State E-Discovery Today: An Assessment and Update of Rulemaking

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As of February, 2011, a total of thirty-seven states have adopted procedural rules which address e-discovery issues² or deal with the non-waiver of the attorney-client privilege and attorney work product.³ Most states have adopted variants of the 2006 Amendments to the Federal Rules of Civil Procedure,⁴ which made targeted amendments to Rules 16, 26, 33, 34, 37 and 45. Texas acted prior to the Federal Amendments, thus being the first state to formally enact rules governing e-discovery.⁵

Thirteen states and the District of Columbia⁶ have not enacted any comprehensive rule changes dealing with discovery of electronic information.⁷ This includes states with notable amounts of civil litigation such as Delaware,⁸ Florida,⁹ Illinois,¹⁰ Massachusetts,¹¹ Pennsylvania and New York.¹²

¹ ©Thomas Y. Allman. The author, a former General Counsel and litigator, is Chair Emeritus of Working Group 1 of the Sedona Conference®. He is one of the Editors of the Sedona Principles (2nd Ed. 2007) and the PLI Deskbook on Electronic Discovery (2009).
³ Arizona, Arkansas, Iowa, Louisiana, Maryland, New Hampshire and Oklahoma enacted non-waiver provisions in addition to e-discovery rules. Washington, however, has enacted only a non-waiver provision.
⁵ TEX. R.CIV. P. 196.4 (eff. Jan. 1, 1999)(parties may object to specific requests for production of electronic data that is “not reasonably available” as requested and, if nonetheless ordered to produce, costs of any extraordinary steps required must be paid by requesting party). Idaho and Mississippi adopted a similar approach with discretionary cost-shifting.
⁶ A set of e-discovery Rules for the District are awaiting approval by the Appellate Court. Telephone Interview, Office of General Counsel, District of Columbia, November 5, 2010.
⁷ Colorado, District of Columbia, Georgia, Hawaii, Kentucky, Massachusetts, Missouri, Nevada, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota and West Virginia.
⁹ Florida has enacted e-discovery rules for “complex” cases.
The controversial nature of some of the 2006 Amendments may have contributed to adoption of a “wait and see” attitude, but the lack of urgency given the ample federal precedent should not be underestimated. Some have argued that the 2006 amendments were merely intended to “codify” the jurisprudence “largely encapsulated in the Zubulake decisions,” implying that rulemaking was and remains unnecessary.

There are also limits to what rulemaking can accomplish. Some argue that the 2006 Amendments have not achieved their objectives of adequately addressing the burdens and expense of e-discovery by creating uniform rules which provide appropriate guidance. The extent to which the rules avoid many of the tough issues in e-discovery may contribute to this argument.

This first part of this memorandum describes the general level of state e-discovery activity in terms to key e-discovery issues, leaving to an Appendix to summarize the activity in 50 states and the District of Columbia.

I. State Rulemaking

The states that have acted to date were heavily influenced by the positions taken in the 2006 Federal e-Discovery Amendments as well as the contemporaneous case law.

In addition, The Sedona Principles Best Practices Recommendations & Principles for Addressing Electronic Document Production (“Sedona

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10 Illinois rules acknowledge computer-based information as being subject to discovery.
11 Massachusetts is said to be close to having a Committee recommendation on potential rules.
12 New York has added, via administrative rules, requirements for early discussion of ESI issues and an associated duty to prepare for that process.
13 The dissenting opinions in the recent Wisconsin Opinion urged the members of the bar to observe the operation of the mandatory meet and confer process under the Seventh Circuit Pilot program and to petition the Wisconsin Supreme Court if a basis for repeal exists.
Principles”)\(^{17}\) provided a model for action by its stress on early discussion of ESI issues, presumptive limits on scope of discovery and articulation standards of care to be applied in regard to preservation and sanction issues. Sedona also continues to fulfill its “gap filler” role by providing best practice guidelines for crucial issues\(^{18}\) which, in the absence of rules, often have been reliable and useful guides for state courts.\(^{19}\)

Two other important resources were the 2006 Guidelines for State Trial Courts on Discovery of Electronically Stored Information (“CCF Guidelines”) developed by the Conference of Chief Justices,\(^{20}\) and the 2007 Uniform Rules Relating to the Discovery of Electronically Stored Information (“Uniform Rules”).\(^{21}\) The former was primarily intended to act as a guide for the judiciary, and the latter usefully adapted the 2006 Amendments to provide an optional standalone set of e-discovery rules.

### Uniformity Among Courts Within States

Many states seek to maintain uniformity of procedural result with the Federal courts of their jurisdiction so that same rules apply in all courts in a given geographical area.\(^{22}\) In Vermont, for example, adoption of the Federal Amendments was explained as necessary to “retain the basic uniformity between state and federal practice that is a continuing goal of the

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\(^{18}\) For example, in 2010, the Sedona Conference issued its updated Commentary on Legal Holds: The Trigger & the Process, 11 SEDONA CONF. J. 265 (Fall 2010) and a new Commentary on Proportionality in Electronic Discovery, 11 SEDONA CONF. J. 289 (Fall 2010).


\(^{21}\) The Uniform Rules were drafted to serve as “stand-alone” supplemental e-discovery rules which could be applied separate, if needed, an approach adopted by the State of Arkansas. A copy of the Uniform Rules is at [http://www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.htm](http://www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.htm).

\(^{22}\) Hon. R.D. Horne, Electronic Data: A Commentary on the Law in Virginia in 2007, 42 U. RICH. L. REV. 344, 380 (2007)(“ Virginia common law . . .could be greatly enhanced if the Supreme Court of Virginia chose to adopt the amended federal rules [dealing with e-discovery]”).
The presence of identical procedural is said to reduce the costs associated with “balkanization” and to make interpretive precedent available for use from other jurisdictions.

However, the matter is complicated by local Federal district court rules which impose varying standards and requirements. This also has implications for – and can be said to undermine – procedural uniformity among the Federal District Courts across the United States.

Some commentators have suggested that there is “no uniformity in state and federal eDiscovery laws – and there may never be,” citing, as examples the “surprising” lack of citation to the “federal eDiscovery rules or Zubulake in state court decisions” and, in particular the alleged divergence between cost-shifting as applied in the federal and state courts of California and New York.

The author strongly disagrees, as emphasized in this Memorandum. In most states, a predominant degree of conformity with the federal approach results from the fact that state courts routinely apply federal decisions. Absent rules “dealing specifically with discovery of ESI,” the courts apply the “precedent [from] within the federal civil justice system.”

It is not uncommon, moreover, for state courts - even appellate courts - to heavily rely on federal precedent even where state procedural rules already

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26 Renee T. Lawson, I know About The Federal eDiscovery rules, Now What About the States?, 766 PLI/Lit 357 (October-December, 2007).
exist. This often includes reliance on specific provisions of the 2006 Amendments.

What is notable, however, is the increasing “pushback” against blind acceptance of federal decisions in the context of preservation and spoliation. In New York, for example, a strongly worded White Paper on the topic by the Advisory Group to the New York State – Federal Judicial Council has challenged, on both practical, evidentiary and constitution grounds the object federal common law decisions.

Finally, “chipping around the edges” by use of Administrative rulemaking is evident in some of the states that have not acted. The Delaware Court of Chancery recently promulgated, for example, “Guidelines for Preservation of Electronically Stored Information,” striking at one of the fundamental e-discovery obligations not directly addressed in Federal Rules or state analogs. New York exhibits even more vigorous activity along these lines.

Impact of the 2010 Duke Conference

Frustration about the costs of dealing with e-discovery expressed by the Supreme Court and the American College of Trial Lawyers, led the Rules Advisory Committee to convene the 2010 Civil Litigation conference at Duke Law School in May, 2010 (the “Duke Conference”). A number of expert panels and a carefully selected audience of practitioners, judges and members of the academy discussed a wide variety of issues associated with

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29 In re Weekley Homes, L.P., supra, 295 S.W.3d 309, 316-317 (2009)(although “we have not amended [Tex. R. Civ. P. 196.4] to mirror the federal language, our rules as written are not inconsistent with the federal rules or the case law interpreting them”); see also Thomas O. Main, Procedural Uniformity and the Exaggerated Role of Rules. 46 WILL. L. REV. 311, 319 (2001)(citing similar examples).
30 See, e.g., Ex parte Cooper Tire & Rubber, 987 So.2d 1090, 1104, 1009 (S.C. Ala. Jan. 18, 2008)(granting write and ordering lower court to apply limits outlined in FRCP 26(b)(2)(B) to subpoena of emails “in light of recent federal guidelines on that subject”) [prior to Alabama action adopting Federal Rules].
34 Final Report, ACTL/IAALS, 10 (March 2009)(state and federal rulemaking to date has “accomplished little or nothing” to address the problems of a broken system of civil litigation).
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state and federal litigation. Consensus was rare, with the exception being a unanimous recommendation that problems associated with preservation and spoliation had reached the point where remedial rulemaking needed to be explored further. 36

Currently, a subcommittee of the Rules Committee, as well as ad hoc groups within the Rules Committee, have been tasked with assessing the recommendations arising from Duke.

In the meantime, pilot programs in Massachusetts 37 and New Hampshire, 38 are testing some of the discovery improvements (and in their Pilot Project Rules) as suggested by the American College of Trial Lawyers Task Force at Duke. 39 A number of other state projects are also in various planning stages. 40 Iowa, for example, has requested a task force to “develop a plan for a multi-option civil justice system.” 41 New York is actively examining ways to improve e-discovery practices. 42

The federal system is also assessing alternative approaches relevant to further rulemaking through efforts such as the Seventh Circuit under the Seventh Circuit Electronic Discovery Pilot Program.

II. Analysis

The following sections analyze the similarities and variations among states in regard to the key e-discovery issues.

36 The Duke Panel “[held] the consensus view that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure.” See “Elements of A Preservation Rule,” April, 2010, copy at http://civilconference.uscourts.gov/ (scroll to E-Discovery Panel papers). The author, a former GC, was a member of the Panel, together with two members of the federal judiciary and three outside counsel.
39 For copies of the ACTL/IAALS Pilot Rules, scroll to “Empirical Research, Part.”
40 Iowa, Colorado, Minnesota, Utah and Wyoming. The National Center for the State Courts is reportedly working up evaluative tools to assess the impact of any pilot programs. Interviews, October 26, 2010.
Where adopted, e-discovery procedural rules typically operate in a “trans-substantive” manner; *i.e.*, without differentiation as to the types of cases involved, as is the case with the Federal rules. However, some states treat e-discovery rules as applicable only when e-discovery is likely or the parties have agreed to utilize the rules. Alternatively, the e-discovery rules may apply only to cases designated as “complex” or which are assigned to dedicated “business courts.”

Commentators in states that have not yet enacted e-discovery rules sometimes cite the disadvantages of a “one-size-fits-all” approach given the wide variety of disparate actions that states must handle.45

(1) Electronically Stored Information

While information created and stored in electronic form has long been discoverable in Federal and state courts, the 2006 Amendments to Fed. R.Civ. P. 34(a) famously adopted “electronically stored information” (“ESI”) to describe a distinct category of discoverable. That terminology has been widely adopted in many states, although Texas, which acted earlier, continues to refer to “data or information that exists in electronic or magnetic form.”

The Committee Note to Fed. R. Civ. P. 34(a) explains that ESI includes “information that is stored in a medium from which it can retrieved

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43 Professor Subrin (who thinks the concept is flawed) defines it (1) making the same procedural rules available for all civil suits and (2) doing so regardless of the size of the litigation or the stakes involved. Stephen N. Subrin, The Limitations of Transubstantive Procedure: An Essay on Adjusting the “One-Size Fits All” Assumption, 87 DENV. U. L. REV. 377, 378 (2010).


45 See Jill M. O'Toole, Conn. Courts’ Lack of E-Discovery Rules Raises Questions, Conn. Law. Tribunal, Feb. 11, 2011 (“It is likely that [such an approach] would be effective or practical given the wide-ranging cases pending in our state court system, including small claims, juvenile, family and matrimonial, environmental and land use, real estate, class actions, commercial disputes, employment, personal injury, and motor vehicle (just to name a few”).

46 See Banc of America v. SR Int’l, 2006 WL 3093174, at (N.C. Superior Ct. Nov. 1, 2006)(noting that “straightforward application” of Rules 26 and 45 permit discovery of electronic information and if it is necessary to adapt a separate test “it would not be the province of this Court to do so”).

47 FED. R.CIV.P 34 (a). The phrase was also inserted into Rules 16, 26, 33, 37 and 45.

48 See also ILL. R. Civ. P. 201(b)(2010); Rule 214 (“[a]ny party may by written request direct any other party to produce . . . [which shall include] “all retrievable information in computer storage in printed form.”
and examined,” and that the definition is “intended to be broad enough” to cover both current types of computer based information and “future changes and developments.” California defines ESI as “information that is stored in an electronic medium,” and describes “electronic” as “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.” The Comment to CCF Guideline 1 emphasizes that ESI includes “both on-screen information and system data and metadata that may not be readily viewable.”

“Electronically stored information” has been interpreted to include ephemeral information as well as system and application metadata, some of which may not be visible to the viewer in ordinary usage.

(2) Preservation

The common law duty to preserve relevant evidence has long been acknowledged by Federal and state courts when litigation is pending or reasonably anticipated.

In some federal courts, specific conduct is required once the duty has been “triggered,” with a judgment of adequacy typically made retroactively. Prominent among these requirements are those mandated by the Zubulake line of cases, including the 2010 update in Pension Committee, requiring use of written litigation holds in all cases, said to have been in effect since mid-2004 in that District. State courts often apply this federal precedent – which approaches strict liability – without examination.

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49 Committee Note, Subdivision (a), Rule 34.
51 See CCF GUIDELINE 1(a)(listing examples).
52 See Columbia Pictures v. Bunnell, 245 F.R.D. 443, 447 (C.D. Cal. 2007)(“Rule 34 requires no greater degree of permanency from a medium than that which makes obtaining the data possible.”).
54 Under Zubulake v. UBS Warburg (Zubulake IV), 220 F.R.D. 212, 218 (S.D. N.Y. 2003), however, “[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” (emphasis added). In Pension Comm. v. Bank of Am. Sec., LLC, 685 F. Supp. 2d 456 (S.D. N.Y. Jan. 15, 2010), the failure to institute a written litigation hold was said to always justifies imposing an serious spoliation sanction - whether or not potentially relevant information has been spoliated.
56 See Robert E. Shapiro, Advance Sheet, LITIGATION, Vol. 36, No. 3, 59, at 60-61 (Spring 2010, ©ABA); Justin N. Joy, Post-Pension Committee Discovery Practice – A Strict Liability Standard, ABA Section on Litigation, Summer 2010 (“this Zubulake quartet is chock-a-block full of additional rules for the
In most other forums, however, including most state courts, courts require only that a party act reasonably and in good faith, as recommended by the Sedona Principles, and in some cases, apply principles of proportionality in assessing the fact-specific cases.

During the 2006 Federal Amendment process, the thorny drafting issues involving pre-litigation preservation obligations were seen as an insurmountable barrier to including preservation rules in the Federal Rules. Proposed Committee Notes which “explain[ed] or define[d] a preservation obligation” were withdrawn before the final issuance of the Rules and it was left to Fed. R. Civ. P. 37(f)[now 37(e)] to provide, by implication, the standard of conduct (“good faith”) contemplated by the rules.

conduct of the parties and their lawyers . . . beyond acting reasonably, actually redefining what comprises good faith under Rule 26 . . . [s]houldn’t such a significant change in the discovery process be standardized, and therefore fall with the province of the Supreme Court, the Advisory Committee, or at least the district court as a whole?”), copy at http://www.americanbar.org/content/dam/aba/publishing/litigation_news/LitMag_Spr10_shapiro.authcheckdam.pdf

57 The Sedona Conference® COMMENTARY ON LEGAL HOLDS: THE TRIGGER & THE PROCESS (2010), 10 SEDONA CONF. J. 265, 277(2010)(“the keys to addressing these issues, as with all discovery issues, are reasonableness and good faith”); accord, Principle 5 of THE SEDONA PRINCIPLES (2nd Ed. 2007)(it is “unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data”).

58 Rimkus Consulting v. Cammarata, 2010 WL 645353, at *6 (S.D. Tex. Feb. 19, 2010)(“Whether 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); 7TH CIR. PRINCIPLE 2.04 (Scope of Preservation)(providing that “[d]etermining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry.”).

59 As noted subsequently, since the 2010 post-Duke Conference period commentators have opined that the barriers can be overcome. See A. Benjamin Spencer, The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court, [forthcoming in Fordham Law Review]. The dimensions of the pre-litigation obligation to preserve are a function of the inherent power possessed by courts to regulate their own affairs. Rimkus v. Cammarata, 688 F.Supp.2d 598, 611 (S.D. Tex. Feb. 19, 2010)(“[a]llegations of spoliation . . . are addressed in federal courts through the inherent power to regulate the litigation process if the conduct occurs before a case is filed . . . “).

60 ADVISORY COMMITTEE MINUTES, April 14-15, 2005, at p. 39-40, copy available at http://www.uscourts.gov/rules/Minutes/CRAC0405.pdf (“the difficulties of drafting a good rule would be so great that there is no occasion even to consider the question whether a preservation rule would be an authorized or wise exercise of Enabling Act authority”).


Similarly, those states which enacted e-discovery rules patterned on the 2006 Amendments also failed to define preservation obligations. Two states acknowledged the existence of preservation obligations in their versions of Rule 37(e) as do several Committee comments.

Thus, the Ohio Staff Notes provide that the duty to preserve is “addressed by case law and is generally left to the discretion of the trial judge.” Utah refers, by rule, to the use of inherent power to take action for violation “of a duty [to preserve].” The comments to the Alabama rule add that “the party must act appropriately, which may include issuing a ‘litigation hold.’”

The issue of resolving confusion over preservation obligations remains open at the federal and state level. A recent article concerning Connecticut asserted that “[a]t a minimum, any state court e-discovery rules [in Connecticut] should address [the] duties to preserve electronic data.”

As a result, a variety of specific rulemaking proposals dealing more explicitly with preservation and spoliation are available. The author suggested after the Duke Conference that a general standard of care should be identified in a new Rule 34.1, coupled with an expanded Rule 37 at the “back end” covering preservation failures so as to reduce reliance on ad hoc inherent power and to enhance the effectiveness of Rule 37(e).

See MCR 2.302(B)(5)(2010) (“[a] party has the same obligation to preserve electronically stored information as it does for all other types of information.”). Similarly, California provides that its safe harbor rule “shall not be construed to alter any obligation to preserve discoverable information.”

Advisory Commission Comments, TENN. R. CIV. P. 37.06 (2010) (“[a] preservation obligation may rise from many sources, including common law, statutes, regulations, or a court order in the case.”).

URCP Rule 37(g)(Failure to preserve evidence) (“Nothing in this rule limits the inherent power of the court to take any action authorized by Subdivision (b)(2) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty.”).

Committee Comments to Adoption of Rule 37(g), ALA. R. CIV. P. Rule 37(g)(2010).


Rulemaking could require parties to take reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. In addition, categories of ESI could be identified which are presumptively not subject to preservation requirements absent agreement of the parties or a court order issued for good cause.\(^{70}\)

As discussed in more detail below (at Section 17 [“Sanctions – Safe Harbor (ESI)’’]), Rule 37(e) may need to be clarified to properly play its role of excluding sanctions for routine, good faith losses caused by inadvertent conduct not intended to deprive the requesting party of the use of ESI in discovery.\(^{71}\)

The post-conference report by the Committee to the Chief Justice noted that there was “significant support across plaintiff and defense lines” for additional guidance in the rules “on the obligation to preserve information relevant to litigation and the consequences of failing to do so.”\(^{72}\)

The Rules Committee has assigned the issue to its Discovery Subcommittee.

(3) Early Planning Conference(s)

There is a broad consensus that early and candid attention to planning for discovery – including those issues unique to e-discovery - is the most effective method of avoiding unnecessary disputes. This was one of the core suggestions of the original Sedona Principles (2004)\(^ {73}\) and was incorporated into the both the Uniform Rules and the CCF Guidelines. The merit of the approach was strongly affirmed at the Duke Litigation Conference, as facilitated by the cooperative approach of the Sedona Conference Cooperation initiative launched in 2008, now widely endorsed by many

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\(^{70}\) **7th Cir. Principle 2.04(d)(“deleted, slack, fragmented or unallocated data on hard drives,” etc., and “[o]ther forms of ESI which require extraordinary affirmative measure not utilized in the ordinary course of business”). Another approach would be to articulate presumptive limitations on the total number of custodians and information systems whose relevant information must be preserved.**

\(^{71}\) **See, e.g., Lawyers for Civil Justice WHITE PAPER, Reshaping the Rules of Civil Procedure for the 21st Century, follow the same process to Empirical Research, Part 2.**

\(^{72}\) **REPORT TO THE CHIEF JUSTICE, supra, at 8.**

\(^{73}\) **Sedona Principle 3 (2004)(“Parties should confer early in discovery regarding the preservation and production of electronic data and documents when these matters are at issue in the litigation , and seek to agree on the scope of each party’s rights and responsibilities.”).**
courts, and included in the Seventh Circuit Electronic Discovery Pilot Program as a key principle.

The goal is to encourage parties, from the outset, and throughout the case, to resolve disputed discovery issues by agreement and without court intervention.

Under the Federal approach, the planning process starts with a mandatory early conference prior to meeting with the court. FED. R. CIV. P 26(f) mandates the parties to “meet and confer” regarding discovery prior to the initial conference with the court, at which time they must discuss both preservation and e-discovery issues. As part of this process, the parties must develop a “discovery plan” to be presented to the Court.

In some cases, the initial conference may be assigned to a Federal Magistrate Judge. FED. R. CIV. P 16(b) provides a list of specific e-discovery topics for such discussions with the court, the results of which are to be reflected in the scheduling or case-management orders issued thereafter. No mention is made, however, of discussions of preservation issues. As the author has noted, “cooperation among parties in discovery has emerged as a decisive mandate” and courts expect parties to reach

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74 See The Sedona Conference® Cooperation Proclamation, 10 SEDONA CONF. J. 331 (2009)(listing endorsing courts); See also The Case for Cooperation, 10 SEDONA CONF. J. 339 (2009)(describing the 2008 Cooperation Proclamation and encourage voluntary cooperation in such discussions); accord S.D. Ill. LR 26.1 (d)(“Cooperative discovery arrangements in the interest of reducing delay and expense are mandated.”).

75 Seventh Circuit ED Pilot Program, Sec. 102 (Cooperation)(“An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner”), 11, copy at http://www.ilcd.uscourts.gov/Statement%20-%20-%20Phase%20One.pdf.

76 Some District Courts combine aspects of the two. See N. & S.D. IOWA CIV. LR 26(d)(3)(“the Rule 26(f) discovery plan conference should be combined with the Rule 16(b) scheduling order conference.”).

77 Steven S. Gensler, Some Thoughts on the Lawyers’s E-Volving Duties in Discovery, 36 N. KY. L. REV. 521, 527 (2009)(the “dialogue contemplated between the parties and the court was not mandatory [in the initial version of the rule], and few lawyers invoked it”). Rule 26(f) does not list the e-discovery issues as part of its checklist of items for the “discovery plan.”

78 Some Federal District Courts provide sample forms. For an excellent example of a “speaking form” which has substantial explanatory comments built into it, see DIST. CT. COLO. LR APP. F.1, copy at http://www.cod.uscourts.gov/Documents/LocalRules/LR_App_F1.pdf.

79 N.D. CAL. CIVIL L.R. 16-10 (a) (2010)(“The assigned District Judge may designate a Magistrate Judge to conduct the initial Case Management Conference”).

80 Committee Note (2006), FED. R. CIV. P. 16 (Rule 16(b) is “designed to alert the court to the possible need to address” the topic of e-discovery “if such discovery is expected to occur.”)
practical agreement on search terms, date ranges, key players, and the like.”

This “check-list” approach to meeting these obligations in Federal Courts is often supplemented by Local District Rules emphasizing the reciprocal obligations of parties.

Currently, only Alaska, Arizona (complex cases), Arkansas, California, New Hampshire, North Carolina (Business Court), Wisconsin and Utah explicitly require a similar early “meet and confer” session before the initial meeting with the court.

However, early planning conferences with the court are available at the discretion of the court or on motion of parties in most states. In Alabama, the court may order parties to meet and confer if discovery of ESI


82 See, e.g., The Sedona Conference® “Jumpstart Outline” (May 2008).

83 USDC DNJ LOC. CIV. R. 26.1(d)(1)(“Duty to Investigate and Disclose”)(requiring counsel to “review with the client” the information management systems “in order to understand how information is stored and how it can be retrieved” to determine what must be discussed pursuant to R. 26(a)(1) and to identify a person or persons with knowledge about the systems so as to facilitate “reasonably anticipated discovery”); see also 26.(d)(2)(“Duty to Notify”)(requiring party seeking ESI to notify, by the R. 26(f) conference, the categories of information which may be sought).

84 ALASKA R. CIV. PROC. 26(f)(2010).

85 ARIZ. R. CIV. P. 16.3(b)(2010).

86 ARCP Rule 26.1(b)(1)(if the supplemental e-discovery rule is applied, parties “shall confer” and discuss, inter alia, issues relating to preservation, form of production, period of production, etc.).

87 CAL. RULES OF COURT, RULE 3.724 (2010)(requiring meeting of parties “in person or by telephone” at least 30 calendar days before the date for initial case management conference and requiring discussion of any issues relating to ESI, including “preservation” of ESI and a “proposed plan” relating to discovery).

88 N.H. SUPER. CT. R. 62(C). The meeting is to be held prior to a “Structuring Conference” and covers the full range of ESI topics, including accessibility, privilege waiver, form of production, cost allocations as well as “the need for and the extent of any holds or other mechanism that have been or should be put in place to prevent the destruction of such information.”

89 The North Carolina Business Court Local Rules of Practice and Procedure require an early case management meeting to discuss e-discovery prior to meeting with the Court (NC R. BUS CT Rule 17.1) and prior to filing motions and objections relating to the topic (NC R BUS CT Rule 18.6(b)).

90 WIS. STAT. Stat. § 804.01(2)(e)(requiring conference of parties as condition of serving request to produce ESI or to using it to respond to an interrogatory)(effective January 1, 2011).

91 URCP Rule 26 (2010).

92 Wyoming permits a court to “direct the attorneys” to appear before it “for a conference on the subject of discovery.” The court is required to do so if any party seeks a conference and proposed a plan and schedule of discovery which, presumably could include disputed issues relating to ESI (Wyoming has not explicitly amended its Rules to reflect e-discovery). WYO. R. CIV. PROC. RULE 26(f)(2010).
will be sought.\footnote{ALA. R. CIV. P. 26(f)(2010)\textquotedblright;\textquotedblleft;that the parties confer regarding any issues relating to discovery electronically stored information, including issues relating to preserving discoverable information\textquotedblright;};\footnote{MD. RULE 2-504.1(C)(2)(court may order, as condition to scheduling conference, that parties confer in person or telephone to attempt to reach agreement on matters to be considered at the conference). The Committee Note points out that the parties may \textquotedblleft;need to address any request for metadata,\textquotedblright; citing to Sedona Principle 12 (2nd Ed. 2007).}\footnote{ARCP Rule 26.1(d)(court may issue orders governing discovery, including preservation of information).} Maryland also provides that such a meeting may be ordered as a pre-condition to the scheduling conference, for which an extended potential agenda involving ESI is suggested by Committee Note.\footnote{See, e.g., VA. SUP. CT. R. 4:13 (2010)\textquotedblright;issues relating to the preservation of potentially discoverable information, including electronically stored information and information that may be located in sources that are believed not reasonable accessible because [of] undue burden or cost\textquotedblright;};\footnote{In contrast, Federal Rule Civ. P. 16(b) ignores preservation issues, as does, for example Montana, which mandates discussion of ESI-issues in general, but does not mention \textquotedblleft;preservation\textquotedblright; as a topic for discussion. See MONT. CODE ANNO. CHAPT. 20, Rule 26(f)(2010).} In New York, discussions about e-discovery are to be held at preliminary conferences when the court \textquotedblleft;deems appropriate.\textquotedblright;\footnote{N.Y. CLS UNIFORM RULES, TRIAL CTS. §202.12.} In August, 2010, that rule was revised (effective immediately) to require heightened counsel preparation for the discussions.\footnote{Court Notice, copy at \url{http://www.dos.state.ny.us/info/register/2010/aug18/pdfs/courtnotices.pdf} (also amending SEC. 207.70 (g)(Commercial Division)).} If held, parties are expected to discuss key ESI issues, often phrased in terms of the Federal Rule \textquotedblleft;checklist\textquotedblright; found in Rule 16(b), such as the form and manner of production, cost allocation, if any, and resolution of methods to assert privilege, including the need for any non-waiver agreements to be entered by the court.\footnote{MN. R. CIV. P. 16.02.} Many states identify preservation of potentially discoverable information as one of the topics for discussion with the court,\footnote{See also TENN. R. CIV. P. 26.06(E)(4)(discussion of \textquotedblleft;the steps the parties will take to segregate and preserve relevant electronically stored information\textquotedblright;); accord CAL. RULES OF COURT, Rule 3.724(8)(A); N.H. SUPER. CT. RULE 62(I)(C)(the need for a litigation hold or other mechanism to protect \textquotedblleft;information stored electronically or in any other medium\textquotedblright;); V.R.C.P. Rule 26(f)(\textquoteleft;any other proposed orders with respect to discovery\textquoteright; which may include) any issues about preserving discoverable information\textquoteright;}. with the results, if any, memorialized by court orders.\footnote{99 See, e.g., VA. SUP. CT. R. 4:13 (2010)\textquotedblright;issues relating to the preservation of potentially discoverable information, including electronically stored information and information that may be located in sources that are believed not reasonable accessible because [of] undue burden or cost\textquotedblright;};\footnote{In contrast, Federal Rule Civ. P. 16(b) ignores preservation issues, as does, for example Montana, which mandates discussion of ESI-issues in general, but does not mention \textquotedblleft;preservation\textquotedblright; as a topic for discussion. See MONT. CODE ANNO. CHAPT. 20, Rule 26(f)(2010).} New York specifies discussion of e-discovery issues such as \textquotedblleft;retention,\textquotedblright; plans for implementation of a data preservation plan and individuals responsible for preservation as well as \textquotedblleft;proposed initial allocation\textquotedblright; of costs.\footnote{See, e.g., VA. SUP. CT. R. 4:13 (2010)\textquotedblright;issues relating to the preservation of potentially discoverable information, including electronically stored information and information that may be located in sources that are believed not reasonable accessible because [of] undue burden or cost\textquotedblright;};\footnote{In contrast, Federal Rule Civ. P. 16(b) ignores preservation issues, as does, for example Montana, which mandates discussion of ESI-issues in general, but does not mention \textquotedblleft;preservation\textquotedblright; as a topic for discussion. See MONT. CODE ANNO. CHAPT. 20, Rule 26(f)(2010).}
Opposition to mandatory early meetings of parties is sometimes based on the impression that they are costly and counterproductive where e-discovery is only a marginal part of discovery. Wisconsin recently adopted mandatory meet and confer only over stiff opposition on this point.

In many instances, e-discovery disputes are not presented by the case or the parties are not yet prepared to confront e-discovery details given the early nature of the claims or defenses and the lack of knowledge of the sources involved. There was, for example, mixed evidence in the FJC Survey presented at the Duke Litigation Conference as to the productivity of mandatory early discussions of ESI issues in federal Courts. While the issues “are not being discussed in many cases in which the Rules envision that they should be,” it is possible that they are being discussed in cases “where electronic discovery disputes are more likely to arise.”

An underlying assumption is that informed counsel can reach agreement only if they are knowledgeable about their client’s information management resources and practices. Some federal courts impose obligations on counsel to do so and have sanctioned inadequate efforts contributing to failures to preserve. New York state practitioners are now required by Administrative Rule to be prepared to discuss the technical and system aspects of client information architecture at the preliminary conference.

The CCF Guidelines also recommend that courts encourage counsel to meet and confer to exchange basic information about the systems where information relevant to the issues anticipated in the case may be found.

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101 In dissenting from a decision to adopt a mandatory meet and confer for all cases, two Wisconsin Supreme Court Justices argued that the “vast majority” of Wisconsin cases do not involve - unlike federal courts - large document and electronic disputes and that the process should remain discretionary. See ORDER NO. 09-01A, Supreme Court of Wisconsin, November 10, 2010.

102 See Emery G. Lee III, Effectiveness of the 2006 Amendments, 11 SEDONA CONF. J. 191, 195 (2010)(noting response of one counsel to the effect that he had never met an opposing counsel eager to discuss e-discovery issues).

103 See Who. U.S.D.C.L.R. Rule 26.1(e)(2010)(requiring counsel to “carefully investigate their client’s information management system” and ascertain the contents of “client’s computer files to ascertain the contents thereof, including archival and legacy data” and “disclose in initial discovery” the computer based evidence “which may be used to support claims or defenses.”).

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

105 See Comment, CCF GUIDELINE 3 (listing eight categories of information that a court could use to select topics for an appropriate order). CCF GUIDELINE 2 also urges judges, “when appropriate,” to encourage
Texas, having neither an equivalent of Rule 26(f) or 16(b), has encouraged early communication between parties on electronic storage as a matter of case law.\footnote{In re Weekley Homes, L.P., supra, 295 S.W. 3d 309, 315 (S.C. Tex. 2009)(“early discussion between the parties or early discovery directed toward learning about an opposing party’s electronic storage systems and procedures is encouraged.”). Absent such an exchange, it was reasonable not to interpret a request for production as encompassing backup media, requiring an objection under TRCP 196.4. MRT v. Vounckx, 299 S.W.3d 500, 508 (C.A. Tex, 2009)(no duty to object that tapes were not reasonably available).}

As noted earlier, detailed requirements along these lines are often provided by individual Federal District courts.

\textbf{(4) Orders Governing Preservation/Discovery}

The Federal Rules and the rules of most states authorize their courts to issue orders following discovery involving agreements dealing with steps to be undertaken in discovery, including those regarding preservation.\footnote{Vermont requires courts conducting a Discovery Conference to follow with an order identify, inter alia, “the issues for discovery purposes, including any issues about preserving discoverable information.” V.R.C.P Rule 26(f).} Where a state has addressed specific e-discovery issues in the rules, courts are expected to follow suit in the orders.

However, courts need to tread carefully before including or all inclusive blanket preservation orders over opposition in light of the damage which can be done by orders which insensitive to business operations. As the Committee Note to \textit{FED. R. CIV. P} 26(f) states, “the requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders.” Nonetheless, where courts have reason to consider potential misconduct, courts are prepared to issue orders requiring preservation even in the absence of a specific rule on the topic.\footnote{\textit{See, e.g., Stein v. Clinical Data, Inc.,} 2009 WL 3857445, at *2 (Super. Ct. Suffolk Co. Oct. 9, 2009)(ordering plaintiff to refrain from deletion and to produce laptop for forensic inspection without finding misconduct but “in interest of moving this forward”).}

Thus, Arizona authorizes its courts to set forth “any measures the parties must take to preserve discoverable documents or electronically stored information,”\footnote{\textit{ARIZ. R. CIV. P.} 16 (b)(ii).} but the Commentary notes that \textit{ex parte} orders should issue “only in exceptional circumstances” and the court should “carefully tailor

counsel to “become familiar” with the operation of relevant systems, including how information is stored and retrieved.
the order so that it is no broader than necessary to safeguard the information in question.” Similar cautionary remarks appear in other state rules.

(5) Initial Information Exchanges

FED. R. CIV. P 26(a)(“Required Disclosures”) requires early informational exchanges in civil actions “without awaiting a discovery request,” including lists of individuals likely to have discoverable information, copies or descriptions of information that a party may use to support its claims or defenses and the opportunity to inspect and copy damage computations and relevant insurance agreements. Certain classes of cases are exempted from the disclosure requirements, and as a practical matter, it is not uncommon for parties to waive these requirements or postpone them by agreement.

The 2006 Amendments merely added electronically stored information to the mix of disclosures, which was also reflected in the many local rules discussing the topic. Thus, Wyoming Federal District Court Local Rules requires parties to disclose in “initial discovery (self-executing routine discovery) the computer based evidence which may be used to support claims or defenses.”

States were not quick to adopt this innovation in their civil rules when initially added to the Federal Rules, with the possible exception of

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111 Advisory Committee Comments (2009), TENN. R. CIV. P. 26.06. In Gorgen v. Brecht, 2002 Minn. App. LEXIS 539 (C.A. Minn. 2002), the appellate court reversed an ex parte order enjoining the disposition, destruction, damage, mutilation, transfer, relocations, change, alteration, modification, copying or deletion of documents “electronic or otherwise” pertaining to a complaint of misappropriation of confidential business information as an abuse of discretion of the trial court.
112 A nationally uniform practice for initial disclosure was mandated by the 2000 Amendments. The 2006 Amendments amended Rule 26(a)(1)(A)(ii), but not subsection (iii), to explicitly require disclosure of information in the form of electronically stored information in addition to documents.
113 Local Rules sometimes permit parties to “decline to provide” certain types of core information when otherwise provided for in specialized rules. See, e.g., W.D. PA. LPR 2.5 (2010)(patent claims). Those rules often provide for additional disclosures because of the fact that patent litigation “differs from most other civil litigation.” See Preamble, N.D. Ill, Patent (2010).
114 Fed.R.Civ. P. 26(f)(3)(A) identifies the timing of initial disclosures as one of the items to be covered in the “discovery plan” submitted to the Court prior to the initial scheduling conference.
115 Wyo. U.S.D.C.L.R. Rule 26.1 (2010)(“It is the policy of this District that discovery shall be open, full and complete within the parameters of the [FRCP]”).
116 A major exception is Arizona in ARIZ. R. CIV. P. 26.1 (2010). See Associate Justice Hurwitz, Arizona Supreme Court, Possible Responses to the ACTL/IAALS Report: The Arizona Experience, 4 (2010), copy at http://civilconference.uscourts.gov/ (scroll to Panelist Papers, Perspectives from the States)”[t]he scope of disclosure required” in Arizona is “much broader than that provided under the later enacted (and
domestic relations courts, and only Oklahoma appears to have acted to do so recently. Thus, the impact of the 2006 amendments at the state level has been limited to the addition of ESI to some of the rules that otherwise require such disclosures.

Expanded use of voluntary exchanges of discoverable information about claims and defenses in the form of ESI has never been proposed as a panacea to discovery concerns. Indeed, anecdotal evidence given by participants (and captured in some of the Papers) at the Duke Litigation Conference indicated that parties do not regard the current form of the initial disclosure process as particularly useful and either ignore it, or agree to postpone it until the normal discovery process.

However, as noted above, there is a related, but in some respects distinctly different emphasis, on early disclosure of technical information relating to systems and form of production by producing parties and the reciprocal obligation of requesting parties with regard to plans for discovery.

(6) Discovery - General

Discovery in state and federal courts is typically accomplished by requests for production, interrogatories, requests for admission and oral depositions. A party may seek to secure ESI which is in the “possession, custody or control” of another party or, relying upon subpoenas, a non-party.

Discovery in Federal Courts is limited to matters that are relevant to any party’s “claim or defense,” with the ability, for good cause, to secure

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117 12 O.KA. ST. § 3226 (2)(a)(making available “the documents or other evidentiary material” on which damage computations are based). Disclosure of “other evidentiary material” is apparently sufficiently broad to include “electronically stored information.”

118 Compare URCP Rule 26(a)(1)(B) & (C)(requiring initial disclosure of discoverable “data compilations, electronically stored information, and tangible things”) with WY. R. CIV. PROC. RULE 26(a)(identical to federal rule but without reference to electronically stored information), (e)(1.1)(initial disclosures in divorce actions) and NEV. R.C.P. 16.2(2)(requiring parties to divorce’).

119 See, e.g., USDC DNJ LOCAL CIV. R. 26.1(d)(1), supra, (“Duty to Investigate and Disclose”) and also 26.(d)(2)(“Duty to Notify”)(requiring party seeking ESI to notify, by the time of the R. 26(f) conference, the categories of information which may be sought in discovery).

120 See, e.g., K.S.A. § 60-234(c) (2009)(“person not a party to the action may be compelled [by subpoena] to produce documents, electronically stored information, etc.”).
any matter relevant to the subject matter involved in the action.”

In contrast, however, most states still maintain the traditional standard that discovery may be obtained on any matter, not privileged, relevant to the subject matter.

The scope of initial or “first-tier” ESI discovery is limited in Federal court by Rule 26(b)(2)(B) to information located on accessible sources, although a procedure exists for requiring production from inaccessible sources based on a showing of “good cause.” While most states that have acted have also adopted this approach, some states, such as California, have made this a basis for an objection, not a restriction on scope. This topic is discussed separately below.

Federal and state procedural rules typically require that discovery filings must be signed by an attorney certifying, pursuant to provisions analogous to Fed. R. Civ. P. 26(g), that the filing is not ‘for any improper purpose” and that any request is ‘not unreasonable or unduly burdensome or expensive, given the needs of the case.” The signature also constitutes a certificate that counsel has undertaken reasonable inquiry to ascertain adequacy of compliance by the party. Some courts construe this requirement to obligate counsel, for example, to “take appropriate measures to ensure that the client has provided all information and documents which are responsive to discovery requests.”

Sedona Principles 8 and 9 suggest that the “primary source” of ESI in discovery should be “active data and information,” not disaster recovery backup tapes and, “[a]bsent a showing of special need and relevance,” a responding party need not “preserve, review, or produce deleted, shadowed, fragmented, or residual [ESI].” Initially, prior to the 2nd Edition, Sedona

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122 Ala. R. Civ. P. 26(b)(1)(2010); Cal. Code Civ. Proc §2017.010 (“if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence”), 12 Okla. St. § 3226 (B)(1)(2010); MCR § 2.302(B)(1); N.M. Dist. Ct. R. C. P. 1-026(B)(1) (2010); Tenn. R. Civ. P. 26.02(1)(2010); URCP Rule 26(b)(1)(2010); V.R.C.P Rule 26(b)(1)(2010); but compare M.R.C.P. Rule 26(b)(1) (“relevant to the issues raised by the claims or defenses of any party”).
124 Cache La Poudre Fees v. Land O’Lakes, 244 F.R.D. 614 (D. Colo. 2007)(assessing $5000 monetary sanction under Rule 26(g). In the case of In re Qualcomm, 2010 WL 1336937 , at *6 (S.D. Cal. April 2, 2010), a court refused to apply this principle to sanction counsel for failures of production where, the inquiry “although flawed” was reasonable given that the client had “misled” counsel).
Principle 12 expressed a mild presumption against the need to produce metadata, which was lightened somewhat after the 2006 Amendments.125

(7) Discovery – Direct Access

Traditionally, when ESI or documents are sought in discovery, it is understood that the producing party has the duty to select and furnish the information, whether it is furnished physically or via other means. There is no routine right to seek to acquire the information directly by rummaging through the electronic or hard copy filing or storage cabinets of one’s opponent.126 The same point is emphasized by Sedona Principle 6.127

However, under some circumstances, Fed. R.Civ.P. Rule 34(a) and state counterparts, as amended, authorize requests to “inspect, copy, test or sample” ESI, documents and tangible things, including the computers or other electronic devices of the producing party.128 As one Illinois Circuit judge put it, while paper discovery “does not ordinarily extend to ‘dumpster diving,’” cases seeking e-discovery do, in appropriate circumstances, “hold that ‘deleted computer files, whether they be e-mails or otherwise, are discoverable.’”129

Thus, where a requesting party is convinced that deletion of ESI has occurred,130 resulting in missing production of, for example, e-mail, or information from databases, it sometimes seeks orders to compel that it be given direct access to hard drives or systems so that a forensic examination

126 Menke v. Broward County School Board, 916 So.2d 8, at *10 (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”).
127 Sedona Principle 6 notes that responding parties “are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing” their ESI. See Comment 6.a. (“It is the responsibility of the producing party to determine what is responsive to discovery demands”) and Comment 6.c (Rule 34 Inspections). Sedona Principle 11 empowers parties to use “electronic tools and processes” in doing so, as discussed in Section (10)(Production Methodology).
128 A typical example is Neb. Ct. R. Disc. § 6-334(a)(1). As is the case in Rule 34, the authority to serve a request is coupled with instructions on how to serve the request and respond to it in regard to the “form or forms of production. Id., § 6-334(b).
130 Sedona argues that the primary source of discovery should be active information, and while conceding that deleted data may “at one time” have had value, points out that individuals and organizations routinely and “properly” delete or destroy information and documents without business value. Sedona Comment [to Sedona Principle 9, see infra], 9.b (Deleted electronically stored information).
can be undertaken to recover information.\textsuperscript{131} It is not unusual for courts, in hotly contested where employees have left to work for competitors, to grant such relief where evidence of deliberate misconduct exists.\textsuperscript{132}

Requests for inspection and sampling may be objected to for burdensomeness and intrusiveness under Rule 26(b)(2)(B) and 26(c) and their state counterparts.\textsuperscript{133} Mere speculation that information exists which has not been produced are typically held not sufficient.\textsuperscript{134} Inspection and testing of hard drives may raise “issues of confidentiality or privacy” and the right to request it “is not meant to create a routine right of direct access to a party’s electronic information system, although such access might be justified in some circumstances.”\textsuperscript{135} Thus, Maryland Committee Notes indicate that “in most cases there is no justification for direct inspection of an opposing party’s computer system.”\textsuperscript{136}

There have been a number of reported appellate decisions, at both the federal and state level, dealing with the issues of trial court abuse of discretion in granting direct access. Many jurisdictions grant immediate appeal rights to such orders, given their finality. The most prominent

\textsuperscript{131} Forensic examinations of “slack space” may yield fragments from which experts can reconstruct or identify information which has been deleted from active files. The process typically involves creation of a mirror image, review by an expert, with attorney “eyes only” involvement in dealing with potentially privileged information before or after culling with agreed or court determined search terms, often pursuant orders embodying protocols involving FRE 502(b) & (d) provisions providing for non-waiver and for treatment of inadvertently produced materials.

\textsuperscript{132} See Sedona Comment [to Sedona Principle 8], 8.c. (Forensic data collection)(when key employees leave under suspicious circumstances or theft or misappropriate of trade secrates or confidential information may be involved); Vision Point of Sale v. Haas, 2004 WL 5326424 (Ill. Cir. Ct. September 27, 2004)(applying Zubulake and Sedona Principles where issues involve verifying separation of data belonging to former employer).

\textsuperscript{133} These are also used to deal with demands to restore and search disaster recovery backup tapes when the requesting party asserts that there is reason to believe that deleted information may uniquely reside on the storage media but has not been produced. This subject is treated under the discussion of “inaccessible” media, but the applicable principles are closely analogous.

\textsuperscript{134} See John B. v. Goetz, 531 F.3d 448, 460 (6th Cir. 2008)(vacating order of forensic imaging done for preservation purposes since “mere skepticism that an opposing party” has not produced all relevant information is “not sufficient to warrant drastic electronic discovery measures”); accord State v. Wesco, 180 Vt. 345, 356, 911 A. 2d 181 (2006)(assertion that depositions of employees had indicated deletion of emails insufficient speculation which does not “provide any evidence to support its assertion that the alleged emails once existed”).

\textsuperscript{135} Committee Note, Fed. R.Civ.P. 34, Subdivision (a)(2006)(“Courts should guard against undue intrusiveness resulting from inspecting or testing such systems”).

\textsuperscript{136} Comment, MD. RULE 2-422 (2009). The Comment also cites to In re Ford Motor Co, 345 F.3d 1315 (11th Cir. 2003) and to the Sedona Principles (2ed. 2007), Comment 6.c.( Inspection of an opposing party’s computer system under Rule 34 and state equivalents should be the exception and not the rule [because] the issues typically related to the content of the data, not the actual operation of the systems).
example is the Texas Supreme Court decision in *Weekley Homes*, but other have similarly addressed the issues before and after the 2006 Federal Amendments and their state counterparts.

### (8) Discovery Limitations - Accessibility

A key innovation in the 2006 Amendments was the addition of Fed. R. Civ. P. 26(b)(2)(B) to provide what is called a “two-tiered” system of discovery of ESI. Under that approach, a party need not produce information from sources which it has identified as “not reasonably accessible” because of “undue burden or cost” and in the absence of a court order issued for good cause. Its adoption has had “positive impact on how parties manage their discovery responsibilities.”

A party may seek a protective order under Rule from being required to produce information from backup media even where the reason for the information being inaccessible is that it was not preserved at the time the duty to preserve attached. A multifactor test to assess “good cause” to require production is applicable pursuant to the Committee Note.

Most states that have acted have adopted the presumptive limitation on productions from inaccessible sources as part of their e-discovery initiative. Even states that have not adopted the provisions have cited it in determining controversies involving backup media and other inaccessible

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137 In re *Weekley Homes*, 295 S.W. 3d 309 (Tex. 2009)(vacating order of inspection giving complete access to all data stored on devices). See also *Kenneth J. Withers and Monica Wiseman Latin, Living Daily with Weekley Homes*, 51 THE ADVOC. (TEXAS) 23 at *29 (Summer 2010).

138 *See, e.g.*, *Bennett v. Martin*, 186 Ohio App. 3d 412, 428 928 N.E. 2d 763 (C.A. 10th Dist. 2009)(finding abuse of discretion in court order failing to adopt a protocol involving independent computer expert first creates forensic image and retrieves responsive files for first review by producing party counsel before making available to requesting party).

139 The 2006 Amendments to FRCP 34(a) clarified that, in addition to “inspect and copy,” a party may also seek to “test” and “sample.” The Committee Note explains this amendment as necessary because “[t]he current rule is not clear that such testing or sampling is authorized; the amendment expressly permits it.” The Note cautions that this is not meant “to create a routine right of direct access to a party’s electronic information system.”

140 Federal Rule 26(b)(2)(B) provides that “[a] party need not provide discovery of electronically stored information that a party identifies as not reasonably accessible because of undue burden or cost.”


142 *Major Tours v. Colorel*, 720 F. Supp. 2d 587, 619-620 (D. N. J. June 22, 2010)(rejecting “bright-line” rule applying *Zubulake* and Pension Committee by analogy and allowing multifactor tests spelled out in the Committee Notes even if there is some degree of negligent spoliation).
material. Louisiana initially contended that it was implicit in its modified code provisions, but has now included it in the Code itself. New Mexico, on the other hand, has pointedly refused to do so, arguing that it was not needed. California has taken a slightly different course, albeit tempered by final amendments, under which the lack of accessibility is grounds for an objection, but does not presumptively exempt the materials from discovery.

The “identification” requirement is a condition precedent, in most states, to the right to refrain from acting. Alabama requires that the identification be made “to the requesting party,” explaining that it is useful to “make clear that the requesting party is the one to whom these sources of ESI should be identified.” New Jersey appears to have taken a middle course.

An alternative approach, modeled on the 1999 Texas rules, also applicable in Idaho and Mississippi, requires a party to immediately


144 LA. C.C.P. ART. 1462(B)(2)(“[a] party need not provide discovery of ESI from sources that the party identifies, etc.”).

145 The New Mexico Committee Commentary, found at N.M. DIST. CT. R. C.P. 1-026, states that discovery of ESI “should be subject to the same provisions in these rules for motions to compel discovery and motions for protective orders that current govern the discovery of non-electronic information.”

146 See Hon. Maureen Duffy-Lewis & Dan. Garrie, E-Discovery: Federal Rules versus California Rules – the Devil is in the Details, 63 CONSUMER FIN. L. Q. REP. 218, 219-220 (Fall-Winter 2009)(“California legislations upsets the balanced approach the FRCP takes [but] represents a shift from the original proposal [which] some commentators interpreted as putting pressure on defendants to seek protective orders over inaccessible data searches”).

147 CAL. CODE CIV. PROC. § 2031.210; § 2031.210 (d)(“If a party objects to the discovery of [inaccessible] ESI” it “preserves any objections it may have relating to that electronically stored information”); See David M. Hickey and Veronica Harris, California Rules to Amend Inaccessible ESI, THE RECORDER, March 27, 2009, at http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202429426048.


149 Id., Committee Comment (2010), Para. 2; see also URCP Rule 26(b)(2)(2010)(emphasizing need to provide information so other parties can assess the claim of burdensomeness).

150 See N.J. COURT RULES, R. 4:18-1 (2010)(“The party upon whom the request is served may, however, object . . . on the ground of . . accessibility of electronically stored information”).

151 The Texas Supreme Court has interpreted the rule as in harmony with Fed. R. Civ. P 26(b)(2)(B), in the case of In re Weekley Homes, LP, 295 S.W.3d 309 (S.C. Tex. 2009)( courts may “look to the federal rules for guidance” since “[w]e see no different in the considerations that would apply when weighing the benefits against the burdens of electronic-information production”).

152 I.R.C. P. Rule 34(b)(2010)(allowing court to order payment for any extraordinary steps if production ordered over objection).

produce information that is “reasonably available to the responding party in its ordinary course of business,” while objecting to production as which a party cannot “through reasonable efforts” retrieve the ESI or produce it in the form requested. However, absent targeted requests for information covered by the rule, such as information found on sources such as backup tapes, there may be no duty to file an objection.  

Finally, the limitation does not necessarily ban the obligation to preserve the information. Alabama posits that the issue be reviewed on a case-by-case basis in terms of whether “good faith” was exercised in making the decision, citing to its version of the safe harbor rule. As noted in the Committee Note to FED. R. CIV. P 37(e), “[o]ne factor is whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources.” Sedona has issued a targeted Commentary which seeks to articulate the consideration involved in making preservation decisions for information which is deemed to be not reasonably accessible.

(9) Discovery Limitations - Proportionality

Under both federal and state rules, courts are required to limit the frequency or extent of discovery when “the likely burden or expense of the proposed discovery outweighs the likely benefits.” This restraint is known as the “proportionality” principle and it is increasingly seen as a restraint on the duty to preserve as well as rule-based discovery.

154 MRT v. Vounckx, 299 S.W.3d 500, 508 (C.A. Tex, 2009)(it was reasonable not to interpret a request for production as encompassing backup media where the parties failed to meet and exchange reciprocal information about ESI and anticipated discovery.).
155 Committee Comments to Adoption of Rule 37(g), ALA. R. CIV. P. Rule 37(g).
157 See Sedona Conference® Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible, 10 SEDONA CONF. J. 281 (Fall 2009)
158 See, e.g., N.M DIST. CT. R. C. P. 1-026; CAL. CODE CIV. PROC. § 1985.8 (h).
159 Fed. R. CIV. P. 26(b)(2)(C)(“the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties resources, the importance of the issues at state in the action and the importance of the discovery in resolving the issues.”).
160 Hon. Paul W. Grimm, Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions, 37 U. Balt. L. Rev. 381, 405 (2008)(“there is an implicit notion that the scope of preservation [before litigation commences] should somehow be proportional to the amount in controversy and the costs and burdens of preservation.”); See also Sedona Conference® Commentary on Proportionality in Electronic Discovery, supra, 11 SEDONA CONF. J. 289 (2010)(“The burdens and costs of preservation of
obligations. Counsel signature of discovery filings constitutes a certificate that requests or responses are neither unreasonable nor unduly burdensome, as assessed against proportionality principles.\(^{161}\)

Assessment of proportionality in specific contexts, however, can be difficult, especially in litigation involving non-monetary “values” created by statutes or involving non-monetary disputes. There is, for example, little uniformity in how the “cost-benefit” factors are articulated, as shown by the subtle differences between the definitions used in the Sedona Principles,\(^{162}\) state rules\(^ {163}\) and the Committee Notes to the federal rules.

As part of the 2006 Amendments, a reference to proportionality was explicitly included in the process applicable when a court considers production from inaccessible sources of information.\(^ {164}\) However, the principle applies to all types of discovery, not just e-discovery involving inaccessible sources.\(^ {165}\) Arkansas explicitly states that the principle applies “even [to discovery sought] from a source that is reasonably accessible.”\(^ {166}\)

Tennessee has adopted the most extensive articulation of the principle (said to be adapted from Guideline 5 of the CCF Guidelines) focusing on whether production is warranted under a motion to compel, with allusions to determining if the production is not “reasonably warranted.”\(^ {167}\)

One emerging issue is whether proportionality limitations can be invoked against excessive demands for preservation of potentially

\(^{161}\) Under Fed. R. Civ. P. 26(g) and its state counterparts, counsel signing a discovery related instrument certifies that, to the best of their belief and a reasonable inquiry, the action taken or called for is not unduly burdensome or expensive, considering the needs of the case, prior discovery, the amount in controversy and the importance of the issues at stake.

\(^{162}\) SEDONA PRINCIPLE 2 (2\(^{nd}\) Ed. 2007)(“when balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard in Fed. R. Civ. P. 26(b)(2)(C) and its state equivalents, which require consideration of the technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing electronically stored information, as well as the nature of the litigation and the amount in controversy”).

\(^{163}\) See, e.g., 12 OKLA. ST. § 3226(G)(3)(“given the nature and complexity of the case, the discovery, amount in controversy and other values at stake in the litigation”).

\(^{164}\) FED. R. CIV. P. 26(b)(2)(B)(2010)(the court may order production if the requesting party shows good cause “considering the limitation of Rule 26(b)(2)(C).”).

\(^{165}\) See FED. R. CIV. P. 26, Committee Note, Subdivision (b)(2)(2006)(“The limitations [of the proportionality principle in Rule 26(b)(2)(C)] apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.”)

\(^{166}\) ARCP 26.1(Arkansas “Limitations on Discovery”).

\(^{167}\) TENN. R. CIV. P. 37.06(1)(2010).
discoverable information. Historically, an overt cost-benefit analysis has been absent from an analysis of preservation issues, a trend which has been reversed in recent Sedona Conference Commentaries and other writings.

The author has been a strong proponent of the view that preservation obligations already are (or certainly should be, by analogy) tempered by proportionality, a position shared, increasingly, by courts. There is a close and intimate relationship between preservation and production in discovery, and the barriers, if any, are increasingly irrelevant when the burdens and costs are being assessed.

The issue is particularly acute before suit is filed. In the only reported case where restraints on the duty to preserve to a burdensome demand were sought from a court before litigation was commenced, the court blinked. In Texas v. City of Frisco, the court “decline[d]” to issue an advisory opinion on “what actions by the State would constitute good faith as to the City’s [preservation demand]

In contrast to the federal system, there is no institutional impediment at the state level for failing to apply proportionality standards to pre-litigation requests for guidance by litigants facing burdensome preservation demands. A state could craft a rule authorizing its courts to issue protective orders, analogous to actions under Fed. R. Civ. P. 27, when litigation is contemplated, coextensive with any rules dealing with preservation obligations.

(10) Metadata and “Form” of Production

“Metadata is not addressed directly in the [Federal Rules] but is subject to the general rules of discovery. Metadata thus is discoverable if it

\[168\] See, e.g., the recently released (for public comment) Sedona Conference Commentary on Proportionality in Electronic Discovery, reproduced at Sedona Confidential, 289 (2010).

\[169\] Thomas Y. Allman, Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments, 13 Rich. J. L. & Tech. 9, at *26 (2007)(“just as the duty to produce is tempered by the principle of proportionality, so should courts take the same approach in regard to preservation decisions”).


\[172\] It might be possible to amend Federal Rule 27, however, to authorize a movant to seek relief to “respond to preservation demands concerning discovery before an action is filed.” Rule 27 actions do not require an independent basis for federal jurisdiction as long as the contemplated or foreseeable action is itself authorized by statute. Jay E. Grenig, Taking and Using Depositions Before Action or Pending Appeal in Federal Court, 27 Am. J. Trial Advoc. 451, 454-55 (Spring, 2004).
is relevant to the claim or defense of any party [or the subject matter, in most state courts] and is not privileged.” 173 The Committee Note to Rule 26, Subdivision (f)(2006) mentions that “metadata” and other material, such as “embedded data” or “embedded edits” - material which is not “apparent to the creator or readers” - is discoverable and should be discussed early.174

Instead, Fed. R. Civ. P. 34(b) and most of its state counterparts (and the related Committee Notes)175 provide that absent agreement or a court order, ESI should be produced in either the form in which the information is “ordinarily maintained” or in a “reasonably usable” form.176

Thus, form of production should be discussed at both the meet and confer [if applicable] and the scheduling conferences.177 Revised Sedona Principle 12 (2nd Ed. 2007)178 makes the point that the need for production of metadata in a particular case depends on the circumstances, backing away from its original advice in the First Edition that a mild presumption against production of metadata existed.179 The underlying intent, however, is that

173 Aguilar v. Dept. of Homeland Security, 255 F.R.D. 350, 359 (S.D. N.Y. Nov. 21, 2008)(discovery of metadata is also subject to “balancing test” requiring a court to weigh “probative value of proposed discovery against its potential burden”).
174 Metadata” or “data about data” is described more fully in the case law and in Sedona Principle 12 (2nd Ed. 2007), the leading best practice guidance, which acknowledges “at least several distinct types, including substantive (or application) metadata, system metadata, and embedded metadata.” Aguilar, supra, 255 F.R.D. 350 at 354 – 355 (describing types of metadata in some detail).
175 The Committee Note to Rule 34(a) and 34(b)(2006) does not explicitly discuss the implications of each type for production of metadata, apparently because the Committee preferred that parties address the issue. See Thomas Y. Allman, The Impact of the Proposed Federal E-Discovery Rules, supra, 12 RICH. J. L. & TECH. 13, *21 (2006)(“Neither default form [of production listed in Rule 34(b)] is intended to[automatically] mandate production of metadata or embedded data”). See the Committee Note to Rule 26(f).
176 Comment (2009), TENN. R. CIV. P. 45.08(1)(C)(quoting Guideline 6 to the effect that the court “should select the form of production in which the information is ordinarily maintained or in a form that is reasonably usable”). In Ohio, a party may produce information in the form in which it is “ordinarily maintained [only] if that form is reasonably useable.” OHIO CIV. R. 34(B)(3)(2010). Virginia and Alaska rules make the same point.
177 It is also wise to discuss how to handle the inadvertent production of privileged or confidential information which may be included in embedded metadata, since “scrubbing technology that removes all metadata may violate discovery rules or a subpoena by altering the document a party is required to produce.” Steven L. Nichols, Metadata Minefield, Utah Rules, 22- DEC UTAH B. J. 14 (Nov./Dec, 2009)(primarily addressing ethical issues involved in non-litigation context of mining metadata).
178 SEDONA PRINCIPLE 12 (2nd Ed. 2007)(the choice should “[t]ake into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case”).
parties, not courts, should make the tough choices that fit the particular
discovery needs of a case.\footnote{Sedona Principle 12 (2\textsuperscript{nd} Ed. 2007), Comment 12(c)("to the extent that the parties believe that production of metadata is needed because of either relevance or usability, that should be raised at [the] conference as it will be a consideration in determining both the need to preserve information in a particular form and the ultimate form or forms of production"); Aguilar, supra, 255 F.R.D. 350, 359("Metadata has become ‘the new black,’ with parties increasingly seeking its production in every case, regardless of size or complexity").}

Ultimately, of course, the courts must provide finality if the parties, after good faith and cooperative efforts, are unable to resolve the matter. Alabama states that “motion practice is available to resolve the issues.”\footnote{ALA. R. CIV. P. 34, Comment (2010)(also quoting the full text of the federal Committee Note).} The court is “not limited” by the previous choices - or even the choices noted in the Rule itself.\footnote{FED. R. CIV. P 34, Committee Note, 2006 Amendment, Subdivision (b).} The determination in a specific case is very fact-specific, and may vary within a given case depending upon the particular type of information sought.\footnote{Aguilar, supra, 255 F.R.D. 350 at 359("Metadata has become ‘the new black,’ with parties increasingly seeking its production in every case, regardless of size or complexity").}

The form in which information is “ordinarily maintained” is typically understood to be its “native format” with full set of metadata. This is often contrasted with production utilizing an image of the ESI in static formats where the native format has been converted to, for example, TIFF or searchable PDF, with a load file to provide agreed upon search capability and which is capable of being (easily) bates-number stamped. Thus, the Maryland Committee Notes speak of the need to chose, at the scheduling conference, “the form of production, such as PDF, TIFF, or JPEG files, or native form, for example, Microsoft Word, Excel, etc.”\footnote{Committee Note, MD. RULE 2-504.1(c).}

Production in a static form, with load file may be a “reasonably useable” form, depending on the circumstances, in part because of ease of

shape decision to produce in native format with full metadata); Aguilar, supra, 255 F.R.D. 350, 356-357 (summarizing Sedona commentary on “advantages and disadvantages of various production options”).
Recent cases seem to reject this as a justification for static formats and routinely favor production in native format if the relevance is shown, given that metadata must be affirmatively removed from such images, thus undercutting the burden argument.

One “bright-line” conclusion is that a party should not fail to identify the relevance of any metadata sought and avail itself of the opportunity in the early planning conferences to discuss the matter. Absent such an effort, a court is likely to deny the opportunity to seek the full measure of metadata to which the requesting party may belatedly decide to claim entitlement.

(11) Production Methodology (Search & Review)

The Rules do not prescribe the methods to be followed in in identification, preservation, collection, processing and producing discoverable information, regardless of its form. Discovery obligations are framed typically in terms of the tools which are available and typically do not specific the method to be followed in meeting them.

Electronically stored information is uniquely susceptible to duplication, exotic forms of storage and confusing issues surrounding the form of storage and production and the management of the processes needed to carry out discovery.

The obligation of a party is to proceed in a reasonable and good faith manner, with a coherent strategy, but considerable discretion exists in its execution. There is no requirement, for example that each and every potential piece of evidence be manually reviewed. Thus, Sedona Principle 11 provides that a party may satisfy its good faith obligations by using electronic tools and processes, such as data sampling, searching or use of selection criteria to identify ESI reasonably likely to contain relevant information.

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185 In Chevron v. Stratus Consulting, 2010 WL 3489922 (D. Colo. Aug. 31, 2010)(holding that searchable pdf was not a reasonably usable form because the respondents “were on notice that authorship and other subsumed details of the electronic documents requested would be at issue”).


This is particularly true in the search for responsive electronic information by means of winnowing techniques ranging from de-duplication and culling to targeted searches based of advanced concept or predictive coding searches.\textsuperscript{188} These steps are usually preparatory to what can be the single most egregious expense associated with volumes of ESI, namely the “time it takes for a human being to review each electronic record in a review set to decide if it is relevant and/or privileged.”\textsuperscript{189} At the Duke Conference, it was argued that use of automated or non-human techniques could reduce these costs by substantial margins.

The use of automated search techniques based on keyword searching, individually or using Boolean connectors are common and, with caveats, generally acceptable for some, but by no means all, purposes. Sedona has published a variety of learned Commentaries focusing on the advantages to the parties and the courts of the use of such techniques, as compared to manual techniques.\textsuperscript{190}

More advanced techniques, and cases involving large volumes, typically require expertise and assistance, which is often purchased on a case-by-case basis. As a result, a large and costly industry has been built up to deal with the unique issues involved, which requires management\textsuperscript{191} and can raise subtle issues of the allocation of responsibility among inside and outside counsel and between a party and its counsel.

Increasingly, courts demand that the selection and application of specific methods will be openly discussed as part of the early planning process.\textsuperscript{192} Ideally, this will include the methods and protocols used or to be used in searches, reducing (“culling”) volumes and data and in second stage privilege reviews. The issues around the form or forms in which information should be preserved and produced is also a central topic\textsuperscript{193} as is

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\item Trenchard and Berrent, The Defensibility of Non-Human Review, Digital Discovery & e-Evidence\textsuperscript{®} (February 3, 2011), BNA (available by subscription), p. 1.
\item The Sedona Conference\textsuperscript{®} Commentary on Achieving Quality in the E-discovery Process (2009).
\item See Sedona Best Practices for the Selection of Electronic Discovery Vendors (June 2007).
\item In re Seroquel Products Liability Litigation, 2007 WL 2412946 (M.D. Fla. Aug. 21, 2007).
\item As noted below, the federal and state rulemakers punted the issue to the parties, and, ultimately, the courts by focusing on the “form or forms” of production and ignoring the metadata issue. Sedona Principle 12, as amended, largely fills that void along with the evolving case law.
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any provision for clawback of production of privileged or work product information. Sedona has issued a very practical “Nutshell” which assists parties in negotiations of such protocols.¹⁹⁴

Courts are impatient with and intolerant of failures to do so. As is the case generally, see Section 3 (‘‘Planning Conferences’’), the Sedona Cooperation Proclamation has been enthusiastically adopted by a number of state and federal courts as a way of emphasizing the advantages of this approach, which is tailored to and largely dispositive of the issues.

The extent to which counsel are responsible for the accomplishment of accurate search and review has varied, and Rule 26(g)’s certification requirement is often cited as a reason, together with ethical constraints, to govern. The author contends, however, that there is or should be a mild presumption that in the absence of egregious counsel conduct, the responsibility should rest on the party. However, Rule 37’s sanction provisions – and cases decided under inherent power where “bad faith” exists – often focus on counsel.

While no formal proposals have been made at the state or federal level to specify a methodology to be applied in any of the phases of production, the author has toyed with suggestions for relevant amendments.

(12) Cost-Allocation (Shifting)

Costs associated with discovery – including any incremental costs of preservation - are typically assumed by the parties providing the information, although in both Federal and State jurisprudence, subject to the power of a court to issue protective orders to deal with undue burden or expense. Allocation or shifting of costs is explicitly treated in procedural rules only in Texas,¹⁹⁵ Mississippi¹⁹⁶ and Idaho.¹⁹⁷

¹⁹⁵ TEX. R. CIV. P. 196.4 (2010)(“the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce” electronic or magnetic data ordered to be produced over objection that is not reasonably available)(emphasis added).
¹⁹⁶ Under M.R.C.P 26(b)(5)(Electronic Data), if a court orders production of information which a party cannot produce with “reasonable” efforts, the court “may also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information”).
¹⁹⁷ I.R.C.P. Rule 34(b)(2)(same).
By statute, California requires that the reasonable costs of translating data compilations into a useable form be at the requesting parties expense.\(^{198}\) Another series of statutes apply to court orders over objection to producing ESI from inaccessible sources.\(^{199}\) In New York, some lower courts apply a “requester-pays” found in New York jurisprudence to ESI.\(^{200}\) However, other lower courts have held that a better view is that this doctrine is confined to instances where the ESI is not readily available.\(^{201}\)

However, most states adopting e-discovery amendments have provided, as does Fed. R. Civ. P. 26(b)(2)(B), that a court may “specify conditions for the discovery” (emphasis added), when production is ordered from inaccessible sources for good cause, which is generally understood to include cost-shifting.\(^{202}\)

It was noted at the Duke Conference that cost-shifting, under any rationale, was rarely invoked in commercial litigation. Some participants argued that automatic allocation would force requesting parties to tailor their requests more closely to what is actually needed in litigation, in part prompted by the Supreme Court’s assertion in *Twombly*\(^{203}\) that under the current system, there was very little a court could do to contain costs of discovery by case management.\(^{204}\) However, the issue was not directly

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\(^{198}\) Cal. Code Civil Proc. §§ 1985.8(g)(subpoenas); 2031.280(e). In Toshiba America Electronic Components, Inc. v. Superior Court, 124 Cal App. 4th 762, 21 Cal. Rptr. 3d 532 (C.A.6th Dist. 2004), the Court of Appeals for the Sixth District of California interpreted the predecessor version of the statute [§2031(g)(1)] to require a requesting party to share in the reasonable expenses of restoring backup media. Compare Sara Hoffman Jurand, California E-Discovery Statute Doesn’t Mandate Cost-Shifting, Court Says, 41-FEB Trial 73 (February 2005). In Connecticut, a court ordering disclosure of electronic data in an “alternative format” may enter an order compelling one or more parties to pay the cost of preparing the disclosure. CONN. PRACTICE BOOK, § 13-9 and § 25A-17 (2010).

\(^{199}\) California added provisions in 2009 which permit a court to allocate the “expense of discovery” if it orders production of information from inaccessible sources. See §§1985.8(f)(subpoenas); 2031.0609(e); 2031.310(f).


\(^{201}\) See Committee Note, Rule 26 (b)(2)(2006)(part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible.”); *accord*, Michigan Staff Comments, MCR 2.302 (2010)(a court may “shift the cost of discovery to the requesting party”; Commentary, LA. C.C.P. ART. 1462 (2010)(trial court may “shift all or part of the cost or burden of producing electronically stored information to the requesting party when considering a motion to compel”).


\(^{203}\) See Edward D. Cavanagh, *Twombly*, the Federal Rules of Evidence and the Courts, 82 St. John’s L. Rev. 877,882 (2008)(“there is little that a judge can do to contain pretrial costs in a federal action and...
addressed in the post-Conference reports to the Standing Committee or the Chief Justice.

An emerging issue at both the federal and state level is whether the incremental costs of preservation caused by burdensome demands warrants cost shifting. It has been argued, for example, that New York state could regard preservation expenses as “part of the discovery request” and thus subject to the “requesting party pays” principle said to be applicable in New York discovery.\(^{205}\)

\(\text{(13) Privilege waiver}\)

The costs of review for relevance and privilege can constitute a substantial percentage of overall discovery burdens when the volume of electronically stored information to be reviewed is substantial. A major reason for the concern expressed at the Litigation Conference, for example, was the impact of these costs in some types of cases.\(^{206}\)

The 2006 Amendments sought to address this issue, in part, by providing, in Fed. R. Civ. P. 26(f) and in Rule 16(b), an invitation for parties to address the issue of facilitating claims of inadvertent production by agreement, thereby encouraging more rational and cost-effective pre-production practices.

This approach has been widely adopted by states. Arizona explained that when “the amount of documents and electronic data to be disclosed is voluminous, an agreement among the parties minimizing the risk associated with the inadvertent production of privilege or otherwise protected material may be helpful in lessening discovery costs and expediting litigation.”\(^{207}\)

\(\text{\textsuperscript{207}}\) State Bar Committee Notes (2008), ARIZ. R. CIV. P. 16 (b)(iii)(requiring discussion of “adopting any agreements the parties reach for asserting claims of privilege or of protection as to trial preparation materials after production”).
As an alternative or backup process, the 2006 Amendments also added, in Rule 26(b)(5)(B), a procedure for making a claim of privilege after production which required retention and nonuse pending any court resolution of the claim. This requirement does not, however, impact the ultimate decision as to whether a particular claim of privilege was valid or whether the inadvertent or “regretted” production constituted a waiver. It also did not address the highly idiosyncratic issues around the professional conduct obligations associated with the topic.

Subsequently, Congress, acting on the recommendation of the Evidence Committee, enacted an amendment to the Federal Rules of Evidence (FRE 502) to provide a uniform approach to waiver issues involved in inadvertent production and, equally important, the authority of a federal court to bind both parties and non-parties - whether in state or federal courts - to court ordered processes on the topic.

A number of states, including Arizona, Arkansas, Iowa, Louisiana, Maryland, New Hampshire, Oklahoma and

208 Advisory Committee Comment, MINN. R. CIV. P. 26.02 (noting that a claim of privilege under Rule 26.02(f)(2) “does not excuse the inadvertent or regretted production”).

209 Oklahoma explicit states in its equivalent rule that “[t]his mechanism is procedural only and does not alter the standards governing whether the information is privileged or subject to protection as trial preparation material or whether such privilege or protection has been waived.” See 12 OKLA. ST. § 3226(5)(2010).


211 See Rajala v. McGuire Woods, 2010 WL 2949582 (D.Kan. July 22, 2010)(approving protective order, over objection, whereby inadvertently produced privileged information may be retrieved without proof that the party took the reasonable steps normally required under 502(b) to avoid waiver).


213 A.R.C.P. 26(b)(5)(D) and A.R.E. 502 (providing non-waiver for inadvertent production generally and selective non-waiver for production made to state agencies).

214 IOWA RULE 5.502, effective June 1, 2009, available at [http://www.iowacourts.gov/wfData/files/CourtRules/40209RptreIREvid5_502_5_615_5_803_4&7.pdf](http://www.iowacourts.gov/wfData/files/CourtRules/40209RptreIREvid5_502_5_615_5_803_4&7.pdf)

215 LA C.C.P. ART. 1424(C) & (D) (2007)(non-waiver rule dealing with inadvertent disclosure).

216 MD. R. C.P. ART. 2-402(e)(3)(non-waiver rule dealing with inadvertent disclosure and providing for binding effect of court orders on non-parties when based on agreements).

217 N.H. RULE OF EVID. 511 (privilege claim not “defeated” by “disclosure that was made inadvertently during the court of discovery”).

218 12 OKLA. ST. § 2502 (Attorney-Client Privilege)(Chapter 40 of Title 12 (“Civil Procedure”))(non-waiver of inadvertent disclosures provision for selective non-waiver of attorney-client or work product matter furnished to governmental agencies).
Washington\textsuperscript{219} have also enacted rules governing non-waiver in a variety of instances, including inadvertent production.\textsuperscript{220}

Arkansas Oklahoma and Washington have authorized selective non-waiver for disclosures made to governmental entities, an approach dropped from the final version of the FRE 502.

\textbf{(14) Discovery Sanctions - General}

Sanctions for failures to meet discovery obligations including those involving “spoliation”) in state and federal courts, sometimes rest on Federal Rule 37\textsuperscript{221} and its state counterparts\textsuperscript{222} and sometimes on the exercise of inherent powers not dependent on rules or statutes. In addition, those states\textsuperscript{223} which have adopted provisions analogous to Federal Rule 26(g), increasingly cite it when there has been an inadequate inquiry of clients as to compliance with discovery requirement. California, which did not enact Rule 26(g),\textsuperscript{224} has nonetheless enacted a statute which permits sanctions for “misuse” of the discovery process.\textsuperscript{225}

Egregious discovery misconduct is sanctionable in degrees which often varies according to the degree of prejudice by the late production or incomplete production, often by analogy to the spoliation cases involving ESI.\textsuperscript{226}

\textsuperscript{219}\text{WASH. E.R. 502 (Eff. September 1, 2010)(selective non-waiver provision for disclosures to state agencies in addition to providing non-waiver for inadvertent disclosure and the controlling effect of court orders and agreements).}


\textsuperscript{221}Under Fed. R.Civ.P. 37(b), sanctions are available for one who “fails to obey an order to provide or permit discovery” and under Rule 37(c), a refusal to provide information required by Rule 26(a) [or to supplement same as needed] is sanctionable.

\textsuperscript{222}In California, for example, a failure to comply with an order granting “inspection, copying, testing, or sampling” is sanctionable by orders that are “just, including the imposition of an issue sanction, an evidence sanction, or a termination sanction” in lieu of or in addition to a monetary sanction. \text{CAL. CODE. CIV. PROC. § 2031.300 (c).}

\textsuperscript{223}Hilten v. Bragg, 2010 WL 5559603 (Mont.) (S.C. Mont. Dec. 21, 2010)(rejecting argument that failure to sanction attorney shows they are being held “to a higher standard of legal knowledge than their attorney”).

\textsuperscript{224}See Estate of Manuel, 187 Cal. App. 4\textsuperscript{th} 400, 113 Cal.Rptr. 3d 448, 451, n. 28 (2\textsuperscript{nd} Dist. C.A. Aug. 10, 2010)(“California has no parallel statute to Rule 26(g). An attorney need not sign a response to requests for admission ... ”).

\textsuperscript{225}Cal Code Civ. Proc. §2023.010.

\textsuperscript{226}In Nycomed U.S. v. Glenmark Geneerics, 2010 WL 3173785, at *3 (E. D. N.Y. Aug. 11, 2010), the court fined a party $125K for late delivery of ESI, citing \textit{Pension Committee}, “even [though] the misconduct involves late disclosure, as opposed to spoliation”).
(15) Sanctions – Counsel Responsibility

The culpable failure to meet discovery obligations attributable to counsel – as set forth in Rules 11, 26(g) and 37 – is remedied in Federal and state courts by the assessment of attorney’s fees or monetary sanctions jointly with the client or individually. Where counsel is arguably involved in spoliation courts may refer counsel to local state bar authorities or, in some cases, deal directly with the issue. See ABA Model Rule of Prof. Conduct, 3.4(a)(a lawyer shall not unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or counsel or assist another to do such an act).

(16) Sanctions – Spoliation

Sanctions for spoliation – or, more precisely, the fear of sanctions – which are not governed by rulemaking – have had a large and arguable inappropriate impact on pre-litigation conduct. Spoliation – defined as the loss, damage or destruction of evidence at the time a duty to preserve exists – are typically not covered by Federal Rule 37 or its state counterparts in the absence of a prior order mandating their preservation. There are exceptions resting on the concept that if spoliation prevents a party from fulfilling discovery requests, rule-based sanctions still apply.


\[228\] A single plaintiff action led to a $29.3 million dollar jury verdict after an adverse inference instruction despite good faith attempts to institute an early litigation hold in Zubulake V, 229 F.R.D. 422 at 440 (S.D. N.Y. 2004)(mandating further steps for counsel to take to avoid sanctions). Under Fed. R.Civ.P. 37(b), sanctions are available for one who “fails to obey an order to provide or permit discovery” and under Rule 37(c), a refusal to provide information required by Rule 26(a) [or to supplement same as needed] is sanctionable.

\[229\] In California, for example, a failure to comply with an order granting “inspection, copying, testing, or sampling” is sanctionable by orders that are “just, including the imposition of an issue sanction, an evidence sanction, or a termination sanction” in lieu of or in addition to a monetary sanction. CAL. CODE. CIV. PROC. § 2031.300 (c).


\[232\] See ARCP Rule 37(d)(sanctions where a party “fails” to “serve a written response to a request for inspection submitted under Rule 34, after proper service of the request”); See Comment, WASH. KING SUPER. CT. LCR 37(d)(“Failure of part . . to Respond to Request for Production or Inspection”)(under paragraph (d) a party “may not withhold discoverable materials.”)
Maryland, for example, even though the rules “do not deal explicitly with the destruction of evidence,” sanctions are deemed appropriate since unavailability renders requests for production “hollow” and any orders to produce would be “moot.”

More typically, state and federal courts routinely exercise their inherent power to control litigation to sanction for a failure to preserve. Some state courts treat the inherent power as a supplement to civil rules on sanctions. In most cases, there is a close – or often congruent – relationship between evidentiary principles relating to the use of the destruction of information at trial and the doctrines applicable to spoliation sanctions. In California, for example, the willful suppression of evidence supports an instruction that a jury may presume it to have been unfavorable “on the theory that destruction of documents suggests an awareness that the evidence is weak or adverse to the destroying party.”

Some states also acknowledge and enforce independent tort actions for first-party negligent spoliation under which a claimant seeks to recover damages in addition to or in place of court-ordered sanctions. Most states refuse to do so, arguing that sanctions are sufficient. Other states

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233 See MD. RULE 2-432 (a)(“Immediate Sanctions for Certain Failures of Discovery”) (providing for sanctions for failure to serve a response “to a request for production or inspection under Rule 2-422, after proper service”).

234 Klupt v. Krongard, 126 Md. 179, 194, 728 A.2d 727 (1999)(“Destruction of evidence such as was found in this case would render hollow any response to a request for production, even if timely filed, just as it would render an order to compel moot,” citing to Turner v. Hudson Transit Lines, 142 F.R.D. 68, 72 (S.D. N.Y. 1991)); accord Tuck v. Godfrey, 1999 UT App. 127, 981 P.2d 407 (C.A. Utah 1999)(Rule 37(d) applies where material cannot be found and party failed to seek protective order under Rule 26(c)); La v. Nokia, 2010 WL 4245533 at *3 (CA 2nd Dist. Oct. 28, 2010).

235 Chambers v. NASCO, 501 U.S. 32, 46 (1991)(the sanctioning scheme of the rules does not displace “the inherent power to impose sanctions”).

236 Slesinger v. The Walt Disney Company, 155 Cal. App. 4th 736, 66 Cal. Rptr. 3d 268 (2nd App. Dist. Sept. 25, 2007)(no constitutional or legislative impairment to courts authority under Civil Discovery Act which “supplements, but does not supplant, a court’s inherent power to deal with legislative abuse”).


238 Torres v. El Paso Electric Company, 127 N.M. 729, 987 P.2d 386 (S.C. New Mex. 1999)(aff’g directed verdict on tort of intentional spoliation of evidence for failure to prove malicious intent to defeat or disrupt lawsuit at time of disposition of telephone pole); See also 40 CAUSES OF ACTION 2nd 1(SPOILATION OF EVIDENCE)(2010)(listing Alaska, Conn., D.C., Florida, Ill., Indiana, Kansas, Montana, N.J., New Mexico, New York, North Carolina, Ohio, Pa., and West Virginia as recognizing some form of an independent tort actin for spoliation). See also Kearney v. Foley & Lardner, 582 F.3d 896, 908-9(9th Cir.Sept. 18, 2009) (discussing evolution of the California tort “to the point of nearly eradicating it”).

acknowledge a tort action against third-parties spoliators. While these substantive tort actions are enforceable in Federal courts, spoliation sanctions in those courts are “controlled by federal law” since “federal courts apply their own evidentiary rules in diversity cases.”

Non-monetary sanctions for spoliation are typically imposed in a manner proportional to the offense and reflect the degree of culpability and prejudice involved. Harsh sanctions such as a jury instruction, dismissal or default – are “generally reserved [in Massachusetts] for egregious conduct that results in extreme prejudice to the requesting party.”

Similarly, while terminating sanctions are appropriate only where information is lost due to “egregious “misconduct” in California, an adverse inference instruction is available when “there is evidence of willful suppression, that is, evidence that a party destroyed evidence with the intention of preventing its use in litigation.” This appears to be the case also in Arkansas and New York - and in many Federal Circuits.

The Eleventh Circuit, for example, utilizes a five element test in which culpability is only one factor and the First Circuit refers only to the

244 ARKANSAS MODEL JURY INSTRUCTIONS – CIVIL, AMI 106 (if you find that the party intentionally destroyed the item with knowledge that its contents may be material to a pending claim, you may draw the inference that its contents would have been unfavorable to his or her claim or defense).
245 N.Y. PATTERN JURY INSTR. - CIVIL, 1:77.1 (if you find that the party “destroyed” an item that “relates in an important way to a question” in the case [as identified] and “that no reasonable explanation for such destruction has been offered” you may, although you are not required to, infer that the [content] would have been against the case as such and you may infer the fact of such destruction the weight you think proper).
246 Stevenson v. Union Pacific, 354 F. 3d 739, 746, 748-749 (8th Cir. Jan. 5, 2004) affirming district court ruling that voice tape was destroyed in “bad faith” but noting that “we have never approved of giving an adverse inference instruction on the basis of negligence alone”).
247 Flury v. Daimler Chrysler, 427 F.3d 939, 945 (11th Cir. 2005), as applied to sanction deletion of ESI in Connor v. Sun Trust Bank, 546 F. Supp. 2d 1360, at 1375 (N.D. Ga. 2008)sanctions are appropriate only after addressing (1) prejudice to non-spoiling party as a result of destruction (2) whether it can be cured (3) practical importance (4) whether acted in good or bad faith and (5) potential for abuse if expert testimony involved).
need to assess the party’s “consciousness that the documents would damage his case.”  

However, the Federal Court for the Second Circuit has famously held that “[t]he sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence.”  Other Circuits may have adopted this approach as well. Practical differences can be seen by comparing the instruction to be given in Pension Committee and Rimkus, which reflect the differences between, respectively, the Second and Fifth Circuits.

Sedona Principle 14 (2nd Ed. 2007) emphasizes that spoliation sanctions should like only if there a “reasonable probability that the loss of the evidence has materially prejudiced the adverse party.” Where the culpability involved is limited, courts hold that proof of substantial prejudice is essential for sanctions, especially serious sanctions.

At the Duke Litigation Conference, the Panel on which the author served unanimously suggested clarifying Rule 37 by amendments to extend its coverage to preservation failures which result in prejudice. The

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248 Booker v. Mass. Dept. of Public Health, 612 F.3d 34, 46 (1st Cir. July 15, 2010)(reversing for failure to provide evidentiary foundation that the party destroying evidence “knew of (a) the claim (that is, the litigation or the potential for litigation) and (b) the document’s potential relevance to that claim”); cf. Scheinlin, et al., CASES AND MATERIALS ON ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE (2009), p. 388 (the First Circuit has “no required finding of any particular degree of culpability”).

249 Residential Funding Corp. v. DeGeorge Financial Corp., 306 F. 3d 99, 107, 108-109 (2nd Cir. 2002)(“where a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party.”). The Court ultimately remanded for an examination by the District Judge of whether the late produced emails were sufficiently prejudicial to disturb the initial jury. Id. at 112-113.


251 Pension Committee v. Banc of America Securities, 685 F. Supp. 2d 456, 496-497 (S.D. N.Y., Jan. 15, 2010, amended May 28, 2010)(jury may presume that such lost evidence was relevant and would have been favorable to the non-spoiling party).

252 Rimkus Consulting v. Cammarta, 688 F. Supp. 2d 598, text at n. 21 and 34 (Feb. 19, 2010)(jury may infer that deleted emails would have been unfavorable only if the party acted “to prevent their use in litigation with Rimkus”).

253 Sedona Principle 14 (2nd Ed. 2007).

254 Davis v. Grant Park Nursing Home, 2010 WL 4642531 (D.D.C. Nov. 9, 2010) (“[a]ssessing whether sanctions are warranted for the loss of otherwise discoverable information is a function of whether a party has been prejudiced by that loss”)(Facciola, J.) (Judge Facciola was a member of the DUKE e-discovery panel).

author has contended that, if that were done, the need for the use of inherent power would be limited and the applicability of Rule 37(e) would be more clearly established.\textsuperscript{256}

The Discovery Subcommittee of the Federal Rules Advisory Committee is seriously considering the appropriate treatment of spoliation issues for possible rulemaking in light of the lack of uniformity around the country on the topic.

\textbf{(17) Sanctions – Safe Harbor (ESI)}

The matter of compliance with the duty to preserve discoverable evidence upon commencement or reasonable anticipation of litigation resulted in attention-getting spoliation sanctions involving ESI in the late 1990s.\textsuperscript{257} As one commentator later put it, “[h]arrowing tales of multi-million dollar sanctions and botched preservation and production schemes made electronic discovery a hot legal topic.”\textsuperscript{258}

The 2006 Amendments attempted to address these concerns by mandating uniform treatment of spoliation sanctions in electronic discovery by adopting what has been renumbered as Fed. R. Civ. P. 37(e).\textsuperscript{259} This approach was viewed at the time as a preferable alternative to dealing with preservation uncertainty by defining minimum obligations on the “front end,” since that approach might implicate pre-litigation obligations.\textsuperscript{260}

\textsuperscript{256} See also A. Benjamin Spencer, \textit{The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court}, FORDHAM LAW REV. (forthcoming), copy at \url{http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1696526}.
\textsuperscript{259} See Rimkus v. Cammarata, 688 F.Supp.2d 598, 642 (S.D. Tex. Feb. 19, 2010)(“[t]he rule precludes sanctions if the loss of the information arises from the routine operation of the party’s computer system, operated in good faith”).
As adopted, Rule 37(e) and its state counterparts provide that “[a]bsent exceptional circumstances, a court may not impose sanctions 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.”

Alabama, Alaska, Arizona, Arkansas, California, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, New Jersey, North Dakota, Ohio, Oklahoma, Tennessee, Utah, Vermont, Wisconsin and Wyoming have adopted the “safe harbor” albeit with some minor variations.

Only California has explicitly extended the protection from sanctions to third parties, such as those subject to a subpoena and those attorneys who represent parties and third parties. California also expanded the definitions of loss to include ESI that has “lost, damaged, altered, or

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261 ALA. R. CIV. P. Rule 37(g).
262 ALASKA R. CIV. PROC. 37 (f)(2010).
263 ARIZ. R. CIV. P. 37(g)(2010); ARIZ. FAM. LAW PROC. R. 65(E)(2010).
264 ARCP Rule 26.1(e)(Limitations on sanctions).
265 CAL. CODE CIV. PROC. § 1985.8(l)(subpoena of ESI) and §§ 2031.60(i)(protective orders); 2031.300(d)(responses to demands); 2031.310(j)(motion to compel); 2031.320(d)(motion to compel compliance)(2009)(extending the scope of the safe harbor to apply to “any attorney of a party” ).
266 IND. R. TRIAL P. 37(e)(2010).
269 Me. R. CIV. P. 37(e)(2010).
270 MD. RULE 2-433 (2010).
271 MCR 2.302(B)(5)(2010) and MCR 2.313E(2010).
272 MINN. R. CIV. P. 37.05 (2010).
273 MONT. CODE ANNO., Ch. 20, Rule 37(e)(2010)
276 OHIO CIV. R. 37(2010).
277 12 OKLA. ST. § 3237(G)(2010).
279 UCRP Rule 37(g)(2010).
280 V.R.C.P: Rule 37(f) (2010).
281 WIS. STATS. § 804.12(4m)(effective January 1, 2011).
283 CAL. CODE CIV. PROC. § 1985.8(l)(“Absent any exceptional circumstances, the court shall not impose sanctions on a subpoenaed person or any attorney of a subpoenaed person for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system”)
“overwritten” and does not limit the provision(s) to sanctions issued under legislative authority.284

Inclusion of a “safe harbor” principle limited solely to electronically stored information was controversial in both the federal and state rulemaking and has not been uniformly adopted.285 New Mexico, for example, concluded that there was no reason to single out electronically stored information for special treatment.286 Virginia also did not include the rule in its otherwise comprehensive enactments.

In Maryland, the rule speaks in terms of information “that is no longer available” instead of information that is “lost.”287 Ohio adds five “factors” that a court “may consider” in deciding whether the exemption applies.288 Oklahoma also deletes the restriction to rule-based sanctions, implying that a court may not assert inherent power to sanction under covered conditions. In contrast, Utah, which kept the restriction, explicitly provides that that “nothing in this rule limits the inherent power of the court” to act if a party “destroys, conceals, alters, tampers with or fails to preserve information “in violation of a duty.”289

A number of states address the role of a litigation hold in their commentaries, as does the Committee Note to Rule 37(e). Alabama notes, as does the Federal Committee Note, that if a duty to preserve exists, a party should act appropriately, which “may” include issuing a ‘litigation hold.”290 Alabama cites as an example of a lack of good faith the “adopt[ion of] a short record-retention period with no legitimate business purpose in order to

284 See, e.g., CAL CODE CIV. PROC. § 2031.310(j)(1) and the four other similar provisions listed above.
286 The New Mexico Commentary to Rule 37 asserts that “nothing in the nature” of ESI “requires curtailment of the existing discretion of the district court.” N. M. DIST. Ct. R.C.P. 1-037 (2010)(noting in Commentary that “good-faith purging” of electronic files should be no different than destruction of paper files pursuant to a “records retention schedule” and that “a bad faith approach to discovery warrants the imposition of sanctions”). Interestingly, the ACTL had suggested to the Advisory committee that the principle should be applied to all forms of evidence at the time of the 2006 amendments.
288 Ohio Civ. R. 37(2010)( “whether and when any obligation to preserve the information was triggered” as well as steps taken “to comply with any court order or party agreement requiring preservation of specific information”).
289 UCRP Rule 37(g)(2010).
290 Committee Comments, ALA. R. CIV. P. Rule 37(g).
thwart discovery of harmful information by having its computer system overwrite the information.”

Other state commentaries, however, seem to read “good faith” as imposing a strict liability test; i.e., the slightest failure to preserve forfeits the right to rely on Rule 37(e). As Massachusetts puts it, “[t]he ‘good-faith’ requirement presupposes that a party will preserve its ESI once it anticipates litigation.” Thus, a Federal District Judge held in 2007 that “in order to take advantage of the good faith exemption, a party needs to act affirmatively to prevent the system from destroying or altering information. . . . [and] [b]ecause the defendants [in the case] failed to suspend [the routine operation of its information system] at any time, the court finds that the defendants cannot take advantage of Rule 37(e)’s good faith exception.”

If “good faith” is seen as leaving no room for error or inadequacies leading to lost information, it ignores the fact that it was intended as an “intermediate standard” clearly intended to negate automatic sanctions for mere negligence even when a duty to preserve existed. The Vermont Reporter’s Note more accurately notes that a “good faith” operation “precludes” the “knowing continuation of an operation that results in destruction of information that a party was obligated to preserve.” As the Staff Comment to the Michigan Civil Rule put it, “[t]he safe harbor provision . . . applies when information is lost or destroyed under a routine electronic information system, if the operation of the system was performed in good faith.”

291 Id.
292 See, e.g., Advisory Committee Comment, MINN. R. CIV. P. 37.05 (the “good-faith” test is “not met” if a party “fails” to take appropriate steps to preserve data can be read to leave no room for failures of any kind. See also Panel Discussion, Sanctions in Electronic Discovery Cases: Views from the Judges, 78 FORDHAM L. REV. 1, 30-31 (October, 2009)(“what this toothless thing [Rule 37(e) really tells you is the flip side of a safe harbor. It says if you don’t put in a litigation hold when you should there’s going to be no excuse if you lose information.”).
294 Doe v. Norwalk Community College, 248 F.R.D. 372, 378 (D. Conn. July 16, 2007). The court also determined that the College did not have a “consistent, ‘routine’ system in place” as the duration of backup of emails varied and a State Librarian policy was not followed. Id.
295 Thomas Y. Allman, Inadvertent Spoliation of ESF After the 2006 Amendments: the Impact of Rule 37(e), 3 FED. CTS. L. REV. 25, 30-31 (Feb. 2009)(summarizing legislative history demonstrating that good faith is intended as an intermediate standard).
296 Reporter’s Note, V.R.C.P. Rule 37(Failure to Make Discovery; Sanctions) (2010).
297 Staff Comment (2008), MCR 2.313E)(2010)(also noting that it “prohibits” sanctions when lost or destroyed “as a result of a good-faith, routine record destruction policy or ‘litigation hold’ procedures.”).
Moreover, there is evidence that state courts are applying the underlying concepts in a pragmatic manner. This is particularly the case in the context of the confusion engendered as to the required culpability standard for spoliation sanctions. In an unreported decision in Ohio,\footnote{Duane C. Bennett v. James R.J. Martin II, Case No. 04CVH099259, Franklin County, Ohio [Columbus] (Magistrate Thompson), September 1, 2010, at 14.} for example, the court held that while there had been confusion caused by Second Circuit authority, courts in Ohio are not permitted to impose spoliation sanctions unless the spoliator is shown to have acted in bad faith” even when efforts to preserve are “loosely organized, not memorialized in writing and somewhat improvident” - even perhaps “ris[ing] to the level of simple negligence.”

There is also a trend in the Federal cases towards treating Rule 37(e) as supporting a less aggressive approach to “a pre-litigation duty to preserve evidence.”\footnote{Mohrmeyer v. Wal-Mart Stores East, 2009 WL 4166996 at *3 (E.D. Ky. Nov. 20, 2009)(applying Rule 37(e) by analogy in reviewing case law on duty to preserve).}

At the Duke Litigation Conference, both the American College and LCJ suggested that it would be appropriate to require proof of deliberate and reckless conduct, amounting to bad faith, designed to deny access to information, as a pre-condition to deny the protections of the rule.\footnote{Thomas Y. Allman, Preservation Rulemaking, supra, 11 SEDONA CONF. J. 217 at 228 (Fall, 2010).} This could be accomplished either by amendments to Rule 37(e) or by folding the concept into an amended version of Rule 37(c).

There is no reason why one or more of the state rulemaking authorities could not explore a similar approach.

**Concluding Remarks**

Any assessment of state rulemaking must include recognition that “[t]he number of cases in state courts dwarfs the federal caseload” and “millions of individual Americans and businesses rely upon the state civil justice system to resolve crucial issues.”\footnote{Seymour Moskowitz, What Federal Rulemakers Can Learn from State Procedural Innovations, Paper Presented at Duke Litigation Conference, May, 2010, http://civilconference.uscourts.gov. (Scroll to “Perspectives from the States: Different Solutions for Common Problems and their Relative Effectiveness; IAALS Program Results,” then to Paper.} However, as Justice Brandeis once noted, “a single courageous state may, if its citizens choose, serve as a
laboratory . . . without risk to the rest of the country.’” 302 As the author has stressed, the 2006 Amendments are practical and effective and should be incorporated wherever feasible in state rulemaking efforts since uniformity permits access to “a large body of interpretive opinions on which courts and parties can rely.” 303 However, to the extent that unresolved e-discovery procedural issues exist, as identified above, then state-based experimentation may be crucial to finding an answer.

303 Thomas Y. Allman, Addressing State E-discovery Issues Through Rulemaking: The Case for Adopting the 2006 Amendments, 74 DEF. COUNS. J. 233, 239 (July 2007)(arguing that the appellate courts “bear a special responsibility to promote harmonization and uniformity” through facilitation of interlocutory discovery orders).
APPENDIX
State by State Summaries

The discussion below is based on original research and is believed to be accurate as of this date (December, 2010), but due to the rapidly changing nature of the topic, the reader would be wise to check and verify as the author is not in a position to guarantee continuing accuracy. Additional summaries are available through the periodic updates published by KL Gates,304 Kroll305 and Navigant.306


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

3. Arizona. The Arizona Supreme Court adopted a comprehensive set of e-discovery rules which became effective on January 1, 2008, including

305 KrollOnTrack provides both a visual aid (map) and details at: http://www.krollontrack.com/library/staterrules_krollontrack_july2010.pdf

4. Arkansas. Unique among the states, the Supreme Court incorporated the core e-discovery amendments – “meet and confer,” form of production, two-tiered production and safe harbor - into a single “supplemental and optional” rule, A.R.CP 26.1, which applies to cases if parties agree or the court orders it. The Rule is based on the Uniform Rules. See In Re: Electronic Discovery and Adoption of Rule of Civil Procedure 26.1, 2009 Ark. 448, 2009 Ark. LEXIS 609 (S.C. Ark. Sept. 24, 2009)(adopting draft proposal effective Oct. 1, 2009). Separately, the Supreme Court amended A.R.C.P 26 in January, 2008 to provide for a presumption against waiver if a party making an inadvertent disclosure acts promptly. See 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 R. Ryan Younger, Recent Developments, 61 Ark. L. Rev. 187 (2008).

5. California. In June 2009, the California Legislature adopted Assembly Bill 5 (Section 1: the “Electronic Discovery Act”) involving e-discovery amendments to the Code of Civil Procedure and in August, 2009, the Judicial Council of California amended Cal. Rules of Court 3.724 to include discussion of key e-discovery issues in preparation for case management conferences. For the text of the final bill, showing the changes in text of amendments, see http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-
See generally Barrad and Holland, “Spotlight on E-Discovery: The Cutting Edge,” 51 Orange County Lawyer 18 (2009). The initial legislation as proposed was vetoed in September, 2008 as part of a budget dispute but reintroduced in December, 2008 but passed and signed in June, 2009 as an emergency measure to take effect immediately. The legislation was recommended in an April, 2008 Report prepared by California Judicial Council, found at http://www.courtinfo.ca.gov/jc/documents/reports/042508item4.pdf. See also discussion in Thomas Y. Allman, [regarding the 2008 Proposals], copy at http://www.law.northwestern.edu/searlecenter/uploads/Proposed%20E-Discovery%20Legislation%20&%20Rulemaking%20-%20California%20update.pdf

The final legislation differs from the Federal Amendments in that Cal. Civ. Code Proc. §2031.210(d) (Sec. 10 )requires an objection based on lack of reasonably accessibility and identification of sources not being produced to preserve the objection to production of that type of ESI. It does not explicitly acknowledge that no duty exists to produce information from an inaccessible source. See also Cal. Civ. Code Proc. 2031.060 (Sec. 9); 2031.310 (Sec. 21)[allowing discovery order for good cause]. The safe harbor provisions [Cal. Civ. Code Proc. §§1985.8(l)(subpoenaed person); 2031.060(l); 2031.300(d); 2031.310(j); and 2031.320 (d)] mirror Rule 37(e) except that they extends the exemption to subpoenaed non-parties and attorneys for parties and such non-parties;apply to ESI that has been “lost, damaged, altered, or overwritten” and explicitly state that the protection is not to be “construed to alter any obligation to preserve discoverable information.” The provisions also contain no general limitation comparable to the Federal rule-based language, thus (apparently) applying the prohibition to sanctions exercised under inherent powers. The Act continued statutory language mandating payment by a “demanding party” of the “reasonable expense” of translating “any data compilations” into “reasonably usable form [Cal Civil Code Proc. §§1985.8(g)(re subpoenas)(Sec. 2) & 2031.280(e)(Sec. 17)] and added a reference to setting conditions for good cause production “including allocation of the expense of discovery.” §§1985.8(f)(re subpoenas)(Sec. 2), 2031.060(e)(Sec. 9), 2031.310(f)(Sec. 21). The precise 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.** Current status unknown. The Committee on Rules of Civil Procedure has reported no need for e-discovery rule amendments. See [http://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Civil_Rules_Committee/01-25-08.pdf](http://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Civil_Rules_Committee/01-25-08.pdf). A limited pilot program involving only complex business and medical malpractice cases is reportedly being considered for district courts in the Denver area.

7. **Connecticut.** The Connecticut “Practice Book,” which provides Rules for Practice in the Superior Court, provides in Section 13-9 that electronic data may, for good cause, be ordered to the disclosed in an “alternative format” if the data is otherwise discoverable and the court may enter an order compelling one or more parties to pay the cost of preparing the disclosure. Conn. Practice Book § 13-9 (2010). A similar provision appears in the provision for Procedure in Family Matters. Conn. Practice Book § 25A-17 (2010).


9. **District of Columbia.** The District of Columbia Court of Appeals has stayed the requirement that the Superior court conduct its business according to the Federal Rules (D.C. Code § 11-946) to enable the Superior Court and its advisory committee time to revise the local rules. As of November, 2010, revisions were approved by the Superior Court and transferred to the Court of Appeals for final approval.
10. **Florida.** In 2009, the Florida Supreme court added a special rule dealing with complex litigation under which parties must discuss and include, if a case management conference occurs, some aspects of ESI production. See Rule 1.201, Supreme Court Florida Order No. SC08-1141 at [http://www.floridasupremecourt.org/decisions/2009/sc08-1141.pdf](http://www.floridasupremecourt.org/decisions/2009/sc08-1141.pdf). In addition, an ad hoc Subcommittee of the E-Discovery Subcommittee of the Florida bar, working in parallel with other Bar Committees, has prepared a comprehensive series of amendments for possible consideration in the next regular Rules change cycle (2013) or earlier, if called upon by the Supreme Court. These proposals, including a “safe harbor” rule, but not a “meet and confer” requirements, are described in a 39 page (undated) report and were reportedly adopted 35-0 by the full Committee in January, 2011.

11. **Georgia.** Status unknown.


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

14. **Illinois.** To date, Illinois has not enacted comprehensive e-discovery rules. It has been pointed out that existing Illinois law and the 2006 Amendments have differences, some fairly subtle, which will require reconciliation. Parness, *E-Discovery in Illinois Civil Actions*, 95 Ill. B. J. 150 (March 2007); 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 electronic discovery in amended Rule 201 (b)(1995) which includes “retrievable information” in “computer storage” as part of the definition of “documents.” The related
production provision, Rule 214, requires production in printed form to prevent from producing in a manner which “tends to frustrate” access to information in computer storage, according to the Committee Note. See [http://www.state.il.us/court/SupremeCourt/Rules/Art_II/ArtII.htm#214](http://www.state.il.us/court/SupremeCourt/Rules/Art_II/ArtII.htm#214).


18. **Kentucky.** Status unknown.

added a counterpart to Rule 37(e) at La. C.C.P. Art. 1471(B)(2010). In the 2009 session, further amendments (SB 65) which would have increased the threshold in the safe harbor bill failed as the result of a tie vote in the Senate. In the 2010 Session, the Legislature added La. C.C.P. Article 1462(B)(2) based on Fed.R.Civ.P.26(b)(2)(B) and also a sentence to Article 1462(C) to require a producing party to identify the means which must be used to access ESI being produced. The amendments take effect on January 1, 2011 and August 15, 2010, respectively.

20. **Maine.** The Supreme Judicial Court adopted e-discovery amendments based on the 2006 Amendments, to be effective August 1, 2009. See [http://www.courts.maine.gov/rules_forms_fees/rules/MRCivPAmand7-08.pdf](http://www.courts.maine.gov/rules_forms_fees/rules/MRCivPAmand7-08.pdf). Minor corrections were quickly made with the same effective date [http://www.courts.state.me.us/rules_forms_fees/rules/MRCivPAmand7-30.pdf](http://www.courts.state.me.us/rules_forms_fees/rules/MRCivPAmand7-30.pdf). The Advisory Committee Notes are quite informative, especially in regard to defining “routine” and “good faith” in Rule 37(e).

21. **Maryland.** The Court of Appeals (the highest court) adopted e-discovery rules 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) Instead of requiring “good cause” for production from inaccessible sources, a party requesting discovery must establish that the “need” outweighs the burden and cost of “locating, retrieving, and producing” it. The safe harbor provision speaks in terms of limitations on sanctions for information “that is no longer available.” (Md. R. Civ. P. 2-433(2010).) Also, the amendment relating to disclosure of privileged material includes a non-waiver provision governing inadvertent production of information coupled with authority to courts to bind non-parties by issuing court orders based on agreements (Md. R. Civ. P. 402(e)(3).) See generally Lynn McAlain, *The Impact of the First Year of the Federal Rules and the Adoption of the Maryland Rules: Foreward*, 37 U. Balt. L. Rev. 315 (2008).

22. **Massachusetts.** The E-Discovery subcommittee of the Supreme Judicial Court Rules Advisory Committee has completed work on a draft of e-discovery rules which reportedly will be submitted to the entire SJC RAC. If approved, it would be published for comment thereafter. Electronic data has long been recognized as subject to discovery as a document, which is defined to include “data compilations.” See 49 Mass. Prac., Discovery § 7:1 (Electronic Discovery – Generally). For an excellent summary of Massachusetts case law, especially in regard to preservation and spoliation,

23. **Michigan.** The Michigan Supreme Court adopted e-discovery provisions in December, 2008 which became effective on January 1, 2009 modeled on the 2006 Amendments, with staff comments. See [http://www.icle.org/contentfiles/milawnews/rules/mcr/AMENDED/2007-24_12-16-08_UNFORMATTED-ORDER_AMENDMENT.PDF](http://www.icle.org/contentfiles/milawnews/rules/mcr/AMENDED/2007-24_12-16-08_UNFORMATTED-ORDER_AMENDMENT.PDF). The full text of all of the Michigan Revised Civil Procedure Code is found at [http://coa.courts.mi.gov/rules/documents/1chapter2civilprocedure.pdf](http://coa.courts.mi.gov/rules/documents/1chapter2civilprocedure.pdf). A pithy summary is at Randy E. Davidson, *Digital Legal Authority: Michigan Court Rules in the Digital Age*, 88 MI Bar Jnl. 30 (July. 2009). The “safe harbor” provisions were inserted in both the general discovery provisions (at MCR 2.302(B)(5) and at the general sanction provision (at MCR 2-313(E)). However, in the former provision, the clause is preceded by a statement that the party has the same obligation to preserve ESE as it does for all other types of information.


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

26. **Missouri.** Status unknown.


29. **Nevada.** Status unknown.

30. **New Hampshire.** The Rules of the Superior Court were amended by the Supreme Court in 2007 to require, in N.H. Super. Ct. R 62(I)(C) that parties shall “meet and confer personally” prior to the “Structuring Conference” to discuss scope of discovery including, as to ESI, accessibility, cost sharing, form of production and the need for and extent of litigation holds or other mechanisms to prevent destruction of the information as well as agreements re privilege waiver. [http://www.courts.state.nh.us/rules/sror/sror-h3-62.htm](http://www.courts.state.nh.us/rules/sror/sror-h3-62.htm). N. H. Rules of Evidence Rule 511 provides in a pithy rule that a claim of privilege is not “defeated” by “disclosure” made inadvertently during discovery. A pilot project is in place to test the Pilot Rules which include a blend of the American College recommendations and the 2006 Amendments, as well as to test the impact of a non-waiver rule. See [http://www.courts.state.nh.us/superior/civilrulespp/Pilot-Rules-Report.pdf](http://www.courts.state.nh.us/superior/civilrulespp/Pilot-Rules-Report.pdf).


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

In February, 2010, after further inaction a report prepared for the Chief Judge and the Chief Administrative Judge advocated a number of steps to be taken without relying upon legislative action. A Copy may be found at http://www.nycourts.gov/courts/comdiv/PDFS/E-DiscoveryReport.pdf. In 2010, the Uniform Civil Rules for Supreme and County Courts require discussions at preliminary conferences when the court “deems appropriate” of specified e-discovery issues such as “retention,” plans for implementation of a data preservation plan and individuals responsible for preservation as well as “proposed initial allocation” of costs. NY CLS Unif Rules, Trial Cts. §202.12 (c)(3). A similar rule exists for the Commercial Trial Courts (§202.70(8)(b)). In August, 2010, the rules applicable in both instances were amended (effective immediately) to require heightened counsel preparation for e-discovery as §§202.12(b) & 202.70(g)] http://www.dos.state.ny.us/info/register/2010/aug18/pdfs/courtnotices.pdf.


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


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 can be found at: http://www.sconet.state.oh.us/RuleAmendments/documents/2008%20Amend.%20to%20Appellate,%20Criminal%20&m%20as%20published%20(Final).doc.

37. **Oklahoma.** Effective November 1, 2010, Oklahoma enacted a mixture of court rules and statutory enactments based on – but not identical to – the 2006 Amendments. The two-tiered discovery provisions are found in Section 3226 of Chapter 41 (Discovery Code), included in Title 12, copy at http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?citeid=440624. Similarly, Rule 37(e), dropping the qualification that it applies only to sanctions under the Rules, is included in Section 3237, at http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?citeid=95008. On the other hand, Rule 5 of the District Courts, governing the possible entry of “orders addressing the preservation of potentially discoverable information” is found in the Appendix to Chapter 2 of Title 12, with the inference being that it was adopted by the Supreme Court. See http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=458104. Under Section 2016 of Title 12, Chapter 39, “[i]n the absence of specific superseding legislation, the procedures for conducting pretrial conferences shall be governed by rules promulgated by the Supreme Court of Oklahoma.” The legislature, in Section 2502 (Attorney-Client Privilege), Chapter 40 of Title 12 (“Civil Procedure”), has also adopted a modified version of FRE 502(b) dealing with non-waiver of inadvertent disclosures and, unlike FRE 502, including a provision authorizing selective non-waiver of attorney-client or work product matter to governmental agencies. See http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?CiteID=94921.

38. **Oregon.** On September 11, 2010, the Council on Court Procedures of the Oregon Supreme Court has released for public comment a limited proposal regarding electronic discovery, with a copy available at http://legacy.clark.edu/~ccp/Content/Publications/PROPOSED_AMENDMENTS_TO_OREGON_RULES_OF_CIVIL_PROCEDURE_9-11-10.pdf. After opportunity for comment, the proposals will be submitted to the Oregon Legislature for action, with enactment taking effect no earlier than January 1, 2012.

39. **Pennsylvania.** Status unknown.
40. **Rhode Island.** Status unknown.

41. **South Carolina.** Status unknown.

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


44. **Texas.** Texas enacted an e-discovery rule by adding §196.4 to its Civil Procedure code in 1999. It permits an objection to production of electronic data which is not “reasonably available” to the responding party in “its ordinary course of business.” If ordered to produce, the rule requires payment of the “reasonable expenses of any extraordinary steps required to retrieve and produce 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).

45. **Utah.** The Utah Supreme Court approved a set of e-discovery rules based on the 2006 Amendments, effective on November 1, 2007. Preservation obligations are listed among the topics for early discussion and the power to sanction using inherent powers is expressly acknowledged. 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.” [http://www.utcourts.gov/resources/rules/urcp/](http://www.utcourts.gov/resources/rules/urcp/)

46. **Vermont.** Vermont promulgated rules based on the 2006 Amendments in May, 2009, with provisions for a discovery conference at the discretion of the court, 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 that results in destruction of information. See, http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATED-VRCP16.2._26(b)and(f)_33(c)_34_37(f)_45_50(b).pdf


48. **Washington.** Effective on September 1, 2010, Washington adopted a highly modified version of FRE 502, styled ER 502. It establishes 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.

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

50. **Wisconsin.** On April 23, 2010, a divided Supreme Court of Wisconsin adopted e-discovery amendments to become effective on January 1, 2011 unless modified before then. A copy of the relevant Order is at http://wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=51827 and the full text of the amended statutes, pending final changes by the Court, is at http://www.legis.state.wi.us/statutes/Stat0804.pdf. On November 10, 2010, over a strongly worded dissent, the Court replaced one section with Wis. Stat. § 804.01(2)(e), which mandates a conference of parties as condition to serving request to produce ESI or to using it to respond to an interrogatory. Reported decisions on case law on ESI is 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).

51. **Wyoming.** The Wyoming Supreme court amended its Civil Rules to conform to the 2006 Amendments in (similarly numbered) Rules 26, 33, 34, 37 and 45 effective on July 1, 2008. A copy can be found at