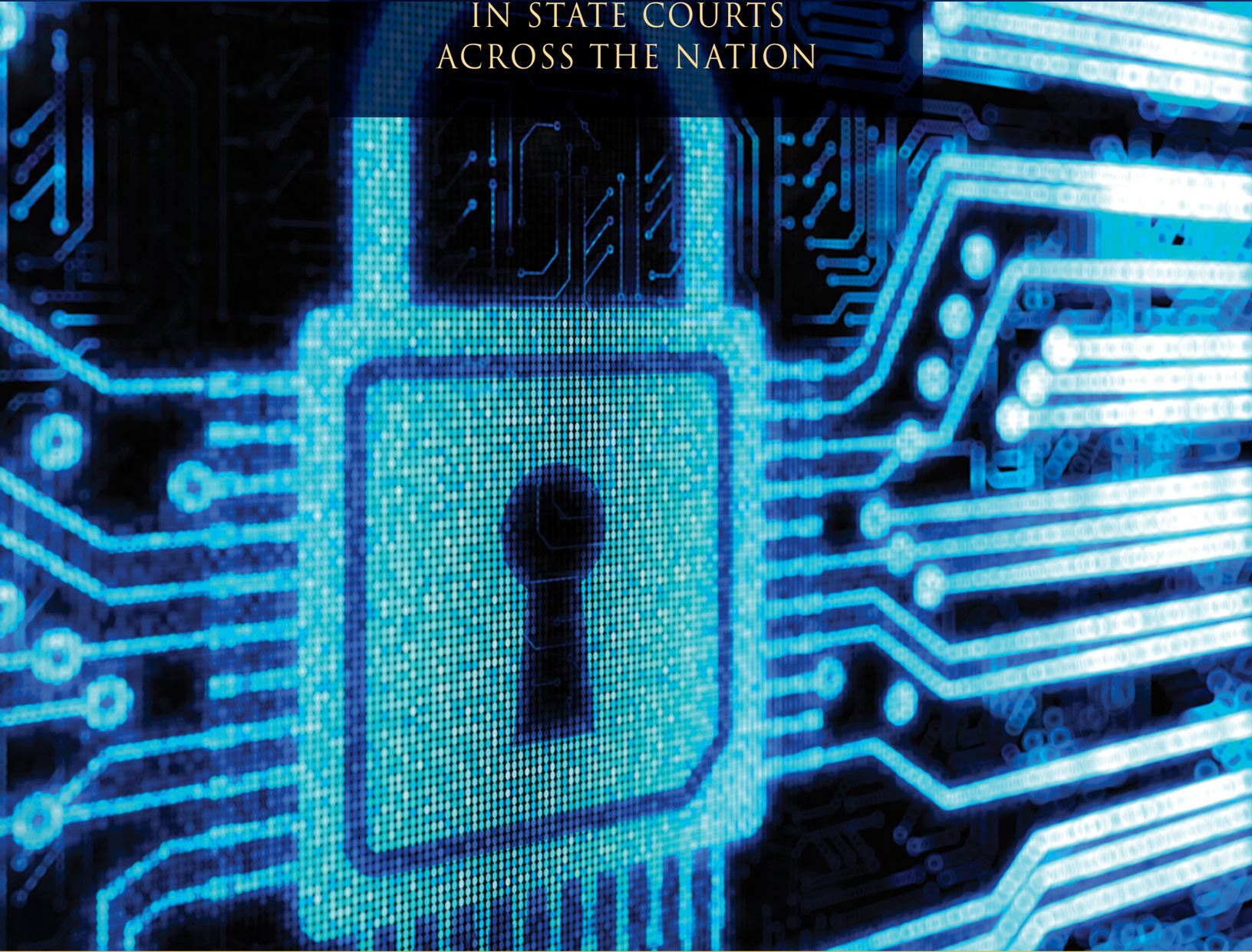


# UNLOCKING E-DISCOVERY:



A TOOLKIT FOR JUDGES  
IN STATE COURTS  
ACROSS THE NATION



RULE ONE  
INITIATIVE



EMPOWERING IMPROVEMENT.  
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DENVER

# UNLOCKING E-DISCOVERY: A TOOLKIT FOR JUDGES IN STATE COURTS ACROSS THE NATION

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**October 2013**

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IAALS, the Institute for the Advancement of the American Legal System, is a national independent research center at the University of Denver dedicated to continuous improvement of the process and culture of the civil justice system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable civil justice system.

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*With special thanks to Thomas Y. Allman, Steven S. Gensler,  
and the Honorable Morris Hoffman for their review and helpful feedback.*



*Rule One* is an initiative of IAALS dedicated to advancing empirically informed models to promote greater accessibility, efficiency, and accountability in the civil justice system. Through comprehensive analysis of existing practices and the collaborative development of recommended models, *Rule One Initiative* empowers, encourages, and enables continuous improvement in the civil justice process.

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## I. WHERE IS A STATE COURT JUDGE TO BEGIN?

Over the last decade, the impact of electronically stored information on litigation in state court has continued to grow across the nation. From county courts to complex business courts, state court judges increasingly need to understand, and manage, the discovery and use of electronically stored information, or ESI, in their cases. And for the same reasons that ESI poses a challenge to litigants in the United States, ESI poses a challenge to judges. ESI can be challenging to understand, preserve, collect, review, and produce. It can also be used as leverage, and ultimately may distract from the central issues in a case. On the flip side, along with the challenges come the many benefits of electronically stored information. For these reasons, it must be understood and managed so that proportionality, rather than a runaway train, is the result.

Another challenge is that state court judges around the country come to the bench with a very diverse set of experiences, including diverse experiences regarding ESI. Some judges, and jurisdictions, are on the cutting edge of e-discovery issues, while others are just beginning to encounter ESI in their cases. When it comes to judicial education, the same thing is true. Some state court judges are at the forefront of judicial education in this area, while others have not yet been exposed to any formal training. Judges are just as pressed for time as the attorneys who practice before them. In this day and age, there is an abundance of information available with just the stroke of a key. Yet, even if all of the information is available, for many the question is, “*Where to begin?*”

This toolkit attempts to answer that question. Rather than providing another primer on e-discovery, we have pulled together some of the best resources and offer here the tools to get started. Whether you are an expert on ESI just looking for the answer to a specific question, or a novice learning about these issues for the first time, we think you will find this compilation of materials a useful tool in determining how best to address the discovery and use of ESI in your cases.

## II. A COLLECTION OF PRIMERS

There are several good resources available that are specifically tailored for the judiciary, and we have compiled a list of some of the best below. While some of these resources are aimed at federal judges, they nevertheless are useful for the state court judge, both because many of the basic issues related to ESI are the same regardless of the court, and because of the number of states that have adopted rules mirroring the Federal Rules of Civil Procedure. We begin our list with IAALS' own manual for state court judges, the companion piece to this toolkit, which is specifically tailored for state court judges:

- **Institute for the Advancement of the American Legal System, Navigating the Hazards of E-Discovery: A Manual For Judges in State Courts Across the Nation**
  - In this Second Edition, IAALS provides an updated and accessible manual for state court judges and anyone who needs a basic resource that includes the terminology, background, summary of current issues, and relevant case law.
  - INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., NAVIGATING THE HAZARDS OF E-DISCOVERY: A MANUAL FOR JUDGES IN STATE COURTS ACROSS THE NATION (2012), available at <http://iaals.du.edu/library/publications/navigating-the-hazards-of-e-discovery-a-manual-for-judges-in-state-courts-a>.

Other recommended primers include:

- **Federal Judicial Center, Benchbook for U.S. District Court Judges**
  - While this resource is intended for federal judges, it can be a useful resource for state court judges as well. It now includes a section for judges on how to address electronic discovery issues, as well as jury instructions related to social media and jurors' use of electronic devices during trial.
  - FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES (6th ed. 2013), available at [http://www.fjc.gov/public/pdf.nsf/lookup/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf/\\$file/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf/$file/Benchbook-US-District-Judges-6TH-FJC-MAR-2013-Public.pdf).
- **The Sedona Conference<sup>®</sup>, The Sedona Conference<sup>®</sup> Cooperation Proclamation: Resources for the Judiciary (2012)**
  - The Sedona Conference<sup>®</sup> has an online version of its Resources for the Judiciary from November 2012 and a preliminary paper version that was circulated for comment in August 2011. The Resources recognize that “[t]he key to reducing the costs and delay associated with e-discovery is judicial attention to discovery issues starting early in, and continuing throughout, any given stage of an action.”

The Resources makes several broad recommendations and then walks through the various stages of litigation from a judge's perspective.

- THE SEDONA CONFERENCE<sup>®</sup>, THE SEDONA CONFERENCE<sup>®</sup> COOPERATION PROCLAMATION: RESOURCES FOR THE JUDICIARY (2012), available at <https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20Cooperation%20Proclamation%3A%20Resources%20for%20the%20Judiciary>.
- **Barbara J. Rothstein, Ronald J. Hedges, & Elizabeth C. Wiggins, Federal Judicial Center, Managing Discovery of Electronic Information: A Pocket Guide for Judges**
  - This resource focuses on discovery of electronically stored information under the Federal Rules of Civil Procedure. The first edition of the Guide was published in 2006 following the 2006 amendments to the Federal Rules. This Second Edition has been reorganized into a question and answer format, which is useful for judges who are still learning which questions to ask when it comes to electronically stored information.
  - BARBARA J. ROTHSTEIN, RONALD J. HEDGES, & ELIZABETH C. WIGGINS, FED. JUDICIAL CTR., MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES (2d ed. 2012), available at [http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt2d\\_eb.pdf/\\$file/eldscpkt2d\\_eb.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt2d_eb.pdf/$file/eldscpkt2d_eb.pdf).
- **Anne Kershaw & Joe Howie, Electronic Discovery Institute, Judges' Guide to Cost-Effective E-Discovery**
  - This guide recommends specific technologies and processes for reducing discovery costs so as to control the costs of discovery in this age of electronically stored information. This is a useful resource for judges who already understand the basic terminology of electronic discovery and want more in-depth information regarding the technical aspects of preservation and production.
  - ANNE KERSHAW & JOE HOWIE, ELECTRONIC DISCOVERY INST., JUDGES' GUIDE TO COST-EFFECTIVE E-DISCOVERY (Oct. 2010), available at [http://www.ediscoveryinstitute.org/publications/edis\\_judges\\_guide\\_to\\_cost-effective\\_e-discovery](http://www.ediscoveryinstitute.org/publications/edis_judges_guide_to_cost-effective_e-discovery).

### III. A RECOMMENDED READING LIST

There are many excellent law review articles and opinions on the topic of electronic discovery. Here, we narrow down the universe to provide a more manageable and focused recommended reading list, beginning with the most recent.

- THOMAS Y. ALLMAN, E-DISCOVERY IN FEDERAL AND STATE COURTS: THE ROLE AND IMPACT OF RULEMAKING (August 25, 2013), available in an earlier version at <http://www.ediscoverylaw.com/uploads/file/2012FedStateEDiscoveryRules%28May3%29.pdf>, and on file with the author. This article discusses the impact of the 2006 e-discovery amendments to the Federal Rules of Civil Procedure, and the potential impact of the “package” of proposed amendments recently published for public comment by the Standing Committee of the Judicial Conference. The memo also provides a very useful and detailed examination of the key discovery issues involving electronically stored information in both federal and state courts. The memo ends with an Appendix that provides a state-by-state survey, which has been reproduced in this toolkit in Section IV.
- *In re DCP Midstream, LP v. Anadarko Petroleum Corporation*, 303 P.3d 1187 (Colo. 2013). In this case, the Colorado Supreme Court exercised its original jurisdiction to review the trial court’s order granting DCP’s motion to compel, and in so doing, addressed the scope of discovery under Rule 26 of the Colorado Rules of Civil Procedure. The Court held that, not only does the trial judge have the power to take an active role in determining the appropriate level of discovery for the case, the trial judge is required to do so under the rules. According to the opinion, under Colorado Rule of Civil Procedure 26(b)(1), which is similar to its federal counterpart, when a dispute about the proper scope of discovery arises, “the trial court must determine the appropriate scope of discovery in light of the reasonable needs of the case and tailor discovery to those needs.”
- Philip J. Favro & 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. Several states around the country have experimented in the last several years with pilot projects aimed at improving the civil justice system through rule changes focused on proportionality and increased judicial case management. Rather than implement a pilot project, the Utah bench and bar decided to implement broad rule changes. This article provides an analysis of proportionality, a review of Utah’s rule amendments, and proposed amendments to the Federal Rules drawing on Utah’s experience.
- NICOLAS M. PACE & LAURA ZAKARAS, RAND CORPORATION, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY



(2012), available at <http://www.rand.org/pubs/monographs/MG1208>. Despite a general consensus that discovery has become too expensive in our civil justice system, particularly with the advent of electronically stored information, and all of the associated costs of electronic discovery, it is notoriously difficult to pin down these costs. The authors of this article employed a case-study method to gather cost data for 57 large-volume e-discovery productions. While the findings cannot be applied to smaller cases, or even generalized across all large cases, the monograph nevertheless provides useful insights into the costs of litigation in the age of electronically stored information.

- The Sedona Conference<sup>®</sup>, *The Sedona Conference<sup>®</sup> Cooperation Proclamation*, 10 SEDONA CONF. J. 331, 333 (2009 Supp.), available at <https://thesedonaconference.org/cooperation-proclamation>. Through its Cooperation Proclamation, the Sedona Conference<sup>®</sup> launched “a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery.” State and federal judges around the country have signed on to the Cooperation Proclamation, and state and federal judicial opinions around the country have cited it, recognizing the importance of cooperation in achieving the goals of a just, speedy, and inexpensive system.
- Kristen L. Mix, *Discovery of Social Media*, 5 FED. CTS. L. REV. 119 (2011). As Magistrate Judge Kristin Mix recognizes in her article, “[i]ncreasingly, courts are being asked to decide whether litigants are entitled to discovery information contained in social media, how they may do so, and how such information may be used in litigation.” This is particularly true for state court judges, where such issues can arise in a diverse range of cases. This helpful article addresses the intersection of social media and litigation, including getting the information, using the information obtained, and related constitutional issues.
- *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. 2010). Then Magistrate Judge Paul Grimm acknowledges the “concern throughout the country among lawyers and institutional clients regarding the lack of a uniform national standard governing when the duty to preserve potentially relevant evidence commences, the level of culpability required to justify sanctions, the nature and severity of appropriate sanctions, and the scope of the duty to preserve evidence and whether it is tempered by the same principles of proportionality that Fed. R. Civ. P. 26(b)(2)(C) applies to all discovery in civil cases.” In addition to tackling application of the law in this case, Judge Grimm includes a twelve-page chart analyzing the law of spoliation in each of the federal circuits.

- Hon. John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. CTS. L. REV. 19 (2009). The volume of electronically stored information has affected every aspect of review, collection, and production, including the process of reviewing that information for privilege. The authors of this article reject the traditional document-by-document privilege log and propose a new framework.
- Steven S. Gensler, *Some Thoughts on the Lawyer's E-volving Duties in Discovery*, 36 N. KY. L. REV. 521 (2009). Professor Gensler reminds us that the “impact of e-discovery goes beyond mechanics.” This article examines the way that e-discovery is changing the practice of law, and specifically the discovery culture. From Rule 26(f) conferences, to cooperation, to a lawyer’s duty to oversee search and production, this article walks through the various impacts of e-discovery on the profession—an important consideration for lawyers and judges.
- *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008). In this influential opinion, then Magistrate Judge Paul Grimm provides a detailed analysis of the requirements of Federal Rule of Civil Procedure 26(g), concluding that the process clearly requires cooperation and communication by counsel, both as a legal matter and to ensure orderly and cost-effective discovery. The opinion is a must-read for judges and attorneys alike.
- THE SEDONA CONFERENCE<sup>®</sup>, THE SEDONA PRINCIPLES: SECOND EDITION BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (June 2007), available at <https://thesedonaconference.org/publications>. This second edition of *The Sedona Principles* provides an updated version of the 14 original principles, which provide guidance and “best practices” in the area of electronic discovery.
- *Zubulake v. UBS Warburg LLC (Zubulake I)*, 217 F.R.D. 309 (S.D.N.Y. 2003). In this well-known federal decision, Judge Shira Scheindlin of the Southern District of New York distinguishes between different types of data and sets forth an analysis based on this distinction to determine whether the producing party is responsible for the costs of production, in accordance with the traditional rule, or whether such costs should shift to the requesting party. While there continues to be debate surrounding cost-shifting, the 2006 Amendments to the Federal Rules of Civil Procedure were heavily influenced by the approach in this case.

## IV. RULES GOVERNING E-DISCOVERY IN STATE COURTS AROUND THE NATION

Once a judge has a good understanding of electronically stored information generally, the next question is, “*What is happening in my state?*” We provide here a list of some of the best resources for answering that question.

- K&L Gates, *Current Listing of States That Have Enacted E-Discovery Rules*, ELECTRONIC DISCOVERY LAW, <http://www.ediscoverylaw.com/promo/state-district-court-rules/> (last visited Oct. 9, 2013).
- Carole Basri & Mary Mack, *Chapter 26. eDiscovery in State Courts: A Work in Progress*, by Alitia Faccone, Annkatrin Jensen-Bucaro, & John Tassini, § 26:2 State by State Survey, § 26:3 Quick Reference Chart for State eDiscovery Rules, E-DISCOVERY FOR CORPORATE COUNSEL, available on Westlaw at EDISCCORP § 26:2, 26:3.
- Thomas Reuters, *Civil Laws/Civil Procedure Electronic Discovery, State by State Analysis*, 50 STATE STATUTORY SURVEYS (April 2013), available on Westlaw at 0020 SURVEYS 4.

The following State-by-State Summaries section is an excellent summary of the activity in each state, *reprinted with permission from* Thomas Y. Allman, *E-Discovery in Federal and State Courts: The Role and Impact of Rulemaking*, Appendix A (August 25, 2013) (available in an earlier version at <http://www.ediscoverylaw.com/uploads/file/2012FedStateEDiscoveryRules%28May3%29.pdf>, and on file with the author)<sup>1</sup>:

### A. STATE-BY-STATE SUMMARIES

The patterns of procedural rulemaking vary among the states. States like California, Connecticut, Illinois, Louisiana, Massachusetts, New York, Oklahoma, Pennsylvania and Texas utilize a series of unique rules reflecting historical patterns, including divisions of labor in rulemaking among the legislative and judicial branches.<sup>2</sup> On the other hand, “replica” states

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<sup>1</sup> This article is an excellent resource and is included, in its entirety, in the recommended reading list in Section III. In addition to its discussion of activity in state courts, the article provides a very useful discussion of the federal approach, which state court judges will find helpful for its comparative value.

<sup>2</sup> One minor difference between New York and the rest of the United States is that the

often duplicate the organizational approach of the Federal Rules, although not necessarily the same numbering as the individual Federal Rules.<sup>3</sup>

1. **Alabama.** E-discovery amendments to the Alabama Civil Rules (“Ala. R. Civ. P.”) became effective on February 1, 2010 with adoption of essentially identical amendments to the similarly numbered Rules 16, 26, 33(c), 34 and 45. The Committee Comments are particularly insightful, especially those relating to Rules 26 and 37. A meet and confer is optional at the court’s discretion and there is no required early disclosure of information comparable to Rule 26(a). Alabama adopted a Form 51A (Ala. R. Civ. P. Form 51A) which advises recipients of subpoenas intending to produce ESI of their rights and obligations. *See generally* J. Paul Zimmerman, *A Primer on the New Electronic Discovery Provisions in the Alabama Rules of Civil Procedure*, 71 ALA. LAW. 206 (2010).

2. **Alaska.** E-discovery amendments (“Alaska R. Civ. P.”) became effective on April 15, 2009, adopting provisions equivalent to Fed. R. Civ. P. 16, 26, 33, 34, 37 and 45, similarly numbered in Alaska, but without a requirement of discussion of preservation in Rule 26(f).

3. **Arizona.** E-discovery amendments (“Ariz. R. Civ. P.”) became effective on January 1, 2008 with adoption of rules based on the 2006 Amendments but without a requirement of a “meet and confer” (Rule 26(b)). Arizona amended its unique take on early disclosure—beyond Fed. R. Civ. P. 26(a) to accommodate ESI (Rule 26.1). [*See* the 2008 Comment to Rule 16(b) for a particularly provocative discussion of preservation orders.] A copy of the full text and comments of the rules are at [http://www.supreme.state.az.us/rules/ramd\\_pdf/r-06-0034.pdf](http://www.supreme.state.az.us/rules/ramd_pdf/r-06-0034.pdf). Arizona also added an equivalent to Fed. R. Civ. P. 16(b), with authority to issue preservation orders to its “Initial Case Management” conference in Complex Litigation (Ariz. R. Civ. P. 16.3), and modified its unique Medical Malpractice provisions to accommodate ESI (Ariz. R. Civ. P. 16(c), 26.2). It also modified its Family Court procedures (*see, e.g.*, 17B A.R.S. Rules Fam. Law. Proc., 51, 52, 62, etc.) to include e-discovery rules previously adopted for civil proceedings. *See* <http://www.supreme.state.az.us/rules/2008RulesA/R-07-0010.pdf>. Effective January 1, 2010, the state adopted a version of Fed. R. Evid. 502 (Ariz. R. Evid. 502) with nuanced amendments dealing with uniformity of impact of disclosures in sister states. Unlike many other states, Arizona requires extensive early disclosures as part of the “Zlaket Rules”

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legislatively adopted procedural rules speak of “disclosure”—not discovery, although terminology has been creeping into both the Federal Rules and other state provisions.

<sup>3</sup> Among the “replica” states using their own numbering: Florida, Iowa, Maryland, New Jersey, Michigan, Tennessee, Virginia and Wisconsin.

adopted in 1992. See Ariz. R. Civ. P. 26.1 (2010); Andrew D. Hurwitz, *Possible Responses to the ACTL/IAALS Report: The Arizona Experience*, 43 ARIZ. ST. L.J. 461 (2011). According to an Arizona commentator, Rule 26(b)(1)(B)'s reference to "disclosure" means that the "inaccessibility" distinction applies to disclosures under Rule 26.1 as well as requests under Rule 34. Robert G. Schaffer & Anthony Austin, *New Arizona E-Discovery Rules*, 44-FEB ARIZ. ATT'Y 24 (2008). For a general discussion, see Daniel J. McAuliffe & Shirley J. Wahl, 2 Ariz. Prac., Civil Trial Practice § 16.11.50 (2d ed. 2012), at 2 AZPRAC § 16.11.50.

4. **Arkansas.** Arkansas has embodied its core e-discovery amendments in a single rule (Ark. R. Civ. P. 26.1), effective on October 1, 2009. The Rule is based on the 2007 *Uniform Rules Relating to the Discovery of [ESI]* developed by the Uniform Law Commissioners.<sup>4</sup> Separately, the Supreme Court amended Rule 26 in January, 2008 to provide for a presumption against waiver if a party making an inadvertent disclosure acts promptly. Ark. R. Civ. 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. In *Lake Village Healthcare Center v. Hatchett*, No. 11-458, 2012 WL 1877299 (Ark. May 24, 2012), the Arkansas Supreme Court affirmed a harsh sanction imposed for delay in production of email and what the lower court deemed a lack of good faith and respect for court orders.

5. **California.** E-discovery amendments ("Cal. Civ. Proc. Code") became effective on June 29, 2009 by unique amendments to the California Code of Civil Procedure (via the "Electronic Discovery Act"). ESI is defined (§ 2016.020), and is available for discovery (§ 2031.010), subject to "accessibility" limits (§ 2031.060), with objections (§ 2031.210) [or to compel their production (§ 2031.310)], subject to proportionality concerns (§ 1985.8(h)(4), 2031.060, 2031.310), and to be produced at the expense of demanding party if translation needed (§ 2031.280(e), 1985.8(g) [subpoenas]). A "clawback" provision was added (§ 2031.285) and a broader version of Rule 37(e) is included for ESI in sections 1985.8 [subpoena], 2031.060, 2031.300, 2031.310 and 2031.320. It extends the exemption to subpoenaed non-parties and attorneys and provides that they are not to be "construed to alter any obligation to preserve discoverable information" and apparently applies to sanctions exercised under inherent powers.

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<sup>4</sup> Nat'l Conf. of Commissioners on Uniform State Laws, *Uniform Rules Relating to the Discovery of Electronically Stored Information* (2007), copy at [http://www.uniformlaws.org/shared/docs/discovery%20of%20electronically%20stored%20information/urrdoesi\\_final\\_07.pdf](http://www.uniformlaws.org/shared/docs/discovery%20of%20electronically%20stored%20information/urrdoesi_final_07.pdf).

There is also reference to “allocation of the expense of discovery” in connection with production of ESI from inaccessible sources (§ 1985.8(f)[subpoenas], 2031.060, 2031.310) as well as generally (Cal. R. Ct. 3.724) but *Toshiba Am. Elec. Components, Inc. v. Superior Court*, 21 Cal. Rptr. 3d 532 (Cal. Ct. App., 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) has been applied since the Electronic Discovery Act. The California Rules of Court were amended (Cal. R. Ct. 3.724) in 2009 to adopt a “meet and confer” requirement regarding e-discovery. In June, 2011, the California Judicial Council sought input on certain “clean-up” amendments deemed appropriate to cover gaps in the earlier effort. See ITC (Leg11-01), copy at <http://www.courts.ca.gov/documents/LEG11-01.pdf> and in 2012, SB No. 1374 amended various provisions of the California Civil Discovery Act to conform to the provisions of the existing E-Discovery Amendments, based on the 2006 Amendments, effective January 1, 2013.

6. **Colorado.** Colorado has not enacted e-discovery amendments, although it recently amended C.R.C.P. 45(a)(iii)(eff. Jan. 2013) to permit a party to seek from a non-party “designated books, papers and documents, whether in physical or electronic form (“records”).” The Supreme Court has authorized the “Civil Access Pilot Project” (CAPP), in certain District Courts to address excessive costs in certain business actions in District Court by streamlined procedures. Among the excluded actions are employment actions, medical negligence actions, and construction defect cases. A copy of the Pilot Rules and the forms developed for the effort are found on the Supreme Court website, at [http://www.courts.state.co.us/Courts/Civil\\_Rules.cfm](http://www.courts.state.co.us/Courts/Civil_Rules.cfm). See also Chief Justice Directive 11-02, Amended June 2013, available at [http://www.courts.state.co.us/Courts/Supreme\\_Court/Directives/CJD%2011-02amended%206-26-13.pdf](http://www.courts.state.co.us/Courts/Supreme_Court/Directives/CJD%2011-02amended%206-26-13.pdf). Pilot Rule 1.3 speaks of proportionality in discovery of ESI; Pilot Rule 6.1 speaks of meet and confers “concerning reasonable preservation of all relevant documents and things, including any electronically stored information” and Rule 6.2 authorizes the shifting of all or any costs “associated with the preservation, collection and production of [ESI] as the interests of justice and proportionality so require.” The Appendix B Case Management Order requires parties to discuss their strategy regarding ESI. There is no Pilot Rule regarding sanctions comparable to the initial Model IAALS/ACTL Model Rule 12, which permitted sanctions only “upon a showing of intent to destroy evidence or recklessness” for a failure to preserve. In *Aloi v. Union Pacific*, 129 P.3d 999, 1003 (Colo. March 6, 2009), the Supreme Court of Colorado had held that a showing of bad faith was not required to justify use of adverse inference jury instruction since “regardless of the destroying party’s mental state, the opposing party will suffer the same prejudice.” A concise summary of other Colorado cases bearing on e-discovery is found at Vail, Colorado State E-Discovery Law, copy at <http://www.jeffvail.net/2012/12/colorado-state-e-discovery-law.html>.

7. **Connecticut.** E-Discovery amendments were made to the Connecticut “Practice Book,”

effective January 1, 2012 (“Conn. Super. Ct. Civil § 13-\_\_\_”) by a series of e-discovery Amendments also cited as “Practice Book 1998, § \_\_\_”. Connecticut adopted the Uniform Rules approach to defining ESI (§ 13-1); and included ESI within “designated documents” (§ 13-9 (a)) which should be produced in its form [not “or forms”] of production (§ 13-9 (d)); authorized the allocation of the “expense of the discovery of ESI” [and listed certain factors to be applied] (§ 13-5); provided a “clawback” provision (§ 13-33); and included an enhanced version of Rule 37(e), barring sanctions for a failure to provide information 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” (§ 13-14(d)). Although the extensive Committee Comments to the Practice Book are not apparently available on Westlaw, they can be found at [http://www.jud.ct.gov/Publications/PracticeBook/PB\\_070511.pdf](http://www.jud.ct.gov/Publications/PracticeBook/PB_070511.pdf). Thus, the text of and explanation for Sec. 13-14(d) can be found at pages 108PB – 110PB of the cited document, from the July 5, 2011 edition of the Connecticut Journal. An interesting case illustrating the frustrations of the Superior Court in regard to production format is *Innis Arden Golf Club v. O'Brien & Gere Engineers, Inc.*, No. CV106006581, 2011 WL 6117908 (Conn. Super. Ct. Nov. 18, 2011). For a case applying the new Revisions shortly before their effective date in a cutting edge social media/privacy context, see *Squeo v. Norwalk Hospital Ass'n* No. CV095012548, 2011 WL 7029761 (Conn. Super. Ct. Dec. 16, 2011) (by a different judge in the same court).

8. **Delaware.** Effective January 1, 2013, the Delaware Court of Chancery amended its civil rules to conform to the 2006 Amendments, with the exception of a “safe harbor” amendment equivalent to Rule 37(e). A copy of the rules is found at [http://courts.state.de.us/chancery/docs/AmendmentRule26\\_30\\_34\\_45.pdf](http://courts.state.de.us/chancery/docs/AmendmentRule26_30_34_45.pdf). The Court also updated its “Guidelines of Best Practices for Discovery,” adding sections dealing with the role of outside counsel in the collection and review of documents and incorporating its previously issued “Guidelines for Preservation of ESI” (2011). The Guidelines are at <http://courts.state.de.us/chancery/docs/CompleteGuidelines.pdf>. The Superior Court earlier established a Commercial Litigation Division, for cases above \$1M in controversy, including E-Discovery Plan Guidelines in Appendix B, a copy of which is at [http://courts.delaware.gov/superior/pdf/cclld\\_appendix\\_b.pdf](http://courts.delaware.gov/superior/pdf/cclld_appendix_b.pdf). The Guidelines require preparation of an “e-Discovery Plan and Report,” which may include objections to production from inaccessible sources of ESI and provide “safe harbors,” including one for destruction of ESI not ordered to be produced when a party acts in compliance with an e-discovery order. The state Chancery court has rendered a number of decisions on preservation and spoliation of ESI. See *Beard Research v. Kates*, 981 A.2d 1175 (Del. Ch. 2009). In *Genger v. TR Investors*, 26 A.3d 180 (Del. 2011), the Supreme Court affirmed a Chancery Court contempt finding (at 2009 WL 469062), including a sanction of \$3.2 million for the intentional destruction of information but refused to hold “that as a matter of routine, document-retention procedures, a computer hard drive’s unallocated free space must always be preserved” (at 192). In *Cruz v. G-Town Partners*,

No. 09C-08-218, 2010 WL 5297161, at \*10 (Del. Sup. Ct. Dec. 3, 2010), the trial court refused harsh sanctions where a moving party failed to demonstrate “intentional or reckless destruction or suppression of evidence.”

9. **District of Columbia.** As of November 2010, e-discovery revisions were approved by the Superior Court and transferred to the Court of Appeals for final approval. The court stayed the requirement that the Superior Court conduct its business according to the Federal Rules (D.C. CODE § 11-946).

10. **Florida.** The Florida Supreme Court adopted e-discovery (“Fla. R. Civ. P.”) effective September 1, 2012, largely based on the 2006 Amendments. *See* Order, 2012 WL 2579681 (amended text). The Initial Case Management Conference rules (Rule 1.200 & R. 1.201 [Complex Litigation]) require that counsel prepare and file, prior to the conference, a plan covering preservation of ESI and other issues. Rule 1.350 treats ESI as a document and Rule 1.280 authorizes production of inaccessible information over objection. Rule 1.380 adopts Rule 37(e), and the Committee states that in determining “good faith” the court may consider any steps taken to comply with preservation obligations. Effective January 2011, Florida adopted Rule 1.285 to govern post-production claims of inadvertent production of privileged material. The issue of pre-litigation preservation obligations is thoroughly discussed in William Hamilton, *Florida Moving to Adopt Federally-Inspired E-Discovery Rules* (Sept. 20, 2011), and in Michael D. Starks, *Deconstructing Damages for Destruction of Evidence*, 80 FLA. BUS. J. 36 (July/August 2006) (noting that both sanctions and tort damages are available under Florida law, although Martino “destroyed the first-party spoliation tort”).

11. **Georgia.** Status unknown.

12. **Hawaii.** According to a May 2012 article in the *Hawaii Bar Journal*, there were (then) no pending Rules proposals. *See* Eric Y. Yamamoto & Brandon M. Kimura, *Electronic Discovery and Hawaii’s State Courts*, 16-MAY HAW. BAR J. 4 (2012). In 2009, the same authors reported that the issue was under review in an excellent and prescient summary of the provisions—and gaps—in the federal rules. Brandon M. Kimura & Eric Y. Yamamoto, *Electronic Discovery: A Call for a New Rules Regime for the Hawai’i Courts*, 32 U. HAW. L. REV. 153, 169, n.121 (2009).

13. **Idaho.** E-Discovery amendments to the Idaho Rules of Civil Procedure (“I.R.C.P.”) became effective in July, 2006, involving amendments to Rules 26, 33, 34, and 45. Rule 34(b) is similar—but not identical—to 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 does not require early discussions of e-discovery, specify default forms of production, or have a purported safe harbor. However, Rule 45 includes references to “electronically stored information” at three places, and mandates (at Rule 45(b)(2)) reimbursement for the “reasonable cost” of producing subpoenaed ESI.

14. **Illinois.** Illinois has not adopted comprehensive changes, but includes “retrievable information” in “computer storage” as within the definition of “documents” in Supreme Court Rule 201(b), and Rule 214 requires its production in printed form. Opinions dealing with ESI issues include *Vision Point of Sale v. Haas*, 2004 WL 5326424 (Ill. Cir. Ct. 2004) (direct access; cost allocation), and *Peal v. Lee*, 403 Ill. App. 3d 197, 933 N.E.2d 450 (2010) (failure to preserve electronic evidence). Illinois acknowledges a pre-litigation duty to preserve which is enforceable by sanctions issued under Rule 219(c) if a party fails to take “reasonable measures to preserve the integrity of relevant and material evidence.” See *Shimanovsky v. General Motors Corp.*, 692 N.E.2d 286, 290 (Ill. 1998) (despite fact that Rule 219(c) limits sanctions to violations of court orders). Also, while stating that there is no general duty to preserve, the Illinois Supreme Court permits recovery of damages for negligent spoliation. *Boyd v. Travelers Ins.*, 652 N.E.2d 267, 270-271 (Ill. 1995) (“[t]he general rule is that there is no duty to preserve evidence” but such a duty may arise under some circumstances and “can be stated under existing negligence law without creating a new tort”); *accord Martin v. Keeley & Sons, Inc.*, 979 N.E.2d 22 (Ill. 2012). The two remedies are recognized as “separate and distinct.” *Adams v. Bath and Body Works, Inc.*, 830 N.E.2d 645, 651 (Ill. App. Ct. 2005). In November 2012 (eff. January 1, 2013), Illinois amended Rule 201 to provide for clawback of inadvertently produced materials while incorporating an equivalent to Fed. R. Evid. 502; copy available at <http://www.state.il.us/court/SupremeCourt/Evidence/Evidence.htm#502>.

15. **Indiana.** The Indiana e-discovery amendments (“Ind. Trial Rule”) became effective on January 1, 2008 including equivalents to Rules 26, Rule 34(a), Rule 34(b), and Rule 37(e). No equivalent to Rule 26(f) was included nor was Rule 45 amended to relate to ESI, as subpoenas to non-parties are included within Ind. Trial Rule 34. The Indiana Supreme Court has recently opined on the role of tort based actions relating to spoliation in *Howard Regional Health v. Gordon*, 952 N.E.2d 182 (Ind. 2011).

16. **Iowa.** E-discovery amendments in Iowa (“Iowa R. Civ. P.”) became effective May 1, 2008 based on the 2006 Amendments. This involved equivalents of Rule 34(1.503), Rule 26(b) (1.504), Rule 26(f) (1.507), Rule 33 (1.509) Rule 34(b) (1.512), Rule 37(e) (1.517), Rule 16(b) (1.602) and Rule (45) (1.1701). Effective on June 1, 2009, the Supreme Court adopted Iowa R.

Evid. 5.502 (“I.C.A. Rule 502”). A Supreme Court Task Force for Civil Justice Reform has recommended rules “holding discovery proportional to the size and nature of the case”; the Task Force released a Report, which is available at [http://www.iowacourts.gov/wfdata/files/Committees/CivilJusticeReform/FINAL03\\_22\\_12.pdf](http://www.iowacourts.gov/wfdata/files/Committees/CivilJusticeReform/FINAL03_22_12.pdf).

17. **Kansas.** Effective July 1, 2008, Kansas adopted e-discovery amendments (“Kan. Stat. Ann. 60-2\_\_”) essentially identical to the 2006 Federal Amendments. Thus, Rules 60-216, 60-226, 60-233, 60-234, 60-237, and 60-245 are identical to the initial enactments, 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. Nordhus*, 533 P.2d 1324 (Kan. 1975).

18. **Kentucky.** Status unknown.

19. **Louisiana.** In 2007, 2008, and 2010, the Legislature passed and the Governor signed legislation which collectively provides comprehensive e-discovery amendments (“La. Code Civ. Proc. Ann. art.”). In 2008, the Legislature added its counterpart to Rule 37(e) [art. 1471(B)] with Comments noting the inapplicability of the limitation to spoliation torts, citing an ambiguous case, *Guillory v. Dillard's*, 777 So. 2d 1, 2000-190 (La. Ct. App. 2000). The Legislature also amended Article 1462 to add an inaccessibility distinction based on Fed. R. Civ. P. 26(b)(2)(B) and added a unique requirement in Article 1462(C) requiring a producing party to identify the means which must be used to access ESI being produced. According to the Comment, the sentence is intended to require a party to identify the “software and hardware” which a party must use to “fully and accurately access” the ESI being produced. Currently, the amendments are roughly equivalent to Rules 16 [art. 1551], 26(b)(2)(B), and 45 [art.1462(B)(2), art.1354(F)], 26(b)(5)(B) and Fed. R. Evid. 502 [art. 1424(d)], 34(a) [art. 1461], 34(b) “plus” direct access [art. 1462 (B)(1),C and D], 33 [art. 1460], 37(e) [art. 1471(B)] and 45 [art. 1354], with comments. No changes were made to art. 1424(D) (general scope of discovery), but the expert rule incorporates references to ESI [art. 1425(E)(1)], unlike the comparable Federal Rule. Uniquely, Louisiana spells out [art.1462] provisions for “specific means” to access ESI when produced and provide a process, upon “good cause” for providing direct access to the “computers or other types of devices” and to permit inspection, testing, and sampling. Some of the confusion over the form or forms of production provisions are illustrated by *Louisiana Workers Compensation Corp. v. Quality Exterior Services, LLC*, No. 2011 CW 1197, 2012 WL 1668027 (La. Ct. App. May 2, 2012). See William R. Forrester, *New Technology & The 2007 Amendments to the Code of Civil Procedure*, 55 LA. BUS. J. 236, 238 (2008) (stressing that direct access is available only after party has had initial opportunity to produce and only for “good cause”).

20. **Maine.** E-discovery amendments (“Me. R. Civ. P.”) became effective on August 1, 2009 based on the 2006 Amendments. The Advisory Committee Notes are quite extensive, especially in regard to defining “routine” and “good faith” destruction(?) in Rule 37(e).

21. **Maryland.** E-discovery amendments (“Md. Rule 2-\_\_”) became effective on January 1, 2008, primarily based on the provisions of the 2006 Amendments. The equivalent of Rule 34 [2-422] provides for service of a request to produce and inspect and the form of production, but the Committee Note cautions that inspection of ESI should be the “exception, not the rule” and that “substantial need” and “lack of a reasonable alternative” must be demonstrated and rights preserved, citing Comment 6.c of the Sedona Principles. The Rule 26 equivalent [2-402(b)(1)] 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 and a court may order conditions, including “an assessment of costs.” Rule 2-402(e)(3), (4) [Fed. R. Evid. 502 equivalent] describes the impact of inadvertent production on waiver and the impact of agreements and orders entered by the court, including what the Committee Note describes as “clawback” and “quick peek” agreements. The Rule 37(e) equivalent [2-433] limits sanctions for information “that is no longer available.” In contrast to Rule 36, the Maryland equivalent [2-424] includes ESI as a subject for requests for admission, as is true of 2-402 (d) and (c) [work product and privilege logs]. *See also* Lynn Mclain, *The Impact of the First Year of the Federal Rules and the Adoption of the Maryland Rules: Foreword*, 37 U. BALT. L. REV. 315 (2008).

22. **Massachusetts.** The Standing Advisory Committee on Rules of Civil Procedure of the Supreme Judicial Court Rules Advisory Committee completed work on a draft of e-discovery rules in 2011. Approval is pending. A copy of the proposals is found at <http://www.mass.gov/courts/sjc/docs/Rules/comment-civil-proc-rules-051311.pdf> and the Reporters Notes are found at <http://www.mass.gov/courts/sjc/docs/Rules/reporters-notes-comment-civil-proc-rules-051311.pdf>. The proposed rules draw on both the 2006 Amendments and the Uniform Rules, and the Reporter Notes cross-reference to aspects of the CCP Guidelines. Thus, a party must object to raise inaccessibility of ESI as a defense to production under Rule 26, and the safe harbor amendment to Rule 37, for example, applies to all sanctions, not just rule-based sanctions. For an excellent summary of Massachusetts case law, especially in regard to preservation and spoliation, *see* Barry C. Klickstein & Katherine Young Fergus, *Navigating E-Discovery in the Massachusetts State Trial Courts*, 14 SUFFOLK J. OF TRIAL & APP. ADVOCACY 35 (2009); *see also* 49 Mass. Prac. Discovery § 7:1 (Electronic Discovery – Generally). A Boston-area pilot project testing some of the ACTL pilot rules has been completed.

23. **Michigan.** E-discovery amendments (“MCR”) became effective on January 1, 2009, largely based on the 2006 Amendments. The “safe harbor” provision in 2.302(B)(5) is preceded by a statement that “[a] party has the same obligation to preserve [ESI] as it does for all other types of information.” The changes to the Michigan Rules involve 2.302 (preservation; safe harbor; inaccessibility; inadvertent production), 2.310 (form; scheduling orders), 2.313 (safe harbor), 2.401 (early scheduling order; preservation), and 2.506 (non-party form; inaccessibility). The “safe harbor” provision was also inserted in 2-313(E)). An excellent summary is provided in Dante Stella, *Avoiding E-Discovery Heartburn*, 90 MICH. BUS. J. 42 (2011). A case alluding to (but not applying) the Michigan safe harbor is *Gillett v. Michigan Farm Bureau*, 2009 WL 4981193 (Mich. Ct. App. 2009). While the Staff Notes are said not be an “authoritative construction by the court,” they are provocative. See, e.g., Staff Comment to “MCR 2.302” explaining that the “safe harbor” provision applies when information is lost or destroyed “as a result of a good-faith, routine record destruction policy or ‘litigation hold’ procedures.”

24. **Minnesota.** The Minnesota Supreme Court adopted e-discovery rules effective on July 1, 2007 (“Minn. R. Civ. P.”) which mirror the 2006 Amendments. However, effective on July 1, 2013, Rules 1 and 26(b) will be amended to emphasize the role of “proportionality” in e-discovery, as recommended by a Task Force on Judicial Reform appointed by the Minnesota Supreme Court. The Supreme Court Order is found at [http://www.mncourts.gov/Documents/0/Public/Clerks\\_Office/Rule%20Amendments/2013-02-04%20Order%20Civ%20Proc%20&%20Gen%20Rls%20Amendments.pdf](http://www.mncourts.gov/Documents/0/Public/Clerks_Office/Rule%20Amendments/2013-02-04%20Order%20Civ%20Proc%20&%20Gen%20Rls%20Amendments.pdf). The Minnesota Supreme Court distinguished the tort “duty” to preserve in pending and third party actions in *Miller v. Lankow*, 801 N.W. 2d 120 (Minn. 2011).

25. **Mississippi.** The Mississippi Supreme Court initially adopted a limited e-discovery rule in 2003 (“Miss. R. Civ. P. 26(b)(5)”) 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 2012, the Supreme Court announced that on July 1, 2013, it would amend Rules 34 and 45 to conform to the federal approach to specification of and objection to the form of production. The order is found at <http://courts.ms.gov/Images/Opinions/179878.pdf>.

26. **Missouri.** Status unknown.

27. **Montana.** E-discovery amendments to the Montana Civil Rules (“Mont. R. Civ. P.”) were adopted by Order of February 28, 2007 with adoption of the 2006 Amendments, absent Rule 37(e). Rule 26(f) (“Discovery conference”) is not mandatory, but is applicable when one of the parties raises its need, including issues relating to ESI. The topics for discussion do not

explicitly refer to issues involving preservation. The post-conference order shall contain determination of such matters as “the allocation of expenses.” Rule 26(f)(6). *See Court Issues Major Rule Changes on Civil Procedure and Court Records*, 32 MONT. LAW. 12 (March 2007).

28. **Nebraska.** Limited e-discovery amendments to several Rules (“Neb. Ct. R. Disc. § 6-334”) 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 (Rule 33).

29. **Nevada.** Status unknown.

30. **New Hampshire.** Amendments dealing with e-discovery in one Rule (“N.H. Super. Ct. R. 62”) became effective in March 2007. Currently, the Supreme Court has authorized use of PAD (Proportional Discovery/Automatic Disclosure) Pilot Project Rules, which emphasize early disclosure and other measures in several counties. See <http://www.courts.state.nh.us/rules/sror/sror-h3-pilot%20project.htm>.

31. **New Jersey.** New Jersey was the first state to incorporate the provisions of the 2006 Amendments into its civil rules with certain minor exceptions, effective September 1, 2006 (“N.J. Rule \_\_\_\_”). See <http://www.judiciary.state.nj.us/rules/part4toc.htm>. ESI is discoverable under the equivalent of Rule 34 [Rule 4:18] as part of a request to produce designated documents, 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 <http://www.ediscoverylaw.com/2012/12/articles/news-updates/new-jersey-addresses-discovery-of-esi-in-amendments-to-rules-governing-criminal-practice-and-rules-governing-practice-in-the-municipal-courts/>.

32. **New Mexico.** Limited E-discovery amendments (“NMRA, Rule 1-\_\_\_\_”) became effective in May 2009 by action of the New Mexico Supreme Court. See Order, reproduced in the April 20, 2009 issue of the New Mexico Bar Bulletin, copy at <http://www.nmbar.org/Attorneys/lawpubs/BB/bb2009/BB042009.pdf>. The Committee Commentary to 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 treated the same as that of documents.

33. **New York.** There have been no changes to Article 31 of the Civil Practice Law and Rules (“N.Y. C.P.L.R.”) to accommodate e-discovery. The scope of “disclosure” in New York (C.P.L.R. 3101) remains “all matter material and necessary”; a party may seek to inspect “designated documents or things” (C.P.L.R. 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 (C.P.L.R. 3122). Recently, the leading intermediate appellate court adopted the *Zubulake* logic as governing the onset of the duty to preserve<sup>5</sup> and the approach to be followed in the initial payment of production costs.<sup>6</sup> This decision rejected the argument that a “requester pays” rule exists in New York. A third decision by the same appellate court<sup>7</sup> involved a dispute over subpoena of ESI. However, despite inaction at the legislative level, the Uniform Rules for the New York State Trial Courts (“N.Y. Ct. Rules, § \_\_\_”) were amended to deal with counsel and party responsibilities in connection with preliminary conferences (Sec. 202.12(b) and (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. Action by the Administrative officers regarding ESI was encouraged by a February 2010 Report, which may be found at <http://www.nycourts.gov/courts/comdiv/PDFs/E-DiscoveryReport.pdf>.

34. **North Carolina.** The North Carolina Legislature adopted e-discovery amendments (“N.C. R. Civ. P.”) effective October 2011. Rule 16 now mandates a post pre-trial conference order by the court. Rule 26 defines ESI to include “reasonably accessible metadata that will enable a party to have certain ability to access such information as the date sent, date received, author and recipients.” The Comment quotes extensively from Sedona Principle 12. Rule 26 adopts an inaccessibility analogue and Rule 26(f) provides for a “discovery conference” which may be ordered into effect if parties do not agree upon one. The Comment argues that the new provision will make it easier to seek and obtain one “even if no other attorney wants one.” An evaluation of this change is found at Brian C. Vick & Neil C. Magnuson, *The Promise of a Cooperative and Proportional Discovery Process in North Carolina*, 34 CAMPBELL L. REV. 233, 269 (2012). Rule 34(b) incorporates a process for determining if production should be from sources identified as not reasonable accessible. It refers only to production of ESI in a reasonably usable form or forms without reference to the form in which the information is maintained. Rule 37(c)

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<sup>5</sup> *Voom HD Holdings v. Echostar*, 93 A.D. 3d 33, 939 N.Y.S. 2d 321 (N.Y. App. Div. 2012).

<sup>6</sup> *U.S. Bank v. Greenpoint Mortgage*, 94 A.D. 3d 58, 939 N.Y.S.2d 395 (N.Y. App. Div. 2012).

<sup>7</sup> *Tener v. Cremer*, 89 A.D. 3d 75, 931 N.Y.S. 2d 552 (N.Y. App. Div. 2011).

was adapted unchanged from Fed. R. Civ. P. Rule 37(e). Rule 45 specifies that a person responding to a subpoena must produce it in a form in which it “ordinarily is maintained” or in a “reasonably useable form or forms.” 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 encourage discussion at an early case management meeting prior to meeting with the Court (Rule 17.1) and prior to filing motions and objections relating to ESI. (Rule 18.6(b)).

35. **North Dakota.** Amendments based on the 2006 Amendments (“N.D. R. Civ. P.”) became effective March 1, 2008. North Dakota did not enact counterparts to the amendments to Rule 26(f) and 26(a) because North Dakota does not require discovery conferences and initial disclosures. It also chose not to enact a “standalone” approach as advocated by the National Conference of Commissioners on Uniform State Laws.

36. **Ohio.** Amendments to the Ohio Civil Rules (“OH Civ. R.”), largely based on the 2006 Amendments, became effective July 1, 2008. Rule 16, relating to pre-trial conferences, authorizes discussions of the “timing, methods of search and production, and the limitations, if any” to be applied to discovery of ESI. Rule 34(D), permitting discovery before filing of an action, was also amended to at the same time to apply to ESI.<sup>8</sup> No equivalent to Fed. R. Evid. 502 has been adopted. Rule 26(b)(4), limiting production from inaccessible sources, does not require “identification” of the ESI involved, but 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. Rule 34(B)(3) notes that production in a form in which the information is ordinarily maintained applies only if “the form is reasonably usable.” The safe harbor provision in Rule 37(f) includes five factors which 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 issue.” According to the Staff Notes, this does not “address the larger question of when the duty to preserve [ESI] is triggered,” which is addressed by case law and left to court discretion. Ohio permits actions for “interference with or destruction of evidence” but not for negligent spoliation (party must show willful or purposeful action to disrupt or deter litigation).

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<sup>8</sup> Ohio also permits perpetuation of testimony under a separate rule, Rule 27, which was not amended.

37. **Oklahoma.** Oklahoma enacted e-discovery rules effective November 1, 2010 (“12 Okl. St. Ann.”). Section 3226 of Chapter 41 (Discovery Code) limits production of inaccessible ESI and Section 3237 includes a broadened version of Rule 37(e). While Section 3226 does not refer to ESI in a “Discovery Conference,” Okla. Civ. Rule 5 of the District Courts (“Pretrial Proceedings”), found in Title 12, Chapter 2 (“T.12, Ch. 2, App. Rule \_\_\_”), lists as subjects any “special procedures or protocols” addressing discovery of ESI as well as the need for any orders addressing preservation of potentially discoverable information.” 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 Fed. R. Evid. 502(b) dealing with non-waiver of inadvertent disclosures *and*, unlike Fed. R. Evid. 502, including a provision authorizing selective non-waiver of attorney-client or work product matter to governmental agencies. The provisions are found at 12 Okla. St. Ann. § 2502 (E) & (F). See Steven S. Gensler, *Oklahoma’s New E-Discovery Rules*, 81 OKLA. BAR J. 29, 2427 (2010), copy at <http://jimcalloway.typepad.com/files/oklahomas-new-ediscovery-rules.gensler.oklabarj.pdf>.

38. **Oregon.** Oregon enacted a single e-discovery amendment (with two changes) effective January 1, 2012 (“Or. R. Civ. P. 43”), as recommended in 2010. Under the Amendment, “electronically stored information” is discoverable as a form of documents which, 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 Rule 43(B).

39. **Pennsylvania.** The Pennsylvania Supreme Court enacted limited changes (“Pa. R. Civ. P.”) which became effective on August 1, 2012. Rule 4009.1 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 of ESI if sought in bad faith or would cause “unreasonable annoyance, embarrassment, oppression, burden or expense.” The Court provided a “2012 Explanatory Comment—Electronically Stored Information,” which is found at Pa. R. Civ. P. Refs & Annos. at <http://www.pacourts.us/OpPosting/Supreme/out/564civ.rpt.pdf>, 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. Pennsylvania does not acknowledge a cause of action for negligent spoliation in Pennsylvania. *Pyeritz v. Commonwealth*, 32 A.3d 687, 692 (Pa. 2011) (permitting sanctions only for “first-party spoliation”).



40. **Rhode Island.** Status unknown.

41. **South Carolina.** The Supreme Court adopted and sent to the Legislature E-discovery Amendments (“S.C. R. Civ. P.”) which became effective in April, 2011. The Amendments to Rules 16, 26, 33, 34, and 45 are essentially identical to the 2006 Amendments, without involving early disclosure or “meet and confers.” Rule 26(f) authorizes a discovery conference and the “allocation of expenses” and Rule 34(a) speaks of requests for “any designated documents, or electronically stored information.”

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

43. **Tennessee.** E-discovery amendments (“Tenn. R. Civ. P.”) became effective on July 1, 2009 with rough equivalents to Fed. R. Civ. P. 16 (Rule 16.01), 26 (Rule 26.02 and 26.06), 34 (Rules 34.01 and 34.02), 37 (Rule 37.06), and 45 (Rule 45.02). Extensive commentary was also provided, often reproducing FRCP comments and those of the *Guidelines*. Effective July 1, 2010, Tenn R. Evid. 502 provides for limitations on waiver due to inadvertent disclosure of privileged information or work product, based on Fed. R. Evid. 502(b).

44. **Texas.** As part of the reform of Texas Civil Procedure code in 1999, a provision was added dealing with electronic or magnetic data (“Tex. R. Civ. P. 196.4”). Rule 196.4 permits an objection to production of electronic data which is not “reasonably available” to the responding party in “its ordinary course of business.” If ordered to produce, the rule requires payment of the reasonable expenses of any extraordinary steps required retrieving and producing the information. The Texas Supreme Court harmonized this with Fed. R. Civ. P. 26(b)(2)(B) in the case of *In re Weekley Homes, LP*, 295 S.W.3d 309 (Tex. 2009). Rule 196.6—also enacted in 1999—allocates the costs of producing “items” to the “requesting party” unless otherwise ordered for “good cause.” Tex. R. Civ. P. 193.3(d) provides that production of privileged information when a party does not intend to waive the claim is not a waiver if a party notifies within 10 days of actual discovery. Texas did not include a safe harbor provision in its more limited approach to e-discovery. *See generally*, Hon. Nathan L. Hecht & Robert H. Pemberton, *A Guide to the 1999 Texas Discovery Rule Revisions* (Nov. 1998), available at <http://www.adrr.com/law1/rules.htm>.

45. **Utah.** The Utah Supreme Court approved a set of e-discovery rules (“Utah R. Civ. P.”) 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 sanction if a party fails to preserve documents or ESI, followed by a verbatim copy of FRCP 37(e). Rule 26(b)(4) requires a party claiming inaccessibility to describe the source, the burden and nature of

the information. In 2011, Rule 26(b) was amended to permit discovery of matters relevant to the claims or defense of any party only “if the party satisfies the standard of proportionality” as set forth and with the burden of establishing proportionality and relevance “always” placed on the party “seeking discovery.” Rule 26(b)(1)-(3)(2011). 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 37 (b)(2). For a summary, see Philip J. Favro & Hon. Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012 MICH. ST. LAW REV. 933 (2012), available at <http://eval.symantec.com/mktginfo/downloads/ltny2013-New-Utah-Rule-26.pdf>.

46. **Vermont.** E-Discovery amendments (“Vt. R. Civ. P.”) became effective July 6, 2009, based on the 2006 Amendments. Rule 26(f) provides for a discovery conference which must be followed by an order identifying preservation issues. 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.

47. **Virginia.** E-Discovery amendments (“Va. S. Ct. Rule 4:\_\_\_”) 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)) except for the safe harbor provisions and “meet and confer” obligations. The obligation to produce information as “it is ordinarily maintained” applies only “if it is reasonably usable in such form or forms.” A version Fed. R. Evid. 502 was included in 2010. See VA. CODE ANN. § 8.01–420.7.

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

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

50. **Wisconsin.** The Supreme Court of Wisconsin adopted e-discovery amendments (“Wis. Stat.”) effective January 1, 2011, a copy of which is found at <http://www.legis.state.wi.us/statutes/Stat0804.pdf>. 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)) and Rule 26(b)(5)(B)(804.01(7)). Effective on January 1, 2013, a provision roughly equivalent to Fed. R. Evid. 502(a) and (b) relating to forfeiture of the privilege if production is inadvertent was added as 905.03(5).

51. **Wyoming.** The Wyoming Supreme court amended its Civil Rules to conform to the 2006 Amendments (“Wyo. R. Civ. P.”) in its Rules 26, 33, 34, 37, and 45. Rule 34 more explicitly provides for objections to the form or forms of production. 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 Wyo. R. Civ. P. for Circuit Courts, Rule 1 & 8). *See* Craig Silva, *The Repeal and Replacement of the Wyoming Rules of Civil Procedure for Circuit Courts*, 34 WYO. LAW. 13 (June 2011).

## V. LEARNING BY EXAMPLE

In *Navigating the Hazards of E-Discovery: A Manual for Judges in State Courts Across the Nation*, we noted that:

Electronic discovery continues to pose challenges for the civil justice system, and for individual courts. ***But even if you are entirely new to the issues surrounding e-discovery, you are not starting from square one.*** The same principles of case management apply whether the information at stake is digitized or written in pencil; e-discovery merely asks you to transfer those traditional case management skills to an electronic age. One of the keys to managing e-discovery is early intervention in the case, and consistent oversight so as to assure that the parties do not engage in unnecessary expense.<sup>9</sup>

The challenge for state court judges is to take the principles of case management that have been effective in other contexts and apply them in the context of ESI. But state court judges need not reinvent the wheel. Federal judges and practitioners have laid groundwork that should be considered by state court judges as they determine how best to address ESI in each of their jurisdictions. Moreover, there are many examples of state courts around the country that have considered these issues and adopted guidelines, model orders, or discovery plans. We offer a collection below and encourage you to consider what would work in your court, and in the particular case at hand.

### A. GUIDELINES

- CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION (2006), available at <http://nsc.contentdm.oclc.org/cdm/singleitem/collection/civil/id/56/rec/18>.
- Delaware State Courts, *Court of Chancery Guidelines for the Collection and Review of Documents in Discovery*, available at <http://courts.state.de.us/chancery/docs/CollectionReviewGuidelines.pdf> (including

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<sup>9</sup> INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *NAVIGATING THE HAZARDS OF E-DISCOVERY: A MANUAL FOR JUDGES IN STATE COURTS ACROSS THE NATION* 30 (2012) (emphasis added), available at <http://iaals.du.edu/library/publications/navigating-the-hazards-of-e-discovery-a-manual-for-judges-in-state-courts-a>.

Example 10. Sample Document Collection Outline, available at <http://courts.delaware.gov/Chancery/docs/SampleDocCollectionOutline.pdf> (last visited Oct. 4, 2013).

- New York State, Commercial Division, Nassau County, *Guidelines for Discovery of Electronically Stored Information (“ESI”)*, available at [http://www.courts.state.ny.us/courts/comdiv/PDFs/Nassau-E-Filing\\_Guidelines.pdf](http://www.courts.state.ny.us/courts/comdiv/PDFs/Nassau-E-Filing_Guidelines.pdf) (last visited Oct. 4, 2013).
- U.S. District Court for the District of Delaware, *Default Standard for Discovery, Including Discovery of Electronically Stored Information (“ESI”)*, available at <http://www.ded.uscourts.gov/sites/default/files/Chambers/SLR/Misc/EDiscov.pdf> (last visited Oct. 4, 2013).
- U.S. District Court for the District of Delaware, *Default Standard for Access to Source Code*, available at <http://www.ded.uscourts.gov/sites/default/files/Chambers/SLR/Misc/DefStdAccess.pdf> (last visited Oct. 4, 2013).
- U.S. District Court for the District of Maryland, *Suggested Protocol for Discovery of Electronically Stored Information (“ESI”)*, available at <http://www.mdd.uscourts.gov/news/news/esiprotocol.pdf> (last visited Oct. 4, 2013).
- 7<sup>th</sup> Circuit Electronic Discovery Committee, *Principles Relating to the Discovery of Electronically Stored Information* (Rev. 08/01/2010), available at [http://www.discoverypilot.com/sites/default/files/Principles8\\_10.pdf](http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf).
- U.S. District Court for the Northern District of California, *Guidelines for the Discovery of Electronically Stored Information*, available at <http://cand.uscourts.gov/eDiscoveryGuidelines> (last visited Oct. 4, 2013).
- U.S. District Court for the District of Kansas, *Guidelines for Cases Involving Electronically Stored Information (ESI)*, available at <http://www.ksd.uscourts.gov/rule-1-task-force-documents/> (last visited Oct. 4, 2013).

## B. MODEL ORDERS

- In the Circuit Court of Cook County, Illinois, County Department, Law Division, *Standing Order Governing Discovery of Electronically Stored Information* (effective January 1, 2012), available at <http://www.cookcountycourt.org/Portals/0/Law%20Divison/Standing%20Orders/Tailor%20SO%20Governing%20Discovery%20of%20Electronically%20Stored%20Inform..pdf> (including Form A, Joint Report on Electronic Discovery; and Form B, Contested Electronic Discovery).
- New York State Supreme Court, *Model Electronic Discovery Order*, available at [http://www.nycourts.gov/ip/ediscovery/ModelE-DiscoveryPC\\_Order.pdf](http://www.nycourts.gov/ip/ediscovery/ModelE-DiscoveryPC_Order.pdf) (last visited Oct. 4, 2013).
- 7<sup>th</sup> Circuit Electronic Discovery Pilot Program, *[Proposed] Pilot Project Case Management Order No. 2, Management of Attorney-Client Privilege & Work Product Protection*, available at <http://www.discoverypilot.com/content/model-discovery-plan-and-privilege-order> (last visited Oct. 4, 2013).
- U.S. District Court for the Northern District of California, *[Model] Stipulated Order Re: Discovery of Electronically Stored Information for Standard Litigation*, available at <http://cand.uscourts.gov/eDiscoveryGuidelines> (last visited Oct. 4, 2013).
- U.S. District Court for the Eastern District of Michigan, *Model Order Relating to the Discovery of Electronically Stored Information (ESI)*, available at <http://www.mied.uscourts.gov/News/Docs/EsiOrderChecklist.pdf> (last visited Oct. 4, 2013).
- Paul W. Grimm, U.S. District Court for the District of Maryland, *Discovery Order*, available at [http://iaals.du.edu/images/wygwam/documents/publications/Grimm\\_Discovery\\_Order.pdf](http://iaals.du.edu/images/wygwam/documents/publications/Grimm_Discovery_Order.pdf) (last visited Oct. 4, 2013).

## C. OTHER HELPFUL DOCUMENTS

- Supreme Court of Colorado, Colorado Civil Access Pilot Project, *Initial Case Management Conference Joint Report of the Parties*, available at [http://www.courts.state.co.us/Courts/Supreme\\_Court/Directives/CJD%2011-02amended%206-26-13.pdf](http://www.courts.state.co.us/Courts/Supreme_Court/Directives/CJD%2011-02amended%206-26-13.pdf) (last visited Oct. 4, 2013).

- U.S. District Court for the Northern District of California, *Checklist for Rule 26(f) Meet and Confer Regarding Electronically Stored Information*, available at <http://cand.uscourts.gov/eDiscoveryGuidelines> (last visited Oct. 4, 2013).
- U.S. District Court of the Eastern District of Michigan, *Checklist for Rule 26(f) Meet and Confer Regarding Electronically Stored Information*, available at <http://www.mied.uscourts.gov/News/Docs/EsiOrderChecklist.pdf> (last visited Oct. 4, 2013).
- U.S. District Court for the Southern District of New York, Standing Order M10-468, *In re: Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York*, Case No. 11Misc00388 (filed Nov. 1, 2011), available at [http://www.nysd.uscourts.gov/rules/Complex\\_Civil\\_Rules\\_Pilot.pdf](http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf) (including Exhibit A, Initial Pretrial Conference Checklist Standing Order; and Exhibit B, Joint Electronic Discovery Submission No. \_\_\_\_ and [Proposed] Order).
- U.S. District Court for the Western District of Washington, *[Model] Agreement Regarding Discovery of Electronically Stored Information and [Proposed] Order*, available at <http://www.wawd.uscourts.gov/sites/wawd/files/ModelESIAGreement.pdf> (last visited Oct. 4, 2013).
- 7<sup>th</sup> Circuit Electronic Discovery Pilot Program, *[Proposed] Model Discovery Plan for Electronically Stored Information*, available at <http://www.discoverypilot.com/content/model-discovery-plan-and-privilege-order> (last visited Oct. 4, 2013).

## VI. A GLOSSARY OF THE BEST GLOSSARIES

Consistent with the nature of this toolkit, we offer here not a new glossary of terms, but links to some of the “best of the best” glossaries and other useful reference models.

- Electronic Discovery Reference Model (EDRM) v2.0 (2009) (available at <http://www.edrm.net/resources/edrm-stages-explained>). This is a conceptual depiction of the stages of the e-discovery process.
- Computer Assisted Review Reference Model (CARRM) (2012) (available at <http://www.edrm.net/resources/carrm>). This is a conceptual depiction of the stages of computer assisted review.
- Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technology-Assisted Review, with Foreword by John M. Facciola, U.S. Magistrate Judge*, 2013 FED. CTS. L. REV. 7 (available at <http://www.fclr.org/fclr/articles/html/2010/grossman.pdf>).
- THE SEDONA CONFERENCE<sup>®</sup> GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT (THIRD EDITION) (2010) (available at <https://thesedonaconference.org/publications>).
- MICHAEL R. ARKFELD, ARKFELD ON ELECTRONIC DISCOVERY AND EVIDENCE, Glossary at G-1 to G16 (3d ed. 2011).