APPENDIX E

Best Practices for Courts and Parties Regarding Electronic Discovery in State Courts

Introduction

The creation, retention, and retrieval of electronically stored information ("ESI") have serious implications for discovery in civil litigation.[1] Despite the fact that ESI has been around for decades, it has taken time for the federal discovery rules and their state counterparts to adequately recognize the impact on civil litigation and address many of the tough issues arising from the discovery of ESI. Thankfully, recent Federal Rules amendments reflect a number of important improvements, and the states have also taken up the charge to adopt rule amendments, relating to both preservation and production.[2] Nonetheless, especially in more complex cases, it is appropriate for knowledgeable practitioners and courts to come up with practical solutions to the issues left open.

This summary describes the rough consensus that has emerged about the best practices. Courts and parties may find it appropriate to apply them, tailoring each to case specifics and the demands of local practice. A state-by-state summary of the current status of e-discovery rulemaking is also included.

Preservation of ESI

Parties—plaintiffs and defendants alike—should be vigilant about preserving ESI, and courts should be deferential to reasonable and good faith preservation efforts.

A party owes a common law obligation to the court[3] to undertake reasonable efforts, tempered by proportionality concerns, to retain discoverable information that may be called for in pending or reasonably foreseeable litigation. The obligation is shared equally by parties who seek to pursue claims and by those who defend them.

As a practical matter, once the duty is "triggered," parties must undertake affirmative measures to assure continued availability of information. This often takes the form of a "litigation hold" designed to give notice to relevant custodians.[4] The degree of formality and the form of the notice is highly fact-specific and perfection is not required.

The 2015 Federal Amendments acknowledge the obligation of a party to take "reasonable steps" and provide a "safe harbor" when that is achieved, even if perfection in restoring or replacing lost ESI is not possible.[5] States will likely consider and hopefully adopt similar rules to govern preservation. Implementation of preservation obligations under that standard necessarily involves making choices among alternatives. A choice may be reasonable under the circumstances even when some ESI is overlooked or is otherwise "lost" and cannot be restored or replaced.

A preservation obligation does not typically extend to ESI that is incidental to the routine operation of information systems or incorporated in backup materials retained for disaster recovery purposes or otherwise requires disproportionate efforts to preserve.

The duty to preserve (and, ultimately, to produce) attaches to all forms of relevant ESI, including electronic mail ("e-mail"), text messages and memoranda, spreadsheets, photographs, videos, and the like. It also extends to ESI contained in databases, as well as information related to or contained in systems and applications ("metadata").

Typically, the ESI must be under a party's custody and control, including material in the possession of third parties to which they have access, such as social media or other types of ESI "in the cloud." Where not available via subpoena, parties may be required to cooperate to furnish access to such information.

However, a party is generally not required to preserve ESI routinely generated and overwritten by operations of information systems, including metadata, or ESI routinely stored in backup systems used for disaster recovery, absent special circumstances.[6] A party with legitimate interest in preservation of inaccessible or ephemeral ESI, which may not be preserved in the ordinary course, should make a good faith effort to communicate those concerns to the party from whom the ESI is being sought in time to avoid its loss.

This is a practical reflection of the emerging principle that efforts required to preserve must be proportional to the needs of the case and that actual notice (and a good cause showing) is necessary before a party must undertake disproportionate or excessively costly efforts. The 2015 Federal Amendments emphasize the role of proportionality in determining if reasonable steps have been undertaken to preserve.[8]

Courts should exercise restraint when faced with requests by one side to compel preservation over objection.

The responsibility to preserve—like the duty to produce—rests in the first instance with the party from whom the ESI is sought, and since there may be several appropriate ways of executing that duty, courts should pay appropriate deference to good-faith efforts to do so.

Concerns about the adequacy of preservation efforts are best handled by early discussion among the parties and, if necessary, the court. However, where imminent loss of ESI by a party whose recalcitrance to meet preservation obligations is demonstrated, a court may take appropriate steps to preserve the status quo.

Courts are generally unavailable to address preservation issues prior to commencement of litigation. Once litigation begins, courts should be very reluctant to unilaterally impose such orders at the urging of impatient or skeptical parties absent a strong showing of imminent spoliation.

Assessment of a failure to preserve ESI should focus on the relevance of the missing ESI and the prejudice, if any, resulting from its loss. A clear preference for addressing ESI losses by curative measures before imposing spoliation sanctions has emerged in the case law and is now required under the Federal Rules.

Where ESI is "lost" as a result of a failure to take "reasonable steps," courts should first address whether additional discovery should be undertaken to remediate and reduce prejudice from the missing ESI.[9] Because ESI is often available from multiple sources, it may be possible to restore or replace the ESI, making further measures unnecessary.

Punitive measures, and those undertaken to deter, should be imposed only where culpable intent is shown, as defined in the jurisdiction. The federal rules now acknowledge that only intentional conduct is fairly indicative of an understanding that the missing content was unfavorable to the party whose conduct caused its loss.

Harsh spoliation sanctions for ESI—such as dismissals or default judgments, permitting inferences by juries as to the contents of missing information, or excluding evidence central to a case or a defense—should not be imposed unless there is a showing of a specific intent to deprive the opposing party of the use of the ESI. Some federal circuits (and states) have historically imposed such measures based on negligent or grossly negligent conduct. The resulting confusion has fostered an atmosphere of costly "over-preservation" among entities seeking to comply on a national basis.

Production of ESI

Parties are obligated to make reasonable efforts to respond to requests for production of ESI, taking into account the permissible scope of discovery, the nature of the litigation, and the burdens and costs involved. Proportional discovery is the goal. However, it is advisable to seek agreement in advance to avoid predictable "choke points," which can otherwise lead to costly and unproductive ancillary disputes.

Producing parties have the responsibility to identify and produce responsive information that is *both* relevant to the claims and defenses *and* proportional to the needs of the case.[10] The implementation of this obligation in the ESI context is informed by counsel. Attorneys should become familiar with e-discovery technology and processes or seek help from a qualified professional in carrying out those obligations.[11] Knowledge of the formal rules is not enough.

Parties and courts should encourage early discussion of discovery requests and seek to reach agreement on the scope, timing, quantity, and duration of the ESI that will be sought in discovery.

By far the best results come when the parties become informed early in the process regarding ESI and talk over any issues early with opponents, including securing help from qualified third parties if they lack the expertise and experience to deal with it. The requesting and the producing party—and the courts—have an obligation to cooperate with the goal of making appropriate requests and objections and ensuring that the efforts undertaken are proportional to the needs of the case.

Early service of requests for production and open discussion of the extent and nature of the costs and burdens (and other proportionality factors) associated with compliance to discovery demands can make all the difference in the quality of the discovery process. One important variable is the identification of the "key custodians" from whom the information will be drawn. The number of such custodians, and the need to consult or seek production from third parties, will inform the size of the production and how it is treated.

Many courts have found it useful to employ active case management techniques, if feasible, early in the process. For example, in more complex cases, phased discovery, incorporation of agreements or discovery protocols in scheduling orders, and active court involvement have been effective. Many courts have developed guidelines and checklists for illustrative and educational purposes.[12]

The form or forms of production of ESI (which may vary according to the type of ESI involved) should be agreed upon before the producing party commits to expensive processes. Such matters are best left to the parties if possible.

It is essential for the parties to discuss and agree on the forms of production of ESI. For ESI that has document-like characteristics (such as email, word documents, and other self-generated information), it is perfectly acceptable to produce in PDF or TIFF form using a "load file" with the appropriate contents to assure compatibility with the contemplated review platforms of the requesting party. For smaller productions, production of the same materials in "hard copy" (paper) or single PDFs can be an adequate and useful tool, especially if there are no genuine authenticity issues, given the comparative ease of redaction and feasibility of bates numbering.

In some cases—such as Excel spreadsheets—the form in which the information is maintained (its "native" format) is often best used as the form of production, given that hidden formulae and metadata influence the usefulness of the end product. Database production has its own unique characteristics and parties should work cooperatively to agree on methods of accomplishing adequate production.

Pretrial Orders should govern privilege waiver issues involving inadvertently produced privileged information or work product.

The potential waiver of a client's privilege to refrain from producing communications with counsel—and the protection also given to attorney work product by civil rules and local practices—present heightened risks in ESI productions, given the volumes involved. Rules often provide, consistent with ethical obligations, for measures to be taken to notify producing parties upon the receipt of ESI that is believed to have been inadvertently sent.[13]

Given the disagreements among the courts as to the degree of diligence that may be needed to excuse inadvertent production, it may be prudent to enter into agreements, endorsed by the court and embodied in a Pretrial Order, acknowledging that production may include privileged information and spelling out the respective obligations to identify and deal with such circumstances. Federal Rule of Evidence 502, and many state equivalents, addresses inadvertent disclosure and whether such disclosure operates as a waiver of the attorney-client privilege and/or work-product protection.

In smaller cases, manual review by counsel can be used to manage some or all of production and privilege review. When parties utilize predictive coding or other forms of technology-assisted review to deal with larger volumes of ESI, as discussed further below, the parties need to consider whether an additional "tier" of manual review to exclude privileged or other excludable ESI is necessary or ethically required.[14]

Early discussion of use of technology-assisted review can be useful where use of the technology is contemplated.

Locating, collecting, culling, and searching of ESI can be a costly project, and the use of forms of technology assistance is often considered by producing parties to address the matter. Parties employing such techniques are responsible for ensuring the accuracy and efficacy of such measures in a particular case. Deference should be paid to their good faith efforts. Given the "black box" operations of Computer Assisted Review ("CAR"), Technology Assisted Review ("TAR"), and "Predictive Coding"—or even the use of "keywords"—some courts have contended that "transparency" with regard to aspects of these techniques is mandatory.[15]

Many believe that a best practice is—at least where complex searches are involved—to reduce the key aspects and variables to a protocol endorsed by the court, thereby precluding disputes.

Parties and courts should consider use of cost sharing of reasonable expenses, including attorney's fees, to address discovery requests that are deemed relevant and necessary, but may be disproportionate because of associated undue burdens and costs.

The so-called "American Rule" assumes that each party will bear its own costs of preservation and production. This is quite appropriate in most instances, especially in regard to smaller productions. However, in some instances, where discovery of ESI from inaccessible sources is ordered for good cause, it may be useful to make it conditional on the allocation of the costs of doing so.[16]

It is entirely appropriate for parties to seek, and courts to encourage, voluntary agreements on the topic. A court should not, however, order disproportionate discovery over objection merely because the requesting party is willing to pay some or all of the costs involved.

Status of E-Discovery Rulemaking in State Courts

The following summary tracks the current status of state e-discovery rulemaking,[17] with a particular focus on adoption of measures dealing with proportional discovery and preservation of ESI inspired by the 2015 Federal Amendments.[18] Many states have already adopted elements of the 2006 Federal Amendments, as indicated in the individual summaries, and there has been subsequent relevant activity in Arizona (2016), Colorado (2015), Illinois (2014), Iowa (2015), Massachusetts (2016), Minnesota (2013), New Hampshire (2013), Texas (2016) and Utah (2011), as described below.

There are several additional summaries of note, including K&L Gates' online listing of states that have enacted e-discovery rules, with links.[19] In addition, rules adopted by specific states are discussed in a database ("eDiscovery for Corporate Counsel") that is accessible in WESTLAW.[20] (To go to a specific state, access the Table of Contents and scroll to "State by State" summary.)

Alabama. E-discovery amendments to the Alabama Civil Rules became effective on February 1, 2010 with adoption of essentially identical amendments to FRCP Rules 16, 26, 33(c), 34, 37 and 45. The Committee Comments are particularly insightful, especially those relating to Rules 26 and 37(g) ("ESI may be lost or destroyed without culpability, fault, or ill motive.").

Alaska. E-discovery amendments to the Alaska Rules of Civil Procedure became effective on April 15, 2009, adopting provisions equivalent to FRCP 16, 26(b)(2)(B), 33, 34, 37(f) and 45, similarly numbered.

Arizona. E-discovery amendments to the Arizona Rules of Civil Procedure, based on the 2006 Amendments, became effective on January 1, 2008, including limitations on inaccessible production (Rule 26(b)(1)(B)) and sanctions for loss of ESI due to routine, good-faith operations (Rule 37(g)). A pending Petition to amend the rules to reflect the 2015 federal amendments does not include the proportionality changes in Rule 26(b)(1), but Rule 16(a) would require courts to "ensure" that "discovery is appropriate to the needs of action," considering a list of unique factors. Rule 37(g), if amended as proposed, would include the measures authorized by amended FRCP Rule 37(e), but would also define factors for determining if "reasonable steps" were undertaken.

Arkansas. Arkansas adopted core e-discovery amendments in a single rule (Ark. R. Civ. P. 26.1) effective on October 1, 2009, including counterparts to FRCP Rule 26(b)(2)(B) and Rule 37(e).

California. E-discovery amendments became effective in California on June 29, 2009 by unique legislative amendments to the California Code of Civil Procedure (via the "Electronic Discovery Act"). Discovery of ESI is subject to "accessibility" limits (2031.060) and to proportionality concerns (1985.8(h)(4)), (2031.060, 2031.310), and must be produced at the expense of the demanding party if translation is needed (2031. 280(e) and 1985.8(g) [subpoenas]). A broader version of former FRCP Rule 37(e) is included in sections 1985.8 [subpoena], 2031.060, 2031.300, 2031.310 and 2031.320. It extends its coverage beyond parties to subpoenaed non-parties and attorneys, is not confined to rule-based sanctions and provides that it is not to be "construed to alter any obligation to preserve discoverable information." For a discussion of California case law including the Toshiba cost-shifting litigation, *see* EDISCCORP § 26:35.

Colorado. Colorado amended its civil rules effective July 1, 2015 so that Colorado Rule 1(a) requires that the rules be "construed, administered, and employed by the court and the parties" to achieve the goals of the Rules, reflecting the (then) proposal of the 2015 federal amendments. The applicable Comment states this is a wave of reform. Rule 26(b)(1) incorporates language making the scope of discovery "proportional to the needs of the case" and related factors, while also deleting references to subject matter, "reasonably calculated," and examples. Rule 16(b)(6) requires parties to state positions on the application of the factors "to be considered in determining proportionality" and Rule 16(b)(15) requires, as to ESI, agreements as to search terms and "continued preservation, and restoration of ESI," including the form of production. The applicable Comment regarding proportionality factors is extensive. Colorado has not adopted either the 2006 nor the amended version of FRCP Rule 37(e) nor placed limitations on production from inaccessible sources of ESI as found in FRCP 26(b)(2)(B).

Connecticut. E-discovery amendments were made to the Connecticut *Practice Book* effective January 1, 2012 by a series of e-discovery amendments, also cited as *Practice Book* 1998, §13. Those changes remain as part of the 2016 Version and include authority for the allocation of the "expense of the discovery of ESI" as part of protective orders (Sec. 13-5), limits on production akin to proportionality (Sec. 13-2), and an enhanced version of FRCP Rule 37(e) that bars sanctions for a failure to provide information, including ESI, which is not available due to routine, good faith "operation of a system or process" in the "absence of a showing of intentional actions designed to avoid known preservation obligations" (Sec. 13-14(d)).

Delaware. Effective January 1, 2013, the Delaware Court of Chancery amended its civil rules to conform to some of the 2006 amendments, but not limits on production of inaccessible ESI nor a "safe harbor" amendment equivalent to Rule 37(e). The Court also updated its ***Guidelines of Best Practices for Discovery***. The Superior Court earlier established a Commercial Litigation Division, with ***Guidelines*** that deal with production from inaccessible sources of ESI and provide "safe harbors," including one for destruction of ESI not ordered to be produced when a party acts in compliance with an e-discovery order. The Chancery court has rendered a number of decisions on preservation and spoliation of ESI. In *Cruz v. G-Town Partners*, 2010 WL 5297161, at *10 (Sup. Ct. New Castle Co. Dec. 3, 2010), for example, the trial court refused harsh sanctions where a moving party failed to demonstrate "intentional or reckless destruction or suppression of evidence."

District of Columbia. The Court of Appeals has approved the November 2010, e-discovery revisions recommended by the Superior Court and transferred to the Court of Appeals for final approval. These rules include a counterpart to FRCP 37(f) as adopted in 2006.

Florida. The Florida Supreme Court adopted e-discovery rules in the Florida Rules of Civil Procedure effective September 1, 2012, largely based on the 2006 amendments. Rule 1.280 authorizes production of inaccessible information over objection, and invokes proportionality factors for use in the assessment of discovery of ESI. Rule 1.380 adopts the former version of Rule 37(e) and the Committee Note states that in determining "good faith" the court may consider any steps taken to comply with court orders, party agreements, or requests to preserve such information. An ongoing (and unresolved) controversy exists over whether Florida acknowledges a general pre-litigation duty to preserve. *See* Michael B. Bittner, *Electronic Discovery: Understanding the Framework of Florida E-Discovery Law*, 35 No. 2 Trial Advoc. Q. 22 (Spring 2016).

Georgia. The discovery rules in the Civil Practice Act of the Georgia Code do not contain specific references to e-discovery. *See, e.g.*, Ga. Code Ann. § 9-11-26 (General Provisions Governing Discovery) (providing no limits on production unique to ESI). Various attempts to pass e-discovery legislation in the Georgia General Assembly have failed. *See* EDISCCORP § 26.48. The Uniform Georgia Civil Rules incorporate permission for parties to agree on preservation and production of ESI, including formats, at an Early Planning Conference. *See* Rule 5.4 (effective 2015).

Hawaii. Hawaii adopted counterparts to the 2006 amendments, including Rule 26(b)(2)(B) and Rule 37(f) effective in January 2015, bearing the same numbers, with one Justice dissenting to the inclusion of Rule 37(f). In *Ace Quality Farm v. Hahn*, 362 P.3d 806 (C. A. Nov. 10, 2015), the court affirmed a lower court imposition of permissive adverse inference, which turned into a mandatory inference, for loss of email.

Idaho. E-discovery amendments to the Idaho Rules of Civil Procedure became effective in July 2006, involving amendments to Rules 26, 33, 34 and 45. Rule 34(b) is similar to – but not identical with – Tex. R. Civ. P. 196.4 and requires production of "data that is responsive and reasonably available to the responding party in its ordinary course of business." If a party cannot "through reasonable efforts" retrieve the data or information requested or produce it in the form requested, a court may order – at the requesting party's cost – compliance. As in the case of Texas, the responding party must state an objection in order to assert that the information cannot be retrieved through reasonable efforts. Idaho did not enact an equivalent to Rule 37(e).

Illinois. Illinois updated its Civil Rules in 2014 to add proportionality considerations to Rule 201(c)(3) ("Proportionality"). The Committee Comments note that the analysis may indicate that various categories of ESI (drawn from the Seventh Circuit Electronic Discovery Program) should not be discoverable. Rule 219 ("Consequences of Refusal to Comply with Rules or Order") was not amended to incorporate former or current Rule 37(e) since *Shimanovsky v. General Motors*[22] and *Adams v. Bath and Body Works*[23] contain sufficient discussion of sanctions for discovery violations and the separate and distinct claim for the tort of negligent spoliation. *See* Committee Comment to Rule 219. Rule 218 was amended to encourage use of the case management conference to resolve issues relating to ESI early in the case.

Indiana. E-discovery amendments to the Indiana Rules of Civil Procedure became effective on January 1, 2008 based on the 2006 federal amendments including equivalents to Rule 26, Rule 34 (a), Rule 34(b) and former Rule 37(e). The Indiana Supreme Court has opined on the role of tort based actions relating to spoliation in *Howard Regional Health v. Gordon*, 952 N.E.2d 182 (Sup. Ct. Aug. 10, 2011).

Iowa. E-discovery amendments were initially adopted in the Iowa Rules of Civil Procedure in 2008 based on the 2006 Amendments. This included equivalents of Rule 26(b)(2)(B)(1.504(2)) and former Rule 37(e)(1.517). Subsequently, a Supreme Court Task Force for Civil Justice Reform recommended further revisions, which became effective January 1, 2015. These included adoption of the 2015 FRCP changes to the equivalent to Rule 1 (1.501(2)) ("administered, and employed by the courts and the parties" etc.) as well as new disclosure requirements (1.500(1)) (including ESI) and relocation of proportionality requirements, now articulated separately, not just as limits on protective orders (1.503(8)). *See, e.g.,* Comment to I.C.A. Rule 1.504(1) (stressing "independent obligation" to "ensure the proportionality of discovery").

Kansas. Effective July 1, 2008, Kansas adopted e-discovery amendments essentially identical to the 2006 federal amendments. Thus, KSA Rules 60-216, 60-226, 60-233, 60-234, 60-237 and 60-245 are identical to their federal counterparts, with the exception that Rule 60-226 does not contain early disclosure nor meet and confer requirements. Kansas "[t]raditionally [has] followed federal interpretation of federal procedural rules after which our own have been patterned." *Stock v. Norhus*, 216 Kan. 779, 533 P.2d 1324 (S. Ct. Kan. April 5, 1975).

Kentucky. Kentucky has not adopted analogs to the federal e-discovery rules, but does encourage parties to respond to production in an electronic format using commercially available word processing software in addition to production in hard copy. *See* CR 26.01 (Discovery Methods). In *University Medical Center v. Beglin*, 375 S.W.3d 783 (Ky. 2011), the court dealt with the availability of adverse inference instructions in regard to pre-litigation spoliation.

Louisiana. In 2007, 2008 and 2010, the Legislature passed and the Governor signed legislation that collectively provides comprehensive e-discovery amendments to the Louisiana Code of Civil Procedure. In 2008, the Legislature added a counterpart to former Rule 37(e) [Art. 1471(B)] with Comments noting the inapplicability of the limitation to spoliation torts, citing an ambiguous case, *Guillory v. Dillards*.[24] The Legislature also amended Article 1462 to add an inaccessibility distinction based on Rule 26(b)(2)(B) and a unique requirement in Article 1462(C) requiring a producing party to identify the means which must be used to access ESI being produced.

Maine. E-discovery amendments to the Maine Rules of Civil Procedure became effective on August 1, 2009 based on the 2006 Amendments, including limits on production from inaccessible sources (Rule 26(b)(6)) and on losses of ESI (Rule 37(e)). The Advisory Committee Notes are quite extensive, especially in regard to defining the meaning of "routine" and "good faith" in applying the equivalent to former Rule 37(e).

Maryland. E-discovery amendments to the Maryland Rules became effective on January 1, 2008, primarily based on the provisions of the 2006 Amendments. Rule 2-402(b)(2) permits a party to "decline" to produce ESI because the sources are inaccessible but requires a party to state the reasons why production from an inaccessible source would cause undue burden or cost in sufficient "detail" to enable the other side to evaluate. Production may be ordered only if the "need" outweighs the burden and cost of "locating, retrieving, and producing" it after considering the [proportionality] factors listed in Rule 2-402(a). Rule 2-433(b) limits sanctions for ESI "that is no longer available" as the result of the routine, good-faith operation of an information system.

Massachusetts. The Supreme Judicial Court initially adopted, effective January 1, 2014, amendments to its Civil Rules to embody e-discovery amendments with Reporters Notes. Rule 26(f)(4) permits objections to production of inaccessible ESI, which may be ordered based on benefit outweighing the burdens of production. Proportionality limits apply "even from an accessible source, in the interests of justice," and are subject to a list of factors. Rule 37(f) is identical to former FRCP 37(e), except that it limits all sanctions, not just rule-based sanctions. After the 2015 federal amendments, by Order of the Supreme Judicial Court effective July 1, 2016 (MA Order 16-0037), Rule 26(c) has been amended to add factors to determine if discovery is unduly burdensome. The Reporters Notes reflect a conscious decision to refuse to amend the scope of discovery to add "proportional to the needs of the case," in favor of a "wait and see" attitude.

Michigan. E-discovery amendments to the Michigan Civil Rules became effective on January 1, 2009, largely based on the 2006 amendments. A "safe harbor" provision was included in 2.302(B)(5) [roughly equivalent to Rule 26] and is preceded by a statement that "[a] party has the same obligation to preserve [ESI] as it does for all other types of information." MCR 2.302(B)(6) limits production of ESI from inaccessible sources. MCR 2.313(E) [roughly equivalent to Rule 37] includes the same safe harbor language without the introduction. An excellent summary is provided in Dante Stella, *Avoiding E-Discovery Heartburn*, 90-FEB Mich. B. J. 42 (2011). A case alluding to (but not applying) the Michigan safe harbor is *Gillett v. Michigan Farm Bureau*.[25] *See, also* Staff Comment to "MCR 2.302" explaining that the "safe harbor" provision applies when information is lost or destroyed "as a result of a good-faith, routine record destruction policy or 'litigation hold' procedures."

Minnesota. The Minnesota Supreme Court initially adopted e-discovery rules effective on July 1, 2007 that mirror the 2006 amendments, including limits on production of ESI from inaccessible sources and former Rule 37(e) [Rule 37.05]. On July 1, 2013, Rules 1 and 26.02(b) were amended to emphasize the role of "proportionality" in e-discovery. Rule 1 places the responsibility on the courts and parties to assure that "the process and costs are proportionate to the amount in controversy and the complexity and importance of the issues," listing factors. Rule 26.02(b)(2) provides that discovery must be limited to "comport with the factors of proportionality." The scope of discovery is limited to matters relevant to claims or defense but a court may order discovery as to subject matter after a showing of "good cause and proportionality." The Minnesota Supreme Court has famously distinguished the tort "duty" to preserve in pending and third party actions in *Miller v. Lankow*, 801 N.W.2d 120 (Sup. Ct. Aug. 3, 2011).

Mississippi. The Mississippi Supreme Court initially adopted a limited e-discovery rule in 2003 based on the Texas approach of limiting production of "electronic or magnetic data" to that which is "reasonably available to the responding party in the ordinary course of business" and authorizing – at the discretion of the Court – an order for payment of "reasonable expenses" of any "extraordinary steps" required to comply with an order to produce. In 2013, amendments to Rules 34 and 45 became effective to conform to the federal approach to specification of and objection to the form of production.

Missouri. Missouri has not adopted analogs to the federal e-discovery amendments, but there is a local rule that encourages production in electronic format. *See* EDISCCORP § 26.50.

Montana. E-discovery amendments to the Montana Civil Rules were adopted to incorporate the 2006 federal amendments, including equivalents to Rule 26(b)(2)(B) and former Rule 37(e).

Nebraska. Limited e-discovery amendments to several of the Nebraska Court Rules of Discovery became effective in July 2008 by action of the Nebraska Supreme Court. The primary change in §6-334 was to authorize discovery of ESI from parties and non-parties and to specify the form or forms of production; and to authorize the use of ESI in the form of business records in lieu of interrogatory answers (NCRD Rule 33). There is no equivalent to FRCP Rule 26(b)(2)(B) or former Rule 37(e).

Nevada. As of March 2014, Nevada amended Rule 34 of its Rules of Civil Procedure to accommodate production of ESI. There is no equivalent to FRCP Rule 26(b)(2)(B) or former Rule 37(e).

New Hampshire. E-discovery amendments were incorporated into a single rule (N.H. Super. Ct. Rule 25), which became effective October 1, 2013. This unique rule identifies a duty to preserve on the part of parties; requires counsel to notify clients to place a "litigation hold;" and requires that requests for ESI be "proportional" to the significance of the issue (and allows shifting costs if not). It makes no provision for limiting sanctions for losses of ESI.

New Jersey. New Jersey was the first state to incorporate the provisions of the 2006 amendments into its civil rules, effective September 1, 2006. ESI is discoverable although inaccessible information need not be produced [4:10-2(f)] and an equivalent to Rule 37(e) exists [4:23-6]. In 2010, Rule 4:18(c) was added to include a required certification or affidavit of "completeness" that a "good faith" search has been made and acknowledging a duty to supplement. In 2012, expansive rules dealing with e-discovery in Criminal and Municipal Courts were added, extending to both many of the concepts of civil e-discovery practice. *See* EDISCCORP § 26.12 (New Jersey).

New Mexico. Limited e-discovery amendments became effective in May 2009 by action of the New Mexico Supreme Court. The Committee Commentary to Rule 1-026 and Rule 1-037 explains that neither the accessibility limitation nor the safe harbor were adopted because discovery of ESI should be the same as that of discovery of documents.

New York. There have been no Legislative changes to Article 31 of the Civil Practice Law and Rules to accommodate e-discovery. The scope of "disclosure" in New York (CPLR 3101) remains "all matter material and necessary"; a party may seek to inspect "designated documents or things" (CPLR 3120(1)(i), "documents" must be produced as they are kept in the ordinary course of business or organized to correspond to the request, with "reasonable production expenses" defrayed by the party seeking discovery (CPLR 3122)). In *Voom HD Holdings v. Echostar*, an appellate court adopted the Zubulake logic as governing the onset of the duty to preserve[26] and in *U.S. Bank v. Greenpoint Mortgage*, the same court adopted its approach to payment of production costs.[27] A third decision by the same appellate court in *Tener v. Cremer*,[28] involving a dispute over subpoena of ESI. The Uniform Rules for the New York State Trial Courts were amended to deal with counsel and party responsibilities in connection with preliminary conferences (Sec. 202.12(b) & (c)) in the regular and the Commercial Division of the Supreme Court (Sec. 202.70(g)). The Nassau County Commercial Court has published Guidelines and Model Stipulation and Order for Discovery of ESI. For greater detail, including case citations, *see* EDISCCORP § 26:41.

North Carolina. The North Carolina Legislature adopted e-discovery amendments to its Rules of Civil Procedure effective October 2011. Rule 26(b)(1) defines ESI as including metadata and (1b) cross-references an inaccessibility analogue to FRCP 26(b)(2)(B) found in Rule 34(b). The Committee Comment elaborates on the definition of ESI and the placement of the accessibility limitation. Rule 37(b)(1) is identical to the former FRCP Rule 37(e). The Committee Comment notes that it does not affect authority to impose sanctions under the rules of professional responsibility or "other sources." The ***North Carolina Business Court***, part of the trial division, has since 2006 operated with "Amended Local Rules" (July 31, 2006).

North Dakota. Amendments to the North Dakota Rules of Civil Procedure, based on the 2006 amendments, became effective March 1, 2008, including FRCP 26(b)(2)(B) and former Rule 37(f), bearing those numbers.

Ohio. Amendments to the Ohio Civil Rules, largely based on the 2006 amendments, became effective July 1, 2008. Rule 26(b)(4), limiting production from inaccessible sources, does not require "identification" of the ESI involved, but a party may simply refuse to produce it. The rule also states that if production of ESI is ordered, a court may specify the "format, extent, timing, allocations of expenses and other conditions" for production. The safe harbor provision in Rule 37(f) includes five factors that a court "may" consider when deciding if sanctions should be imposed including whether the information was lost "as a result of the routine alteration or deletion of information that attends the ordinary use of the system in which it is maintained or in a reasonably useable form under ORCP 43(E).

Okahoma. Oklahoma enacted 3-discovery rules effective November 1, 2010. Section 3226(b)(2)(B) of Chapter 41 (Discovery Code) of the Oklahoma Statutes Annotated limits production of inaccessible ESI and Section 3237(G) includes a broadened version of former Rule 37(e), which is not restricted to rule-based sanctions. ***See Steven S. Gensler, Oklahoma's New E-Discovery Rules (2010)***.

Oregon. Oregon amended its Rules of Civil Procedure effective January 1, 2012. Under the amendment, "electronically stored information" is discoverable as a form of documents that, in the absence of a specific requested form, must be produced in the form in which it is maintained or in a reasonably useable form under ORCP 43(E).

Pennsylvania. The Pennsylvania Supreme Court enacted limited changes to its Rules of Civil Procedure, which became effective on August 1, 2012. Rule 4009 now authorizes requests for ESI (as a form of a document) and specifies its "format" for production [in the absence of a request] as the "form in which it is ordinarily maintained or in a reasonably usable form," while Rule 4011 prohibits discovery, including of ESI, which is sought in bad faith or would cause "unreasonable annoyance, embarrassment, oppression, burden or expense." The Court provided a "2012 Explanatory Comment – Electronically Stored Information" (at former Rule 4009), which states that "there is no intent to incorporate the federal jurisprudence surrounding the discovery of [ESI]" and that the "treatment of such issues is to be determined by traditional principles of proportionality under Pennsylvania law." The Comment also suggests that parties and courts may consider "tools" such as "electronic searching, sampling, cost sharing and non-waiver agreements to fairly allocate discovery burdens and costs." It also advocates incorporating non-waiver agreements into court orders.

Rhode Island. Rule 34 of the Rhode Island Rules permits requests for production of ESI but does not include equivalents of Rule 26(b)(2) or former Rule 37(e).

South Carolina. The Supreme Court adopted and sent to the Legislature e-discovery amendments to the South Carolina Rules of Civil Procedure that became effective in April 2011. The text of the amendments are essentially identical to the 2006 Amendments, including Rule 26(b)(6) [as to FRCP Rule 26(b)(2)(B) and Rule 37(f) [as to former FRCP Rule 37(e)]].

South Dakota. South Dakota has not adopted any provisions dealing with ESI.

Tennessee. E-discovery amendments to the Tennessee Rules of Civil Procedure became effective on July 1, 2009 with rough equivalents to FRCP 16 (Rule 16.01), 26 (Rules 26.02 and 26.06), 34 (Rules 34.01 and 34.02), 37 (Rule 37.06) and 45 (Rule 45.02). These include provisions limiting production from inaccessible sources (Rule 26.02(1)) and limits on ESI lost due to routine, good-faith operations (Rule 37.06(2)). A unique additional provision governs issues arising when a motion to compel ESI is filed (Rule 37.06(1)), which includes a tailored list of proportionality factors.

Texas. The Texas Civil Procedure code was initially amended in 1999 to deal with electronic or magnetic data. It authorized objections to production of electronic data which is not "reasonably available" to the responding party in "its ordinary course of business." If ordered to produce, the rule requires payment of the reasonable expenses of any extraordinary steps required retrieving and producing the information. The Texas Supreme Court analogized the rule with FRCP Rule 26(b)(2)(B) in the case of *In re Weekley Homes, LP.*[29] Rule 196.6 allocates the costs of producing "items" to the "requesting party" unless otherwise ordered for "good cause." Texas did not include a safe harbor provision. By letter of April 18, 2016, the Chief Justice has asked the Supreme Court Advisory Committee to review a proposal to add a "spoliation rule" (Proposed Tex. R. Civ. P. 215.7). That proposal deals, among other issues, with the impact of *Brookshire Bros. v. Aldridge*,[30] under which Texas courts are barred from submitting evidence of spoliation to juries under certain circumstances. For a more detailed discussion of Texas case law, see EDISCCORP § 26:42.

Utah. The Utah Supreme Court initially approved a set of e-discovery rules in the Utah Rules of Civil Procedure based on the 2006 Amendments, effective on November 1, 2007. Rule 37(i) ("Failure to preserve evidence") provides that nothing in the rule limits the inherent power to issue sanctions if a party fails to preserve documents or ESI, followed by a verbatim copy of former FRCP 37(e). See *Veazie v. RCB Ranch.*[31] Rule 26(b)(4) limits production from sources that are not reasonably accessible but requires a party claiming inaccessibility to describe the source, the burden and nature of the information. In 2011, as part of a comprehensive revision, Rule 26(b) was amended to permit discovery only "if the party satisfies the standard of proportionality" set forth and with the burden of establishing proportionality and relevance "always" placed on the party "seeking discovery." Under Rule 37(b)(2) a party seeking discovery has the burden of "demonstrating that the information being sought is proportional" when a protective order motion "raises issues of proportionality." Rule 26(b)(2) defines "proportionality" in terms of factors and its ability to further the just, speedy, and inexpensive resolution of the case. The amount of discovery available is tied to the amount in controversy although a party can seek extraordinary discovery if "necessary and proportional." *See* EDISCCORP § 26: 17. *See also* Philip J. Favro and The Hon. Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012 Mich. St. L. Rev. 933.

Vermont. E-discovery amendments to the Vermont Rules of Civil Procedure became effective July 6, 2009 based on the 2006 amendments. Rule 26(b)(1) limits production from inaccessible sources and Rule 37(f) adopts the former FRCP limitation on rule-based sanctions for losses of ESI. The Reporter's notes to Rule 26 mention that they "will retain the basic uniformity between state and federal practice that is a continuing goal of the Vermont Rules." The Reporter's Notes to Rule 37 define "good faith" as precluding "knowing continuation" of an operation resulting in destruction of information.

Virginia. E-discovery amendments to the Virginia Supreme Court Rules became effective January 1, 2009, to include the 2006 federal amendments, including an equivalent to Rule 26(b)(2)(B) (4:1(b)(7)) and Rule 34(b) (4:9(b)(iii)(B)). Virginia did not adopt a version of former Rule 37(e).

Washington. Washington has not adopted e-discovery rules. However, in *Cook v. Tarbert Logging*, a state appellate court compared the 2015 version of Rule 37(e) to the alleged absence of a pre-litigation duty in Washington and noted that in diversity actions, the Federal Courts avoid Erie issues in such removed actions by labeling spoliation as involving evidentiary issues.[32]

West Virginia. West Virginia has not adopted e-discovery rules.

Wisconsin. The Supreme Court of Wisconsin adopted e-discovery amendments effective January 1, 2011. One section of an equivalent to Rule 26 (Wis. Stat. § 804.01(2)(e)) conditions the ability to request production of ESI on a prior conference of the parties on topics relating to ESI production including "[t]he cost of the proposed discovery of [ESI]" and the extent to which it should be limited. The 2010 Judicial Council Note states that this was created "as a measure to manage the costs of the discovery of [ESI]." The Rules include an equivalent of Rule 34 (804.09(2)(b)) and Rule 37(e) (804.12(4m)).

Wyoming. The Wyoming Supreme Court amended its Civil Rules to conform to the 2006 amendments in its Rules 26, 33, 34, 37 and 45, including Rule 26(b)(2)(B) and Rule 37(f). In 2011, the Rules for Wyoming Circuit (not in excess of $50K, as opposed to District Courts) were revised to place substantial emphasis on proportionality and to limit discovery, and to take precedence over the RCP (see W.R.C.P.C.C., Rules 1 & 8). *See* Craig Silva, *The Repeal and Replacement of the Wyoming Rules of Civil Procedure for Circuit Courts*, 34-JUN Wyo. Law. 13 (June 2011).

Notes

1. Acknowledgements: CJI Committee member Thomas Y. Allman principally authored this appendix with generous assistance from Brittany Kaufman (Director, Rule One Project, IAALS), and Judge Gregory E. Mize (CJI Committee Reporter).

2. The 2006 Federal E-Discovery Amendments were adopted, in whole or in part, by over 26 States. *See* Thomas Y. Allman, ***E-Discovery Standards in Federal and State Courts after the 2006 Federal Amendments (2012)***. The 2015 Federal Amendments expand and clarify many of innovations in the initial cycle. *See* Thomas Y. Allman, *The 2015 Civil Rules Package as Transmitted to Congress,* 16 Sedona Conf. J. 1, 39 (2015) (replacing Rule 37(e) with a "rifle shot" aimed at "tak[ing] some very severe [spoliation] measures of[f] the table" without a showing of specific intent).

3. In some jurisdictions, a breach of the duty to preserve is treated as a tort obligation owed to the party deprived of the ESI, enforceable by an action for damages. Most do not. *Miller v. Lankow*, 801 N.W. 2d 120, 128 at n. 2 (S.C. Minn. 2011) (the use of the word "duty" does not imply "a general duty in tort").

4. *See* Minnesota E-Discovery Working Group, *Using Legal Holds for Electronic Discovery*, 40 Wm. Mitchell L. Rev. 462 (2014).

5. Fed. R. Civ. P. 37(e) (2015) and Committee Note.

6. A list of the typical categories of such ESI is provided in Principle 2.04(d) (Scope of Preservation) of the ***Seventh Circuit Principles Relating to the Discovery of Electronically Stored Information***: (1) deleted, slack, fragmented, or unallocated data on hard drives; (2) random access memory (RAM); (3) on-line access data such as temporary internet files, cookies, etc.; (4) data in metadata fields that is frequently updated; (5) backup data substantially duplicative of ESI more accessible elsewhere; (6) other forms of ESI requiring extraordinary affirmative measures not utilized in the ordinary course of business.

7. Fed. R. Civ. P. 37(e), Committee Note.

8. *Id.* Arizona is considering adoption of a form of Fed. R. Civ. P. 37(e) (2015) which specifically defines "reasonable steps" (in contrast to the federal rule, which does not). *See* ***Ariz. Rule 37(g)(1)(C)("Reasonable Steps to Preserve") [Proposed]***.

9. Proportionality factors are now included as limits in the scope of discovery in Fed. R. Civ. P. 26(b)(1) as a result of the 2015 Federal Amendments, following similar changes made by civil rule in Colorado (Rules 1 and 26(b)(1)), Minnesota (Rules 1 and 26.02(b)), and Utah (Rules 26(b) and 37(a)).

10. Attorney competence in the ethical sense includes keeping abreast of changes in the law and practice including the benefits and risks of relevant technology. Comment 8, Rule 1.1 ABA MRPC. California has articulated the implications of the duty of competence in e-discovery. *See* ***Formal Opinion No. 11-0004 (Interim)***.

11. A United States District Court in Colorado recently issued Guidelines and a Checklist for early consultation based on similar efforts in the Northern District of California. *See* ***U.S. Dist. Ct. Dist. Colo. Electronic Discovery Guidelines and Checklist***.

12. MRPC Rule 4.4 (comment 2 refers to ESI and to embedded data).

13. MRPC Rule 1.6 (requiring a lawyer not to reveal client information without informed consent, with implications for privacy, security of networks, cloud computing, etc.).

14. Delaware Court of Chancery Guidelines for the Preservation of ESI (2011).

15. The 2015 Federal Amendments have clarified Rule 26(c)(1)(B) to emphasize that allocation of expenses is available as a condition of protective orders issued for good cause.

16. This Memorandum updates the ***Appendix in E-Discovery Standards in the Federal and State Courts after the 2006 Amendments (2012)***.

17. *See* Rule 1, 26(b)(1) and Rule 37(e) and Committee Notes, at 305 F.R.D. 457 (2015).

18. ***Current Listing of States That Have Enacted E-Discovery Rules (K&L Gates)***.

19. *See, e.g.,* "EDISCCORP § 26:1 ("eDiscovery in the state Courts"). To go to a specific state, access the Table of Contents at the citation above and scroll to "State by State" summary.

20. 181 Ill.2d 112, 692 N.E.2d 286, 290 (Feb. 20, 1998).

21. 358 Ill. App.3d 387, 393, 830 N.E.2d 645 (App. Ct. 1st D. 2005).

22. 777 So.2d 1, 2000-190 (La. App. 3 Cir. Oct. 11, 2000).

23. 2009 WL 4981193 (Mich. App. Dec. 22, 2009) (drawing distinction between inherent power and rule based sanctions).

24. 93 A.D.3d 33, 939 N.Y.S.2d 321 (N.Y. A.D.1 Dept. Jan. 31, 2012).

25. 94 A.D.3d 58, 939 N.Y.S.2d 395 (N.Y. A.D.1 Dept. Feb. 28, 2012).

26. 89 A.D.3d 75, 931 N.Y.S.2d 552 (N.Y. A.D.1 Dept. Sept. 22, 2011).

27. 295 S.W.3d 309 (2009).

28. 438 S.W.3d 9 (Tex. 2014).

29. 2016 UT App. 78, 2016 WL 1618416 (CA. April 21, 2016) (civil contempt finding enabled use of remedies under Rule 37 as a result of equivalent of slightly revised former FRCP Rule 37(e)).

30. 190 Wash. App. 448, 360 P.3d 855, 865-866 (C.A. Wash. Oct. 1, 2015).