, good faith” operations. The Committee Note implicitly endorsed use of “litigation holds” to meet preservation obligations.

The Amendments were also silent as to the propriety of supplementation by local rulemaking. However, that silence did not equate to a ban on efforts to define or supply useful detail.30 A degree of experimentation was anticipated – even welcomed – by the Rules Committee. The Committee was well aware that it was leaving some issues on the cutting room floor. In order reach consensus, watered down language was the norm.

Not surprisingly, a number of Districts Courts31 have acted to amend their Local Rules or to implement a variety of innovative measures to help fill the gaps or address the ambiguities.32 Thus, local e-discovery provisions designed to help practitioners and courts navigate the Amendments have been widely adopted. Not all commentators applaud the results.33

There have also been efforts made to revisit the Federal Rules to deal with open or incompletely handled issues. A Conference on Civil Litigation was held in 2010 at Duke Law School by the Rules Committee34 at which time the need for rulemaking in a variety of contexts touching on e-discovery was identified. The Duke Conference was

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28 Rule 33 was also amended to permit the offer of business records “including ESI” in lieu of interrogatory answers and Rule 26(a) was amended to acknowledge that early disclosure obligations applied to ESI. In 2008, newly enacted FRE 502 provided helpful certainty as to waiver issues and the scope of judicial authority.

29 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” but did not do so).

30 Whitehouse v. United States District Court, 53 F.3d 1349, 1362-1363 (1st Cir. 1995)(“silence in the federal rules should not be interpreted as a prohibition on local rule-making authority”).

31 For a KL Gates summary of the varieties of e-discovery initiatives at the local level as of late 2011, see http://tinyurl.com/LNw12-cp02.

32 Thomas Y. Allman, Local E-Discovery Mandates: Creative Experimentation or Threat to Procedural Uniformity?, IAALS Third Civil Justice Reform Summit, August 30, 2012 (copy on file with author).

33 Charles S. Fax, Does Federalism Work for the Federal Rules?, ABA LITIGATION NEWS, February 8, 2012, copy at http://apps.americanbar.org/litigation/litigationnews/civil_procedure/012512-federalism-federal-rules.html (noting adverse impact on efficiency, costs and the “risk of sanctions due to unfamiliarity with, or negligent failure to adhere to, local norms that differ from a lawyer’s home jurisdiction”).

followed by a “mini-conference” held in Dallas in 2011, focusing on preservation and spoliation issues, which has led the Discovery Subcommittee of the Rules Committee to engage closely in draft rulemaking exercises.

In addition, the Duke Subcommittee of the Rules Committee has also identified and is currently working on a number of more general rule change possibilities.

Other Influences

As noted, the 2006 Amendments were deliberately modest in scope, leaving post-Amendment e-discovery guidance to emerging case law and “best practices” guidance, as well as to local initiatives, both Federal and State.

Federal Case Law

Federal District Judges - and especially Magistrate Judges to whom discovery issues are often assigned - have had considerable opportunity, which many have embraced with alacrity, to create a robust corpus of e-discovery decisions, which have served as the principal source of guidance for courts and parties.

Federal case law has been particularly influential in state courts, many of which have a tradition of applying federal case law in the absence of state rulings on point.

Best Practice Guidance

The Sedona Principles, issued by the Sedona Conference® Working Group (“WG1”), consist of fourteen recommendations on key e-discovery topics. They were updated after the 2006 Amendments and have been supplemented by an increasing number of “Commentaries” providing authoritative discussion.

Other guidance has emerged. At the Federal level, the Federal Judicial Center issued Managing Discovery of Electronic Information: A Pocket Guide for Judges (2nd Ed. 2007), copy at http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf.

The topics have included Search and Retrieval, Quality Assurance, Legal Holds, Proportionality, as supplement by a Glossary, Guidelines on Managing Information and the Cooperation Proclamation.
Ed. 2011), among other relevant publications. Similarly, the IAALS issued *Navigating the Hazards of E-Discovery*, subtitled as a Manual for Judges In State Courts.40

In addition, keyed to state trial court judges, the Conference of Chief Justices issued *Guidelines for State Trial Courts*,41 which also influenced several state e-discovery enactments.42 The Conference of Uniform Law Commissioners issued *Uniform Rules Relating to the Discovery of [ESI]*43 to provide “an alternative [rules] framework” largely based on the 2006 Amendments. Arkansas adopted that approach44 and individual provisions of the *Uniform Rules* have been influential in a number of recent drafting efforts.45

Local Initiatives (Federal & State)

Various local initiatives adopted by Federal district courts or State trial courts have also played an important role in filling the gaps in the 2006 Amendments.46 Some Federal Courts have amended their Local Rules while others use Standing Orders adopted by individual judges.47 A few judges have also adopted “one-off” e-discovery protocols through this method.

Rule 83(a)48 and 28 U.S.C. 207149 mandate that adoption or modification of Local rules secure the concurrence of a majority of the District Judges. They typically are readily available on District courts websites and in legal research databases.50 The

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42 See, e.g., the Arizona State Bar Committee Notes to Rule 16(b), at AZ ST RCP Rule 16(b)(2008).
46 Gaza & Rawnsley, Local Practices for Electronic Discovery, 58-FEB Fed. Law. 32 (2011)(noting that “the 2006 Amendments were [not] the starting point” and referencing the District of Delaware Default standards as preceding the 2006 Amendments).
47 Others have utilized Pilot Projects or made model orders or protocols available for use in their Districts.
48 Rule 83(a) permits a district court, acting by a “majority of its district judges” to “adopt and amend rules governing its practice” which are “consistent with—but not duplicat[ive] [of] federal statutes and rules” and conform to any prescribed “uniform numbering system.” Copies must be furnished to the Administrative Office and to the Circuit Judicial Council, as well as “made available to the public.”
49 28 U.S.C. 2071 requires that local rules “shall be consistent with Acts of Congress and rules and practice prescribed under section 2072 [the Federal Rules].” Any rule is ineffective unless “prescribed” after “giving appropriate public notice and an opportunity for comment.” Copies must be furnished to the Administrative Office and to the Circuit Judicial Council, as well as “made available to the public.”
50 WESTLAW indexes Local Rules by state (e.g. insert “KS-ST-ANN” in “Search for database,” then go to “Table of Contents” and select Local Rules for Civil or Bankruptcy); to retrieve known individual Rules, insert “KS-RULES” in “Find this document,” scroll to bottom and insert desired LR number).
Judicial Council of each Circuit must determine “consistency with [existing federal rules],” with the power to “modify or abrogate any such rule found inconsistent in the court of such a review.”

There is an inevitable tension between local initiatives and the national goal of a uniform procedural approach to e-discovery rules. While “local rules which unnecessarily impose costs and burdens” may exceed the rulemaking power of the district courts, they can also “provide implementing detail that is not appropriate for national rules” and can be modified “much more rapidly than a national rule.”

Some examples of these local initiatives in Federal Courts include:

- The Default Standards of the federal District of Delaware require disclosures on key topics such as potential custodians and search methodology and adopt presumptive categories of ESI which are not subject to a duty to preserve.

- The Seventh Circuit Electronic Discovery Pilot Program focuses primarily on the duty to preserve and produce ESI. Phase II of the Project “wrapped” up recently, with a Final Report issued in June, 2012 from which, hopefully useful lessons can be drawn.

- A Southern District of New York Pilot Project is testing the use of intensive case management in complex Civil Cases. As part of the Program, a Model Joint Electronic Discovery Submission and Order is required to report on (and govern) the e-discovery process in the case.

- The Chief Judge for the Federal Circuit has suggested a Model order for patent cases which presumptively limits the number of custodians.

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53 Thomas Y. Allman, supra, Local Rules, at 10.
54 Marcus, supra, at 338.
In some cases, individual states have also encouraged the issuance of protocols or state-wide guidance for the conduct of e-discovery in their states. Of these, the Guidelines for Discovery of Electronically Stored Information issued by the Nassau County [N.Y.] commercial court, which includes a model order, has been particularly influential.

III. E-Discovery Today

We now turn to a detailed examination of the issues involved in e-discovery in both federal and state courts, as impacted by the 2006 Amendments and their state counterparts.

(1) ESI

The 2006 Amendments amended Rules 34(a) and Rule 45(a) to speak of the right to request to inspect or copy “designated documents or electronically stored information (emphasis added).” States have also adopted this terminology, with some variances. Florida (eff. September, 2012), Iowa and Oregon, continue to treat ESI as a subset of “documents,” as was the case prior to the 2006 Amendments.

ESI is not confined to user-generated information, which is one of the reasons for identifying it as a separate source of discoverable information. All forms of metadata – whether relating to the applications being run or the systems on which they are run – are potentially discoverable. It is defined as “data or data compilations – stored in any medium from which information can be obtained directly or, if necessary, after translation by the responding party into a reasonably usable form.”

Discoverable ESI is typically found in active files maintained by personal or corporate computer systems - as well as the variety of backup devices, distributed storage or archival systems, including legacy systems. It may also exist as ephemeral or

63 Fla. R. Civ. P. 1.350 (“designated documents, including electronically stored information”); [Oregon] ORCP 43(A)(same); see also Iowa R. Civ. P 503(1)(documents “shall encompass [ESI]”).
64 Shira A. Scheindlin and Jeffry Rabkin, Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up To The Task?, 41 B. C. L. REV. 327, 373-4 (2000)(recommending use of “electronically-stored information” since “embedded data, web caches, history, temporary, cookie and backup files” are all forms of information automatically created by computer systems rather than by computer users and do not obviously fall within the scope of the term “documents” in any traditional sense”).
65 Compare N.C. GEN STAT. 1A-1, Rule 26(1)(defining ESI to include only “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.” In contrast, “other metadata” is not discoverable ESI “unless the parties agree otherwise or the court orders [production on a] showing of good cause).
66 Rule 34(a).
fragmentary information which can be found only by direct access and forensic examination of storage devices.\textsuperscript{67}

For example, in \textit{Columbia Pictures v. Bunnell}, ESI was held to include transitory data found in Random Access Memory (RAM) since the Rule “requires no greater degree of permanency from a medium than that which makes obtaining the data possible.”\textsuperscript{68} As noted at the time, a party may be required to produce existing ESI that exists for any period of time and that can be placed into a usable form for production with a “modicum of cooperation.”\textsuperscript{69}

More recently, there has been a movement at the District Court level to establish bright-line standards based on the proportionality principle. The Seventh Circuit E-discovery Pilot Program\textsuperscript{70} and the District of Delaware Default Standards,\textsuperscript{71} for example, list presumptive categories of ESI need not be preserved because they are not typically subject to discovery. The (currently) proposed e-discovery Local Rule amendments in one District echo this approach.\textsuperscript{72}

Possession, Custody and Control

The responsibility to produce ESI turns on whether the producing party has possession, custody or control of the information. Information held by a foreign parent, is typically not found to be under the “control” of its independent US subsidiary,\textsuperscript{73} although the opposite is often true if the foreign entity is a subsidiary of the US party. Production is often ordered despite the existence of The Hague Convention or foreign data protection\textsuperscript{74} or other types of “blocking statutes.” Some commentators argue that


\textsuperscript{68}245 F.R.D. 443, 447 (C.D. Cal. Aug. 24, 2007)(Cooper, J.)(the Rules does not exclude “information written in a particular medium simply because that medium stores information only temporarily”).

\textsuperscript{69}Thomas Y. Allman and Kevin Brady, Can Random Access Memory Make Good Law?, 12/10/2007 Nat’l L. J. E1, (Col. 3)(noting also that no duty to preserve was found because merely interim or transitory information not routinely retained), copy at http://www.cblh.com/sites/default/files/BradyNLJDec2007.pdf.

\textsuperscript{70}See [Proposed] Standing Order, Seventh Circuit E-Discovery Pilot Project, at http://www.discoverypilot.com/ (scroll to “Standing Order”)(articulating a preservation obligation and lists six categories of ESI whose possible preservation or production must be raised “at the meet and confer or as soon thereafter as practicable”).


\textsuperscript{73}Ex parte BASF Corporation, 957 So.2d 1104 (Oct. 27, 2006).


\textsuperscript{75}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
some adjustment in the language of control may be necessary in regard to cloud-based storage.\textsuperscript{76}

### Production Formats

Rule 34(b), as amended, provides that in the absence of an agreement or a court order, a party must produce ESI in a form or forms in which it “is ordinarily maintained” or one which is “reasonably usable.”\textsuperscript{77} This generic description – widely copied by states enacting e-discovery rules – ducks the practical issues involved in the choices. Accordingly, both federal and state rules stress the importance of discussion of the form or forms of production, and early agreement where possible.\textsuperscript{78}

A recent Louisiana appellate decision illustrates how confusing the topic is when the parties do not reach agreement on format in advance.\textsuperscript{79}

#### (2) Retention Policies

Management of the retention of ESI, like information in hard copy form, is often managed by entities using formal or informal polices which involve retention “schedules” which provide for the storage or destruction of the information. This typically involves an effort to separate “records” grade material from merely transitory information to comply with regulatory and risk management concerns and to best utilize limited storage capabilities.

When adopted and operated in good faith,\textsuperscript{80} destruction of discoverable ESI pursuant to such a policy is appropriate when implemented for “legitimate business reasons such as general house-keeping.”\textsuperscript{81} In \textit{Arthur Andersen LLP v. United States},\textsuperscript{82} the Supreme Court noted that “[i]t is, of course, not wrongful for a manager to instruct his

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\textsuperscript{76} 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”).

\textsuperscript{77} A requesting party may - but need not – request a particular form or forms. See Rule 34(b).\textsuperscript{77}

\textsuperscript{78} These choices are discussed in more detail in Section 4.5 (Form of Production), below.


\textsuperscript{80} 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”).

\textsuperscript{81} 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).

\textsuperscript{82} 544 U.S. 696, 704 (2005).
employees to comply with a valid document retention policy under ordinary circumstances.” As one Commentator put it, “one means of protection [from spoliation claims] is to show that data was inadvertently destroyed in good faith and pursuant to a bona fide consistent and reasonable electronic data retention policy.”83

Pending or Anticipated Litigation

However, retention policies which are otherwise “neutral” in their purpose and operated to facilitate management can shield routine deletions from criticism only if they reasonably attempt to accommodate litigation needs.84 Similarly, the use of such policies to avoid the post-Enron expansion of criminal liability for document destruction requires care to avoid the inference of bad faith use of such policies.85 In Peter Kiewit Sons’s v. Wall Street Equity,86 for example, citing to Lewy v. Remington Arms,87 the court noted that “even if [destruction of evidence] is acceptable conduct outside of the context of litigation [because of document retention policies],” it may not be “once litigation has started and they are on notice of Plaintiff’s intention to seek production of [the specific evidence].”88 A court rejected as “laughable and frivolous” the argument that a records retention policy excused destruction of a tape recording of a closed city council meeting where there was a “powerful inference of intentional destruction indicating a desire to suppress the truth.”89

Once litigation is commenced or is imminent, the focus shifts to an examination of the response of the entity or party in light of the known conditions, which “transcends any requirements of internal policy or schedule regarding retention and destruction.”90

83 1-5 LN Practice Guide: FL Civil Discovery 5.40 (2011)
84 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 a duty to preserve was triggered).
85 See, e.g., United States v. Kernell, 667 F.3d 746 (6th Cir. Jan. 30, 2012)(18 USC 1519 may be violated by acts undertaken prior to investigation when party had no pre-existing legal obligation to retain records or documents); Sher, et. al, Is There a Forseeable Federal Investigation in Your Future?, 17 No. 24 WJBLL 1 (the principles applicable to the duty to preserve in civil litigation which attaches when litigation is “reasonably anticipated” may be applied to support the argument that the statute is not implicated).
86 2012 WL 1852048, at *22-23 (D. Neb. May 18, 2012)(sanctions issued because the "pattern of misrepresentations and improper actions” were committed in “bad faith to perpetuate fraud on the court”).
87 836 F. 2d 1104, 112 (8th Cir. 1988)(“a corporation cannot blindly destroy documents and expect to be shield by a seemingly innocuous retention policy”).
89 Doctor John’s v. City of Sioux City, 486 F. Supp. 2d 953, 956 (D. Ia. May 17, 2007)(where policy “plainly did not require the destruction of records pertinent to pending litigation, destroying the records “was unreasonable and amounted to bad faith conduct”).
90 See, e.g., The Sedona Conference® Principles (2nd Ed. 2007)(“Organizations must properly preserve [ESI] that can reasonably be anticipated to be relevant to litigation”); Comment 1.c (“The duty to preserve transcends any requirements of internal policy or schedule regarding retention and destruction. As part of a legal hold process, a party should be prepared to take good faith measure to suspend or modify any feature of information systems which might impede the ability to preserve discovery information”).
the mere fact that a party categorizes or views ESI as transitory and not worthy of long-term retention under a policy or practice is not decisive of its preservation obligations once litigation commences or is reasonably anticipated.

The line between acceptable and unacceptable conduct often requires a showing of intent to ignore these obligations. In Grabenstein v. Arrow Electronics,\(^{91}\) sanctions were not issued where e-mails were destroyed in the “normal course of business pursuant to [the party’s] e-mail retention policy” after a duty to preserve attached apparently because the party had provided no evidence that the emails were destroyed in bad faith.\(^{92}\)

In Genger v. TR Investors,\(^{93}\) however, the Supreme Court of Delaware affirmed a sanction of $3.2 million when a party “intentionally took affirmative actions to destroy several relevant documents on his work computer” (at 192).\(^{94}\) The court emphasized, however, that “the outcome perhaps might be different” if the loss had been due to the application of a data retention policy which was “coincidentally” run at the time the loss occurred.\(^{95}\) The court noted that state and federal cases differ in their approach to whether sanctions such as adverse inference instructions are warranted where destruction occurs pursuant to “routine document destruction policies.”\(^{96}\)

**Email Retention Policies**

Many – but not all - e-mail policies utilize “auto-delete” policies involving short retention periods, but also make available “records” or other shared storage for emails for long-term storage.\(^{97}\) While some argue that this obviates the need for suspension of the auto-delete function once a duty to preserve exists,\(^{98}\) many courts do not agree.\(^{99}\)

There seems to be an implicit bias in some courts towards a “save everything” mentality favoring indefinite “archiving,” regardless of the business issues involved. During the preparation of the Sedona Conference® Commentary on Email

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\(^{92}\) Id., at *6.


\(^{94}\) The Court refused to hold “that as a matter of routine, document-retention procedures, a computer hard drive’s unallocated free space must always be preserved.” Id., at 192.

\(^{95}\) Id., 26 A.3d. 180, at 193 & n. 49 (“there is no evidence or claim in this case [,] that the use of the SecureClean program fell within [the party’s] ordinary and routine data retention and deletion procedures”).

\(^{96}\) Id. (collecting cases, including Sears v. Midcap, 893 A.2d 542, 548 (Del. 2006) where destruction occurred “accidentally” or under a routine policy).

\(^{97}\) Cf. Deborah H. Juhnke, The Failed Promise of E-Mail Archive Nirvana, June 5, 2012 (copy on file with author) (advocating classification of email by individual employees with two year retention of “work in progress” before placing for retention based on a schedule)(copy on file with author).


Management, however, the team was unable to identify a universal advantage to expensive archival systems, where not mandated by regulation, as opposed to empowering and training personnel to become, in effect, individual records managers.\footnote{Guideline 3, Sedona 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”).}

Alternatives, such as manual coding of email are unrealistic, however. Experience has shown that coding efforts which impose any significant cost, in terms of time or inconvenience on the employees are problematic.\footnote{The author chaired the diverse team of inside and outside counsel and vendors that studied and wrote the Sedona Commentary.} Most policies are likely to be an eclectic combination of local and shared storage drives, perhaps a document management system, involving both local and disbursed storage.

Some Federal District courts purport to require, by local rules, that even in the absence of a dispute over compliance, parties must appoint a “retention coordinator” whose responsibility runs to the court to ensure that no deletion of discoverable ESI occurs.\footnote{Henry H. Perritt, Jr., Electronic Records Management and Archives, 53 U. PITT. L. REV. 963, at 984-985 (1992)(recommending over-inclusive schedule that causes most documents to be transferred to the Archives on increasingly inexpensive storage media).} However, as Justice Harlan noted in Hanna v. Plumer, federal rules which have a “substantial impact on private primary activity” are beyond the authority of the Enabling Act.\footnote{380 U.S. 460, 477 (1965) (Justice Harlan concurring).} Thus, it is inappropriate for courts to impose their own views of how an entity should manage retention. In Oppenheimer Fund v. Sanders,\footnote{437 U.S. 340 (1978); 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 [unknown] third parties”).} for example, the Supreme Court rejected the argument that any particular form of storage of electronic information was required of a corporate party in the absence of a showing that the party had acted in bad faith as to the litigation process.

Ultimately, resolution of disputes over the failure to preserve any particular communications subject to email policies should turn on whether the entity and/or its employee intentionally manipulated the retention system to thwart discovery of harmful information.\footnote{See Committee Note, ARCP 37(g) [Alabama 2010](“a party may not adopt a short record-retention period with no legitimate business purpose in order to thwart discovery of harmful information by having its computer system overwrite the information”).}

Rule 37(e)
Rule 37(e), as adopted by the 2006 Amendments (and discussed below at Section (4.8)) was adopted in an attempt to formalize this distinction where “routine, good faith” operations of information systems leads to ESI losses.\textsuperscript{107} The purpose was to “promote the adoption of neutral, good faith policies on the management of information and to acknowledge that, absent exceptional circumstances, it is simply unreasonable to impose spoliation obligations absent an adequate showing of intent.”\textsuperscript{108}

However, as discussed in more detail below, courts from some Circuits where mere negligence justifies adverse inferences have generally avoided the impact of the Rule by applying a form of strict liability to email retention policies – prompting routine over-preservation. To those courts, “the “good faith obligation of Rule 37(f) [now Rule 37(e)] may require a party to take affirmative steps to prevent information systems from deleting or discarding discoverable information.”\textsuperscript{109}

\section*{(3) Preservation}

The Federal Rules do not spell out the contours of the duty to preserve,\textsuperscript{110} leaving it to case law and to guidance like the \textit{Sedona Principles} to “flesh out” the duty.\textsuperscript{111} The absence of rules governing the onset and elements of the duty to preserve was noted at the time of the 2006 Amendments. After some debate, the Rules Committee refused to act, but did recommend and the Supreme Court subsequently adopted Rule 37(f), now Rule 37(e), which addresses sanctions for spoliation. To some, the Rule indirectly speaks to the obligation to act in good faith in executing preservation obligations.

According to the 2006 Committee Note to the Rule, “[a] preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case.”\textsuperscript{112}

A similar duty to preserve is widely acknowledged by states, even pre-litigation, as enforceable by sanctions. Only a few states actually mention the duty to preserve in their rules. Michigan, as part of its e-discovery amendments, noted that, “[a] party has

\textsuperscript{107} One of the reasons that New Mexico found it unnecessary to adopt an equivalent to Rule 37(e) was that under New Mexico law, the “good-faith purging of electronic files [should not be treated] any differently than the good-faith, routine destruction of paper files according to an established records retention schedule.” See NMRA, Rule 1-037, Committee Commentary for 2009 Amendments.

\textsuperscript{108} Thomas Y. Allman, Understanding the (“Modest”) Impact of Rule 37(e), August 4, 2012 (copy on file with author); see Point Blank v. Toyobo America, 2011 WL 1456029 (S.D. Fla. April 5, 2011)(refusing sanctions, citing Rule 37(e), in the absence of proof that failure to institute litigation hold was undertaken in bad faith).

\textsuperscript{109} Maria R. Butler, Electronically Stored Information: From Pre-Suit to Trial, 22 No. 12 IPTLJ 3, at 1 (2010).

\textsuperscript{110} The rules do “not attempt to state or define a preservation obligation.” TRANSMITTAL OF RULES TO CONGRESS, 234 F.R.D. 219, 334 (2006).

\textsuperscript{111} The Sedona Principles deal with practical aspects of the duty in many of the fourteen Principles. See, e.g., Principles 1, 2, 3, 5, 6, 7, 9, 11, and 14.

\textsuperscript{112} Committee Note, Rule 37(f)(2006). The Committee Notes to Rule 26(f) and 26(b)(2) also contain discussion of preservation of ESI, as do the Introductions to the respective proposed rules in the Committee Reports sent to Congress. See, e.g., TRANSMITTAL OF RULES TO CONGRESS, 234 F.R.D. 219 (2006).
the same obligation to preserve [ESI] as it does for all other types of information when it enacted its counterpart to Rule 37(e). Similarly, California specifies that its Rule 37(e) counterpart “shall not be construed to alter any obligation to preserve information.”

Some states treat the breach of a duty to preserve as sufficient to provide a tort based recovery of individual damages for negligent or intentional spoliation, enforceable by individualized damages; most states – and federal courts outside of diversity cases - do not.

The Duty

Once a suit commences or is “reasonably foreseeable,” 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 reasonably likely to be requested during discovery and/or is the subject of a pending discovery request. The rules apply equally to plaintiffs as well as defendants. Case law, and local rules in Federal District Courts emphasize that the duty requires only reasonable and proportional steps be undertaken.

One of the key principles of the Seventh Circuit Pilot Program is that “[e]very 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.” Others echo that formulation.

With the possible exception of Florida, federal and state courts acknowledge that the common law duty may arise prior to the commencement of litigation. Some

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113 MCR 2.302(B)(5).
114 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).
119 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).
121 Proportionality in Electronic Discovery, 11 SEDONA CONF. J. 289 (2010).
124 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”). Other Florida courts rely on evidentiary inferences to deal with intentional destruction of
courts hold that litigation need not be “’imminent, or probable without significant contingencies’” for the duty to preserve to arise. The onset of the duty “is very case specific and often depends greatly on hindsight.” States apply similar reasoning in determining the onset of the duty, often in “lock-step” with the Zubulake line of cases.

**Scope**

The 2006 Amendments presumptively limited the scope of discovery of ESI in Rule 26(b)(2)(B), which indirectly influences the duty to preserve, since “preservation and production are necessarily interrelated.” The Rules Committee Notes refused to take a position on the impact on preservation obligations.

Nonetheless, courts have held that if a party acting in good faith has no reason to believe that inaccessible information will be sought in discovery, courts have not found a duty to preserve what may otherwise be discoverable ESI at least until there is “actual notice that [that a requesting party is] requesting the data.” At that point, there may be an obligation to preserve, “if possible, or to at least negotiate in good faith about what data they could produce.” A party seeking to object can also move for a protective order pursuant to Rule 26(c) addressing the issue of burden.

Thus, a party typically need not preserve inaccessible backup tapes maintained solely for disaster recovery, except for identifiable tapes storing documents of key players when the information is not otherwise available. A similar approach applies to Facebook postings during pendency of litigation in the absence of notice that they will be sought in discovery. Moreover, while deleted data, data in slack spaces and evidence prior to litigation. Robert Owen has suggested adoption of a similar approach at the federal level. See Letter, Robert D. Owen to Hon. David G. Campell, October 24, 2011, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Robert_Owen_Adv_Comm_Submission_final.pdf.

125 Hynix v. Rambus, 645 F.3d 1336, 1346-1347 (Fed. Cir. May 13, 2011)(“contingencies whose resolutions are reasonably foreseeable do not foreclose a conclusion that litigation is reasonable foreseeable”).

126 James P. O’Hara [Magistrate Judge, D. of Kansas] and Robin R. Anderson, Navigating Between Scylla and Charybdis, 4 No. 4, Landslide 28, at *30 (2012)(“[c]ases that have addressed the issue either offer specific conclusions that generally guide only that specific dispute, or else they [merely] provide broad statements that relevant information must be preserved”).


130 Id. (citing, as an analogy, Rule 37(e)).

131 Id., at 432.

132 Zubulake IV, supra, 217- 218 (backup tapes which are “accessible” – actively used for information retrieval – are always subject to a litigation hold).

metadata are discoverable, much of this information may be available elsewhere on more accessible sources without the need for intrusive and costly forensic examination of ‘residual data’ or ‘slack space’ at the end of active files.

Similarly, while Rule 26(b)(2)(C)(proportionality) does not explicitly apply to preservation obligations, it is now widely accepted that the principles are relevant. Thus, the Sedona Conference® Commentary on Proportionality notes that the “burdens and costs of preservation” of potentially relevant information should be “weighed” when determining the “appropriate scope of preservation.”

These principles have been applied, in some District Court local initiatives, to produce a list of presumptively exempt categories of ESI – at least until parties and, if necessary the courts in the Rule 16 context - agree or a court orders to the contrary. This approach removes incentives to “sand-bag” an opponent by not mentioning the specific issue earlier.

At the March, 2012 Meeting of the Rules Committee, the Committee was furnished an “informal” draft placing “default limitations on discovery of [ESI]” since they might “also be useful referents for preservation decisions, which we are inclined to limit to ‘discoverable’ information.” As discussed in Section 3.3 below, however, there is no indication of an imminent move by the Rules Committee to adopt this or any other particular approach to mitigation of the preservation obligation, especially in regard to pre-litigation obligations.

Sanctions

The failure to preserve provides the basis for court-ordered sanctions and other remedies, depending on the jurisdiction. It may also include - under some circumstances - criminal consequences under Federal law where it serves to obstruct an investigative or administrative matter. Attorneys are also barred as a matter of ethics from engaging in conduct supporting certain types of failures.

139 Memo, Adapting Rule 26(b)(1) for [ESI], Agenda Book, Advisory Committee on Civil rules, March 22-23, 2012, at 274 of 644 (proposing, inter alia, that discovery “need not be provided” from nine sources of ESI; nor from “” key custodians and that no request for more that “” search terms may be used); copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03.pdf.
141 18 U.S.C. § 1520 (making it a crime to knowingly alter or destroy a record or document “in relation to or contemplation of” a governmental investigation or prosecution with the intent to impede or obstruct it);
Where civil sanctions are sought, the failure is typically described as having caused “spoliation” of evidence, which is remedied, provided the requisite loss of relevant information is shown, when the party acts with sufficient culpability and prejudice results. A more detailed discussion of Spoliation Sanctions is found in Section 4.7 (Sanctions), below.

(3.1) Litigation Holds

In Zubulake IV, District Judge Scheindlin famously held that “[o]nce the duty to preserve attaches, any destruction of documents is, at a minimum, negligent,” and in Pension Committee, a subsequent decision by the same court, it was 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).

Pension Committee also announced other per se examples of gross negligence included failures 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.

Not all courts accept the per se doctrine of Zubulake/Pension Committee. In Rimkus v. Cammarata, 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).

The Second Circuit has also explicitly rejected the argument that “a failure to institute a ‘litigation hold’ constitutes gross negligence per se,” citing Pension Committee. The court stated that the “better approach” is to consider the lack of a

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see David Cylkowski, Obstruction of Justice, 48 AM. CRIM. L. REV. 955, 991 (2011) (“while arising from corporate schanchals, the so-called “anti-shredding” provision of [the] Saxbanes-Oxley Act of 2002 covers any matter in which evidence may be altered” within the jurisdiction of any department or agency of the United States).


143 Id. 220.


145 Id., at 465.

146 Id., at 471 (“after a discovery duty is well established [listing them] the failure to adhere to contemporary standards can be considered gross negligence”).

147 Id., at 466. The list of grossly negligent acts is restated at 471.


149 Sedona Principle 5, supra, speaks of requiring “reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation.”

litigation hold as simply “one factor” to consider in assessing the preservation efforts.\textsuperscript{151} Other courts and commentators have also held that it is not grossly negligent to fail to utilize a written hold,\textsuperscript{152} particularly in the absence of evidence of any intent to interfere with the ability to litigate\textsuperscript{153} or a showing of loss or destruction of evidence.\textsuperscript{154}

In courts applying this approach, sanctions such as adverse jury instructions typically lie only if intentional conduct, designed in bad faith to interfere with discovery, are involved.\textsuperscript{155} Thus, in a case where a party did not interrupt the overwriting of “backup” or “disaster recovery” tapes, a court refused to grant a motion for severe sanctions because the party “took reasonable preservation steps in the context of this case.”\textsuperscript{156} The reasonableness of a party’s preservation efforts should be the prevailing consideration.\textsuperscript{157}

States have followed suit in adopting the “litigation hold” concept. An iconic New Hampshire Rule mandating early discussion of e-discovery topics includes a requirement that parties discuss “the need for an extent of any holds or other mechanisms that have been or should be put in place to prevent the destruction of [ESI].”\textsuperscript{158}

However, given the split in authority, and the inability to predict the jurisdiction in which litigation may occur, only “safe” policy for parties seeking to comply is to undertake preservation as soon as possible, and to sweep broadly, despite the burdens and expense involved from any “over-preservation.”\textsuperscript{159}

Implementation

\textsuperscript{151} Id. (noting that District court in Chin had refused to issue an adverse inference instruction in light of “ample evidence” available elsewhere and the limited role the destroyed evidence played in the case).
\textsuperscript{153} 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).
\textsuperscript{154} Davis v. S.R. Aviation v. Rolls-Royce Deutschland, 2012 WL 175966, at *3, n. 3 (W.D. Tex. Jan. 20, 2012)(criticizing focus on failure to impose a written litigation hold “without sufficient focus on identifying the information that was allegedly lost as a result”).
\textsuperscript{155} 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. 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”).
\textsuperscript{156} Gaalla v. Citizens Medical Center, 2011 WL 2115670, at *2 (S.D. Tex. May 27, 2011)(“[w]hile it is certainly possible that [the party] could have done more, there is no evidence that [it] acted in bad faith, which is necessary for the imposition of sanctions”).
\textsuperscript{157} 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. 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”).
Over time, and whatever the debate about the need for “written” litigation holds, the methodology associated with the “litigation hold” has become the dominant best practice response to the onset of the duty to preserve, albeit with the understanding that in doing so, it is merely an embodiment of the principle that reasonable measures must be undertaken to satisfy the duty.

The Rules Committee Comment to Rule 37(e) also makes explicit reference to use of “litigation holds,” a fact mentioned in numerous opinions.

Current best practices in implementation focus on reasonable, practical steps. The focus is on user-created or ‘unstructured’ information residing in email, electronic documents, spreadsheets and other similar materials, as well as structured data in the form of databases. Typically, a hold notice is communicated to key custodians and to appropriate IT, records retention or other personnel directing them to retain potentially relevant documents, including ESI and, in some cases, to undertake affirmative steps to ensure that information will not be destroyed by routine processes.

The reasons for the hold, the topics subject to it, as well as the manner in which the identified information is to be handled are typically included. One key decision is whether to leave the information in place (i.e., on live networks), or to undertake collection and storage without attempts to winnow or cull the information prior to institution of the review process. Custodians may be asked to identify and notify other potential custodians. There may or may not be automated processes in place to track issuance of the litigation hold and compliance.

The IT department plays a key role in regard to the affirmative actions needed to access enterprise systems and to address suspension of automatic deletion policies. Selective backup media may need to be retained, depending upon the likelihood that it captured unique copies of relevant materials. Hard drives from desktops or laptops of former employees who were potentially involved might also be retained if not already redeployed.

Copies might be made of custodians’ mailboxes and files from active drives and other networked shared sites. In addition, a forensic image can be made of the desktop

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160 Committee Note, Rule 37(f)(2006)(“[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”).


163 See, e.g., Wells Fargo Bank v. LaSalle Bank, 2009 WL 2243854, at *3 (S.D. Ohio July 24, 2009) (refusing to order restoration of backup media where hard copies were retained in loan files).
environment to remove the element of risk that deleted information could escape preservation.\textsuperscript{164}

If incoming and outgoing email has been archived through journaling, a "hold search" might be undertaken to identify email within the archive to be made subject to the hold.\textsuperscript{165} In some cases, multiple keyword searches may be necessary. Broadly worded keyword searches can sometimes be used to help identify and segregate ESI for preservation in dedicated archives.\textsuperscript{166}

Custodians

Custodians are often made responsible for identifying and preserving information stored on "endpoint devices" such as desktops, laptops and removable devices. However, total reliance on custodial identification without any supervision has been questioned.\textsuperscript{167} The risks are said to include inconsistent, idiosyncratic methods and a non-lawyers absence of legal knowledge.\textsuperscript{168} In, the court held that non-lawyers do not have enough knowledge to correctly recognize which documents are relevant and otherwise may fail to reveal their own mistakes or misdeeds.\textsuperscript{169}

However, it can be quite reasonable to rely upon custodians given their greater familiarity with the specific language used and the methods and locations of retention. In \textit{Orbit One v. Numerex}, the court noted that where broad categories of information are sought to be placed on hold or where small numbers of key custodians are involved, reliance on custodial collection – even on oral instructions – can be reasonable.\textsuperscript{170}

Discoverability

\textsuperscript{164} \textit{See, however}, Voom HD Holdings v. EchoStar, 93 A.D.3d 33, 939 N.Y.S.2d 321(N.Y. A.D. 1, Jan. 31, 2012) 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.

\textsuperscript{165} \textit{See, e.g.}, Velocity Press v Bank, 2011 WL 1584720, at *1 (D. Utah April 26, 2011)(emails and attachments archived for one year unless a litigation hold is applied).

\textsuperscript{166} 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).


\textsuperscript{169} 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).

\textsuperscript{170} 271 F.R.D. 429, 441 (S.D.N.Y. 2010)("[i]n a small enterprise, issuing a written litigation hold may not only be unnecessary, but it could be counterproductive, since such a hold would likely be more general and less tailored to individual records custodians than oral directives could be").
Zubulake V\textsuperscript{171} also mandated “active supervision” of the implementation of litigation holds by counsel and listed “steps that counsel should take to ensure compliance with the preservation obligation.”\textsuperscript{172} However, the court also noted that “[a]t the end of the day . . . the duty to preserve and produce documents rests on the party.”\textsuperscript{173}

Some courts treat litigation holds as privileged communications not subject to discovery,\textsuperscript{174} at least in the absence of a preliminary showing of spoliation.\textsuperscript{175} However, that is not true of the details such as “to whom” they were directed and the “kinds and categories of ESI” included.”\textsuperscript{176} Motions to compel lists of employees who received litigation holds may be compelled if the moving party establishes “that documents that should have been preserved” were, in fact, “lost or destroyed.”\textsuperscript{177}

The Federal Rules Committee is currently considering possible amendments under which litigation holds would become factors - but not decisive – in assessing compliance with preservation obligations. The current draft under consideration would differentiate between remedial orders and sanctions, with the latter available only upon a showing of willful or bad faith conduct.\textsuperscript{178}

The evolution of the current proposals is discussed in more detail in Section 3.3, below.

(3.2) Preservation Orders

One of the issues of concern identified as part of the 2006 Amendment process was the potential overuse of blanket preservation orders at the outset of litigation,\textsuperscript{179} often with disruptive results. Although no rule was amended, the Committee Note to Rule

\begin{footnotesize}
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    \item\textsuperscript{171} Zubulake v. UBS Warburg LLC (“Zubulake V”), 229 F.R.D. 422, 432 (S.D. N.Y. July 20, 2004).
    \item\textsuperscript{172} 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 backup media “in a safe place”).
    \item\textsuperscript{173} Id. 436 (once the duty is made known to a party it is on notice and “acts at its own peril”).
    \item\textsuperscript{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);
    \item\textsuperscript{175} Major Tours v. Colorel, 2009 WL 2413631, at *5 (D. N.J. 2009).
    \item\textsuperscript{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 Paul Grimm, et. al., Discovery about Discovery: Does the Attorney-Client Privilege Protect all Attorney-Client Communications Relating to the Preservation of Potentially Relevant Information?, 37 U. BALT. L. REV. 413 (2008).
    \item\textsuperscript{177} Tracy v. NVR, 2012 WL 1067889, at *9 (W.D. N.Y. March 26, 2012).
    \item\textsuperscript{178} Report of Rules Comm., May 8, 2012, at 47 (Proposed Rule 37(g), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2012-06.pdf#pagemode=bookmarks (p. 124 of 732)(limiting imposition of sanctions, absent exceptional circumstances, absent a showing that failure was “willful or in bad faith and caused [substantial] prejudice”)
\end{itemize}
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26(f) cautions that “[t]he requirement that the parties [must] discuss preservation does not imply that courts should routinely enter preservation orders [over objection].”

A credible risk to successful implementation of preservation must be shown as a condition precedent to a coercive order. In addition, consideration should be given to limits on the scope of discovery. In *Genger v. TR Investors*, the Supreme Court of Delaware cautioned that in considering the scope of a “document retention and preservation order,” the court must consider that court-ordered discovery should be “limited to what is ‘reasonably accessible,’” which includes considerations of proportionality and reasonableness.

Federal court authority to act is implied in Rules 16, 26(f) or 37(b)(2) and also falls within the inherent powers of a court. Neither remedy is available prior to institution of litigation, although Rule 27 may in some instances permit pre-litigation orders relating to preservation issues. While some courts treat requests as seeking a preliminary injunction requiring a showing of irreparable harm, others hold that they are merely a type of “discovery order.” Where framed in terms of seeking a “mirror image” of computers to preserve the status quo, a protocol is typically used to shield privileged information, prevent waiver from the process and allocate costs to the requesting party.

State courts also routinely issue preservation orders. Some state e-discovery amendments include provisions which recommend inclusion of preservation orders in

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184 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).
185 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)).
186 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).
190 See, e.g., United Factory v. Alterwitz, 2012 WL 1155741 (D. Nev. April 6, 2012)(“mirror-imaging is appropriate to maintain the status quo,” citing to Playboy Enterprises v. Welles, 60 F.Supp.2d 1050 (S.D. Cal. 1999)).
post-conference orders. Arizona cautions, however, against issuance of orders that might adversely impact the operation of a party’s computer system.

(3.3) Rule 37(e)/Rulemaking

Rule 37(e), barring sanctions for ESI losses as the result of “routine, good-faith” conduct in the operation of information systems, has not been uniformly applied as intended. It was included as part of the Amendments to deal with the fact that inadvertent failures to preserve are sanctionable without a showing of willful conduct in some Circuits. Some courts have “all but read [Rule 37(e)] out of the rules” based on a strained reading of the Committee Note to the effect that the Rule is inapplicable once a duty to preserve attaches.

Some argue that “if you don’t put in a litigation hold when you should there’s going to be no excuse if you lose information” because the rule “[only] protect[s] producing parties from sanctions before their litigation hold responsibilities arise.” In the meantime, however, a counterpart to Rule 37(e) has been adopted by twenty-six states. The better interpretation of the rule is that in the absence of a finding of bad faith conduct, designed to prevent use of information, sanctions are inapplicable even if those measures do not prevent a loss of ESI.

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193 [Arizona] AZ St. RCP Rule 16(b)(1)(B)(ii)(orders may address “any measures the parties must take to preserve discoverable documents or [ESI]”).
194 State Bar Committee Note, AZ St. RCP Rule 16(b). See also 2 AZPRAC §16.11.50 (2nd Ed. 2011).
195 Rule 37(e) provides that sanctions may not be imposed “under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”
196 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 the party “acted willfully or willfully failed to act”).
197 Hardaway, et. al., E-Discovery’s Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age, 63 RUTGERS L. REV. 521, 566 (2011).
198 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”).
200 Panel Discussion, Sanctions in Electronic Discovery Cases: Views from the Judges, 78 FORDHAM L. REV. 1, 30-31 (October, 2009).
201 Rachel Hytken, Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?, 12 Lewis & Clark L. Rev. 875, 887 (2008);
203 See, e.g., Gaalla v. Citizens Medical Center, 2011 WL 2115670, at *2 (S.D. Tex. May 27, 2011)(no sanctions imposed when duty to preserve breached because the party “took reasonable preservation steps in the context of this case”); accord Escobar v. City of Houston, 2007 WL 2900581 (S.D. Tex. Sept. 29, 2007)(applying Rule 37(f) despite failure 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]”).
The problem, of course, is that without any assurance that inadvertent failures are not to be sanctioned, “over-preservation” is the only safe course of conduct. Thus, Rule 37(e) does not adequately address the major source of “angst” – the risk of being branded as a “spoliator” for merely inadvertent failures.

By the time of the 2010 Discovery Conference held by the Rules Committee at the Duke Law School, the consensus of the members of the E-Discovery Panel, on which the author served, was that preservation rulemaking needed to be revisited. In response, the Committee held a “mini-conference” on preservation and spoliation at Dallas in 2011 to review rulemaking options. Corporate representatives described the costly impact of “over-preservation” and urged that a bright-line preservation rule be adopted. The author argued that Rule 37(e) should be amended to reach its full intended potential.

After consideration by the Members of the Committee and the Subcommittee, it was decided not to recommend a preservation rule for adopting but, instead, concentrate on methods of amending or supplementing Rule 37(e). A draft floated at the March, 2012 Meeting in Ann Arbor included a clear requirement of bad faith as a predicate for severe sanctions. It also listed factors to consider in assessing the party’s efforts to preserve the information, including the use of a litigation hold and the scope of the preservation efforts. The draft Committee Note took a more moderate view on the formal necessity of litigation holds than did the 2006 Committee Note.

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208 Id. at 48 - 49 (126-127 of 732)(also invoking proportionality of preservation efforts to “anticipated or ongoing litigation” and whether party sought timely guidance from the court).

209 Id., at 53 & n. 26 (131 of 732)(“it cannot be said that any particular litigation hold, or method of implementing one, is invariably required).
At the same Meeting, the Committee was also furnished an “informal” draft of an amendment to Rule 26 which would place “default limitations on discovery of [ESI]” since they might “also be useful referents for preservation decisions, which we are inclined to limit to ‘discoverable’ information.” This latter approach, modeled on the 7th Cir. Pilot Program, is already part of the (revised) Delaware Guidelines for the District of Delaware.

(4) Discovery

The discovery rules – found in Rules 16, 26, 33, 34, 37 and 45 – were amended in several ways by the 2006 Amendments in order to enhance both “party-managed” processes and to promote greater judicial involvement through active “case management.” Rule 26(f) and Rule 16(b) received additional topics for discussion, inclusion in discovery plans and, if appropriate, in scheduling orders.

Some discovery markers were put in place. Thus, Rule 26(b)(2)(B) was added to suggest a “two-tiered” approach based on the accessibility of ESI and a measures dealing with treatment of privileged or work product claims was emphasized in Rule 26(b)(5)(B), in what turned out to be a prelude to the passage of what is now FRE 502 (2008) dealing with privilege waiver.

These and other issues are discussed below, a number of which were not dealt with in the 2006 Amendments. We conclude the section with a discussion of ongoing rulemaking efforts prompted by ambiguities and issues raised at the Duke litigation Conference and assigned to the Duke Subcommittee of the Civil Rules Advisory Committee.

(4.1) Case Management

Early party agreements on e-discovery issues are an essential element of the 2006 Amendments approach, a process starting with “meet” and confers under Amended Rule 26(f) and extending to the “discovery plan” for discussion with the Court at the Rule 16 Conference. Under that view, increased disclosures and cooperative (self-interested) behavior can yield agreements on key e-discovery issues.

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213 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).
However, Courts are expected to facilitate agreements and manage - and resolve – discovery disputes involving ESI where needed. Rule 16(b), as amended, speaks of reviewing “any issues about disclosure or discovery of [ESI] and courts have ordered parties to engage in “cooperative discussion to facilitate a logical discovery flow” to ensure that discovery is proportional to the specific circumstances of [a] case.” Preservation issues are also on the table, as demonstrated by Pippins v. KPMG.

Local Rules in the District of New Jersey, the Middle and Western Districts of Pennsylvania, the Western District of New York and the District of Wyoming deal in some detail with various aspects of e-discovery. Most Districts, however, have made only relatively minor changes ding to the list of topics required for discovery plans in Rule 26(f) or for discussion at Rule 16 conferences.

Some States have also mandate early party conferences, but others order such conferences only when ESI issues are involved. Early conferences are encouraged by

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218 D.N.J. CIV. RULE 26.1(d)(imposing duty to investigate and disclose, duty to notify of categories sought, and requiring discussion of expanded list of issues, including who will bear costs of “preservation, production, and restoration (if necessary).
219 M.D. PA. LR 26.1)(imposing duty to inquire and to discuss the scope of email discovery, need for deleted information and restoration, cost allocation and format and media for production).
220 W.D. PA. LCR 26.2)(imposing duty to investigate, requiring designation of “resource” person and an expanded list of topics for discussion as to which there should be an “attempt to agree”). The court has also, by Standing Order, established a list of “Electronic Discovery Special Masters” whose reports and recommendations can be used by individual judges. See ORDER #2:10-mc-324, described at http://www.pawd.uscourts.gov/pages/ediscovorey.htm.
221 W.D. N.Y. LCR 26 (f)(describing need to agree on search methodology, expressing preference for production in image files without routine production of “substantive metadata” and cost allocation of ESI upon showing of unequal burdens or unreasonable requests).
223 See also D. WISC. LR 26; N.D and S.D. MISS. LR 26 and E.D. and W.D. ARK. LR 26.1.
224 E.D. & S.D. N.Y. LR 26.3; D. ALASKA L.R. 26(f) and Form Scheduling and Planning Conference Report; D. CONN. L.R. 26(f) and Form of Parties’ Planning Meeting (para .j); D. N.H. LR 26.1 and Sample Discovery Plan; S.D. W. VA. LR CIV. P. 16.1 and Report of Planning Meeting.
225 ALASKA R. CIV. PROC. 26(f); 2010 ARIZ. R. CIV. P. 16.3(b)(2010); ARCP Rule 26.1(b)(1); CAL. RULES OF COURT, RULE 3.724; 2010 N.H. SUPER. CT. R. 62(c); N.Y. CT. RULES, 202.70(g), Rule 8 (b); N.C. R. BUS CT Rule 17.1); WIS. STAT. Stat. § 804.01(2)(e) and URCP Rule 26 (2010).
226 MD RULES, RULE 2-504.1 (court may require, as part of an order setting a scheduling conference, that the parties meet at least 10 days prior to the conference to discuss e-discovery issues).
the Supreme Court of some state.\footnote{In re Weekley Homes, 295 S.W. 3d 309, 315, n. 6, 52 Tex. Sup. Ct. J. 1231 (2009)(parties must conduct an “early discussion” directed “toward learning about an opposing party’s electronic storage systems and procedures”); accord Barbara Brokaw v. Davol, 2011 R.I. Super. LEXIS 23, at *6 (Superior Ct. R.I. Providence, Feb. 15, 2011).} In any event, the initial conference with the court, however denominated, is expected to facilitate agreements on e-discovery issues.\footnote{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).}

As a practical matter, however, parties are often unable to agree on meaningful e-discovery arrangements at an early stage.\footnote{See, e.g., Geraldine Brown, 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.} An FJC study concluded, for example, that in only 13\% of cases in a recent Federal Study had parties actually discussed preservation issues involving ESI at the Rule 26(f) Conference.\footnote{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.} One problem is that many discovery issues are vague and unframed at that point, contributing to an inability to compromise. In other cases, such as asymmetric cases, the incentives to do so are lacking.

Disclosures

The 2006 Amendments did not expand the mandatory disclosures required by Rule 26(a). Many local initiatives expand on the suggested “checklist” in Rule 26(f) rather than merely requiring parties to state a summary of their proposals regarding ESI and to identify any open disputes in their discovery plans.\footnote{N.H. “Sample Discovery Plan), referenced in L.R. 26.1 (“Discovery Plan”).} The logic is that this enhances the discussion of the issues and the likelihood of agreement.\footnote{See, e.g., 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).}

For example, the District Court of Delaware Guidelines requires disclosure of the ten custodians “most likely to have discoverable information” as well as sources of “non-duplicative” discovery.\footnote{Delaware Fed. Ct. Default Standard (2011), Para. 3, copy at http://www.ded.uscourts.gov/.} Similarly, state rules take the same approach, emphasizing the responsibilities of counsel to be prepared to discuss client information architecture at the initial conferences.\footnote{Counsel must be “sufficiently versed” in matters relating to their client’s technological systems to discuss competently all issues relating to electronic discovery.” N.Y. Ct. Rules, §202.12 (b) & 202.70(g), Rule 1 (b). In the case of cases in the Commercial Division, counsel “shall confer” regarding “anticipated electronic discovery issues.” Id, 202.70(g), Rule 8(b).}

Liaisons
A number of Federal Districts require a party to appoint an e-discovery “liaison” to help facilitate coordination in discovery. The Seventh Circuit Pilot Program “Statement of Purpose” describes this as a “novel idea” and reports its successful use.235 A District Judge in the Southern District of Ohio recently ordered it applied to a pending case.237 Care must be taken to limit the appointment so as not to interfere with “private primary activity” affecting “behavior at the planning as distinguished from the disputative stage of activity.”238

**Topics for Discussion**

Topics can include some or all of the following, depending on the case:

- Scope and extent of ESI anticipated to be sought
- Steps to preserve potentially relevant information
- Anticipated numbers of custodians and sources other than active data
- Identification of “inaccessible” sources
- Search methodology
- The “form or forms” to be used for production
- Privilege logs
- Plans for managing post-production claims
- Timing (including phasing) of discovery

Courts expect party agreements on key issues.240 The *Sedona Principles* urge parties and their counsel to address the matter by cooperative efforts, as reinforced by the *Sedona Cooperation Proclamation*, which challenges parties to adopt a culture of cooperation in discovery.241

**4.2 Accessibility and Proportionality**

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240 Thomas Allman, Conducting E-discovery After the Amendments: The Second Wave, 10 SEDONA CONF. J. 215, 216-217 (2009)(“[c]ourts expect parties to reach practical agreement[s] on search terms, date ranges, key players, and the like” as well as the treatment of metadata and the contents of load files).

241 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.”

242 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).
The 2006 Amendments limited the scope of ESI production in Rule 26(b)(2)(B) based on a lack of “accessibility” of the source, absent a showing of “good cause”\(^{243}\) considering the limitations of [renumbered] Rule 26(b)(2)(C), which applies to all forms of discovery.\(^{244}\) That rule requires a court to limit the “frequency or extent” of discovery, \textit{inter alia}, based on balancing the benefits and burdens involved\(^{245}\) in what is referred to the “proportionality” test.\(^{246}\)

Indeed, proportionality principles have emerged as the \textit{de facto} limitation of choice in the ESI context,\(^{247}\) somewhat overshadowing and subsuming the “accessibility” doctrine. We discuss these two intertwined concepts separately.

### Accessibility

Rule 26(b)(2)(B) presumptively exempts from discovery those sources of ESI which “the party identifies as not reasonably accessible because of undue burden or cost.”\(^{248}\) The doctrine reflects the observation that “more easily accessed sources – whether-based, paper, or human – may yield all the information that is reasonably useful for the action.”\(^{249}\)

Thus, parties are encouraged to discuss potentially inaccessible sources in their meet and confer under Rule 26(f) and to report on measures agreed upon (or not) in the discovery plan required before the Rule 16 initial conference with the court. Local rules, protocols and guidelines often require specific disclosures of potential inaccessible data sources to facilitate the discussion.\(^{250}\)

\(^{243}\) The Committee Note to Rule 26(b)(2)(2006) lists the following as appropriate to determining good cause to order production: (1) the specificity of the request; (2) the amount of information available elsewhere; (3) the failure to produce information no longer available; (4) the likelihood of finding unique information; (5) predictions about the importance of the information; (6) the importance of the issues at stake; and (7) the parties resources.

\(^{244}\) Rule 26(b)(1) (“All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)”).

\(^{245}\) Rule 26(b)(2)(C)(iii) involving the balance between burden and benefit but is often referred to as the “proportionality” test. \textit{See, e.g.}, Pippins v. KPMG, 279 F.R.D. 245, 255 (S.D. N.Y. Feb. 3, 2012)(which “establishes a ‘proportionality test for discovery’”).

\(^{246}\) Rule 26(b)(2)(B)(i) also limits discovery which is unreasonably cumulative or can be obtained from other less burdensome or more convenient source and 26(b)(2)(ii) limits it when the party has had ample opportunity to obtain it in discovery.

\(^{247}\) Gordon Netzorg and Tobin Kern, Proportional Discovery: Making it the Norm, Rather than the Exception, 87 \textit{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”).

\(^{248}\) Rule 26(b)(2)(B).


\(^{250}\) Model Protocol, II (B)(4)(2012)(W.D. Wash)(parties must list inaccessible sources immediately after the Rule 26(f) Conference, but not those required to be preserved); copy at \url{http://www.wawd.uscourts.gov/documents/HomePageAnnouncements/61412%20Model%20eDiscovery%20Protocol.pdf}. 
As a concept, the “accessibility” distinction originated with Zubulake I,251 where, because of the “proportionality test”252 and the rule against imposing “undue burden,”253 the court presumptively limited discovery of information on disaster recovery backup media which had to be restored before it could be searched. The court also identified “[f]ive categories of data . . . from most accessible to least accessible” based on backup technology of the era.254 (In Zubulake III, the court dealt with the issue of cost shifting after the sampling was completed and production ordered in the case.)255

The Rules Committee made it clear, however, in its Final Committee Report256 – echoed by a Sedona Conference® Commentary257 – that it is the presence of undue burden which determines inaccessibility under the federal rule.

States have largely adopted a counterpart to Rule 26(b)(2)(B) when amending their rules258 and, in some cases, even without such amendments.259 In Omincare v. Mariner,260 for example, a Delaware 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.”

Some variations exist among the states. For example, in Ohio, there is no duty to assert the distinction as a justification for a failure to produce261 while in California, the opposite is true.262 A draft rule under consideration in Massachusetts permits a court to order discovery only when the requesting party shows that “the likely benefit of its

251 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”).
252 Id., at 316.
253 Id. at 316, citing Rule 26(c), which authorizes – does not mandate – a protective order to “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”
254 Id. at 318 ((w)hether electronic data is accessible or inaccessible turns largely on the media on which it is stored”).
256 See TRANSMITTAL OF RULES, 234 F.R.D. 219, 331 (2006)(backup tapes not susceptible to search; legacy data which is unintelligible on current systems; deleted data requiring “modern form of forensics” to retrieve; and databases not susceptible to query for certain forms of information).
257 The Sedona Conference® Commentary on Preservation, Management and Identification of Sources of Information that Are Not Reasonably Accessible, 10 SEDONA CONФ. J. 281, 289 (2009)(addressing “data complexity factors” which must be addressed in addition to the “media” complexity factors discussed in Zubulake I).
261 OHIO CIV. R.26(B)(4)(2008)(“A party need not provide discovery of [ESI] when the production imposes undue burden or expense”).
262 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]”).
receipt outweighs the likely burden of its production.” In Texas, information which is not “reasonably available” to a party “in its ordinary course of business” must be produced unless an objection is lodged, in which case the costs of any “extraordinary steps” required to “retrieve and produce” the information must be reimbursed.

Proportionality

Renumbered Rule 26(b)(2)(C), which embodies the “proportionality” doctrine, stems from the 1983 Rule Amendments, where it was added with the “objective to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that [would] otherwise [be] proper subjects of inquiry.” Among the factors for consideration are “the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”

Courts have used that doctrine - and its counterpart embedded in Rule 26(g) as to counsel responsibilities - to encourage proportionate discovery action by parties and their counsel. Judge Grimm has pointed out that “the reality seems to be” that counsel routinely make requests that are “far broader” than necessary. The remedy for this “kneejerk” violation of Rule 26(g) is for parties to meet and discuss “the amount, type and sequence of discovery so that it is “proportional to what is at stake in the litigation.” In his 2012 [Proposed] Discovery Order for cases pending before him, Judge Grimm proposes to require that “discovery in this case shall be proportional to what is at issue” and spells out phases of discovery and other measures to make it so.

The proportionality doctrine is also acknowledged to be relevant in the preservation context. In Pippins v. KPMG, the court noted that “[p]reservation and production are necessarily interrelated” and should be a “factor” in determining preservation obligations. It is the cornerstone of the Seventh Circuit Pilot E-Discovery program. The Sedona Conference® Commentary on Proportionality in Electronic

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264 Texas R. Civ. P. 196.4 (1999); but see In re Weekley Homes, L.P. supra, 295 S.W.3d 309 (S.C. Tex. 2009)(“[w]e see no different in the considerations [between federal law and Texas principles] that would apply when weighing the benefits against the burdens of electronic-information production”).
266 But see Qualcomm v. Broadcom, 2010 WL 1336937, at *5-6 (S.D. Cal. April 2, 2010)(vacating sanctions under Rule 26(g) for inadequate discovery responses since they were certified by counsel after “a reasonable, although flawed, inquiry and were not without substantial justification”).
268 Discovery Order [undated, but 2012], 2 (“Scope of Discovery – Proportionality”)(copy on file with author).
270 279 F.R.D. 245, at 255.
271 See 7th Cir. Pilot Program, Principle 1.03 (Discovery Proportionality), at Principles Relating to the Discovery of Electronically Stored Information (Rev. 08/01/2010), copy at http://www.discoverypilot.com/ (scroll to “Principles”).
Discovery,\textsuperscript{272} stresses that the “burdens and costs of preservation of potentially relevant information” should be “weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.”

States increasingly utilize proportionality as a panacea for ESI discovery concerns. Pennsylvania recently amended its rules\textsuperscript{273} to make ESI subject to “traditional principles of proportionality under Pennsylvania law.”\textsuperscript{274} An Explanatory Comment explains that “there is no intent to [otherwise] incorporate the federal jurisprudence surrounding the discovery of [ESI]. Similarly, in Utah, proportionality is the “principal criterion” on which motions to compel or for protective orders are to be evaluated.\textsuperscript{275} California has explicitly acknowledged proportionality as a basis for the issuance of protective orders\textsuperscript{276} in the ESI context.\textsuperscript{277}

**Practical Problems/Rulemaking**

However, there are practical problems in applying proportionality for purposes of planning discovery or preservation compliance since it “requires impossible comparison between discovery value and cost”\textsuperscript{278} – often before the issues are fully formed. As Magistrate Judge Francis pointed out in *Orbit One Communications*, “[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.”\textsuperscript{279}

As the Supreme Court has point out, “[a] magistrate supervising discovery does not – cannot – know the expected productivity of a given request, because the nature of the requester’s claim and the contents of the [source of information] are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests [and the Rules] calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow.”\textsuperscript{280}

\textsuperscript{272} 11 SEDONA CONF. J. 289, 291 (2010).
\textsuperscript{273} Pa. R.C.P. No. 4011 (eff. August, 2012).
\textsuperscript{274} 2012 Explanatory Note – [ESI], at Pa. R.C.P. Refs & Annos, also available at \url{http://www.pacourts.us/OpPosting/Supreme/out/564civ.rpt.pdf}.
\textsuperscript{275} Committee Note to URCP 37 (2011).
\textsuperscript{276} 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”).
\textsuperscript{277} See [California] C.C.P. §§ 2031.060(f); 1985.8(h)(4)(subpoenas); 2031.310(g).
\textsuperscript{278} Scott A. 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).
Thus, while parties are encouraged to seek early court relief based on lack of proportionality, courts have, not surprisingly, been less than responsive to such requests at early stages of the litigation. It is even less likely to produce results when the request for relief from “impositional” demands are made prior to commencement.

In the recent follow-up surveys in the Seventh Circuit Pilot Program, for example, courts and attorneys split badly in their appraisal of their value in regard to preservation. Accordingly, this has led to calls for greater specificity of presumptively non-disclosable forms of ESI, such as the draft proposal recently presented at the March 2012 Rules Committee.

(4.3) Forensic Examinations

Rule 34 and Rule 45 were amended in 2006 to acknowledge the right to “test or sample” the contents of storage devices to facilitate forensic examination for deleted ESI or temporary files relevant to some issue involving ESI. Such a request for “direct access,” based on the allegation that evidence is or may be missing from production, often occurs in employment, trade secret and matrimonial disputes, but it is by no means confined to those instances.

Prior to the 2006 Amendments, parties were permitted to inspect such electronic devices, although it was rare. Requesting parties “do not have the right to actually conduct the search for responsive documents belonging to another party or to a non-party

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286 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”).


290 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”)
subject to a subpoena. As the Eleventh Circuit noted, a party is “unentitled to this kind of discovery without – at the outset – a factual finding of some non-compliance with [the] discovery rules.”

States also acknowledge the right to direct access to ESI under appropriate circumstances. Louisiana permits “access under specified conditions” to “computers or other types of devices” used for storage for good cause, which is subject of a lengthy comment. The Texas Supreme Court, in *Weekley Homes*, emphasized that the practice warrants general discouragement, “just as permitting open access to a party’s file cabinets for general perusal would be.”

The request typically involves allegations of “spoliation,” namely that a party having a duty to preserve has failed to do so or has undertaken affirmative acts to alter or destroy the discoverable evidence. In *Genger v. TR Investors*, for example, “copies of eight separate documents and/or emails [that] should have been - but were - not found on [the company] server or [defendant’s] work computer.”

However, relief cannot be based on mere “speculation” where parties “have not established – preliminarily or otherwise – that documents that should have been preserved [by a party] were lost or destroyed.” Courts are concerned about overly intrusive attempts to seek “wholesale access” to information that exposes matters

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291 *See* Sedona Principle 6 (“Responding parties are best situation to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own [ESI]”).
292 *In re Ford Motor Co.*, 345 F.3d 1315, 1317 (11th Cir. 2003).
293 *See* Cornwall v. Northern Ohio Surgical, 185 Ohio App.3d 337, 923 N.E.2d 1233, 1239 (C.A. Erie Co. OH, Dec. 31, 2009)(“inference of improper conduct” raised by the circumstances under which letter and office note disappeared and the inoperability of computer to be accessed was “allegedly” discovered).
294 LSA-C.C.P. Art. 1462(E).
295 *See* Comments – 2007, LSA-C.C.P. Art. 1461 (an order should be granted only when the initial production of ESI was not in compliance and after less burdensome forms of production have been considered).
296 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”); *see also* Kenneth J. Withers and Monica Wiseman Latin, *Living Daily with Weekley Homes*, 51 THE ADVOC. (TEXAS) 23, at *29 (Summer 2010).
298 *Id*. 192.
300 Tracy v. NVR, 2012 WL 1067889, at *9 (W.D. N.Y. March 26, 2012)(denying motion to compel litigation hold notices and list of employees receiving notices).
“extraneous to the litigation.” Absent cause to question whether defendants have produced all responsive documents, relief is not available.

As a general matter, concerns about invasive or intrusive aspects of e-discovery have become more pervasive with the growth of communications via social media and the use of the internet.

(4.4) Search and Retrieval

The Rules of Civil Procedure “[d]o not describe the lengths to which a party [or non-party] must go to search for [and produce][ESI].” Parties and non-parties must, however, act reasonably in exercising their responsibilities under the discovery rules. This requires a “diligent” search involving a “reasonably comprehensive search strategy,” as would be expected of a “reasonable [person], committed to a good faith resolution” of discovery.

Keyword Search

The use of “keyword” searches helps identify responsive and non-responsive ESI and the mathematical and practical underpinnings of the process are well established and rarely questioned. However, care is needed to ensure that the terms used in the search are not overly inclusive or too narrow, an issue relating to the quality of the output.
The need to assure accuracy in such efforts is a theme of both Sedona Conference® Commentaries relating to the topic. Courts also opine that “[c]ommon sense” dictates that sampling and other quality assurance techniques can be employed to meet requirements of completeness.

Input from knowledgeable ESI custodians on the use of words and abbreviations can be helpful to assure accuracy in elimination of “false positives.” When parties are unable or unwilling to agree on appropriate search terms, both federal and state courts are willing to act, including appointment of Special Masters to specify the terms to be used.

Early discussion of possible keywords at the time of the Rule 26(f) conference is often deemed preferable and some local rules specifically list that as a requirement. The case of In Re Seroquel 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.” 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.”

The unspoken premise seems to be that by “signing off” on the process, the parties have established, for that case and as to those requests, an agreement as to a level of effort that governs the search. Given that discovery is party-driven, and that reasonableness - not perfection - is the underlying goal, this premise seems reasonable. If parties do not take advantage of offers to consult on search terms, it may affect the willingness of courts to order “do-overs” when a requests are made over objection.

Predictive Coding

Ariz. May 4, 2011)(sanctioning an “unreasonably narrow search” using only Plaintiff’s name and escrow number”).

310 The Sedona Conference® Commentary on The Use of Search and Information Retrieval Methods in E-Discovery, 8 SEDONA CONF. J. 189 (Fall 2007) and the Sedona Conference® Commentary On Achieving Quality in The E-Discovery Process, 10 SEDONA CONF. J. 299 (Fall 2009).

311 See In re Seroquel Products Liability Litig., 244 F.R.D. 650, 662 (M.D. Fla. 2007).


313 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).


316 See, e.g., W.D. N.Y. LCR 26 (f)(describing need to agree on search methodology, expressing preference for production in image files without routine production of “substantive metadata” and cost allocation of ESI upon showing of unequal burdens or unreasonable requests).

317 244 F.R.D. 650, 662 (M.D. Fla. Aug. 21, 2007)

318 Id., 664.

More recently, the use of “predictive coding” and other types of “latent semantic indexing” are said to offer the possibility of greatly increased accuracy as compared to 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.”

Magistrate Judge Peck’s quasi-advisory opinion on the use of predictive coding in the case of Da Silva Moore v. Publicis Groupe, as subsequently “adopted” by the District Court responsible for the case, is instructive. Central to Judge Peck’s reasoning was the statement that predictive coding “can (and does) yield more accurate results than exhaustive manual review.” The court left ample room for subsequent challenges to the accuracy of the process, however.

The opinion also noted that it was not deciding “[w]hether [a] Court, at plaintiff’s request, [can or should] order the defendant to use computer-assisted review to respond to plaintiffs’ document requests,” nor does it mean that computer-assisted review “must be used in all cases.” However, other courts have emphasize the positive value of cooperation since it is best used only when “who wish to and are a ble to” agree on “predictive coding techniques and other more innovative ways to search.”

(4.5) Form of Production

The 2006 Amendments did not specify requirements for the form of production of ESI, merely suggesting that it be in the “form in which it was maintained” or in a

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321 Id.
323 2012 WL 1446534 (S.D. N.Y. April 26, 2012)(“At this stage . . . there is insufficient evidence to conclude that the use of the predictive coding software will deny plaintiffs access to liberal discovery”).
326 Id., at *39-40.
“reasonably usable form.” The rules did lay out a process for reaching agreement – starting with the Rule 26(f) Conference – and have not been sympathetic to parties who do not take advantage of the opportunity to discuss the topic.

Responding parties who feel that metadata being sought is not relevant or that the burden of producing is disproportionate to its benefit should raise the issue at any early time. In Aguilar v. ICE, the court emphasized that the limiting principles of ESI – relevance, inaccessibility and proportionality – also apply to decisions relating to the form or form of production.

The Committee Note also expressed a view that stressed the importance of maintaining any existing ability to search ESI. As experience has shown, this can be achieved if sufficient information is included in a “load file” to make the text searchable (“imaged” format). The revised Default E-Discovery Guidelines of the Federal District Court of Delaware, for example, specify the fields of metadata to be included in load files to accomplish these goals.

Experience with the subject has developed a fairly clear pattern favoring production in one of two formats.

Image Formats

An “imaged” format is typically used for production of email and other document-like images as a “reasonably useable” form even though many of the metadata fields are stripped. As Aguilar opined, Sedona Principle 12 supports the view that “even if native files are requested, it is sufficient to produce memoranda, emails and

328 Rule 34(b)(E)(ii); accord Rule 45 (d)(1)(B).
329 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”).
331 255 F.R.D. 350 (S.D. N.Y. Nov. 21, 2008).
332 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”).
333 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”).
334 The complex and interrelated topic of the use of metadata and the role of load files in enabling review is ignored in the rules and Committee Notes, but is discussed separately below under Subparagraph 4.4. (Form of Production).
electronic records in PDF or TIFF format accompanied by a load file containing searchable text and selected metadata. 338

Imaged formats are easier to redact and are “reasonably usable” if care is taken to accommodate review needs. 339 Thus, imaged formats such as PDF, TIFF, or JPEG files are often the default form suggested by local federal default standards, 340 Local rules or guidelines. 341 Parties often agree to produce reports generated from the database – rather than seek to produce the data - in order to retain control over proprietary software. For example, in one case a producing party produced information in searchable PDF format – rather than the “mush” which would otherwise result from production in native format. 342

Native Format

Spreadsheets, sound recordings, animated content and other complex electronic presentations, which are dependent upon hidden formulae and the like, are often produced in “native” or “quasi-native” file, which necessarily contain all metadata associated with that application. However, it is difficult or impossible to include Bates numbers or confidentiality designations, redaction can be difficult and live native files can be altered. 343 Local rules tend to support use of native format production for Excel, Access or other complicated production files which do not easily accommodate imaged production.

The Western District of Washington, for example, is currently seeking comments on a Local Rule, 344 which incorporates a comprehensive Model Protocol with a number of important innovations. 345 Production under the Model Protocol is to be in “searchable text” in TIFF with a companion text file and native production is to be used for Excel, Access and “drawing files.” 346

Indexing

339 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 th that authorship would be at issue).
341 Committee Note, Md. Rule 2-504.1(c).
343 Jason Palm: E-Discovery Practice: Under the [FRCP] and the [Cal Code of CP], 830 PLI/Lit 49, 55 (2010).
345 Model Protocol For Discovery of [ESI] in Civil Litigation, copy at link on home page.
346 It also provides more detailed instructions for complex cases, such as details on appropriate software files for use with Concordance® or Summation® review platforms. Also discussed is the use of OCR technology for scanning of hard copy documents, with appropriate cross reference files.
ESI, in whatever format chosen, is typically delivered to a requesting party on “electronic media of sufficient size to hold the entire production, for example, a CD DVD, or thumb drive” or, if size warrants, a large capacity hard drive. 347

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.” These provisions – added in 1980 – were intended to “prevent the juvenile practice whereby the producing party purposefully rearranged documents prior to production in order to prevent the requesting party’s efficient use of them.” 348

Some courts routinely read this section as being applicable to delivery of ESI, despite differences in volumes and in terminology. 349 However, when large masses of information are collected, searched, culled and deemed producible, it is not practicable to break into the mass and assign specific requests to each fragment. 350

(4.6) Privilege Waiver

The 2006 Amendments included a mandatory “clawback” mechanism in Rules 26 and 45 to deal with post-production claims of privilege or work-product production. Thus, under FRCP 26(b)(5)(B) and FRCP 45(d)(2)(B), when a party produces such information without intending to waive the privilege, and notifies the recipient of that claim, the recipient is obligated to promptly “return, sequester, or destroy the specific information.” 351

The rule did not, however, address the often confusing waiver standards in effect in the federal Circuits, which are believed to have contributed to what some argue is excessive and unnecessary costs due to fears of privilege waiver.

Accordingly, Rules 26(f) and 16(b) were also amended to encourage parties to consider enter into binding agreements which could be adopted as court orders to postpone the waiver. One suggestion was to include a “quick peek” process whereby an adversary would be given access to information prior to privilege review without waiver consequences. 352

350 “[D]ocuments are generally produced in the same sequence in which they were kept. A document’s file path is generally included in metadata, so producing that metadata helps comply with the organization requirement in the rules.” Jason Palm, supra, E-Discovery Practice, 830 PLI/Lit 49, 57 (2010).
351 The Comments to the ABA Model Rule 4.4(b) and the related ABA Opinions 05-437 (2005) and 06-440(2006) take the position that whether the return of privileged information is required is committed to the receiving lawyer’s discretion, subject to procedural and evidentiary law.
Provisions similar to FRCP 26(b)(5)(B) were widely adopted by states. However, as explained by the Arizona Bar Committee, “the [AZ] amendment [is] intended merely to place a ‘hold’ on further use or dissemination of an inadvertently produced document” until a court resolves its status or the parties agree to an appropriate disposition.”

In 2008, after considerable “behind the scenes” activity, Congress enacted Federal Evidence Rule 502 (“FRE 502”). Under FRE 502(b), no waiver of a privilege occurs if the disclosure was “inadvertent,” the holder “took reasonable steps to prevent disclosure” and also “promptly took reasonable steps to rectify the error.” Under FRE (d) & (e), agreements on waiver entered by courts bind parties and non-parties in federal and state cases alike and permit courts to order—even over objection—that waiver-free production does not require proof of reasonable precautions otherwise required under FRE 502(b).

Analogues to FRE 502 have been adopted by Arizona, Arkansas, Florida, Iowa, Louisiana, Maryland, New Hampshire, Oklahoma, Tennessee, Texas, Virginia and Washington. Several states - Arkansas, Louisiana and Oklahoma in particular - extend non-waiver protection to disclosures made to governmental entities, a approach dropped from the final version of the federal rule.

Unfortunately, courts often disagree on the application of FRE 502 to specific fact patterns.

In Mt. Hawley v. Felman Production, a relatively small number of inadvertently disclosed emails was held to support a conclusion that reasonable precautions had not been taken. Courts have also concluded that parties “did not act promptly or diligently in rectifying the inadvertent disclosure.”

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354 Noyes, supra, 693-700 (describing the enactment process).
356 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 “has 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.
358 A.R.C.P. 26(b)(5)(D) and A.R.E. 502 (selective non-waiver for production made to state agencies).
359 LSA-C.C.P. Art. 1424(D)(“a disclosure . . .does not operate as a waiver if the disclosure is inadvertent and is made in connection with litigation or administrative proceedings”).
360 12 OKLA. ST. § 2502(F)(non-waiver when furnished to governmental agencies).
362 Jacob v. Duane Reade, 2012 WL 561536, at *5 (S.D. N.Y. Feb. 28, 2012)(“red flags” should have prompted more diligent inquiry and considering “concerns of fairness and prejudice” since already used in depositions).
In *D’Onofrio v. Borough of Seaside Park*, waiver was found because of post-production failures to detect errors, despite FRE 502 comments that post-production checks were not required.

Commentators have roundly criticized these cases for demanding “near-perfection” and thus preventing FRE 502 from meeting the Congressional intent to “reduce the anxiety and costs associated with privilege review.”

In the opinion of many, the rule has not turned out to be a panacea, resulting in it being underutilized.

(4.7) Sanctions

Rule 37 and its state counterparts are intended to apply to failures to adequately comply with the discovery provisions found in Rules 16, 26, 33, 34, 37 and 45. A finding of culpable conduct is generally not a prerequisite to a violation, but does affect the severity of the sanctions chosen. A typical Rule 37 sanction must be “just” and sanctions may lie against the party, the counsel advising on the conduct involved or both.

In *Surowiec v. Capital Title Agency*, for example, the court awarded Rule 37 sanctions in the form of fees and expenses where an “unreasonably narrow search” for ESI using only Plaintiff’s name and escrow number was “inexcusable.”

Rule 37(b) is occasionally invoked when a failure to preserve is involved, despite the core requirement that sanctions for failures to “provide or permit” discovery lie only when a party has failed to obey an order to do so. Thus, in *Turner v. Hudson Transit Lines*, the court held that “when noncompliance results from the spoliation of evidence, Rule 37(b) comes into play . . . because this inability was self-inflicted.” Similarly, Rule 37(d), which involves failures to serve a response to requests, has also been stretched to cover situations where the information was destroyed.

Some state courts take a similar approach. In *Shimanovsky v. GM*, for example, the Illinois Supreme Court applied its equivalent to Rule 37 to pre-litigation

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366 Principally Rules 16 and 26(g).
369 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”); accord Gorelick, et. al., Destruction of Evidence § 3.4 [DSTEVID s 3.4] (2012)( decisions, treatises and commentary “unanimously agree that sanctions pursuant to Rule 37 may not be awarded absent violation of a court order”).
371 Gorelick, et. al., Destruction of Evidence § 3.6 [DSTEVID s 3.6] (2012).

The 2006 Amendments limited Rule 37 sanctions for losses of ESI resulting from “routine, good-faith” operations in Rule 37(f), now Rule 37(e). This provision, which has been adopted by twenty-six states,\footnote{374}{Its impact - and the rulemaking efforts to clarify and enhance it - is discussed in more detail in Section (4.8), below.} is discussed in more detail in Section 3.3 above, dealing with the duty to preserve.

**Inherent Powers & Spoliation**

The more typical method of dealing with spoliation sanctions, including those arising from pre-litigation conduct,\footnote{375}{\textit{Chambers} v. \textit{NASCO} (1991)(sanctioning scheme of the rules does not displace “the inherent power to impose sanctions”).} is by the application of inherent powers under \textit{Chambers} v. \textit{NASCO} or equivalent state case authority.\footnote{376}{Slesinger v. 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”).} \textit{Black’s Law Dictionary} defines spoliation as the “intentional destruction, mutilation, alteration, or concealment of evidence.”\footnote{377}{\textit{Slesinger} v. \textit{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”).} To be entitled to sanctions, a party typically must show that relevant evidence, subject to a common law duty to preserve, was altered or destroyed with a “culpable state of mind.”\footnote{378}{Black’s Law Dictionary 1409 (7th Ed. 1999), as quoted in Am. Fam. Mutual Insur. V. Golke, 319 Wis. 2d 397, 411, 768 N.W. 2d 729 (Sup. Ct. Wisc. July 15, 2009).  Federal courts and most state courts do not acknowledge tort claims for spoliation under which parties may claim individual damages. \textit{See, e.g.,} Pyeritz v. \textit{Commonwealth}, 32 A.3d 687, 692 (Sup. Ct. Pa. Nov. 23, 2011)(refusing to acknowledge a cause of action for negligent spoliation in Pennsylvania); Miller v. Lankow, 801 N.W.2d 120, 128 at n. 2 (Sup. Ct. Minn. Aug. 3, 2011)(the “use of the word ‘duty’ [in regard to duty to preserve] is not meant to imply a general duty in tort”).} 379

The traditional sanction is an evidentiary instruction to a jury that it may draw adverse inferences about the missing information based on the assumption that it was.
unfavorable to party responsible for its loss. In *Nation-Wide Check v. Forest Hills*, then-Judge Breyer argued that a party that destroys evidence with notice is more likely to have been threatened by the evidence than one who does not as a basis for the inference. The court also noted that sanctions served the “prophylactic and punitive” purpose of deterring parties from destroying relevant evidence before it can be introduced at trial.

Some courts authorize – but do not compel - use of an adverse inference even for negligent destruction based on the argument that each party should bear the risk of its own negligence. Others require a higher standard of culpability. A majority of the Federal Circuits and the States require that there be an “actual suppression or withholding of evidence,” sometimes referred to as “bad faith,” in order to justify a finding of spoliation and the imposition of serious sanctions such adverse inference instructions or case-dispositive orders.

In the Seventh Circuit, for example, “bad faith” refers to the “destruction for the purpose of hiding adverse information.” Courts in the Eighth Circuit speak of the necessity of showing an “intentional destruction of evidence indicating a desire to suppress the truth.” In the Third Circuit, the party must have intended to “impair the ability of the other side to effectively litigate its case.”

The reason is that mere negligence “does not sustain an inference of consciousness of a weak case.” As the Iowa Supreme Court put it in *Phillips v. Covenant Clinic*, the inference is based on “nature of the conduct of the person who

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380 692 F.2d 21, 217-218 (1st Cir. 1982)( Circuit Judge Breyer, J.)(citing 2 WIGMORE ON EVIDENCE § 291 (Chadbourn Rev. 1979)).
382 Failures to preserve fall “along a continuum of fault-ranging from innocence through the degrees of negligence to intentionality.” Welsh v. United States, 844 F.2d 1239, 1246 (quoting in Adkins v. Wolever, supra, 554 F.2d 650, 652 (6th Cir. Feb. 4, 2009).
383 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”).
384 Bull v. UPS, 665 F.3d 68, 73 at n. 5 (3rd Cir. Jan 3, 2012); Brigham Young University v. Pfizer, 2012 WL 1302288, at *6 (D. Utah April 16, 2012)(“an aggrieved party must prove bad faith [to enter a spoliation instruction or adverse inference instruction].
destroyed the evidence and permitting a sanction under a lesser standard would impose “unfair sanctions.” Thus, in Silver v. Countrywide Home Loans, the Eleventh Circuit affirmed denial of an adverse inference when the failure “was properly characterized as carelessness at most.”

Prejudice & Relevance

A showing of prejudice is often a precondition to entitlement to sanctions, especially severe sanctions, although its presence may be presumed if culpability is high. In Schmid v. Milwaukee Electric Tool, however, the Third Circuit reversed a harsh sanction that was not “commensurate with the limited fault and prejudice present in this case.”

Extrinsic evidence tending to show that missing information would have been unfavorable to the spoliator is often required. In courts applying Pension Committee, the failure to use a written litigation hold permits a *per se* presumption of prejudice without consideration of the contents of the missing evidence. In Apple v. Samsung, where no evidence of the missing information existed, the Magistrate Judge found Apple entitled to a jury instruction that – as a matter of law – Samsung had committed spoliation evidence by failing to preserve evidence which resulted from its “failure to perform its discovery obligation.”

Other courts disagree with this *per se* approach 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.” The degree of prejudice can often “tip the scales in favor of or away from severe sanctions.” Sedona Principle 14 suggests that sanctions

392 2012 WL 2052949 (C.A. 11 (Fla), June 8, 2012).
393 *Id.* at *3.
395 13 F. 3d 76, 79 (3rd Cir. 1994)(court should rely on traditional case by case approach “keyed to the degree of fault on the part of the party accused of spoliation and the degree of prejudice to the opponent”).
396 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).
397 Pension Committee v. Banc of America Securities, 685 F. Supp. 2d 456, 467 (S.D. N.Y. May 28, 2010)(“[r]elevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner”); accord. 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”).
399 The jury will be permitted to “presume” that relevant evidence was destroyed and that the “lost evidence was favorable” to Apple.
should be considered “only” if there is a “reasonable probability that the loss of the evidence has materially prejudiced the adverse party.” Thus, in Dunn v. Mercedes Benz, sanctions were denied for a lack of substantial prejudice where a party failed to show that “the missing notes would have been favorable to her.”

(4.8) Cost Allocation

In enacting the 2006 Amendments, the Rules Committee largely ducked the issue of the allocation of the costs of discovery of ESI. Under Rule 26(b)(2)(B), however, the Amendments acknowledged that the authority to order production from inaccessible sources for “good cause” includes the power to set “conditions.” The Committee Notes explained that this referred to the payment of some or all of the costs of obtaining the discovery. Some District Courts have specifically required such discussion in their Local Rules.

Federal courts have, of course, long had discretion under Rule 26(c), authorizing protective orders, to condition discovery on payment of discovery costs in order to protect a party from “undue burden or expense.” This principle was applied in the first of the Zubulake opinions. In that case, the court announced a revised multi-factor test to govern cost-shifting in the limited context of inaccessible ESI, which it subsequently applied in Zubulake III. The court also opined that a producing party should “always bear the cost of reviewing and producing electronic data [and not the costs of attorney review].”

Many federal and state courts routinely apply Zubulake approach, which rarely results in cost-shifting and, when it does, is confined to inaccessible sources of production. The New York appellate court adopting Zubulake specifically rejected the argument that “requester pays” is or should be the general rule in that state. In

404 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”).
405 D.N.J. Civ. RULE 26.1(d)(requiring discussion of expanded list of issues, including who will bear costs of “preservation, production, and restoration (if necessary)).
408 Id., at 324.
409 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”).
410 Id. at 289-290.
411 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).
412 U.S. Bank v. Greenpoint Mortgage, 94 A.D.3d 58, 939 N.Y.S.2d 395, at 63-64 (N.Y.A.D. 1, Feb. 28, 2012)(having the requester pay might ultimately deter the filing of meritorious claims, particularly where the requesting party is an individual). Prior to that decision, there was authority in New York for an unequivocal “requester-pays” approach to production costs of ESI under the New York counterpart to FRCP 26(c). See Lipco v. ASG Consulting, 4 Misc. 3d 1019, 2004 WL 1949062 (Sup. Ct. 2004).
contrast, reimbursement of “the reasonable expenses of any extraordinary steps required” must be made in Texas when a party is ordered to produce electronic data which it cannot retrieve “through reasonable efforts.”

Also, according to one court, California requires that the reasonable costs of translating any “data compilations” into a useable form be at the requesting party’s expense.

A number of other states enacting e-discovery rules appear to leave the matter entirely up to the court in determining whether to order discovery from inaccessible sources. In South Carolina, for example, the equivalent rule provides that a court may specify conditions “including allocation of expenses associated with discovery of the [ESI].” The new North Carolina statute on e-discovery includes the costs of preservation as well as production in its cost-shifting provisions.

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.”

Privilege Review Costs

Despite the Zubulake dicta quoted above, it is not a given that costs associated with culling and privilege review of ESI are exempt from cost shifting under certain circumstances. 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.”

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413 TX RULES OF CIVIL PROCEDURE, RULE 196.4 (“If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information”); TX RULE 196.6 – also enacted in 1999 – allocates the costs of producing “items” to the “requesting party” unless otherwise ordered for “good cause.” One court has applied the latter in the context of forensic examinations of hard drives. See Frankel v. Texas Std. Oil, 2010 WL 7367255 (Tex. Dist. Harris Co. March 25, 2010).

414 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).

415 CAL CODE CIVIL PROC. §§ 1985.8(g)(subpoenas); 2031.280(e)(“[i]f necessary, the responding party at the reasonable expense of the demanding party shall, through detection devices, translate any data compilations included in the demand into reasonably usable form”).

416 Michigan Staff Comments, MCR 2.302 (2010)(a court may “shift the cost of discovery to the requesting party”); Commentary, L.A. 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”).

417 SC R RCP Rule 26(b)(6)(A). Similarly, in connection with a discovery conference under Rule 26(f)[which substitutes for the “meet and confer” of the Federal Rules], a South Carolina court may determine the “allocation of expenses, as are necessary for the proper management of discovery in the action.” See SC R RCP Rule 26(f).

418 Rules Civ. Proc. G.S. § 1A-1, Rule 45(d)(4)(the court may require the party seeking discovery to “bear the costs of locating, preserving, collecting, and producing the [ESI] involved”).


420 See Comment, Sedona Principle 13 (2nd Ed. 2007) (cost-shifting may also be considered when “the aggregate volume of data requested [is] disproportionate”).
Moreover, in a patent case where privilege review was a “daunting task,” the costs of review and preparation of a privilege log were accumulated for further discussion and possible shifting.421 A recent proposed Model Order for patent cases provides that “the discovering party shall bear all reasonable costs of “disproportionate ESI production requests.”422

In *U.S. Bank v. Greenpoint Mortgage Funding*,423 the description of the costs which might be shifted was arguably included review costs (“document production and searching for, retrieving and producing ESI”).

In yet another case, 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.”424

“Prevailing” Parties – Taxing Costs

Under Rule 54(d),425 costs other than attorney’s fees “should be allowed to the prevailing party.” Under 28 U.S.C. § 1920(4), a clerk may “tax as costs” costs of making copies of materials.426 Until recently, few cases had dealt with the exceptional costs driving production of ESI.

In *Tibble v. Edison*,427 a lower court affirmed an award of $530,000 for the costs of “utilizing the expertise of computer technicians in unearthing the vast amount of [ESI] sought by Plaintiffs in discovery.”428 The court rejected the argument that reliance on an e-discovery vendor was simply for the convenience of the party.

This appears to be consistent with the view of the Federal Circuit.429

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425 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.”).
426 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”).
428 *Id.* at *6.
However, the Third Circuit in *Race Tire* recently adopted the view that only the costs attributable to scanning and preparation of material for production are taxable as costs, rejecting the argument that de-duplication, preparation of TIFF and Bates numbering are taxable.

(4.9) Rulemaking

As a result of the Duke Conference in 2010, an eclectic series of potential changes to the Federal Rules are being reviewed by Subcommittees of the Rules Committee as part of their duty to provide ongoing review of the role and efficacy of the Federal rules. Not all of them were prompted by unique e-discovery issues.

The Duke Subcommittee, for example, is looking at alternative means of emphasizing the principles of proportionality, such as placing presumptive limits on the numbers of requests to produce and requests for admissions. As noted in Section 3.3 in regard to preservation issues, the Discovery Subcommittee has been presented with suggestions that there also be presumptive limits as to the types of ESI and number of custodians whose information must be preserved.

Another possible change could establish cooperation among the parties as one of the aspirational goals identified in Rule 1. Something along these lines has been incorporated by a number of local federal district court rules. Local Rule 26.4 for the Southern and Eastern Districts of New York, for example, provides that counsel are expected to “cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process and to be courteous in their dealings with each other.”

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433 *See* SUPPLEMENTAL AGENDA BOOK, March 22-23, 2012, Appendix, Rule 1, at 9 of 156 (p. 33 of Duke Conference: Initial Rules Sketches”) (“... [These rules] should be construed, administered, and employed by the court, and parties to secure the just, speedy, and inexpensive determination of every action and proceeding [...], and the parties should cooperate to achieve these ends”), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03.pdf; *see also* S.D. Ill. L.R. Rule 26.1(d)(cooperative discovery arrangements are mandated); *see 28 U.S.C. § 473(a)(4)(“encouragement of cost-effective discovery... through the use of cooperative discovery devices”).

434 *See* S.D. Ill. L.R. Rule 26.1(d)(cooperative discovery arrangements are mandated); *see also* 28 U.S.C. § 473(a)(4)(listing as a goal of the CJRA of “encouragement of cost-effective discovery... through the use of cooperative discovery devices”).

435 The Local Committee Note expresses the same view in regard to Local Rule 26.2, dealing with the assertion of privilege claims, citing to Rule 1 and the Sedona Cooperation Proclamation, “whose principles the Committee endorses.”
Cost-shifting also resurfaced at the 2010 Duke Litigation Review Conference. The Supreme Court has made it clear in *Bell Atl. Corp. v. Twombly* that it is concerned that excessive discovery expense can be misused to force cost-conscious parties to settle and some have advocated a “requester pays” approach to costs of the producing party. The Duke Subcommittee reported to the March, 2012 meeting of the Rules Committee, however, that it was “not enthusiastic about cost-shifting,” and did not propose adoption of new rules.

The complications of seeking discovery of ESI in the “cloud” also break new ground, and the current rules may be ill-suited to handle the impact of emerging technologies. These technologies also raise a variety of privacy concerns, especially when direct access to personal devices or designated restricted content is involved.

At the state level, a Florida Civil Procedure Committee is considering amendments to Uniform Guidelines for Taxation of costs to specially allow costs related to e-discovery, including “the cost of converting [ESI] to a reasonably usable format in response to a discovery request that seeks production in such format.”

### (5) Evidentiary Issues

The Federal Rules of Evidence do not provide distinctive rules to deal with evidentiary issues raised by ESI. Instead, courts rely upon existing rules, such as FRE 901 (“Authenticating or Identifying Evidence”) and FRE 803 (“Exceptions to the Rule...”)

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436 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558-59 (2007)(noting that discovery would involve “reams and gigabytes” of business records, which would be “a sprawling, costly, and hugely time-consuming undertaking [that is not] easily susceptible to the kind of line drawing and case management that the dissent envisions”).


439 Schwartzreich, et. al., Social Media Evidence in Employment Litigation: Are You Prepared to Click “Like”?, ST033 ALI-ABA 1287 (“Facebook users may not have possession, custody or control”).


441 *City of Ontario v. Quon, 177 L. Ed. 2d 216, 130 S. Ct. 2619, 2631 (2010)(noting issue of “intrusive” searches of employer furnished communication devices).*


443 Tompkins v. Detroit Metro. Airport, 278 F.R.D 387, 388 (E.D. Mich. Jan. 18, 2012)(party does “not have a generalized right to rummage at will through information that Plaintiff has limited [on Facebook]”).

444 *See Agenda, Civil Procedure Committee of the Florida Bar, Attachment D, at II (c), June 20, 2012; at [http://www.floridabar.org/cm/docs/cm210.nsf/e5aca7fBc251a58d85257236004a107f/28d1b76827c8755f85257a1d006e722b/FILE/AGENDA%20FULL%20June%202012.pdf](http://www.floridabar.org/cm/docs/cm210.nsf/e5aca7fBc251a58d85257236004a107f/28d1b76827c8755f85257a1d006e722b/FILE/AGENDA%20FULL%20June%202012.pdf).*

445 FRE Rule 901 (“authentication or identification” is “satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims”).
Against Hearsay”). Some Commentators have expressed frustration with this approach and have argued for yet further amendments to the FRE. In Lorraine v. Market, the court identified five evidentiary hurdles to the admission of ESI into evidence: (1) relevance (2) authenticity and (3) if offered for substantive truth, the hearsay rule (4) as well as the “best evidence” rule (5) and the balance between the probative value and the danger of unfair prejudice.

Authenticity

Concerns about authenticity reflect skepticism due to the fact that ESI is susceptible to alteration. E-mail and text messages are not self-authenticating. The mere fact that email purports to come from an individual with a valid email address is not sufficient. A classic example is Jimena v. UBS AG Bank, where a person bilked by a Nigerian bank transfer scam unsuccessfully sought to sue the Bank on the basis of e-mail purporting to be from a bank executive. The court held that Rule 902 requires some guarantees of trustworthiness which are not evident in general email addresses.

Judge Grimm has also cautioned that it is “problematic” to rely upon the authenticity of information from the internet. The authenticity of Database and other computer generated information is also susceptible to similar concerns.

Nonetheless, distinctive information contained in ESI offered into evidence is often sufficient to justify conditionally submitting it to the jury for its ultimate finding of whether the matter in question is what its proponents claim it to be. However, in Illinois, the mere fact that an email was produced by the party against whom it is sought to be used does not establish authenticity without following “conventional, widely accepted and common means” of proof.

Hearsay

It is important to realize that the hearsay rule is not per se surmounted by the mere fact that email is routinely in use in a business context. The court in the Oil Spill cases

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449 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).  
rejected the view that all email produced in discovery was exempt from the hearsay ban as “the modern equivalent of the interoffice memorandum” and required individual attention to the hearsay exceptions for each email.\footnote{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).}

\section*{(6) Counsel Responsibility}

There were no amendments to the Federal Rules regarding unique counsel responsibility for e-discovery, or sanctions for misconduct, which continues to rest largely on provisions of Rule 11, 16, 26 and 37. In addition, 28 USC § 1927 continues to apply to counsel who “multiplies the proceedings in any case unreasonably and vexatiously.”\footnote{28 USC § 1927 permits a court to order that an attorney “satisfy personally the excess costs, expenses and attorney’s fees reasonably incurred because of such conduct.”}

Local Rules have, however, imposed affirmative duties to become knowledgeable about client information management systems.\footnote{M.D. PA. LCvR 26.2.A.1 and Comments (June 2008); D. WYO. L.R.26.1 (“counsel should carefully investigate their client’s information management system . . . including how information is stored and how it can be retrieved”); [Proposed] W.D. WASH. L.R. 26(f)(2)(duty to “review and understand how their client’s data and ESI are stored and retrieved”).} The Southern District of N.Y. Pilot Program Joint Submission and [Proposed] Order requires counsel to certify that they are sufficiently knowledgeable about client systems or have identified someone who can address the issues.\footnote{See REPORT ON PILOT PROJECT, EXH. B, Para (1).}

There is always a risk, when mandating counsel responsibilities, of intrusion upon the attorney-client relationship, a topic best left to the state-based criteria represented by the Model Code of Professional Conduct. A client has the right to allocate responsibilities as it desires, and overly demanding local initiatives may impose unnecessary burdens on that relationship with unforeseen consequences.\footnote{Thomas Y. Allman, Achieving an Appropriate Balance: The Use of Counsel Sanctions In Connection with the Resolution of E-Discovery Misconduct, 15 RICH. J. L. & TECH. 9, at *2 (2009)(“[a]n increase in finger-pointing and defensive posturing that may result when the dynamics of that [team] effort are not respected is not conducive to full development of this positive trend [of shared e-discovery responsibilities between client and counsel]”).}

\section*{Preservation}

A number of decisions argue that there is responsibility on the part of inside\footnote{Flagg v. City of Detroit, 2011 WL 4634245, at *4 (E.D. Mich. Oct. 5, 2011).} and outside counsel for implementation of preservation obligations by their clients. 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.”\footnote{Telecom Int’l v. AT&T, 189 F.R.D. 76, 81 (S.D. N.Y. Sept. 27, 1999).} Zubulake V,\footnote{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}
mandated “active supervision” by counsel, consisting of “steps that counsel should take to ensure compliance with the preservation obligation,” although, “[a]t the end of the day, however, the duty to preserve and produce documents rests on the party.”

As the ABA Civil Discovery Standards (Rev. 2004) provided in respect to preservation issues, “[w]hen a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents in the client’s custody or control and of the possible consequences of failing to do so.”

Rule-Based Obligations

Thus, while the meet and confer requirement and the obligation to prepare discovery plans and reports refer primarily to obligations of the “parties,” one of the key assumptions of the 2006 Amendment is that counsel will play an increased key role in dealing with the unique problems of e-discovery. Rule 16(f) provides for sanctions on a party or its counsel — including mandatory sanctions on either or both - where there is a failure to participate in “good faith” in the process.

Counsel also has an ethical and practical obligation to acquire the requisite skills and knowledge necessary to advise on e-discovery, confidentiality of client information and privilege reviews. Proposed (2012) amendments to the Comments to the Model Code emphasize that this has a technical component to it in regard to e-discovery. This is echoed at the local and state level by a variety of guidelines and imperatives positing enhanced counsel preparation to facilitate the discussions and the preparation of the required reports.

Rule 26(g) and similar state provisions require counsel to sign discovery papers, thereby certifying completeness of discovery responses as well as existence of a proper
purpose in conducting the discovery. Some courts read Rule 26(g) as requiring a signing attorney to certify that the lawyer has made a “reasonable effort to assure that the client has provided all the information and documents available” that are responsive. In addition, counsel has the responsibility “to determine beforehand the accuracy of any representations that production is complete.”

Where challenges are made to the thoroughness of the discovery efforts, sanctions under Rule 26(g) may lie even where there is no ongoing prejudice because of corrective action. Thus, in the case of In re Delta/AirTran Baggage Fee Antitrust Litigation, the court held sanctions were appropriate where Delta and its counsel had failed to ensure that all “collected hard drives were actually searched” and for missing copies in an evidence locker and “for its myriad inaccurate representations.”

In Qualcomm v. Broadcom, a harsh sanction entered against outside counsel based on Rule 26(g) was set aside by the Magistrate Judge only several years later when the court concluded that the required showing of bad faith did not exist.

Rule 37 also provides for sanctions against parties and their counsel, or either of them, upon the occurrence of failures to make discovery under the rules. Counsel must also maintain an appropriate relationship with courts and opposing counsel while balancing the need for cooperation and advocacy. Courts have not been hesitant to refer counsel to disciplinary authorities for e-discovery misconduct.

Federal Courts also assert the authority to sanction counsel through the assertion of their inherent authority. Similarly, state courts routinely sanction counsel for

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468 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”).
469 Wollam v. Wright Medical Group, 2011 WL 1899774, at *4-5 (D. Colo. May 18, 2011)(parties and counsel must make a thorough search” of client records to “locate all responsive documents” and to either produce them or identify them on a appropriate privilege log).
470 Fendi Adele v. Filene’s Basement, 2009 WL 855955, at *8 (S.D. N.Y. March 24, 2009)(ordering “cost-shifting” as a sanction for the expense caused by delay by “absurd” representation that there were no more documents to produce).
472 Qualcomm v. Broadcom, supra, 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 they had not acted in bad faith).
473 The Sedona Conference Cooperation Proclamation, 10 SEODNA 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).
475 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”).
willful misconduct under both civil rules and inherent power. Under Rule 45, an attorney responsible for the issuance and service of a subpoena may be sanctioned for failure to take “reasonable” steps to “avoid imposing undue burden or expense on a person subject to the subpoena.”

Ethical Issues

The practical obligations of counsel are intertwined with ethical implications. 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. Model Rule 3.4(b) provides that 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. The definition of “unlawfully” and its application in terms of civil litigation are open for debate. Analysis is particularly complicated when a “team” effort of inside and outside counsel is involved.

As the author has pointed out elsewhere, however, the specific role of retained counsel in implementing a team-based approach is determined by the party, upon whom the obligation to preserve lies.

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477 Rule 45 (c)(1).
480 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”).
482 Thomas Y. Allman, Deterring E-Discovery Misconduct With Counsel Sanctions: The Unintended Consequences of Qualcomm v. Broadcom, 118 Yale L.J. Pocket Part 161, 164 (2009)(“A client is ethically entitled to limit the responsibility of retained counsel in regard to a discovery engagement, which may well occur when teams of internal experts and vendors are involved”).
483 Compare Casale v. Kelly, 710 F. Supp. 2d. 347, 365 (S.D.N.Y. April 26, 2010) (“responsibility for adherence to the duty to preserve lies not only with the parties but also, to a significant extent, with their counsel”) with Centrifugal Force v. Softnet Comm., 2011 WL 1792047, at *3 (S.D.N.Y. May 11, 2011) (the obligation to preserve evidence is placed by the Second Circuit “on the ‘party,’ not on counsel” and is met if the party has taken reasonable steps).
APPENDIX
State-by-State Summaries

The discussion below is (hopefully) current as of September, 2012, but the reader would be wise to check and verify when interested in a specific state. Citations to both the WESTLAW and LEXIS versions of amended state rules are referenced when possible at the opening of each State discussion. A comprehensive list of the formats for all WESTLAW state versions are available in a “50 State” survey provided by Thomson Reuters. Individual State summaries are also provided in a useful data base maintained by Carole Basri and Mary Mack.

WESTLAW indexes its procedural Rules – both Federal and State - in single database which is organized on a state by state database. Thus, for a local Federal or a state rule in Kansas, insert “KS-ST-ANN” in “Search for database,” then go to “Table of Contents” and select, e.g., Local Rules for Civil or Bankruptcy in the Federal District; to retrieve known individual Rules, insert “KS-RULES” in “Find this document,” scroll to bottom and insert desired LR number.

KLGates, whose databases are available on the Web, on the other hand, has separate databases for local Federal e-discovery initiatives as of late 2011 and for State e-discovery rules and initiatives.

The patterns of procedural rulemaking and the results thereof vary among the states. Two types stand out. States like California, Illinois and New York – and to a lesser extent Pennsylvania and Massachusetts – are heavily invested in a series of unique rules reflecting historical patterns, largely independent of the structure of the Federal Rules. On the other hand, many states essentially replicate the fundamental approach of the Federal Rules, right down to the numbering of the individual Rules. While this paper has attempted to bridge these differences by focusing on the individual components as they reflect e-discovery issues, regardless of their context, the differences are alluded to in the sections that follow.

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485 See, e.g., eDiscovery in State Courts: A work in Progress, EDISCCORP § 25:8 (“Quick Reference chart for state eDiscovery Rules”). Basri and Mack group states in categories such as states which “adopt the federal scheme in whole” [§ 25:2] or “in part” [§ 25.3]; or have “original” [§ 25.4] or “limited” [§ 25.5] rules; or are “making substantial progress” [§ 25.6] - or have “no eDiscovery rules” [§ 25.7]. The author is grateful for and has made use of these efforts.
486 http://tinyurl.com/LNw12-cp02.
488 One minor difference between New York and the rest of the United States is that the legislatively adopted procedural rules speak of “disclosure” - not discovery, although terminology has been creeping into both the Federal Rules and other state provisions.
1. **Alabama.** E-discovery amendments to the Alabama Civil Rules (“ARCP Rule ___” or “Ala. R. Civ. P. Rule _____”) became effective on February 1, 2010 with adoption of essentially identical amendments to the similarly numbered Rules 16, 26, 33(c), 34 and 45. The Committee Comments are particularly insightful, especially those relating to Rules 26 and 37. The Comments also reproduce large portions of the Federal Committee Notes, after putting the Alabama spin on the rules. A meet and confer is optional at the court’s discretion and there is no required early disclosure of information comparable to Rule 26(a). Alabama adopted a Form 51A (“ARCP Form 51A”) which advises recipients of subpoenas intending to produce ESI of their rights and obligations. See generally 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, adopting provisions equivalent to FRCP 16, 26, 33, 34 and 37, similarly numbered in Alaska, but w/o a requirement of discussion of preservation in Rule 26(f). 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](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, with adoption of general rules equivalent to FRCP 16(b), with authority to issue preservation orders (R. 16(b)); limits on production of inaccessible ESI, but no requirement of a “meet and confer” (R. 26(b)); a clawback provision akin to FRCP 26(b)(5)(B) (R. 26.1(f)(2)); identification of ESI as in FRCP 34(a) (R. 34(a), with form or forms of production as in FRCP 34(b) (R. 34(b), and equivalent to FRCP 33(c) (R. 33(c) and a safe harbor identical for FRCP 37(e) (R. 37(g). Arizona also amended its unique take on early disclosure – beyond FRCP 26(a) to accommodate ESI (R. 26.1). [See the 2008 Comment to Rule 16(b) for a particularly provocative discussion of preservation orders] A copy of the full text and comments of the rules are at [http://www.supreme.state.az.us/rules/ramd_pdf/r-06-0034.pdf](http://www.supreme.state.az.us/rules/ramd_pdf/r-06-0034.pdf). Arizona also added an equivalent to FRCP 16(b), with authority to issue preservation orders, to its “Initial case Management” conference in Complex Litigation (R. 16.3) and modified its unique Medical Malpractice provisions to accommodate ESI (R. 16(c) and R. 26.2). It also modified its Family Court procedures (see, e.g., 17B A.R.S. Rules Fam. Law Proc., 51, 52, 62, etc.) to include e-discovery rules previously adopted for civil proceedings. [See [http://www.supreme.state.az.us/rules/2008RulesA/R-07-0010.pdf](http://www.supreme.state.az.us/rules/2008RulesA/R-07-0010.pdf)] Effective January 1, 2010, the state adopted a version of FRE Rule 502 (“AZ St. Rev. Rule 502”) with nuanced amendments dealing with uniformity of impact of disclosures in sister states. Unlike many other states, Arizona requires extensive early disclosure of electronically stored information as part of the “Zlaket Rules” adopted in 1992. [See Ariz. R. Civ. P. 26.1(2010); Andrew D. Hurwitz, Possible Responses to the ACTL/IAALS Report: The Arizona Experience, 43 Ariz. St. L. J. 461 (2011). According to a Arizona commentator,
Rule 26(b)(1)(B)’s reference to “disclosure” means that the “inaccessibility” distinction applies to disclosures under Rule 26.1 as well as requests under Rule 34. Schaffer and Austin, New Arizona E-Discovery Rules, 44-FED Ariz. Att’y 24 (February 2008). For a general discussion, see McAuliffe and Wahl, Civil Trial Practice, § 16.11.50 (2012), at 2 AZPRAC § 16.11.50.

4. Arkansas. Arkansas incorporated its core e-discovery amendments in a single “supplemental and optional” rule (“Ark. R. Civ. P 26.1” or “ARCP Rule 26.1”), effective on October 1, 2009. These include counterparts to FRCP 26(f), 26 (b)(2)(B), 34, 37(e) and include a provision [26.1(h)] applying all them to subpoenas of third parties for production. Some aspects of the Rule are based on the terms of the 2007 Uniform Rules Relating to the Discovery of [ESI]. 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. E-discovery amendments (“C.C.P. § _____”) or (“Cal Code Civ Proc § _____”) became effective on June 29, 2009 by amendments to the California Code of Civil Procedure (via the “Electronic Discovery Act”), based on legislation based on the 2008 recommendation by the California Judicial Council, a copy of which, with comments, is at http://www.courtinfo.ca.gov/jc/documents/reports/042508item4.pdf. As amended, ESI is defined (2016.020), and is available for discovery (2031.010), subject to “accessibility” limits (2031.060), with a unique twist on use of objections to raised objections (2031.210)[or to compel their production (2031.310)], while subject to proportionality concerns (1985.8(h)(4), 2031.060, 2031.310), and is to be produced in the form ordinarily maintained or a reasonably usable form, at the expense of demanding party if translation needed (2031.280(e) and 1985.8(g) [subpoenas]). A “clawback” provision was added (2031.285) and a safe harbor, broader than the federal version, was included for ESI in a number of sections (1985.8 [subpoena], 2031.060, 2031.300, 2031.310, 2031.320). The California version of FRCP 37(e) extends 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” and apparently applies to sanctions exercised under inherent powers. There is also reference to “allocation of the expense of discovery” in connection with production of ESI from inaccessible sources (1985.8(f)[subpoenas], 2031.060, 2031.310) as well as generally (Rule 3.724). 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.


6. Colorado. Colorado has not enacted e-discovery Amendments. The Committee on Rules of Civil Procedure at its January, 2008 accepted a report from a Standing Subcommittee to the effect that there was no need for e-discovery rule amendments. See http://www.courts.state.co.us/userfiles/File/Court_Probation/Superior_Court/Committees/Civil_Rules_Committee/01-25-08.pdf. As of May, 2012, the C.R.C.P Rules corresponding to Rules 16, 26, 34 and 37 of the FRCP do not directly deal with ESI, although ESI is clearly discoverable as part of “documents,” which retains the language defining it to include “data compilations.” However, the Colorado Supreme Court is currently seeking comment on an amended Rule 45 which would permit a party to seek from a non-party “designated books, papers and documents, whether in physical or electronic form.” A copy of the Supreme Court Request for Comment is at http://www.cobar.org/repository/Courts/June2012_ProposedCourtRule.pdf. Effective in January, 2012, Pilot Rules became effective in certain District Courts to implement the “Civil Access Pilot Project” (CAPP), designed to address excessive costs in certain business actions in District Court by streamlined procedures. Among the excluded actions are employment actions, medical negligence actions, construction defect cases. A copy of the Pilot Rules and the forms developed for the effort are found on the Supreme Court website, at http://www.courts.state.co.us/Courts/Civil_Rules.cfm. Pilot Rule 6 speaks of meet and confers “concerning reasonable preservation of all relevant documents and things, including any electronically stored information” and authorizes the shifting of all or any costs “associated with the preservation, collection and production of [ESI] as the interests of justice and proportionality so require.” There is no Pilot Rule regarding sanctions comparable to the initial Model IALLS/ACTL Model Rule 12, which permitted sanctions only “upon a showing of intent to destroy evidence or recklessness” for a failure to preserve. In Aloi v. Union Pacific, 129 P3d 999, 1003 (S.C. Colo. March 6, 2009), the Supreme Court of Colorado had held that a showing of bad faith was not required to justify use of adverse inference jury instruction since “regardless of the destroying party’s mental state, the opposing party will suffer the same prejudice.”

7. Connecticut. E-Discovery Amendments were made to the Connecticut “Practice Book,” effective January 1, 2012 (“Ct. R. Super CT Civ § ___”) by a series of e-discovery Amendments, which are cited, within Connecticut decisions, as “Practice Book 1998, § ___”. Connecticut adopted the Uniform Rules approach to defining ESI (Sec. 13-1); provided that ESI as within the scope of discovery (Sec. 13-2); posits that a request
for “designated documents” is defined to include ESI (Sec. 13-9 (a)) and should be produced in its form [not “or forms”] of production as in FRCP Rule 34(b)(Sec. 13-9 (d)); authorized the allocation of the “expense of the discovery of ESI” [and listed certain factors to be applied] (Sec. 13-5); provided a “clawback” provision for post-production privilege claims similar to FRCP 26(b)(5)(B)(Sec. 13-33) and included an enhanced version of FRCP Rule 37(e), broadened to include all forms of information and requiring a showing of an “absence of a showing of intentional actions designed to avoid known preservation obligations” (Sec. 13-14 (d). Although the extensive Committee Comments to the Practice Book are not apparently available on WESTLAW, they can be found at http://www.jud.ct.gov/Publications/PracticeBook/PB_070511.pdf. Thus, the text of and explanation for Sec. 13-14(d) can be found at pages 108PB – 110PB of the cited document, from the July 5, 2011 of the Connecticut Journal. An interesting case illustrating the frustrations of the Superior Court in regard to production format is Innis Arden Golf Club v. O’Brien & Gere, 2011 WL 61177908 (Conn. Sup. Ct. Stamford-Norwalk, Nov. 18, 2011). For a case applying the new Revisions shortly before their effective date in a cutting edge social media/privacy context, see Squeo v. Norwalk Hospital (by a different judge in the same court), 2011 WL 7029761 (Dec. 16, 2011).

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.[1] 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 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 by use of a wiping software at a time the party was under a duty to preserve information imposed by court order. The Supreme Court refused to hold “that as a matter of routine, document-retention procedures, a computer hard drive’s unallocated free space must always be preserved"
and affirmed on the more specific and narrow ground that “despite knowing he had a duty to preserve documents, intentionally took affirmative actions to destroy several relevant documents on his work computer.” (at 192). In Cruz v. G-Town Partners, 2010 WL 5297161, at *10 (Sup. Ct. New Castle Co. Dec. 3, 2010), trial court 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.”

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.** On July 5, 2012, the Florida Supreme Court adopted seven amendments to the Florida Rules of Civil Procedure (“Fla. R. Civ. P. Rule ____”), largely based on the 2006 Amendments and designed to encourage harmonization with federal decisions. While the amendments parallel the changes to FRCP Rule 16, 26, 33, 34, 37 and 45, they are uniquely articulated and provide subtle variances. For example, while the “meet and confer” provisions of FRCP Rule 26(f) are not adopted, the requirement of an Initial Case Management Conference (R. 1.200 & R. 1.201 [Complex Litigation]) has been amended to require that counsel prepare and file, prior to the conference, a plan covering preservation of ESI and other issues, which can be seen an enhanced FRCP Rule 16 approach. Rule 1.280 authorizes discovery of ESI and Rule 1.350 treats ESI as a type of document (“[may request] any designated documents, including [ESI]”), whose production must be, absent objection or specification, in the form in which it is ordinarily maintained or in a reasonable form, differing from FRCP 34(a), but essentially adopting FRCP 34(b). Rule 1.280 also authorizes production over objection from inaccessible sources while listing the proportionality concerns, rather than dealing with a presumptive exclusion, as does FRCP Rule 26(b)(2)(B). Rule 1.340 authorizes producing ESI in lieu of interrogatory answers, but spells out the form of production, instead of leaving it open, as does FRCP 33. Rule 1.380 adopts, verbatim, Rule 37(e), and the Committee Note obliquely references the duty to preserve without resolving the controversy over whether there is a pre-litigation duty in Florida. The Committee Note does not mention litigation holds, but states that in determining “good faith” the court may consider any steps taken to comply with preservation obligations. Rule 1.410, dealing with Subpoenas, applies most of these principles (but not early discussions or safe harbors) in that context. Effective January 2011, Florida adopted Rule 1.285 to govern the responsibilities of parties upon post-production claims of inadvertent production of privileged material, analogous to but broader and more comprehensive than FRCP 26(b)(5)(B) but, like it, leaving the issue of waiver to a separate proceeding. The issue of pre-litigation preservation obligations is thoroughly discussed in 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”) and by Michael D. Starks, Deconstructing Damages for Destruction of Evidence, 80-AUG Fla. B. J. 36 (July/August
(noting that both sanctions and tort damages are available under Florida law, although Martino “destroyed the first-party spoliation tort”). The Starks article also argues 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 loses or destroys the evidence.” (at 40)].


13. Idaho. E-Discovery Amendments to the Idaho Rules of Civil Procedure (“I.R.C.P. Rule ____”) became effective in July, 2006, involving amendments to Rules 26, 33, 34 and 45. See Kevin A. Griffiths, The Expense of Uncertainty, 45 Idaho L. Rev. 441, 443 (2009)(“[t]he supreme court adopted the changes on March 17, 2006, and the new rules became effective on July 1, 2006”). The limitation on production of “data” called for in Rule 34(b) is similar to – but not identical with - Tex. R. Civ. P. 196.4, and it makes the cost-shifting of the reasonable expense of any extraordinary steps required to produce “the information” a matter of discretion, not mandatory as in Texas. Rule 34(a) permits inspection of “any tangible things including electronic and data storage devices in any medium” and Rule 34(b) require production of the “data that is responsive and reasonably available to the responding party in its ordinary course of business” from such devices. If a party cannot “through reasonable efforts” retrieve the data or information requested or produce it in the form requested, a court may order – at the requesting party’s cost – compliance. As in the case of Texas, the responding party must state an objection in order to assert that the information cannot be retrieved through reasonable efforts. Idaho did not require early discussions of e-discovery, default forms of production nor add a purported safe harbor. However, a clawback similar to FRCP Rule 26(b)(5)B is provided in Rule 26 and Rule 45 includes references to “electronically stored information” at three places, and mandates (at Rule 45(b)(2)) reimbursement for the “reasonable cost” of producing subpoenaed ESI. A reference to “ESI” also appears in Rule 33. For a discussion of the linkage between FRE 502 and the Idaho clawback rule [I.R.C.P. Rule 26(b)(3)], see Fucile, Inadvertent Production in Electronic Times, 54-FEB Advocate (Idaho) 21 (2011).

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 through 219, plus rule 224, apply to 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 E-Discovery Amendments (“In St Trial Procedure Rule ____”) became effective on January 1, 2008. Indiana adopted equivalents to FRCP Rules 26 (production from inaccessible sources), Rule 34 (a) (discoverability of ESI), Rule 34(b)(form or forms of production) and the “safe harbor” of Rule 37(e). No equivalent to Rule 26(f) was included nor was Rule 45 amended to relate to ESE, as subpoenas to non-parties are included within In St Trial Procedure Rule 34. 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); also Donald R. Lundberg, [ESI] and Spoliation of Evidence, 53-MAY Res Gestae 25 (May 2010).

16. Iowa. E-Discovery Amendments in Iowa (“I.C.A. Rule ____”) or (“Iowa R. Civ. P. ____”) became effective May 1, 2008 based on the 2006 Amendments. This involved changes to 1.503 (ESI is to be treated as a document), 1.504 (inaccessibility of ESI),
1.507 (discussion of discovery, preservation and form of ESI with court; order re allocation of expenses), 1.509 (option to produced ESI in lieu of interrogatory answers), 1.512 (requests for ESI; form of production), 1.517 (safe harbor) and 1.602 (pretrial scheduling orders re discovery of ESI); 1.1701 (subpoena of ESI; protection of parties; inaccessibility; claim of privilege). Effective on June 1, 2009, the Supreme Court adopted Iowa R. Evid. 5.502 (“I.C.A. Rule 502”), essentially identical to Federal Evidence Rule 502. A Task Force for Civil Justice Reform has declined to recommend a preservation rule recommended enhancements in the Comments about the possible topics for a meet and confer on ESI which should be “encouraged” [not currently required].


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, 2008 and 2010, the Legislature passed and the Governor signed legislation which collectively provides comprehensive e-discovery Amendments (“LSA-C.C.P. Art. ____”) roughly equivalent to FRCP 16 [Art. 1551], 26(b)(2)(B) & 45 [Art.1462(B)(2), Art.1354(F)], 26(b)(5)(B) & FRE 502 [Art. 1424(d)], 34(a) [Art. 1461], 34(b) “plus” direct access [Art. 1462 (B)(1),C & D], 33 [Art. 1460], 37(e) [Art. 1471(B)] and 45 [Art. 1354], with comments. No changes were made to Art. 1424(D)(general scope of discovery), but the expert rule incorporates references to ESI [Art. 1425(E)(1), unlike the comparable Federal Rule. Uniquely, Louisiana spells out [Art. 1462] provisions for “specific means” to access ESI when produced and provide a process, upon “good cause” for providing direct access to the “computers or other types of devices” and to permit inspection, testing and sampling. Some of the confusion over the form or forms of production provisions are illustrated by Louisiana Workers Compensation v. Quality Exterior Services, __ So. 3d __., 2012 WL 1668027 (La. App. 1 Cir. May 2, 2012). See William R. Forrester, New Technology & The 2007 Amendments to the Code of Civil Procedure, 55 La. B. J. 236, 238 (2008)(stressing that
direct access is available only after party has initial opportunity to produce and only for “good cause.” In 2008, the Legislature added its counterpart to Rule 37(e) [Art. 1471(B)] with Comments noting the inapplicability of the limitation to spoliation torts, citing an ambiguous case, Guillory v. Dillards, 777 So. 2d 1, 2000-190 (La. App. 3 Cir. Oct. 11, 2000). The Legislature also amended Article 1462 to add an inaccessibility distinction based on Fed.R.Civ.P.26(b)(2)(B) and added a unique requirement in Article 1462(C) requiring a producing party to identify the means which must be used to access ESI being produced. According to the Comment, the sentence is intended to require a party to identify the “software and hardware” which a party must use to “fully and accurately access” the ESI being produced.

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](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.** E-discovery amendments (“MD Rules, Rule ____”) became effective on January 1, 2008, by the Maryland Court of Appeals adopting e-discovery rules primarily based on the provisions of the 2006 Amendments. See [http://www.courts.state.md.us/rules/rodocs/ro158.pdf](http://www.courts.state.md.us/rules/rodocs/ro158.pdf). Rules 2-402 [Eqiv.R26] and 2-422 [Eqiv.R34] authorize discovery of ESI, with a Committee note to the former [2-402] ESI means “encompassing, without exception, whatever is stored electronically.” Rule 2-422 also provides for service of a request to produce and inspect and the form of production, but the Committee Note to 2-422 cautions that inspection of ESI should be the “exception, not the rule” and that “substantial need” and “lack of a reasonable alternative” must be demonstrated and rights preserved, citing Comment 6.c of the Sedona Principles. Rule 2-402(b)(1) permits a party to “decline to provide” discovery of ESI on the ground that its source is inaccessible, but must state the reasons why production would cause undue burden or cost in sufficient “detail” to enable the other side to evaluate. Production may be ordered only if the “need” outweighs the burden and cost of “locating, retrieving, and producing” it and a court may order conditions, including “an assessment of costs.” Rules (2-402 (e)(2) [Eqiv.R26(b)(5)(B)] permits post-production claims of privilege and Rule 2-402(e)(3)&(4)[FRE 502 Equiv] describe the impact of inadvertent production on waiver and the impact of agreements and orders entered by the court, including what the Committee Note describes as “clawback” and “quick peek” agreements. Rule 2-433 [Eqiv.R37] speaks in terms of limitations on sanctions for information “that is no longer available.” Rules 2-504 [Eqiv.R.16] and 2-504.1[Eqiv.R.26(f)] requires discussions of production of processes and preservation, respectively, and the Committee Note speaks of metadata with cross-reference to Sedona Principle 12. In contrast to FRCP Rule 36, the Maryland equivalent (2-424) includes ESI as a subject for requests for admission, which is also true of 2-402 (d)&(c)[work product and privilege logs]. Rule 2-421[Eqiv.R33] and the Rule 2-510 [Eqiv.R.45] were also modified in accordance with the 2006 Amendments. See also 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](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](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. 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); see also 49 Mass. Prac. Discovery § 7:1 (Electronic Discovery – Generally). A Boston-area pilot project testing some of the ACTL pilot rules is reportedly underway.

23. **Michigan.** E-discovery Amendments became effective on January 1, 2009. See [http://www.icle.org/contentfiles/milawnews/rules/mcr/AMENDED/2007-12-16-08_UNFORMATTED-ORDER_AMENDMENT.PDF](http://www.icle.org/contentfiles/milawnews/rules/mcr/AMENDED/2007-12-16-08_UNFORMATTED-ORDER_AMENDMENT.PDF). The changes to the Michigan Rules (“MI Rules MCR ____” or “MCR ____”) involve 2.302 (preservation; safe harbor; inaccessibility; inadvertent production), 2.310 (form; scheduling orders), 2.313 (safe harbor), 2.401 (early scheduling order; preservation) and 2.506 (non-party form; inaccessibility). The “safe harbor” provisions were inserted in both the general discovery and sanction provisions (2.302(B)(5)and 2.313(E)). However, only 2.302(B)(5) is preceded by a statement that “[a] party has the same obligation to preserve [ESI] as it does for all other types of information.” An excellent summary is provided in Dante Stella, *Avoiding E-Discovery Heartburn*, 90-FEB Mich. B.J. 42 (2011). A case alluding to (but not applying) the Michigan safe harbor is Gillett v. Michigan Farm Bureau, 2009 WL 4981193 (Mich. App. Dec. 22, 2009). While the Staff Notes are said not be an “authoritative construction by the court” they are provocative. See, e.g., Staff Comment to “MCR 2.302” explaining that the “safe harbor” provision applies when information is lost or destroyed “as a result of a good-faith, routine record destruction policy or “litigation hold” procedures.” Order, December 16, 2008, *supra*.

25. **Mississippi.** The Mississippi Supreme Court adopted an e-discovery rule in 2003 (“Miss. R. Civ. P. 26(b)(5)”) 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 full text of the Order is at http://www.mssc.state.ms.us/rules/ruleamendments/2003/sn104790.pdf.

26. **Missouri.** Status unknown.

27. **Montana.** E-discovery amendments to the Montana Civil Rules (“M.R.Civ.P., Rule ____” or “MT R RCP Rule ____”) were adopted by Order of February 28, 2007 with adoption of essentially identical amendments to the similarly numbered Rules 16, 26, 33, 34 and 45. The court did not adopt the provisions for early disclosure in Rule 26(a) nor does Rule 26(f)(“Discovery conference”) explicitly refer to issues involving preservation. See Montana Lawyer, *Court Issues Major Rule Changes on Civil Procedure and Court Records*, 32-MAR Mont. Law. 12 (March 2007). In April, 2011, the Supreme Court announced a restyled and amended revised Montana Rules of Civil Procedure, which became effective on October 1, 2011. The Court also issued individual Comments which explain in some detail the similarities to and differences from the Federal Rules, including the key e-discovery provisions. For example, the bulk of Rule 26(b)(2) is “taken verbatim from [the Federal Rules]” as compared to the “non-mandatory discovery conferences” provision, which Montana regards as a useful case management tool. A copy of the Order is found at http://supremecourtdocket.mt.gov/view/AF%2007-0157%20Change%20Order?id={F3708004-97C5-4B9A-8E0E-D09ED1DC9BD5}.

28. **Nebraska.** Limited E-discovery amendments to several Rules (“Neb Ct R Disc § 6-334”) became effective in July, 2008 by action of Nebraska Supreme Court. See http://www.supremecourt.ne.gov/rules/pdf/Ch6Art3.pdf. The primary change was to authorize discovery of ESI parties, including its form or form of production, and via subpoena from non-parties (NCRD Rule 34A). Also authorized was the use of ESI in the form of business records in lieu of interrogatory answers (NCRD Rule 33).

29. **Nevada.** Status unknown.

30. **New Hampshire.** Limited E-discovery amendments to one Rule (“N.H. Super. Ct. R 62”) became effective in March, 2007 by action of the New Hampshire Supreme Court in 2007, copy at http://www.courts.state.nh.us/rules/sror/sror-h3-62.htm. The amended rule provides that parties shall “meet and confer” at least 20 days prior to the “Structuring Conference” to attempt to reach agreement on the “scope of discovery” including, as to ESI, “the extent to which [ESI or other information] is reasonably accessible, the likely costs of obtaining access to such information and who shall bear said costs” and well as the form of production and the need for “and extent of any holds or other mechanisms that have been or should be put in place to prevent the destruction of such information” and the manner in which parties propose to “guard against the waiver of privilege claims with respect to such information.” The parties are also required to submit a “comprehensive written stipulation” of matters on which agreement has been reached and
if unable to agree, proposed orders on each item. After the Structuring Conference, an order may issues adopting proposals or setting dates the court deems appropriate. 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 (“PAD Pilot Rules [Proportional Discovery/Automatic Disclosure”) in two counties since 2010 has include rules based on 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. The pilot project will be expanded to two additional counties, effective October, 2012. See http://www.nhbar.org/publications/display-news-issue.asp?id=6366. Rule 5, for example, codifies the duty to preserve and counsel’s duty to inform the client of the duty and to implement a litigation hold. See E-Discovery in New Hampshire, NH Discov. and Dep. S. 14.2 (“NHCLE-PGDD s 14.2”). In 2009, the Supreme Court provided a comprehensive review of e-discovery issues in Ball Bearings v. Jackson, 158 N.H. 421, 969 A.2d 351 (S.C. N.H. March 18, 2009).


32. **New Mexico.** Limited E-discovery amendments to several Rules (“NMRA, R 1-____”) became effective in May, 2009 by action of the New Mexico Supreme Court. 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. The Committee Commentary to Rules 1-026 list three exceptions to the adoption of the 2006 Amendments and the Comment to Rule 1-037 explicitly focuses on why the “safe harbor” rule was not adopted. Thus, although the counterparts to Rule 16 and 34 were adopted, the state refused to adopt a two-tiered approach to first-party production of ESI [except in Rule 45 for third party subpoenas] and modified the process for claiming privilege or work product to conform to New Mexico practice in Rule 26.

33. **New York.** There have been no changes to Article 31 of the Civil Practice Law and Rules (“McKinney’s CPLR § ____”) to accommodate e-discovery. The scope of “disclosure” in New York (CPLR 3101) involves “all matter material and necessary”); a party may seek to inspect “designated documents or things” (CPLR 3120(1)(i) and “documents” must be produced as they are kept in the ordinary course of business or organized to correspond to the request, with “reasonable production expenses” of non-defrayed defrayed by the party seeking discovery (CPLR 3122). Nonetheless, a vigorous body of law has evolved, largely influenced by the Zubulake line of cases, despite arguments that they should not bind state courts. See also NYSBA Best Practicesin E-Discovery in New York State and Federal Courts (July 2011), copy at http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=58331&Template =/CM/ContentDisplay.cfm. Recently, the leading intermediate appellate court in New York State adopted the Zubulake logic as governing the onset of the duty to preserve.

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and the approach to be followed in the initial payment of production costs because it is “moving discovery, in all contexts, in the proper direction.” This decision rejected the argument that a “requester pays” rule exists in New York, although it did not preclude subsequent cost allocation pursuant to Zubulake standards. A third decision by the same appellate court, involving a dispute over subpoena of ESI of ephemeral ESI from a third party, implied that in that context a court could allocate costs of “disruption” to normal business operations. However, despite inaction at the legislative level, the Uniform Rules for the New York State Trial Courts (“N.Y. Ct. Rules, § ____”) or (NY CLS Unif Rules, Trial Cts § ____”[LEXIS]) have been amended to deal with counsel and party responsibilities in connection with preparation for and attendance at preliminary conferences (Sec. 202.12(b) & (c)) in the regular and the Commercial Division of the Supreme Court (Sec. 202.70(g)). The Uniform Civil Rules 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. The Nassau County Commercial Court Guidelines for Discovery of ESI and the accompanying Preliminary Conference Stipulation and Order have been influential. See copy at http://www.nycourts.gov/courts/comdiv/PDFs/Nassau-E-Filing_Guidelines.pdf. See also 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”). A Model Stipulation and Order is found at http://www.nycourts.gov/courts/comdiv/PDFs/Nassau-PC-Order2-1-09.pdf (Order). Action by the Administrative officers regarding ESI was encouraged by a February 2010 Report which may be found at http://www.nycourts.gov/courts/comdiv/PDFs/E-DiscoveryReport.pdf. (Reproduced by PLI in 2011 at 208 PLI/NY 183). Recommendations for legislative activity have been made. See Report, Explosion of Electronic Discovery Necessitates Changes in CPLR (August, 2009), at http://www.nycbar.org/pdf/report/uploads/20071732-explosionofElectronicDiscovery.pdf (recommending changes in the CPLRto accommodate ESI).

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 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”

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492 Id. at *4.
(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](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](http://www.sconet.state.oh.us/RuleAmendments/documents/2008%20Amend.%20to%20Appellate,%20Criminal%20&%20Civil%20as%20published%20(Final).doc).

37. **Oklahoma.** Oklahoma enacted e-discovery rules effective November 1, 2010 (“12 Okl. St. Ann. § ____”). The provisions of Section 3226 of Chapter 41 (Discovery Code) for example, include limits on production of inaccessible production of ESI and refer to “ESI” in one of several references to “documents” in the rule [copy also found at [http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?citeid=440624](http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?citeid=440624)]. The equivalent to Rule 34 (Section 3234) also spells out the form or forms of production and Section 3237 includes a version of Rule 37(e), broadened to apply to inherent power [at [http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?citeid=95008](http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?citeid=95008)]. While Section 3226 does not refer to ESI in a “Discovery Conference,” Rule 5 of the District Courts (“Pretrial Proceedings”), references early conferences by attorneys, and lists as subjects any “special procedures or protocols” addressing discovery of ESI as well as the need for any orders addressing preservation of potentially discoverable information.” See [http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=458104](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. Ann.§ 2502 (E) & (F). [*NB: this is in contrast to the earlier decision in Farmers Insur., 81 P.3d 659 (S.C. Okla. 2003) where the Supreme Court questioned the principle of self-imposed inaccessibility as a basis for declining discovery].

38. **Oregon.** Oregon enacted a single e-discovery amendment (with two changes) effective January 1, 2012 (“OR Rules Civ. Proc., ORCP 43”), as recommended in 2010, copy at [http://legacy.lclark.edu/~ccp/Promulgated_Amendments_12-11-10.pdf](http://legacy.lclark.edu/~ccp/Promulgated_Amendments_12-11-10.pdf). Under the Amendment, “electronically stored information” is discoverable as a form of
documents (ORCP 43(A)), and, a requesting party may specify the form of production, and only in the absence of a specific requested form must it be produced in the form in which it is maintained or in a reasonably useable form under ORCP 43(B).


41. **South Carolina.** The Supreme Court adopted and sent to the Legislature E-discovery Amendments (“SC R RCP Rule ____”) which became effective in April, 2011. The Amendments to Rules 16, 26, 33, 34 and 45 are essentially identical to the 2006
Amendments, without either amendments involving early disclosure or “meet and confers.” In place of the latter, Rule 26(f) authorizes a discovery conference, at the conclusion of which the court may determine the “allocation of expenses” as necessary for the proper administration of the action. Rule 34(a) speaks of requests for “any designated documents, or electronically stored information.” (comma added). Also, Rule 37(e) is reproduced as Rule 37(f). The Note to the 2011 Amendments states that the amendments are “substantially similar” to the “corresponding” FRCP provisions. In Jennings v. Jennings, 389 S.C. 190, 697 S.E. 2d 671 (C. A. S.C. July 10, 2012), the Court of Appeals resolved a case involving accessing of an email account in connection with a marital dispute under the SCA without mentioning any of the amended civil rules. See also Spoliation in South Carolina, 19-SEP S.C. Law. 26 (2007).

42. South Dakota. Status unknown.

43. Tennessee. E-discovery amendments (“TN Civil Procedure Rule ___”) became effective on July 1, 2009 with rough equivalents to FRCP 16 (Rule 16.01), 26 (Rule 26.02 and 26.06), 34 (Rules 34.01 and 34.02), 37 (Rule 37.06) and 45 (Rule 45.02). Extensive commentary was also provided, often reproducing FRCP comments and those of the Guidelines. See Pivnick, 1 Tenn. Cir. Ct. Prac. § 18:22 (2011 ed) and Maxwell, New Rules for E-Discovery, 45-JUN Tenn. B.J. 12 (June, 2009). Tenn. R. Civ. P. 16.01 and 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. As part of the reform of Texas Civil Procedure code in 1999, a provision was added for requests for electronic or magnetic data (“Tx. Rules of Civil Procedure, Rule 196.4”). See generally, Hecht and Pemberton, A Guide to the 1999 Texas Discovery Rule Revisions (Nov. 1998), copy at http://www.adrr.com/law1/rules.htm. Rule 196.4 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). Rule 196.6 – also enacted in 1999 – allocates the costs of producing “items” to the “requesting party” unless otherwise ordered for “good cause.” One court has applied the latter in the context of forensic examinations of hard drives. See Frankel v. Texas Std. Oil, 2010 WL 7367255 (Tex. Dist. Harris Co. March 25, 2010). 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.


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](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 are 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 (“Wy R RCP Rule ___”) in its Rules 26, 33, 34, 37 and 45. Although the bulk of the rule changes are identical to their FRCP counterparts, Rule 26 does not mandate a “meet and confer,” but instead, Rule 26(f) provides for an optional “discovery conference” between the attorneys and the court without highlight ESI issues. Rule 34 more explicitly provides for objections to the form or forms of production. In 2011, the Rules for Wyoming Circuit (as opposed to District Courts) were completely revised, although apparently without reference to ESI. The changes in these courts of limited jurisdiction place substantial emphasis on proportionality and simplification. See Craig Silva, The Repeal and Replacement of the Wyoming Rules of Civil Procedure for Circuit Courts, 34-JUN Wyo. Law. 13 (June 2011). Wyoming has a unique uniform sanctions Rule, “Wy R. Unif. Dist Cts. Rule 901,” which provides sanctions for rule violations in the District courts and, as modified and number as Rule 10, Enforcement, the Circuit Courts, ie, “W.R.C.P. C.C, Rule 10.”