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

Table of Contents

I. Introduction
II. The E-Discovery Context
III. Key Issues
   (1) Electronically Stored Information
   (2) Preservation
   (3) Spoliation
   (4) Rule 37(e)
   (5) Case Management
   (6) Discovery – Direct Access
   (7) Discovery Limitations – Inaccessibility
   (8) Discovery Limitations – Proportionality
   (9) Form of Production & Metadata
   (10) Search and Retrieval
   (11) Cost Allocation (Shifting)
   (12) Privilege Waiver
IV. Potential Rulemaking

I. Introduction

The 2006 E-Discovery Amendments ("the 2006 Amendments or the "Amendments") were enacted to address unique issues presented by the explosion in use of electronic information. They involved “relatively modest changes to the discovery rules aimed at modernizing the process to accommodate the explosion of ESI,” while addressing “imbalance[s] that [have] emerged in practice.”

1 ©Thomas Y. Allman. The author, a retired General Counsel, is Chair Emeritus of Working Group 1 of the Sedona Conference® and currently serves as an Adjunct Professor at the University of Cincinnati College Of Law.
2 Explanatory comments were included in the Judicial Conference Report furnished to Congress along with copies of the Rules and Committee Notes. See Adoption and Amendments to Civil Rules effective December 1, 2006 (hereinafter “TRANSMITTAL OF RULES TO CONGRESS”), 234 F.R.D. 219 (2006).
4 Mark Kravitz, To Revise, Or Not to Revise: That is the Question, 87 DENV. U. L. REV. 213, 220-221(2010).
They also provided exemplars for States seeking to address e-discovery in their civil rules. As of January, 2012, some thirty states have based e-discovery rules in whole or in part on the 2006 Amendments,”5 including, most recently, North Carolina as of October, 20116 and Connecticut in January, 2012.7 Two other states – Florida and Massachusetts – are considering similar rules8 and District of Columbia has proposals pending approval by its Court of Appeals.9

Of the remaining states, Texas, Idaho and Mississippi have adopted an approach pioneered by Texas in 1999. Oregon adopted minor clarifying amendments, to be effective in 2012,10 Pennsylvania is considering an approach emphasizing proportionality,11 and Utah has recently upgraded its earlier e-discovery rules.12 The remaining states have not acted comprehensively.13

This Memorandum first provides an overview of the Amendments and the context in which they operate, involving court decisions, best practice guidance and pilot projects. Part III describes the state of play in key e-discovery issues, illustrating the remarkable degree of uniformity of practice in both federal and state courts which has emerged on most issues. Wherever useful, the key differences from the 2006 Amendments developments in individual states are highlighted.

In Part IV, Potential Rulemaking, we summarize the renewed pressure, stemming from the Duke Litigation Conference (2010) to consider the efficacy of treatment of preservation obligations in the 2006 Amendments. This key issue relatively untouched in the 2006 Amendments, and has assumed greater importance in the ESI context.

The Appendix to this Report summarizes the e-discovery rulemaking activity in individual states and the District of Columbia.

5 Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Utah, Vermont, Virginia, Wisconsin and Wyoming.
8 See Appendix, under state name, for details.
9 California is currently considering “clean-up” amendments to cover gaps in the earlier effort. See Judicial Council of California Invitation To Comment (Leg11-01).
10 See Amended Rule 43 of the ORCP regarding electronic discovery, a copy of which is found at http://legacy.lclark.edu/~ccp/Promulgated_Amendments_12-11-10.pdf.
11 Gina Passarella, Approaching the Bench: Pa. Judiciary Faces New EDD Rules, Sept. 2, 2011 (quoting draftsman as seeking to avoid unnecessary complications caused by trying to be “sure [that] every single piece of paper that could have some relevance has been found”), copy at http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202513056682.
12 Utah had earlier added e-discovery rules, which remain unchanged. The amendments relating to proportionality are found in URCP 26 & URCP 37 (2011).
II. The E-Discovery Context

In December, 2006, a series of amendments to the Federal Rules of Civil Procedure came into effect in response to the differences in “kind and burden” which differentiate e-discovery from hard-copy discovery. Among the goals of the Amendments was to encourage uniformity of practice not just among the federal courts but between and among the state and federal courts.

However, the Amendments were and are not the only source of guidance for parties and the courts in resolving e-discovery issues, given the explosion of relevant decisions by federal Magistrate and District Judges and the best practice guidance provided by the Sedona Conference Working Group® and others.

The 2006 Amendments

At the heart of the 2006 Amendments is the characterization of “electronically stored information” (“ESI”) as a distinct category of discoverable information, as opposed to constituting a mere subset of “documents.” Under amended Rule 34(a), a party may seek production of ESI which is “stored in any medium” and has the right to seek direct access to “test or sample” such information. Production of ESI in the form or forms in which it is “ordinarily maintained” or in a “reasonably usable” form or forms is required under amended Rule 34(b).

Although the scope of discovery was not changed, Rule 26(b)(2)(B) presumptively limited production of ESI from inaccessible sources in the absence of “good cause.” Similar changes were made to Rule 45, dealing with information subject to subpoenas.

A major emphasis of the Amendments, however, was on enhanced opportunities to resolve e-discovery issues by agreement before they became problems. Rule 26(f) spelled out key e-discovery issues for early “meet and confer” discussion, including any preservation issues. In addition, Rule 16(b) was amended to encourage court attention to the need to manage and resolve e-discovery issues as part of the pre-trial conference process.

Other enhancements include a “clawback” provision in Rule 26(b)(5)(B) covering the return of material as to which a post-production claim of privilege or trial-preparation

15 The amended rule provides for service of a request to “produce and permit” a party to “inspect, copy, test, or sample” any designated documents or electronically stored information or designated tangible things.
16 Although not dealt with in the rule, “metadata” was alluded to in the Committee Note to Rule 26(f) without specifying any priority as to its importance in production.
January 22, 2012,
Page 4 of 58

protection is made. Changes were also made to Rules 26(a) and 33 to reflect the fact that ESI was in the mix in regard to the subject of each of them.

There was one major gap. The Amendments did not deal directly with the contours of the duty to preserve nor spell out the uniform rules dealing with the consequences of failures to preserve (“spoliation”). Both topics were left to administration by courts under their inherent powers except for those instances where Rule 37 provides for a variety of sanctions and remedial options against the non-compliant party or the attorney “advising that party.”

However, the Amendments did include a limited “safe harbor” for rule-based sanctions for ESI losses caused by “routine, good-faith” system operations in what is (now) Rule 37 (e).

Federal Decisional Law

A primary source of guidance for courts, including those in states where e-discovery amendments have not been adopted, has been decisions by Federal Magistrate and District judges. The Zubulake line of cases has played a particularly important role in regard to preservation, spoliation, cost-shifting and inaccessibility. Many courts treat those decisions as announcing national standards.

Other Sources

An influential “gap filler” resource for all courts has been the publications of the Sedona Conference® Working Group on Electronic Document Retention & Production (“WG1”), especially the Best Practices Recommendations & Principles for Addressing Electronic Document Production (“Sedona Principles”). The Principles were

---

17 This was subsequently augmented by Congressional action in enactment of Rule 502 of the Federal Rules of Evidence (2008) providing rules governing the issues of privilege waiver.
18 Chambers v. NASCO, 501 U.S. 32, 46 (1991)(the sanctioning scheme of the rules does not displace “the inherent power to impose sanctions”).
19 Rule 37(b)(2)(C).
20 The rule was initially denominated as Rule 37(f)(2006) and renumbered as Rule 37(e) without change in 2007. Its focus on “rule-based” sanctions may have been a residual reaction to concerns about authority to enact rules touching on pre-litigation issues.
21 Klickstein & Fergus, Navigating E-Discovery in the Massachusetts State Trial Courts, 24 JOURNAL OF TRIAL & APPELLATE ADVOCACY 35, 40-41 (2009)(“intra-state procedural uniformity in practice” is not uncommon in states which do not necessarily adopt or follow the federal rules).
23 But see Point Blank Solutions v. Toyobo America, 2011 WL 1456029, at *4, n. 3 (S.D. Fla. April 5, 2011)(“Judge Scheindlin is in the Second Circuit, which has some rules which are different than those in our Eleventh Circuit”).
developed contemporaneously with the Amendments and were subsequently harmonized with them in the Second Edition.\textsuperscript{25}

Sedona has also released cutting edge publications such as the \textit{Commentary on Legal Holds} (amended in 2010)\textsuperscript{26} and the \textit{Commentary on Proportionality}.\textsuperscript{27} Other publications of note include the \textit{Sedona Guidelines},\textsuperscript{28} the \textit{Sedona Glossary}\textsuperscript{29} and the \textit{Sedona Cooperation Proclamation},\textsuperscript{30} encouraging cooperation among parties in planning and executing discovery.

The 2006 \textit{Guidelines for State Trial Courts on Discovery of Electronically Stored Information (“CCF Guidelines”)} developed by the Conference of Chief Justices\textsuperscript{31} and the 2007 \textit{Uniform Rules Relating to the Discovery of Electronically Stored Information (“Uniform Rules”)}\textsuperscript{32} have also been helpful in the evolution of uniform principles of e-discovery.\textsuperscript{33}

\textbf{Pilot Projects}

Experimental or “pilot” projects have provided creative ideas for e-discovery management. For example, the Seventh Circuit Electronic Discovery Pilot Program is notable for its practical suggestions in dealing with the scope of preservation obligations.\textsuperscript{34} Principle 2.04 (Scope of Preservation), for example, spells out the contours of the duty to preserve\textsuperscript{35} and lists types of ephemeral and other ESI which are presumptively not required to be preserved.\textsuperscript{36}


\textsuperscript{26} Sedona Conference® Commentary on Legal Holds: The Trigger & the Process, 11 \textit{SEDONA CONF. J.} 265 (2\textsuperscript{nd} Ed, 2010).

\textsuperscript{27} Sedona Conference® Commentary on Proportionality in Electronic Discovery, 11 \textit{SEDONA CONF. J.} 289 (2010).

\textsuperscript{28} The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age (2\textsuperscript{nd} Ed. Nov. 2007), copy at \url{http://www.thesedonaconference.org/content/miscFiles/Guidelines.pdf}.

\textsuperscript{29} The Sedona Conference ® Glossary: E-Discovery & Digital Information Management (3\textsuperscript{rd} Ed. 2010).

\textsuperscript{30} 10 \textit{SEDONA CONF. J.} 331 (2009); see also 10 \textit{SEDONA CONF. J.} 339, 363 and 377 (2009).


\textsuperscript{32} The \textit{Uniform Rules} can be found at \url{http://www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.htm}. See also ARCP 26.1(“Electronic Discovery”) (self-described as a “supplemental and optional” rule which applies to cases if parties agree or the court orders it for good cause).

\textsuperscript{33} Seventh Circuit Electronic Discovery Pilot Program, Statement of Purpose and Preparation of Principles (October 2009), copy at \url{http://www.ilcd.uscourts.gov/Statement%20-%20Phase%20One.pdf}.

\textsuperscript{34} “Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control.”

\textsuperscript{35} The categories include, \textit{inter alia}, “deleted” or “unallocated” data on hard drives, RAM, temporary files, frequently updated metadata, duplicative backup data and other forms of ESI requiring “extraordinary affirmative measures.”
Similarly, a working group in the Federal Circuit has recently promulgated a Model Order with suggested limits on the number of custodians, an approach also recently adopted by the (revised) Default Standards for e-discovery by the Federal District Court of Delaware. The Southern District of New York has also implemented a pilot program focusing on more effective early discussion provisions of electronic discovery issues.

Other relevant pilot projects involve ESI guidelines issued by the Delaware Court of Chancery, the Nassau County [N.Y.] commercial court, and the pilot rules suggested by the American College of Trial Lawyers.

### III. Key Issues

The current state of e-discovery practice is best seen through the lens of specific e-discovery issues, as discussed below. Generally speaking, we first describe the changes, if any, made by the 2006 Amendments and follow with a description of the impact on state rulemaking.

#### (1) Electronically Stored Information

The 2006 Amendments established “electronically stored information” (“ESI”) as a distinct category of discoverable information, as opposed to a mere subset of “documents.” Thus, under amended Rule 34(a), a party may seek to secure, inspect, copy, test or sample ESI which is “stored in any medium” from which information can be obtained if in the possession, custody or control of the party. Rule 45 was also

---


38 Default Standard (2011), Para. 3(a)(parties must disclose the ten custodians “most likely to have discoverable information” as well as “non-custodial data sources” most likely to contain “non-duplicative discovery able information for preservation and production consideration”), copy at [http://www.ded.uscourts.gov/](http://www.ded.uscourts.gov/).


43 Rule 34(a) was amended in 1970 to define “documents” to include “data or data compilations from which information could be obtained; translated, if necessary, by the respondent through detection devices into reasonably usable form.”

amended so that a non-party may be compelled to produce ESI under their possession, custody or control.\textsuperscript{45}

\textbf{State Variants}

Illinois, which acted prior to the 2006 Amendments, provides that a party may request discovery of “all retrievable information in computer storage” as part of a request for “documents.”\textsuperscript{46} Texas, which also acted before the 2006 Amendments, authorizes a party to secure production of “data or information that exists in electronic or magnetic form.”\textsuperscript{47} Arkansas defines ESI as “information that is stored in an electronic medium and is retrievable in perceivable form,”\textsuperscript{48} with “electronic” defined quite broadly.\textsuperscript{49} California takes the same approach,\textsuperscript{50} but does not require that ESI be retrievable in a “perceivable form.”

North Carolina has recently defined ESI to include (only) “reasonably accessible metadata that will enable the discovering party to have the ability to access such information as the date sent, date received, author and recipients.”\textsuperscript{51} Other non-privileged metadata is also discoverable, but not unless agreed or ordered to be produced for good cause.

\textbf{Open Issues}

There are increasing concerns about the adequacy of the traditional test of “possession, custody and control” for assessing responsibility for ESI, including metadata, in a public cloud. Issues over the ability to control preservation and production exist\textsuperscript{52} although some take the position that use of the cloud actually will enhance the ability to preserve by reducing the need for collection.\textsuperscript{53}

These issues may become evident because of the exponential growth in use of social media, may require additional definitional and conceptual attention.\textsuperscript{54}

\textsuperscript{45} See Rule 45(c)(party must take reasonable steps to avoid imposing undue burden or expense on a person subject to a subpoena).
\textsuperscript{46} Ill. R. Civ. P. 201(b); see also Rule 214 (a party may produce retrievable information in computer storage in printed form).
\textsuperscript{47} Tex. R. Civ. P. 196.4 (1999).
\textsuperscript{49} Ark. R. Civ. P. 26.1(a)(2)(2009)(“[e]lectronic means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities”).
\textsuperscript{50} Cal. Code Civ. Proc. § 2016.020(d) – (e).
\textsuperscript{51} N.C. Gen Stat 1A-1, Rule 26(1).
\textsuperscript{52} See Alberto G. Araiza, Electronic Discovery in the Cloud, 2011 Duke. L. & Tech. Rev. 008, at ¶43 (2011)(suggesting amendments to “control” so that it applies only to ESI and metadata over which a party has “exclusive or substantial control” because of technical complexities in cloud storage).
\textsuperscript{53} Craig Ball, How the Cloud has E-Discovery Covered, LTN News, August 1, 1011.
(2) Preservation

The duty of a plaintiff or defendant to preserve evidence is a byproduct of the common law obligation not to spoliate evidence, given that the existence of a duty to preserve is one of the elements of “spoliation.” It can arise at or before commencement of litigation from a variety of sources, including triggering events or other sources such as statutes, regulations, or a court order in the case.

The obligation can be stated as requiring use of reasonable and good faith efforts to retain information relevant to threatened or pending litigation. In *Rimkus v. Cammarata*, Judge Lee Rosenthal, then Chair of the Standing Committee of the Judicial Conference, noted that “[w]hether preservation or discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was done – or not done – was proportional to that case and consistent with clearly established applicable standards” (emphasis in original).

To some courts, however, that standard is seen as imposing an affirmative requirement to implement what is known as a “litigation hold.” Thus, in *Zubulake v. UBS Warburg* (“*Zubulake IV*”), Judge Shira Scheindlin, then a Member of the Rules Committee, announced that the “[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” This obligation – and the responsibilities for implementation described in *Zubulake V* - has been widely adopted by other federal and state courts.

---

55 Silvestri v. Gen Motors, 271 F.3d 583, 591 (4th Cir. 2001)(finding that the failure to preserve material evidence in anticipation of litigation was a breach of the “duty not to spoliate evidence”).
56 See, e.g., Klickstein and Fergus, Navigating E-Discovery in the Massachusetts State Trial Courts, 14 Suffolk J. Trial & App. Advoc. 35, 52 (2009)(listing as a “prerequisite” to spoliation sanctions the existence of a duty to preserve evidence).
57 In O’Brien v. Donnelly, 2010 WL 3860522, at *7 (S.D. Ohio Sept. 27, 2010), the court held that the duty to preserve could be inferred from a regulation without also finding that litigation was foreseeable; see, e.g., The Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(3)(C)(i); see also 29 C.F.R. § 1602.14 (1991)(“[a]ny personnel or employment record . . . shall be preserved by the employer for a period of one year from the date of making of the record of the personnel action involved”).
61 Kimur and Yamamoto, Electronic Discovery: A Call For a New Rules Regime for the Hawai’i Courts, 32 U. Haw. L. Rev. 153, 187 (2009)(“ Evolving federal procedural common law has loosely filled this gap by combining rules to create a preservation duty for attorneys and parties, called the Zubulake duty”).
The scope of the obligation is coextensive with the scope of discovery in a given case. In Oleksy v. GE, for example, the court held the duty to encompass “all potentially discoverable evidence” within the scope of discovery. This includes active data as well relevant and non-privileged ephemeral or legacy information, including metadata, regardless of form. It may also include materials which may be available only through forensic investigation, such as ‘deleted’ files or the “scraps of electronic information found on hard drives as ‘residual data’ or in the ‘slack space’ at the end of active files.”

However, data that is not readily accessible, such as legacy or ephemeral data, may not need to be preserved in the absence of agreement. Thus, one need not preserve backup tapes maintained solely for the purpose of disaster recovery unless they are routinely used as archives. An important factor is “whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources.” The Seventh Circuit Pilot Program on E-Discovery, for example, has developed a useful list of suggested types of ESI that need not be preserved in the absence of agreement or a court order.

The Sedona Commentaries on Proportionality Information that is Not Reasonably Accessible and on Legal Holds deal with these and many other practical issues in the preservation context.

---

64 Oleksy v. GE, supra, 2011 WL 4626015, at *3 (N.D. Ill. Oct. 3, 2011)(“even a large corporation” must “not destroy unique, relevant evidence that might be useful to an adversary).
65 See Rule 26(b)(1)(“nonprivileged matter that is relevant to any party’s claim or defense” or, if ordered for good cause, “relevant to the subject matter involved in the action”).
66 The Committee Note to Rule 26, Subdivision (f)(2006) (“metadata” and other material not “apparent to the creator or readers” is discoverable and should be discussed early).
67 Columbia Pictures v. Bunnell, 2007 WL 208419 at *3-6 (C.D. May 29, 2007), motion to review denied, 245 F.R.D. 443, 447 (2007)(“Rule 34 requires no greater degree of permanency from a medium than that which makes obtaining the data possible”).
68 See, e.g., Tener v. Cremer, 2011 WL 4389170, at *4 (N.Y. A.D. 1 Dept. Sept. 22, 2011)(remanding to determine if deleted data is in possession of non-party and whether cost/benefit analysis justifies effort to obtain the data through forensic examination).
69 Kenneth J. Withers, We’ve Moved the Two Tiers and Filled in the Safe Harbor, 52-DEC FED. LAW. 50 (Nov/Dec. 2005).
70 Id. 218; accord, MRT, Inc. v. Vounckx, 299 S.W. 3d. 500,511 (C.A. Tex. (Dallas) Oct. 30, 2009)(backups not created for the purposes of archival preservation need not be preserved).
72 See e.g., Committee Note, Rule 26 Subdivision (b)(2)(2006)(“ It is often useful for the parties to discuss this issue early in discovery.”).
73 SEVENTH CIR. E-DISCOVERY PRINCIPLE 2.04 (Scope of Preservation)( referring to “deleted” or “unallocated” data on hard drives, RAM, temporary files, frequently updated metadata, duplicative backup data and other forms of ESI requiring “extraordinary affirmative measures”), copy at http://www ilcd uscourts gov/Statement%20-%20Phase%20One.pdf.
74 11 SEDONA CONF. J. 289 (Fall 2010)(suggesting that “the burdens and costs of preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation”).
75 10 SEDONA CONF. J. 281 (Fall 2009).
Impact of the 2006 Amendments

The duty is enforced as an inherent power of the court and is not contained in the Federal or state civil rules.\textsuperscript{77} In federal courts, it is governed by federal preservation principles regardless of the basis for exercising jurisdiction.\textsuperscript{78}

While not explicitly included in the 2006 Amendments,\textsuperscript{79} preservation issues were added to the topics required by Rule 26(f) to be discussed at the party “meet and confers.” The purpose was to “require parties to discuss these issues early in the case and to seek early judicial involvement if agreements cannot be reached.”\textsuperscript{80} In addition, a purported “preservation safe harbor” was added as Rule 37(f), now Rule 37(e).\textsuperscript{81} Rule 37(e) existence implicitly acknowledges existence of a duty to preserve and has influenced its articulation. Indeed, the Committee Notes to Rule 37(f), Rules 26(f) and Rules 26(b)(2)(B), as well as comments in the Report transmitted to Congress,\textsuperscript{82} discuss the implications of the preservation duty in some detail.

The “unfinished business” remaining from this partial rulemaking exercise came to a head at the Duke Litigation Conference (2010), leading to recommendations for further rulemaking.\textsuperscript{83} Subsequent developments, including discussions at the Dallas Mini-Conference in September, 2011,\textsuperscript{84} are discussed in Section IV, Potential Rulemaking, below. Pending proposals range from a new Rule 26.1 detailing the trigger and scope requirements to a listing of “backward-looking” preservation factors in a replacement for Rule 37(e).

\begin{footnotesize}
\begin{enumerate}
\item[76] 11 \textsc{Sedona Conf. J.} 265 (Fall 2010).
\item[77] Some states have recognized an independent action in tort for damages for spoliation, which complicates the analysis. \textit{See} Victor Stanley v. Creative Pipe, 269 F.R.D. 497, 525-526 (D. Md. Sept. 9, 2010) (“with the exception of a few jurisdictions that consider spoliation to be an actionable tort, the duty to preserve evidence relevant to litigation of a claim is a duty owed to the \textit{court}, not to a party’s adversary”) (emphasis in original).
\item[79] \textsc{Advisory Committee Minutes}, April 14-15, 2005, at p. 39-40, copy available at \url{http://www.uscourts.gov/rules/Minutes/CRAC0405.pdf} (because of drafting difficulties, “there [was] no occasion even to consider” whether a preservation rule would be an authorized or wise exercise of Enabling Act authority).
\item[81] Rule 37(f), renumbered as Rule 37(e) in 2007, limits sanctions from losses of ESI which result from “routine, good-faith” operation of information systems in the absence of exceptional circumstances.
\item[83] \textsc{Report To The Chief Justice Of The United States} (2010), 8 (“preservation obligations are so important that the Advisory Committee is committed to exploring the possibilities for rulemaking”), copy at \url{http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20report.pdf}.
\end{enumerate}
\end{footnotesize}
Preservation in the States

The duty to preserve is acknowledged by most states in language largely consistent with federal common law decisions. As in the federal context, “notice of the information’s relevance . . . is often examined in hindsight, and [state rules] provides little, if any, bright-line guidance on when a preservation obligation arises.” Some states, including Florida and Illinois, eschew a pre-litigation duty to preserve and rely on evidentiary inferences to remedy intentional destruction of evidence (“spoliation”) when it is found to exist.

Several states have alluded to preservation obligations in their counterparts to Rule 37(e). Michigan, for example, states that “[a] party has the same obligation to preserve [ESI] as it does for all other types of information” and California noted that its Rule 37(e) counterpart “shall not be construed to alter any obligation to preserve information.”

States which had earlier adopted the “meet and confer” process have typically amended their equivalent to Rule 26(f) to include preservation as a topic for early discussion. California incorporated a similar requirement in a new rule, as have states adopting rules for use with specialized divisions or courts, such as Arizona (complex cases), Delaware (complex cases) and North Carolina (Business Court).

---

85 Loukinas v. Roto-Rooter Serv. Co., 167 Ohio App. 3d 559, 569, 855 N.E.2d 1272 (1st D.C.A. (Ham.) June 23, 2006)(“Even prior to the commencement of any litigation, a “plaintiff is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action”).
86 Dante Stella, Avoiding E-Discovery Heartburn, 90-FEB MICH. B. J. 42 (2011).
87 Royal & Sunalliance v. Lauderdale Marine, 877 So.2d 843, 846 (Fla. 4th DCA. July 7, 2004)(“we find [the] argument that there was a common-law duty to preserve the evidence in anticipation of litigation to be without merit”); see also In re Electric Machinery Enterprises, 416 B.R. 801, 874-875 (Bkcy Ct. M.D. Fla. Aug. 28, 2009)(refusing to apply sanctions to pre-litigation failure to preserve in light of authority that parties were under no duty to preserve evidence under Florida law).
88 Boyd v. Travelers, 166 Ill.2d 188, 652 N.E. 267, 270 (S.Ct. Ill. June 22, 1995)(“[t]he general rule is that there is no [pre-litigation] duty to preserve evidence”).
89 See, e.g., Shimanovsky v. GM, 181 Ill. 2d 112, 692 N.E.2d 286 (S.Ct. Ill. Feb. 20, 1998)(applying rule-based sanctions because “a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence”); Nationwide Lift Trucks v. Smith, 832 So. 2d 824, 826 (Fla. 4th DCA Nov. 13, 2002).
90 MCR 2.302(B)(5); see also Staff Notes, OHIO CIV. R. 37(F)(2010)(the duty to preserve is “addressed by case law and is generally left to the discretion of the trial judge”).
91 See, e.g., CAL. CIV. PROC. §§ 1985.8(l)(2); 2031.060(l)(2); 2031.300(d)(2) & 2031.310(j)(2); 2031.320(d)(2).
92 See, e.g., ALA. R. CIV. P. 26(f)(2010)(“ any issues relating to discovery of electronically stored information, including issues relating to preserving discoverable information”).
93 CAL. RULES OF COURT, RULE 3.724 (2010)(requiring meeting of parties to discuss any issues relating to the discovery of ESI, including “preservation,” form of production, scope, methods of asserting privilege or confidentiality, how cost “of production” is to be allocated and other relevant matters).
94 ARIZ. R. CIV. P. 16.3(b)(2010).
96 N.C. R. BUS CT Rule 17.1(r)(“The need for retention of potentially relevant documents, including but not limited to documents stored electronically and the need to suspend all automatic deletions of electronic
Triggering the Duty

The duty to preserve is triggered when a party is on notice that evidence may be sought in discovery in pending or “reasonably foreseeable” litigation. The duty begins when a party “first [knows] litigation [is] on the horizon.” Service of a subpoena or the occurrence of events sufficient to provide notice of potential litigation within an industry may be sufficient to trigger the duty.

The determination of the exact trigger point has been the source of considerable confusion, especially since it is only fixed with hindsight if challenged. For many parties, the only “safe” policy is to act as soon as possible, thereby complying “with the most demanding requirements of the toughest court to have spoken on the issue” despite the burdens and expense involved.

Litigation Holds

As noted earlier, Zubulake IV requires that “[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” Compliance with litigation holds is the subject of Zubulake V.

The reference to possible use of “litigation holds” in the Committee Comment to Rule 37(e) is seen by some courts as mandating the use of litigation holds once a duty to reserve attaches. Similar views have been expressed in various state comments and staff notes.

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

98 Micron Technology v. Rambus, 645 F.3d 1311 (C.A. Fed. (Del.) May 13, 2011)( litigation is foreseeable if “overcoming [potential] contingencies was reasonably foreseeable”).
101 Talavera v. Shah, 638 F.3d 303, 311-312 (C.A. D.C. March 29, 2011)(violation of a regulation can support an inference of spoliation if party is a member of the general class sought to be protected).
102 Phillip Adams v. Dell, 621 F. Supp.2d 1173, 1191 (D. Utah March 30, 2009)(duty arose when “computer and component manufacturers [first] were sensitized to the issue”).
107 Committee Note, Rule 37(f)(2006)(“good faith . . . may involve a party’s intervention to modify or suspend certain features of that routine operation” and also “[w]hen a party is under a duty to preserve information . . . intervention in the routine operation of an information system is one aspect of what is often called a “litigation hold”).
A litigation hold notice is typically communicated to key custodians and to appropriate information technology, records retention or other personnel with access to the relevant data. It identifies the litigation, the parties involved and documents and information to be preserved and provides a time frame and contact person. Provisions may be necessary for contact with former employees.\(^\text{110}\)

Issuance of a notice does not necessarily result in the collection of the data placed on hold – the hold may be “primarily prophylactic” – but it is “sometimes incorporated into and made part of the initial identification and preservation process itself.”\(^\text{111}\) There may or may not be “automated processes in place to track issuance of the litigation hold and to record communications regarding “endpoint” devices such as desktops, laptops and removable devices.\(^\text{112}\)

In *Pension Committee*, a follow-on to *Zubulake* by the same Court, it was held that a litigation hold *must* be in writing to escape the presumptions and sanctions that would otherwise follow.\(^\text{113}\) However, other courts believe that a written hold is not,\(^\text{114}\) especially in the absence of an intent to interfere with the ability to litigate.\(^\text{115}\) As the current Chair of the Rules Advisory Committee has written in disagreeing with *Pension Committee*, “[p]er se rules are too inflexible for this factually complex area of the law.”\(^\text{116}\)

When email archiving\(^\text{117}\) is utilized for data in active use, broadly worded keyword searches can be used to help identify and segregate ESI subject to litigation hold for its duration.\(^\text{118}\) Commentators recommend the use of expansive litigation holds,

\(^{108}\) Advisory Comm. Comments, TENN. R. CIV. P. 37.06 (2009)(intervention is “one aspect of what is often called a “litigation hold””).

\(^{109}\) Staff Comment, MCR 2.313(e)(2008)(“good faith may be shown by a party’s actions to attempt to preserve information as part of a ‘litigation hold’”).

\(^{110}\) 3 N.Y. PRACT., COM. LITIG. IN NEW YORK STATE COURTS § 25:25 (3d ed.) (“the better practice is that the litigation hold should always be in writing”).


\(^{112}\) Id., 6-7.


\(^{115}\) See, e.g., Culler v. Shinseki, 2011 WL 3795009, at *7 (M.D. Pa. Aug. 26, 2011)(no evidence that deletion of mailbox pursuant to routine practice was an intentional act designed to impair ability to litigate).


\(^{117}\) Thomas Y. Allman, Federal Rule-Making Takes Hold: National Standards for E-Discovery, ALI-ABA Course of Study, SM057 ALI-ABA 325, at 337-338 (2006) ("supplemental archiving" can be “helpful to a litigation hold process since “messages can be securely held in place pending future use”).

\(^{118}\) Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432 (Zubulake V) (S.D. N.Y. July 20, 2004) (suggesting use of “a broad list of search terms” to identify materials subject to preservation); accord Sedona Conference® Best Practices Commentary on The Use of Search and Information Retrieval Methods in E-Discovery, 8 SEDONA CONF. J. 189, 200 (Fall 2007).
regardless of costs and burdens, and often advocate the retention of experts and installation of archiving and other systems.\textsuperscript{119}

**Preservation/Protective Orders**

Preservation orders or subpoenas\textsuperscript{120} compelling or managing preservation are often sought or agreed to\textsuperscript{121} at the outset of litigation in Federal\textsuperscript{122} or State courts.\textsuperscript{123} The 2006 Committee Note to Rule 26(f) cautions, however, that “[t]he requirement that the parties [must] discuss preservation does not imply that courts should routinely enter preservation orders [over objection].”\textsuperscript{124} Nonetheless, where a credible risk exists that a party will not preserve information, both Federal\textsuperscript{125} and state\textsuperscript{126} courts are prepared to compel a party to preserve evidence.

Potential producing parties may also seek protective orders to deal with unduly burdensome preservation demands.\textsuperscript{127} While Rule 16(b) and Rule 26(c) were not amended to explicitly to refer to preservation issues,\textsuperscript{128} Rule 26(b)(2)(B) now authorizes use of protective orders by parties wishing to “determine” their “potential preservation


\textsuperscript{120}See also Caston v. Hoaglin, 2009 WL 1687927 at *3-4 (S.D. Ohio June 12, 2009)(authorizing use of “preservation subpoena directed at third party to compel preservation).

\textsuperscript{121}In re Toyota Motor Corp., 2010 WL 2901798 (C.D. July 20, 2010).

\textsuperscript{122}Haraburda v. Arcelor Mittal USA, 2011 WL 2600756, at *3 (N.D. Ind. June 28, 2011)(noting that since the party “already has the burden to preserve the evidence in question,” ordering it to “abide by its preexisting duty will not increase its burden”); Pacific Centure v. Does 1-101, 2011 WL 2690142, at *5 (N.D. Calif. July 8, 2011)(Ordering ISP to preserve subpoenaed information regarding subscriber information pending resolution of motion to quash); cf Jardin v. Datallegro, 2008 WL 4104473 (S.D. Cal. Sept. 3, 2008)(refusing to order preservation because of failure to respond to preservation demand letters).


\textsuperscript{124}In connection with changes to Rule 37(f) after Public Hearings, the Report to Congress explained that the Committee had been concerned that language “would invite routine applications for preservation orders, and often for overbroad orders.” See \textit{TRANSMITTAL OF RULES TO CONGRESS}, 234 F.R.D. 219, 328-329 (2006).

\textsuperscript{125}Haraburda v. Arcelor Mittal USA, 2011 WL 2600756, at *3 (N.D. Ind. June 28, 2011)(noting that since the party “already has the burden to preserve the evidence in question,” ordering it to “abide by its preexisting duty will not increase its burden”); Pacific Centure v. Does 1-101, 2011 WL 2690142, at *5 (N.D. Calif. July 8, 2011)(Ordering ISP to preserve subpoenaed information regarding subscriber information pending resolution of motion to quash); cf Jardin v. Datallegro, 2008 WL 4104473 (S.D. Cal. Sept. 3, 2008)(refusing to order preservation because of failure to respond to preservation demand letters).


\textsuperscript{127}See, e.g., Pippins v. KPMG, 2011 WL 4701849, at *8 (S.D. N.Y. Oct. 2011);

\textsuperscript{128}In contrast, states amending their civil rules routinely include authority for courts to deal with preservation obligations in pre-trial orders. See, e.g., ARIZ. R. CIV. P. 16(B)(II)(“ any measures the parties must take to preserve discoverable documents or electronically stored information”); accord , VA. SUP. CT. R. 4:13 (2010); TENN. R. CIV. P. 26.06(E)(4); ARCP R. 26.1.
obligation by moving for a protective order.”

Courts have not been receptive, however, to attempts to secure such orders prior to the commencement of litigation.

Protective or preservation orders may authorize or compel cost-shifting or cost-allocation to mitigate any undue burden or costs involved.

Responsibilities of Counsel

It has been said that “the obligation to preserve evidence runs first to counsel, who then has a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to litigation.” Zubulake V identified specific duties of counsel in connection with execution of preservation obligations, especially in regard to litigation holds.

Under Fed. R. Civ. P. 26(g) and similar state provisions, counsel is expected to sign all discovery papers, thereby certifying completeness of discovery responses as well as existence of a proper purpose in conducting the discovery. Some commentators suggest that use of “creative” means can be used to force preservation failures within its scope. It is not unusual, in any event, for courts to enforce perceived obligations of counsel through the assertion of their inherent authority.

130 Texas v. City of Frisco, 2008 WL 828055, at *4 (E.D. Tex. March 27, 2008)(declining to adjudicate reasonableness of demand for preservation since the court lacked jurisdiction).
133 Zubulake v. UBS Warburg LLC (“Zubulake V”), 229 F.R.D. 422, 432 (S.D. N.Y. July 20, 2004)(“once a ‘litigation hold’ is in place, a party and her counsel must make certain that all sources of potentially relevant information are identified and placed on ‘hold’”); see also Cardenas v. Dorel, 2006 WL 1537394, at *7 (D. Kan. June 1, 2006)(outside counsel has duty to exercise some degree of oversight over client’s employees charged with executing search to ensure client discharges obligations under discovery provisions).
134 Compare Rule 26(g)(attorney certifies belief after reasonable inquiry that discovery requests are complete, not interposed for improper purpose and not unduly burdensome) with ILCS S. Ct. Rule 137 (Illinois Supreme Court Rules)(“not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation”).
135 Qualcomm v. Broadcom, 2010 WL 1336937, at *5-6 (S.D. Cal. April 2, 2010)(vacating sanctions under Rule 26(g) since responses were certified by counsel after “a reasonable, although flawed, inquiry and were not without substantial justification”).
136 See Kimura and Yamamoto, supra, Electronic Discovery, 32 U. Haw. L. Rev. 153, 200 & n. 323 (suggesting that the “rationale” - deterring misconduct by attorneys and litigants - justifies imposing sanctions by a “creative judge”).
137 Green (Fine Paintings) v. McClendon, 262 F.R.D. 284, 289 (S.D. N.Y. Aug. 13, 2009)(“counsel failed to institute a litigation hold to protect relevant information from destruction”); but compare Qualcomm v. Broadcom, 2010 WL 1336937 (S.D. Cal. April 2, 2010)(withdrawing earlier opinion sanctioning outside counsel because attorneys had not acted in bad faith as required to sanction under inherent powers).
January 22, 2012,
Page 16 of 58

Some courts refuse to hold counsel responsible for discovery shortcomings, noting that the obligations are those of a party, not counsel. A party has the right to assign - or not to assign - responsibilities to its outside counsel in carrying out those duties.

There are also potential ethical, malpractice and criminal implications due to a well-developed "network of state and federal laws." Model Rule of Professional Conduct 3.4(a), for example, specifies that a lawyer "shall not unlawfully . . . alter (or) destroy . . . a document or other material having potential evidentiary value" nor shall "counsel or assist" another to do any such act.

(3) Spoliation

The doctrine of "spoliation" of evidence refers to the set of remedies available when discoverable evidence is altered or destroyed at a time when a duty to preserve exists. Courts typically assess and remedy spoliation in the exercise of their inherent powers to deal with litigation abuse, with Federal courts relying heavily on the Supreme Court decision in Chambers v. NASCO. Spoliation is conceptually distinct

---

140 ABA MODEL RULES OF PROF. COND. 3.4(b)(a lawyer shall not “unlawfully obstruct” access to evidence or “unlawfully alter, destroy or conceal a document or other material having potential evidentiary value” or “counsel or assist another person” to do so); In re Estrada, Esq., 143 P.3d 731 (Sup. Ct. N.Mex. Sept. 28, 2006)(suspension of one year imposed by counsel for, inter alia, violation of state equivalent of Model Rule 3.4).
141 Cf. Kelley v. Patel, 953 N.E. 2d 505, 511 (C.A. Ind. Aug. 9, 2011)(acknowledging possible tort liability of carrier which knew or should have known of the likelihood of litigation and arguably failed to advise insured of a duty to preserve).
142 West’s Ann. Cal. Penal Code § 135 (“Every person who, knowing that any [document] is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, willfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor.”).
144 See, e.g., Disciplinary Counsel v. Robinson, 126 Ohio St. 3d 371, 933 N.E. 2d 1095 (S.C. Ohio Aug. 25, 2010)(imposing one-year suspension as sanction for, inter alia, destruction of firm documents with potential evidentiary value).
146 Chambers v. NASCO, 501 U.S. 32, 46 (1991); see generally Iain D. Johnston, Federal Courts’ Authority to Impose Sanctions for Pre-Litigation or Pre-Order Spoliation of Evidence, 156 F.R.D. 313 (Oct. 1994); see also Utah Rule Civ. P. 37(g)(“Nothing in this rule limits the inherent power of the court to take any action authorized by Subdivision (b)(2) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty).
from other forms of discovery misconduct, although the inherent sanctioning power is often asserted in that context as well.\textsuperscript{147}

The core “elements” necessary to demonstrate entitlement to a spoliation remedy require, as the Second Circuit noted in \textit{Residential Fund v. DeGeorge Fin. Corp.},\textsuperscript{148} a showing of a failure to meet preservation obligations coupled with a “culpable state of mind” and evidence that the lost information was relevant and could have supported the claim or defense.\textsuperscript{149} Some courts emphasize also the necessity of showing prejudice and materiality of the missing evidence, although presumptions may be indulged if the culpability is high.

**Range of Sanctions**

A court may invoke, in its discretion, a wide range of sanctions or other remedies once spoliation is found.\textsuperscript{150} The listed sanctions in the civil rules for discovery misconduct are generally not available unless a preservation order is in place.\textsuperscript{151} Some courts nonetheless apply rule-based sanctions without explaining the reasons for doing so.\textsuperscript{152}

The sanctions may range in severity from curative remedies, including expenses and fees, up to and including dismissal or granting of default judgments. Courts are constrained in their choices by competing principles which stress proportionality and the need to select the least onerous sanction necessary to deal with the consequences of spoliation. Only Rule 37(e), added by the 2006 Amendments, explicitly limits court authority to sanction for preservation failures, and that rule is applicable only to sanctions under the federal rules or, if adopted in a state, its state counterparts.\textsuperscript{153}

The degree of perceived culpability involved plays a major role in determining the severity of sanctions, if any, which are imposed. Some federal circuits\textsuperscript{154} and state

\textsuperscript{147} See, e.g., Nycomed U.S. v. Glenmark Generics, 2010 WL 3173785, at *3 (E. D. N.Y. Aug. 11, 2010) (“the misconduct involves late disclosure, as opposed to spoliation”).

\textsuperscript{148} Residential Fund v. DeGeorge Fin. Corp, 306 F.3d 99, 107 (2\textsuperscript{nd} Cir. 2002).


\textsuperscript{151} Rule 37(b) carefully omits mention of jury instructions, apparently based on an understanding that it is a distinct remedy reserved for spoliation. See, by comparison, 1993 Committee Note, Rule 37(c)(1)(B).


\textsuperscript{153} The Rule is also confined to ESI losses resulting from “routine, good-faith” information system operations under circumstances deemed not to be “exceptional.”

\textsuperscript{154} Micron Technology v. Rambus, 645 F.3d 1311 (Fed. Cir. May 13, 2011); Vick v. Texas Employment Comm., 514 F. 2d 734, 737 (5\textsuperscript{th} Cir. June 12, 1975);
require an explicit showing of “bad faith”\textsuperscript{155} to impose a default judgment or dismissal and others do not.\textsuperscript{156}

Federal courts and most states do not acknowledge a right to seek individual damages for spoliation.\textsuperscript{157}

Evidentiary Inferences

A traditional remedy for spoliation is to instruct a jury that it may draw adverse inferences about the missing information.\textsuperscript{158} In many federal\textsuperscript{159} and state\textsuperscript{160} courts, a pre-condition of such a remedy – which brands the spoliator as a bad actor – is the “intentional destruction of evidence indicating a desire to suppress the truth,” also known as “bad faith.”\textsuperscript{161} The logic behind this remedy is the evidentiary premise that one who knowingly destroys evidence is more likely to have been threatened by the document than a party who does not.\textsuperscript{162}

Thus, in many courts, “mere negligence” in the failure to preserve is not enough to justify such an inference, as “it does not sustain an inference of consciousness of a weak case.”\textsuperscript{163} Lesser sanctions may be provided for those cases.\textsuperscript{164}

\textsuperscript{157}As noted earlier, some states enforce tort actions for damages, arguing that sanctions are insufficient to deter spoliation. \textit{See}, e.g., Boyd v. Travelers Insur., 166 Ill.2d 188, 652 N.E. 2d 267, 270-271 (Ill. S.C. 1995). California, for example, adopted, then abandoned, the position that an independent tort remedy lies against “first-party” spoliators or nonparties. \textit{See} Kearney v. Foley & Lardner, 582 F.3d 896, 908-9(9th Cir. Sept. 18, 2009) (noting evolution of the California tort law on spoliation “to the point of nearly eradicating it”); \textit{see also} 3 CAINLAWDDR § S69.03 (2011 Update).
\textsuperscript{158}Bass-Davis v. Davis, 122 Nev. 442, 134 P.3d 103, 107, 111 (Sup. Ct. Nev. May 11, 2007)(endorsement of permissible inference instruction (as opposed to rebuttable presumption) where negligently lost or destroyed evidence because of “potential consequences to the non-spoliating party”).
\textsuperscript{159}Gallagher v. Magner, 619 F.3d 823, 844-845 (8th Cir. Sept. 1, 2010).
\textsuperscript{161}Haydock and Herr, Discovery Prac. §28-8 [C] Spoliation Inference (2010).
\textsuperscript{162}Nation-Wide Check v. Forest Hills, 692 F.2d 21, 217 (1st Cir. 1982)(then Circuit Judge Breyer, J.)(citing 2 WIGMORE ON EVIDENCE § 291 (Chadbourn Rev. 1979).
\textsuperscript{163}Univ. Medical Center v. Beglin, ___S.W.3d ____, 2011 WL 5248303, at *6 (S.C. Ky. Oct. 27, 2011)(missing evidence instruction \textit{should not be given} “where loss was result of “mere negligence”\textsuperscript{(emphasis in original): Park v. City of Chicago, 297 F.3d 606, 737 (7th Cir. July 22, 2002); accord Victor Stanley v. Creative Pipe, 269 F.R.D. 497, 526 (D. Md. Sept. 9, 2010)(“particularly if the destruction was of ESI and was caused by automatic deletion function of a program that the party negligently failed to disable once the duty to preserve was triggered”).
\textsuperscript{164}See, e. g., McCargo v.Texas Roadhouse, 2011 WL 1638992, at *10 (D. Colo.May 2, 2011)(“[c]ourts have generally not imposed a similar requirement of bad faith when considering other sanctions for the spoliation of evidence”).
However, some courts following the lead of Residential Funding, supra, permit an adverse inference “even for the negligent destruction of documents [or ESI]” because each party should bear the risk of its own negligence.

Relevance

A finding of spoliation - and the imposition of a remedy - requires a showing of the relevance of the missing evidence, preferably in the form of extrinsic evidence tending to show that missing information would have been unfavorable to the spoliator. Relevancy means “something more than sufficiently probative to satisfy Rule 401 of the Federal Rules of evidence.” It is sometimes framed in terms of establishing that “the spoliation prejudiced the non-spoliator’s ability to present its case or defense.”

However, in courts following Pension Committee, the failure to use a written litigation hold permits presumptions of relevance without any proof of the contents. Others – including other judges in the same district - disagree. Moreover, “[n]o matter how inadequate a party’s preservation efforts may be,” it does justify judicial action “if no relevant information is lost.”

Prejudice

---

166 Residential Funding Corp. v. DeGeorge Financial Corp., 306 F. 3d 99, 107, 108 (2nd Cir. 2002)(culpable state of mind requirement satisfied by a showing that evidence was destroyed “knowingly, even if without intent [to breach a duty to preserve it], or negligently”)(internal citations omitted).
167 Id., at 108 (rejecting the “moral culpability” approach).
169 McCargo v. Texas Roadhouse, 2011 WL 1638992, at *5 (D. Colo. May 2, 2011)(“a reasonable possibility, based on concrete evidence rather than a fertile imagination that access to the lost material would have produced evidence favorable” to the movant’s case).
170 Riordan v. BJ’s Wholesale Club, 2011 WL 124500, at *5 (N.D. N.Y. Jan 14, 2011)(adverse inference unwarranted because “the altered documents are not particularly relevant to this litigation”).
172 Pension Comm. v. Bank of Am. Sec., supra, 685 F. Supp. 2d 456, 477 (S.D. N.Y. Jan. 15, 2010; accord, Ahroner v. Israel Discount Bank, supra, 79 A.D. 3d 481, 482 (App. Div. Dec. 7, 2010)(“since the drive was destroyed either intentionally or as the result of gross negligence, the court properly drew an inference as to the relevance of the e-mails stored on the drive”).
173 Surowiec v. Capital Title Agency, 790 F. Supp. 2d 997, 1007 - 1008 (D. Ariz. May 4, 2011)(citing Rimkus, 688 F. Supp.2d. 598 at 616-617); see Orbit One v. Numerex, 271 F.R.D. 429, 411 (S.D. N.Y. Oct. 26, 2010)(disagreeing with Pension Committee that sanctions are warranted for inadequate preservation efforts “where there has been no showing that the information was at least minimally relevant”).
The degree of prejudice caused by spoliation is also a crucial factor in regard to selection of sanctions.\textsuperscript{175} Indeed, Sedona Principle 14 suggests that sanctions should be considered “only” if there is a “reasonable probability that the loss of the evidence has materially prejudiced the adverse party.” The degree of prejudice can often “tip the scales in favor of or away from severe sanctions.”\textsuperscript{176}

Some courts hold that even where the elements necessary to authorize a jury instruction on inference are lacking, litigants are “free to introduce evidence and make arguments regarding the circumstances surrounding” the destruction or alteration of the evidence at issue.\textsuperscript{177}

As discussed in more detail in Section IV, Potential Rulemaking, below, dissatisfaction with current treatment of spoliation remedies, resting in major part with the conflicting treatment among the federal circuits of similar fact patterns, has contributed to a number of proposals for further Federal Amendments.

(4) Rule 37(e)

The 2006 Amendments responded to concerns about sanctions involving inadvertent losses of ESI\textsuperscript{178} with Rule 37(f), now Rule 37(e). That Rule limits rule-based sanctions for ESI losses resulting from “routine, good faith” operations of information systems, in the absence of “exceptional circumstances.”\textsuperscript{179} It does not apply to the “kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information”\textsuperscript{180} nor to sanctions issued under inherent power.\textsuperscript{181}

As initially proposed for public comment in 2004, the limitation was conditioned on whether “the party took reasonable steps to preserve the information after it knew or


\textsuperscript{178}Scheindlin and Wangkeo, Electronic Discovery Sanctions in the Twenty-First Century, 11 MICH. TELECOMM. & TECH. L. REV. 71, 72 (2004)(“ spoliation has become a significant e-discovery problem, and businesses have expressed the need for a ‘safe harbor’ to protect themselves from sanctions for the inadvertent loss of electronic documents”).

\textsuperscript{179}When “exceptional circumstances” exist, however – involving an “entirely innocent party” which is suffered “serious prejudice” – a court may nonetheless provide “remedies” despite “good-faith” conduct under the Rule. See, e.g., KCH Services v. Vinaire, 2009 WL 2216601 (W.D. Ky July 22, 2009)(refusing to apply Rule 37(e) whether or not the evidence was “lost in good faith” because plaintiff is “bereft” of the “very subject of the litigation”).

\textsuperscript{180}Committee Note, Rule 37(f)(2006).

\textsuperscript{181}Johnson v. Wells Fargo Home Mortgage, Inc., 2008 WL 2142219, at *8 (D. Nev. May 16, 2008); Nucor v. Bell, 251 F.R.D. 191, 196 n. 3 (D.S.C. Feb. 1, 2008)(refusing to apply Rule 37(e) to sanctions issued under inherent power even if the conduct would otherwise be covered by the rule).
should have known the information was discoverable in the action,” later described by the Committee as a “negligence test.”\(^{182}\) After criticism that in some circuits this would not provide sufficient protection for sanctions against inadvertent losses, the precondition was changed to use of a “good-faith” standard.\(^{183}\)

Rule 37(e) or a variant, has been adopted by Alabama, Alaska, Arizona, Arkansas, California,\(^ {184}\) Connecticut,\(^ {185}\) Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan,\(^ {186}\) Minnesota, Montana, New Jersey, North Carolina, North Dakota, Ohio,\(^ {187}\) Oklahoma,\(^ {188}\) Tennessee, Utah,\(^ {189}\) Vermont, Wisconsin and Wyoming. It is part of the pending proposals in Massachusetts.\(^ {190}\)

Application of Rule 37(e)

While some courts merely use Rule 37(e) as background\(^ {191}\) others have divided sharply over whether relief is available when information is lost after the existence of a duty to preserve. Most commentators appear to regard the rule as ineffectual, given the split in authority.

Some courts tend to interpret “good-faith” as a mandate for use of a litigation hold, based on the ambiguous 2006 Committee Note.\(^ {192}\) Thus, *Major Tours v. Colorel*, a typical case, held that the Rule *requires* that “any automatic deletion feature should be turned off and a litigation hold imposed once litigation can be reasonably anticipated.”\(^ {193}\)

---

\(^{182}\) The Committee subsequently described this proposal to Congress as “essentially a negligence test.” Introduction to Rule 37(f), RULES TRANSMITTAL, 234 F.R.D. 219, 371 (2006).


\(^{184}\) CAL CODE CIV. PROC. §§ 1985.8(l); 2031.60(i); 2031.300(d); 2031.310(j); 2031.320(d)(2009)(extending the scope of the safe harbor to apply to “any attorney of a party” and broadening scope to include sanctions issued under inherent powers).


\(^{187}\) OHIO CIV. R. 37(F)(2011)(with the addition of “factors” to be considered in determining whether to impose sanctions).

\(^{188}\) 12 OKLA. ST. § 3237(G)(2010)(broadened to include sanctions issued under inherent powers).

\(^{189}\) UCRP Rule 37(g)(2010)(acknowledging inherent power to sanction for spoliation).


\(^{191}\) Coburn v. PN II, Inc., 2010 WL 3895764, at *3 (D. Nev. Sept. 30, 2010)(citing Rule 37(e) for the proposition that destruction of emails is a good-faith function of a software application); Bryden v. Boys and Girls Club of Rockford, 2011 WL 843907, at *1 (N.D. Ill. March 8, 2011)(a court should not impose sanctions for failure to preserve information as a result of routine good-faith operations).

\(^{192}\) Committee Note, Rule 37(f)(2006)(“[g]ood faith . . . may involve a party’s intervention to modify or suspend certain features of that routine operation” and also “[w]hen a party is under a duty to preserve information . . . intervention in the routine operation of an information system is one aspect of what is often called a “litigation hold””.

\(^{193}\) Major Tours v. Colorel, 2009 WL 2413631, at *4 (D. N.J. Aug. 4, 2009); accord, Disability Rights v. WMTA, 242 F.R.D. 139, 146 (D.D. C. June 1, 2007)(rule requires a party to stop operation of a system that
Given that *Zubulake* provides for strict liability when a litigation holds fail to prevent losses, it is not surprising that these courts take the view that “this toothless thing [the Rule]. . . says if you don’t put in [an effective] litigation hold when you should there’s going to be no excuse if you lose information.”  

Other courts, however, view “good-faith” standard as exempting covered sanctions for routine losses of ESI in the absence of a showing of bad faith. Under this view, “good faith” excludes bad faith, examples of which are developed over time. Thus, in *Viramontes v. U.S. Bancorp*, the court declined to permit sanctions since there was “no evidence that the emails were destroyed in bad faith, or, put another way, that the destruction was done by U.S. Bank for the purpose of hiding unfavorable information.”

In contrast, the deliberate exploitation of routine operations for the purpose of avoiding known preservation obligations is not acting in “good faith.”

### Relation to Corporate Policies

The role of the “good-faith” standard in Rule 37(e) is similar to its use in policies relating to information governance. Corporations and public entities typically manage the retention of information by formal policies and practices which can be seen as one

---

194 Panel Discussion, Sanctions in Electronic Discovery Cases: Views from the Judges, 78 FORDHAM L. REV.1, 30-31 (October, 2009).
196 See *Cache La Poudre*, 244 F.R.D. 614, 635 (D. Colo. March 2, 2007)(“[B]ad faith” is the “antithesis of good faith” and involves action undertaken dishonestly and “not merely negligently”); *see also* Gerseta Corp. v. Wessex-Campbell Silk Co., 3 F.2d 236, 238 (2nd Cir. 1924)(“ if [a holder] does not take in bad faith, his good faith is sufficient shown”); THE SEDONA PRINCIPLES (2nd Ed. 2007), Comment 14.e (“the fact that the destruction occurred in compliance with a preexisting policy should be considered *prima facie* evidence of the good faith of the organization”).
197 2011 WL 291077, at *3 & *5 (N.D. Ill. Jan 27, 2011); *see also* Streit v. Electronic Mobility, 2010 WL 4687797, at *2 (S.D. Ind. Nov. 9, 2010)(sanctions barred where no proof that the party had acted in bad faith); Southeastern Mechanical Services v. Brody, 2009 WL 2242395, at *3 (M.D. Fla. July 24, 2009)(Rule 37(e) sanctions inappropriate where no evidence “that the system was operated in bad faith”).
198 Committee Note (2006); *accord*, In re Krause, 367 B.R. 740, 767 (Bkrtcy. D. Kan. June 4, 2007)(rejecting argument that the overwriting resulted from other causes, such as routine overwriting due to excessive volume); Daynight v. Mobilight, 2011 WL 241084 (C.A. Utah Jan. 27, 2011)(affirming, under abuse of discretion standard, imposition of a default judgment).
199 N. M. DIST. CT. R.C.P. 1-037 (2010)(contrasting the result when a “bad faith” destruction of electronically stored information”).
aspect of an effective compliance and ethics program.\textsuperscript{200} When adopted and operated in good faith,\textsuperscript{201} destruction of ESI pursuant to a neutral policy to limit the unnecessary retention of information is not spoliation.\textsuperscript{202} The Supreme Court confirmed the validity of the use of retention policies in \textit{Arthur Andersen}.\textsuperscript{203}

A classic example is the negligent deletion of inactive information due to automatic processes that are not interrupted.\textsuperscript{204} Losses of ESI under those circumstances are unlikely to have been the result of operating in bad faith.\textsuperscript{205} The issue is whether such a policy is adopted or implemented for “legitimate business reasons such as general house-keeping.”\textsuperscript{206} However, a party may not select a “short record-retention period with no legitimate business purpose in order to thwart discovery of harmful information by having its computer system overwrite the information.”\textsuperscript{207}

The Sedona Conference® Guidelines\textsuperscript{208} and publications of other groups such as ARMA have issued guidance on best practices in dealing with such topics.\textsuperscript{209}


\textsuperscript{201}Philip J. Favro, Sea Change or Status Quo: Has the 37(e) Safe Harbor Advanced Best Practices For Records Management?, 11 MINN. J.L. SCI. & TECH. 317, 320 (2010); accord, Ronald J. Hedges, A Foundation for Responding to Litigation, ARMA Int'l (2011), at 5 (“[R]ule 37(e) would shield [an entity with an integrated litigation hold process] from a sanction imposed under the rules for the unintentional loss of relevant ESI due to the routine operation”).

\textsuperscript{202}See 1-5 LN Practice Guide; FL Civil Discovery 5.40 Good Faith Disposal Under Electronic Data Retention Policy May Prevent Spoliation Claim (collecting Florida cases); Genger v. TR Investors, 26 A.3d 180, 193 & n. 49 (S.C Del. July 18, 2011)( purging pursuant to “ordinary and routine retention and deletion procedures” is not spoliation); cf. Adams v. Dell, 621 F. Supp. 2d. 1173 (D. Utah March 30, 2009)(irresponsible data retention practices responsible for loss of significant data can constitute spoliation).


\textsuperscript{204}Velocity Press v. Key Bank, 2011 WL 1584720, at *3 (D. Utah April 26, 2011)(rejecting argument that two copies of emails produced from third-party sources were “removed from KeyBank’s central server pursuant to its neutral document retention program before this date”).

\textsuperscript{205}Victor Stanley v. Creative Pipe, 268 F.R.D. 497, 526 (D. Md. Sept. 9, 2010)(arguing that sanctions “make no logical sense” in such an instance). The court noted that it was more “logical inference is that the party was disorganized, or distracted, or technically challenged, or overextended, not that it failed to preserve evidence because of an awareness that it was harmful.” Id. at 526.

\textsuperscript{206}Micron Technology v. Rambus (“Micron II”), 645 F.3d 1311, 1322 (May 13, 2011)(innocent purpose includes “simply limiting the volume of a party’s files and retaining only that which is of continuing value” as motivated by general business needs, which may include a general concern for the possibility of litigation).

\textsuperscript{207}Committee Comments, ALA. R.CIV.P. RULE 37(g)(2010).

\textsuperscript{208}See The Sedona Conference® Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age (2nd Ed. 2007), copy at http://www.thesedonaconference.org/content/miscFiles/Guidelines.pdf.

Possible Modifications or Enhancements

As discussed in Section IV, Additional Rulemaking, the Rules Committee is considering a number of possible proposals for further amendments to the Civil Rules, several of which focus on Rule 37(e). These range from revising and clarifying Rule 37(e) to replacing it with a completely new Rule 37(g).\footnote{“Preservation/Sanctions Issues Memo,” copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Materials/Preservation-Sanction%20Issues.pdf.}

At one end of the spectrum, Rule 37(e) could be expanded to include sanctions for all forms of discoverable information, not just ESI, and to apply to sanctions issued under inherent powers. Oklahoma and California have already expanded their Rule 37(e) equivalents to include “inherent” power sanctions and California has extended the coverage of the rule to include third parties subject to subpoenas and to attorneys.\footnote{CAL CODE CIV. PROC. § 1985.8(l)(“Absent any exceptional circumstances, the court shall not impose sanctions on a subpoenaed person or any attorney of a subpoenaed person for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system”). See also 2031.60(i); 2031.300(d); 2031.310(j); 2031.320(d)(2009). The California provisions also add that the rule “shall not be construed to alter any obligation to preserve discoverable information.”} The threshold limitations could also be clarified by adding an explicit standard requiring, as Connecticut has done, proof of a high degree of culpability before sanctions were authorized despite “good-faith” conduct.

On a more modest scale, Rule 37(e) could be replaced by a rule “factors” rule for use by the court in determining whether to impose sanctions, much as Ohio has already done.\footnote{See Sec. 13-14 CONNECTICUT PRACTICE BOOK (2011)(eff. Jan. 2012)( copy at http://www.jud.ct.gov/Publications/PracticeBook/PB_070511.pdf.}

(5) Case Management

The 2006 Amendments to Rule 26 emphasized improved “case management” techniques in response to the unique e-discovery issues.

Mandatory Disclosures

Rule 26(a) was amended to add ESI to the forms of information whose disclosure is routinely required without service of document requests at the outset of litigation. A number of local rules also mandate early disclosure of ESI.\footnote{OHIO CIV. R. 37(F)(2010)( namely (1) whether and when the duty was triggered (2) whether resulted from “ordinary use” (3) timely intervention (4) steps taken under agreements or orders and (5) “any other factors relevant” to the determination..}

For example, the District
Court of Delaware requires parties to disclose the names of the ten custodians “most likely to have discoverable information” as well as “non-custodial data sources” most likely to contain “non-duplicative discovery able information for preservation and production consideration.”

Utah has recently expanded its use of voluntary disclosures both at an initial stage – including ESI which a party may offer in its case in chief – and prior to trial.

Early Planning Conferences (“Meet and Confer”)

Rule 26(f) was amended to require parties to confer about “disclosure or discovery of electronically stored information, including the form or forms in which it should be produced,” prior to meeting with the Court pursuant to Rule 16. Parties are also directed to discuss “any issues about preserving discoverable information.” The Sedona Conference® Cooperation Proclamation urges parties and their counsel to utilize this opportunity to address issues by cooperative efforts.

States do not routinely require early conferences among parties, given the costs, especially in cases where ESI does not play a prominent role. Only Alaska, Arizona (complex cases), Arkansas, California, Delaware (complex cases), New Hampshire, North Carolina (Business Court), Wisconsin and Utah have acted

computerized files, e-mails, voice mails, work files, desk files [and basic information should] be made available to the other side . . . as if it were a response to a standing interrogatory”)(copy on file with author).

216 URCP Rule 26(a)(2011).
217 This requirement “does not imply that courts should routinely enter preservation orders.” See Note, Rule 26(f)(2006).
219 See Steven S. Gensler, Some Thoughts On the Lawyer’s E-Volving Duties in Discovery, 36 N. KY. L. REV. 521, 555 (2009)(practicing cooperation does not require a lawyer to relinquish a legitimate position that serves the client’s interest).
221 ARIZ. R. CIV. P. 16.3(b)(2010).
222 ARCP Rule 26.1(b)(1)(parties “shall confer” and discuss, inter alia, issues relating to preservation, form of production, period of production, etc.).
223 CAL. RULES OF COURT, RULE 3.724 (2010)(requiring meeting of parties to discuss any issues relating to the discovery of ESI, including “preservation,” form of production, scope, methods of asserting privilege or confidentiality, how cost “of production” is to be allocated and other relevant matters).
225 N.H. SUPER. CT. R. 62(C). The meeting is to discuss accessibility, privilege waiver, form of production, cost allocations as well as “the need for and the extent of any holds or other mechanisms that have been or should be put in place to prevent the destruction of such information.”
226 N.C. R. BUS CT Rule 17.1).
227 WIS. STAT. Stat. § 804.01(2)(e).
228 URCP Rule 26 (2010).
to require it. In Alabama, however, the court may order parties to meet and confer if discovery of ESI will be sought.\textsuperscript{229}

In Texas, the Supreme Court requires “early discussion” among parties directed “toward learning about an opposing party’s electronic storage systems and procedures.”\textsuperscript{230} A Delaware court has endorsed “early and, if necessary, frequent communication among counsel” and cautioned that it “is not likely to be sympathetic” in handling disputes where this was not done.\textsuperscript{231}

Early Planning Conferences (Court Managed)

Rule 16(b) was amended to require that the “disclosure or discovery” of ESI and agreements regarding asserting claims of privilege or trial-preparation material be discussed at the Scheduling Conference. The scope of the topics for the post-conference scheduling order was similarly expanded.

However, neither the suggested topics for inclusion in the “discovery plan” required prior to the conference\textsuperscript{232} nor those topics suggested for conference order allude to preservation issues.\textsuperscript{233} This may have been deliberate, as the Rules Committee appears to have been concerned about incentivizing the routine use of preservation orders.\textsuperscript{234} States have not been reluctant to mandate inclusion of preservation orders.\textsuperscript{235} For a discussion of the issuance of preservation orders and protective orders relating to that topic, see (2) Preservation, supra.

States encourage meetings with the court at the discretion of the court or on motion of parties.\textsuperscript{236} Topics relating to e-discovery are often one of the subjects of such

\textsuperscript{229} ALA. R. CIV. P. 26(f)(2010)(“any issues relating to discovery of electronically stored information, including issues relating to preserving discoverable information”); accord, TENN. R. CIV. P. 26.06(E)(3) (“in any case in which an issue regarding the discovery of [ESI] is raised or is likely to be raised”).


\textsuperscript{232} Amended Form 52 (“Report of the Parties’ Planning Meeting”) is silent on the need to report preservation issues to the court prior to the scheduling conference.


\textsuperscript{234} Changes Made After Publication and Comment [relating to Rule 37(f)], TRANSMITTAL OF RULES TO CONGRESS, 234 F.R.D. 219 at 375 (2006)( expressing the “fear” that an earlier proposal for rule 37(f) “would invite routine applications for preservation orders, and often for overbroad orders”).

\textsuperscript{235} See, e.g., VA. SUP. CT. R. 4:13 (2010)(“issues relating to the preservation of potentially discoverable information”); See also TENN. R. CIV. P. 26.06(E)(4) (“steps the parties will take to segregate and preserve relevant electronically stored information”) and ARCP Rule 26.1(d)(court may issue orders governing discovery, including preservation of information.

\textsuperscript{236} Wyoming permits a court to “direct the attorneys” to appear before it “for a conference on the subject of discovery.” WYO. R. CIV. PROC. RULE 26(f)(2010).
hearing, and preparation is encouraged. In New York, for example, discussions about e-
discovery are to be held when the court “deems appropriate” and practitioners are
required to be prepared to discuss client information architecture. Increasingly,
“[c]ourts [also] expect parties to reach practical agreement[s]on search terms, date
ranges, key players, and the like” as well as the treatment of metadata and the contents
of load files.

Among the other tools available to a Federal court at its conferences is the
appointment of Special Masters, either by agreement, pursuant to local programs or
an ad hoc basis, to facilitate e-discovery.

(6) Discovery – Direct Access

Rule 34(a) and its state counterparts have been amended to clarify that a
requesting party has the right to “inspect and copy” discoverable matter, as well as the
right to “test” and “sample” documents, tangible things or electronically stored
information. This is understood as authorizing “direct access” to sources of ESI, in
contrast to the practice in the hard-copy world in regard to storage rooms or cabinets.

The use of direct access has had major ramifications in cases involving trade
secret, employment or matrimonial issues. It is not authorized unless there is

238 UNIFORM RULES FOR THE NEW YORK STATE TRIAL COURTS, SEC. 202.12(b); accord, SEC. 207.70
(g)(Commercial Division cases)(Counsel should “promptly and diligently familiarize themselves with their
clients’ information systems to the extent they may be relevant to the issues in dispute” in order to permit
“meaningful participation in the conference and compliance with discovery obligations”).
including additional fields for email messages and separate fields for OCR copies of paper).
241 See, e.g., the Electronic Discovery Special Master’s program initiated in November, 2011 by the
Alternative Dispute Resolution Implementation Committee (W.D. Pa.), copy at
243 The phrase “test or sample” was added to Rule (34(a) and the Committee Note to Subdivision (a)(2006)
clarified that this was in addition to the right to inspect and copy discoverable information.
244 Menke v. Broward County School Board, 916 So.2d 8, at *10 (Fla. Sept. 28, 2005)(“we have never
heard of a discovery request which would simply ask a party litigant to produce its business or personal
filing cabinets for inspection by its adversary to see if they contain any information useful to the
litigation”); accord, Sedona Principle 6 and Comment 6.a. (“It is the responsibility of the production party
to determine what is responsive to discovery demands”).
245 See, e.g., New Hampshire Ball Bearings v. Jackson, 158 N.H. 421, 969 A.2d. 351 (S.C. N.H., March 18,
2009)(trade secret litigation); Bennett v. Martin, 186 Ohio App. 3d 412, 428 928 N.E. 2d 763 (C.A. 10th
Dist. 2009)(finding abuse of discretion in failing to adopt a protocol).
246 Schreiber v. Schreiber, 29 Misc.3d 171, 904 N.Y.S. 2d 886 (Sup. Ct. Kings Co. June 25, 2010); see also
N.Y. L. J. 5 (col. 1)(noting increased use of direct access in matrimonial disputes over financial resources
in New York).
“evidence of [some] destruction of evidence or thwarting of discovery”\textsuperscript{247} given the “issues of confidentiality or privacy” involved.\textsuperscript{248}

The 2006 Committee Note cautions that this amendment was not meant “to create a routine right of direct access to a party’s electronic information system.”\textsuperscript{249} As noted in the Maryland Committee Notes, “in most cases there is no justification for direct inspection of an opposing party’s computer system.”\textsuperscript{250} Typically, when direct access is ordered, a mirror image is created so that an examination can be undertaken by neutral computer experts pursuant to a court-ordered protocol\textsuperscript{251} at the cost of the requesting party.\textsuperscript{252}

(7) Discovery Limitations – Inaccessibility

Rule 26(b)(2)(B) was added by the 2006 Amendments to presumptively exempt information identified as “not reasonably accessible because of undue burden or cost” from production. Rule 45 includes a similar limitation as to non-parties responding to a subpoena.\textsuperscript{253}

In both cases, however, a court may order discovery from such sources if the requesting party shows “good cause,” considering proportionality concerns, for which seven factors are listed in Committee Note.\textsuperscript{254} Under the Rule, a court may also “specify conditions for the discovery,” which the Committee Note explains as including limits on the amount, type or sources of information – and the payment of part or all of the reasonable costs of obtaining the information.

This “two-tiered” approach was presaged by the earliest of the \textit{Zubulake} decisions\textsuperscript{255} which drew a line “largely based on the media on which the ESI was

\textsuperscript{247} Holland v. Barfield, 35 So. 3d 953 (Fla. App. 5 Dist. May 7, 2010)(quashing order to produce all information on computer and mobile phone SIM card without regard to privacy rights).
\textsuperscript{248} Committee Note, Rule 34 (a)(2006)(“Courts should guard against undue intrusiveness resulting from inspecting or testing such systems”).
\textsuperscript{249} See also In re Weekley Homes, 295 S.W. 3d 309, 52 Tex. Sup. Ct. J. 1231 (Tex. 2009)(vacating order). See also Kenneth J. Withers and Monica Wiseman Latin, Living Daily with Weekley Homes, 51 THE ADVOC. (TEXAS) 23 at *29 (Summer 2010).
\textsuperscript{250} Comment, MD. RULE 2-422 (2009); see also In re Ford Motor Co, 345 F.3d 1315 (11th Cir. 2003) and the Sedona Principles (2d. Ed. 2007).
\textsuperscript{251} The process may involve creation of a mirror image, review by an expert, attorney “eyes only” involvement in dealing with potentially privileged information before or after culling with agreed or court determined search terms, often pursuant orders embodying protocols providing for non-waiver treatment of inadvertently produced materials.
\textsuperscript{252} SPM Resorts v. Diamond Resorts, 2011 WL 2650893 (Fla. App. 5 Dist. July 8, 2011)(quashing order that producing party pay one-half of costs of neutral expert inspection because it improperly requires a party “fund its adversary’s litigation”).
\textsuperscript{253} Rule 45(d)(1)(D).
\textsuperscript{254} Committee Note, Rule 26(b)(2)(B)(2006)(listing seven “appropriate considerations”).
\textsuperscript{255} Zubulake v. UBS Warburg (Zubulake I), 217 F.R.D. 309, 318 (May 13, 2003)(limiting production of inaccessible ESI since whether it “is kept in an accessible or inaccessible format” is a “distinction that corresponds closely to the expense of production”) (emphasis in original).
stored." Texas had adopted a similar limitation in 1999 under which ESI which is not “available” in the “ordinary course of business” is not required absent a court order. The Texas and the federal limitations turn on the presence of undue burden or expense, and Texas has authorized use of federal decisions in interpreting its rule.

According to the Report furnished Congress, Rule 26(b)(2)(B) reflects the fact that more accessible sources of information typically yield all of the information that is reasonably needed in discovery. Examples of inaccessible technology from “current technology” were furnished to Congress, but not included in the Committee Note to the Rule.

Whether a party must preserve unsearched sources believed to contain inaccessible information “depends on the circumstances.” The Committee Note to Rule 37(f)(2006) indicates that an important factor to consider is “whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources.” Sedona suggests use of a “decision tree” approach to dealing with preservation issues.

Many states – but not all - have incorporated the inaccessibility limitation into their civil rules and it has influenced the treatment of the issue in states that did not. California requires a party to either raise inaccessibility by objection (and identify the

---

257 Texas R. Civ. P. 196.4 (information that is not “reasonably available to the responding party in its ordinary course of business”).
258 In re Weekley Homes, L.P. supra, 295 S.W.3d 309 (S.C. Tex. 2009) (“[w]e see no different in the considerations that would apply when weighing the benefits against the burdens of electronic-information production”).
259 TRANSMITTAL OF RULES TO CONGRESS, 234 F.R.D. 219, 331 (2006)(back-up tapes, unintelligible legacy data, deleted information in fragmentary form and databases that cannot easily produce forms of information other than those for which it was created).
260 Committee Note, Rule 26(b)(2)(B)(2006)(the identification of sources as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve”); accord, TRANSMITTAL OF RULES TO CONGRESS, 234 F.R.D. 219, 331 (2006) (Introduction of Rule 26(b)(2)(B) (“a party that makes information ‘inaccessible’ because it is likely to be discoverable in litigation is subject to sanctions now and would still be” under the rule change).
261 In contrast, the initial draft of the Committee Note (as issued in 2004) stated that “in most instances, a party acts reasonably by identifying and preserving reasonably accessible electronically stored information that is discoverable.” See REPORT, Advisory Comm., May 17, 2004, Revised August 3, 2004, 34, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/comment2005/CVAug04.pdf
262 See Sedona Conference® Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible, 10 SEDONA CONF. J. 281 (Fall 2009).
263 New Mexico refused to adopt the limitation. See Committee Commentary for 2009 Amendments, N.M. N.M. DIST. CT. R. C.P. CT. R. C.P 1-026 (ESI “should be subject to the same provisions” that currently govern discovery of “non-electronic information”).
“types or categories” of the sources) or “promptly” seek a protective order in order to affirmatively raise the issue. 267 Alabama requires that the identification be made “to the requesting party.” 268 In Ohio, however, a party need not identify sources not being produced. 269

The author has concluded that the distinction plays a useful role in ESI discovery planning and, more indirectly, in regard to assessment of preservation obligations. 270

(8) Discovery Limitations - Proportionality

Rule 26(b)(2)(C)(iii), added to the Federal Rules in 1983, provides that a court must “limit the frequency or extent of discovery” when the burden or expense of “the proposed discovery outweighs its likely benefit.” 271 The 2006 Amendments explicitly referenced the principle in Rule 26(b)(2)(B) in connection with assessing if “good cause” would justify production of ESI from inaccessible sources. 272 Its role in all discovery of ESI, not just discovery involving inaccessible sources. 273

However, its role in regard to preservation is less clear, despite arguments in favor of its use by Commentators. 274 In 2010, however, a leading federal case explicitly articulated it as a component of the duty to preserve, 275 as has the Seventh Circuit E-Discovery Principles. 276 One Court has cautioned, however, that “[i]t seems unlikely, for

---

266 CAL. CODE CIV. PROC. § 2031.210 (d)(“By objecting and identifying information of a type or source or sources that are not reasonably accessible, the responding party preserves any objections it may have relating to that [ESI].”); see David M. Hickey and Veronica Harris, California Rules to Amend Inaccessible ESI, THE RECORDER, March 27, 2009.
267 CAL. CODE CIV. PROC. § 2031.060(c)(“party or affected person who seeks a protective order . . . on the basis that the information is from a source that is not reasonably accessible because of undue burden or expense shall bear the burden of demonstrating [that fact]”).
269 OHIO CIV. R.26(B)(4)(2008)(“A party need not provide discovery of [ESI] when the production imposes undue burden or expense”).
270 Thomas Y. Allman, The “Two-Tiered” Approach to E-Discovery: Has Rule 26(B)(2)(B) fulfilled its Promise?, 14 RICH. J. L. & TECH. 7 at ¶1 & ¶5 (2008)(“[t]he two-tiered approach appears to have had . . . a positive impact on how parties manage their discovery responsibilities under the Amendments”).
271 FED. R. CIV. P. 26(b)(2)(B)(2010)(the court may order production if the requesting party shows good cause “considering the limitation of Rule 26(b)(2)(C)”).
272 FED. R. CIV. P. 26, Committee Note, Subdivision (b)(2)(2006)(“The limitations [of the proportionality principle in Rule 26(b)(2)(C)] apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources”).
274 Rimkus v. Cammarata, supra, 688 F. Supp. 2d 598, 613 (S.D. Tex. Feb. 19, 2010)(“Whether preserve or discovery conduct is acceptable in a case depends on wheat is reasonable, and that in turn depends on whether what was done – or not done – was proportional to that case and consistent with clearly established applicable standards”)(emphasis in original).
275 Principle 2.04 (Scope of Preservation)(“[e]very party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI”).
example, that a court would excuse the destruction of evidence merely because the monetary value of anticipated litigation was low.”

The “proportionality” principle is also important in state jurisprudence. Utah requires, as of November 1, 2011, that the burden of establishing proportionality and relevance is on the party “seeking discovery.” Thus, a party seeking discovery has the burden of “demonstrating that the information being sought is proportional” when a protective order is sought which “raises issues of proportionality.” Similarly, Pennsylvania, in its e-proposed e-discovery rules, suggests that proportionality – not detailed rules or federal case law – is the key limitation on discovery of ESI.

California explicitly references proportionality concerns as a general basis for the issuance of protective orders as well in terms of consideration for a court determining whether or not to order production for good cause from inaccessible sources. Arkansas, in its optional e-discovery rules, states that the principle applies “even [to discovery sought] from a source [of ESI] that is reasonably accessible.”

A proportionality principle is also embedded in Fed. R. Civ. P. 26(g) which, along with its state counterparts, requires that counsel certifies, after a reasonable inquiry, that discovery requests and responses meet the proportionality test.

---

276 Orbit One Communications v. Numerex, 271 F.R.D. 429, 436 at n. 10 (S.D. N.Y. Oct. 26, 2010)(arguing that reasonableness and proportionality are “surely good guiding principles” for use evaluating the sufficient of efforts, but are “highly elastic” and cannot be assumed to create “a safe harbor” for a party obligated to preserve but “not operating under a court-imposed preservation order”); see also Pippins v. KPMG, 2011 WL 4701849, at *5 & *8 (S.D. N.Y. Oct. 7, 2011)(refusing protective order based on disproportionate preservation demands).


278 URCP 26(b)(1)-(3)(2011).

279 URCP 37 (b)(2)(2011).

280 See Proposed Pa. Rule 4011, Explanatory Comment, copy at http://www.courts.state.pa.us/NR/rdonlyres/61B0D4F4-F4A6-445B-8A6B-9169CC4BE07F/0/rec249civ.pdf. The Notes to the Proposed Rule indicate that there is “no intent to incorporate the federal jurisprudence surrounding the discovery of electronically stored information” and that the “treatment of such issues is to be determined by traditional principles of proportionality under Pennsylvania law.”

281 CAL. CODE CIV. PROC. § 2031.060(f)(4)(“likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues”).

282 CAL. CODE CIV. PROC. § 2031.310(f)(4)(same as in .060).

283 ARCP 26.1(Arkansas “Limitations on Discovery”).

284 Counsel certification under Rule 26(g) involves an assertion, “formed after a reasonable inquiry,” that a discovery request, response or objection is “neither unreasonable nor unduly burdensome or expensive” considering the needs of the case, prior discovery, the amount in controversy and the importance of the issues at stake.

Increasingly, the applicability of proportionality principles as a limitation on the duty to preserve is recognized by courts and by commentators alike. The recently adopted Sedona Conference® Commentary on Proportionality, for example, suggests that the “burdens and costs of preservation” of potentially relevant information should be “weighed” when determining the “appropriate scope of preservation.”

(9) Form of Production & Metadata

Rule 34(b) was amended to provide that production of ESI, absent agreement or a court order, is to made in a form or forms in which the information is ordinarily maintained or in a “reasonably useable form.” The Rule does not state a default preference between the two alternatives nor does it “explain what [was] specifically required by [either] default form of production.”

Similarly, neither Rule 334(b) nor its associated Committee Note mention the treatment of “metadata” nor differentiate between “application” and “system” metadata. Application metadata is intrinsic to the primary data (and moves with it) and thus includes “embedded” information. System metadata is stored separately from the primary data but can facilitate the efficient sorting of the primary information.

Metadata is discussed, barely, in the Committee Note to Rule 26(f), where it is defined as information “describing the history, tracking or management of an electronic file.” The focus, however, is on the complications that metadata presents for review for privilege and the need for discussion of review mechanics by the parties at the “meet and confer.”

The Committee Note to Rule 34(b) and the Report to Congress stresses the importance of maintaining the ability to search ESI. This emphasis is supported by e

---

287 The initial proposal was to make the alternative default form one which would be “electronically searchable.” See Rules 33 and 34, Changes Made after Publication and Comment, TRANSMITTAL OF RULES TO CONGRESS”, 234 F.R.D. 219, 366 (2006)(“the published default would authorize production in a minimally searchable form even though more easily searched forms might be available at equal or less cost to the responding party”).
289 Vlad J. Kroll, Default Production of [ESI] under the [FRCP]: The Requirements of Rule 34(B), 59 HASTINGS L.J. 221, 222 (2007).
290 Westcott, supra, 14 RICH. J. L. & TECH. 10 at *4-5 (2008)( application metadata “moves with the file when it is copied (as opposed to the free-standing nature of system metadata”).
291 The Sedona Conference Principles, Principle 12, Comment 12.a. Metadata (2nd Ed. 2007); see also Craig Ball, Going Native Without Bates Numbers and Making it Work, LTN, March 1, 2011, http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202483457782 (system metadata is “essential for classifying and sorting large volumes of ESI”).
amended Sedona Principle 12, adopted after the 2006 Amendments, and is used by some courts to flatly reject non-searchable PDF or TIFF image formats.

Rule 34(b) also provides a method designed to encourage early agreement on the form or forms to fit the requirements of the individual case. Under this approach, a requesting party may, but need not, specify a preferred form, preferably as early as possible, to which the producing party may object, but in any event must specify the form or forms which it intends to utilize.

Failure to discuss the topic of formats for production – as recommended by Rule 26(f) – sometimes leads to denials of requests for a “do-over” when courts may find that a party acted too late in asserting a preference.

As Ordinarily Maintained

Production in a form in which information is “ordinarily maintained” is widely assumed to refer to production in the same or “native” format in which the information is created and maintained. Production of spreadsheets, sound recordings, animated content and other complex data are often accomplished in “native” or “quasi-native” file.

Native production necessarily includes the “metadata” associated with that format as well as a load file to enable use of the data.
Reasonably Useable Form

Absent agreement or a court order, production can also be accomplished in a “reasonably useable” form, which may include a static or “imaged format” such as PDF or TIFF, typically produced with a load file to convey metadata needed to enable the recipient to use review software and search the primary material. The recently amended e-discovery guidelines used by the Federal District Court of Delaware now specifies specific metadata fields to be included in load files, which differ slightly from those advocated by others.

North Carolina defines ESI in Rule 26 to include reasonably accessible metadata that enables a party to have “the ability to access such information as the date sent, date received, author, and recipients.” However, “other metadata” need not be produced unless the parties agree or a court order based on good cause issues requiring its production.

Practical Issues

Production from databases is particularly susceptible to practical compromises in light of the need of the producing party to retain control over proprietary software. Parties often agree or are ordered to produce reports generated from databases – as opposed to production of the raw data.

Image-based files are often used for email and other document-like production. They are easier to redact and often the default form suggested by local rules and protocols. The Maryland Committee Notes, for example, specify PDF, TIFF, or JPEG

---

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

301 Day Laborer, supra, 2011 WL 381624 at *6 (common fields for load files for all forms of ESI include: Identifier, file name, custodian, source device, source path, production path, modified date, modified time, time offset value; additional fields for email messages: to, from, cc, bcc, date sent, time sent, subject, time received, attachments; separate fields for OCR copies of paper records: Bates Begin, Bates End, Attach Begin, Attach End).


304 See, e.g., In re Facebook PPC Advertising Litigation, 2011 WL 1324516, at *4 (N.D. Cal. April 6, 2011) (ordering parties to either review database at Facebook or accept offer of Facebook to provide a laptop loaded with proprietary software and the database – “or any other [compromise] that they may devise.”).


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

307 Suggested Protocol for Discovery of [ESI] in the District of Maryland (“[i]f the parties are unable to reach agreement on the format for production, ESI should be produced to the Requesting Party as Static
files in contrast to native form such as Microsoft Word, Excel, etc. However, since metadata must be affirmatively removed to create static images, some courts default to native formats if the burden of production is raised as an issue.

(10) Search & Retrieval

Reviewing potentially discovery information for purposes of compliance with production requests – or to winnow out irrelevant or privileged information – is difficult and costly in the context of ESI. While no rule is directly applicable, it is axiomatic that not piece of data must be examined. What is required is said to be a “diligent” search involving a “reasonably comprehensive search strategy.”

A variety of automated analytical techniques are available to winnow ESI prior to more intensive substantive review, with manual review serving for privilege review. Under some conditions, automated techniques are essential to assure production accuracy.

The 2006 Amendments did not establish requirements with regard to the use of search methodology, although the Amended Federal Rules of Evidence allude to their use in the Explanatory Note dealing with the duty to take reasonable steps to avoid inadvertent disclosures. The topic is subsumed, however, within the amendment to Rules 16 and 26(f) to promote early discussion of e-discovery topics. Courts expect parties to take advantage of the opportunity to cooperate on search terms and methodology, as emphasized by the Sedona Cooperation Proclamation.


Committee Note, Md. RULE 2-504.1(c).


Velocity Press v. Key Bank, 2011 WL 1584720, at *3 (D. Utah, April 26, 2011)(concluding that the details furnished by counsel as to search terms and the investigation show it was “reasonable” [citing Treppel v. Biovail, 233 F.R.D. 363, 374 (S.D. N.Y. 2006)].)


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


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

See In re Seroquel Products Liability Litigation, 244 F.R.D. 650 (M.D. Fla. 2007)( producing party failed to engage in dialogue over search terms and provided purposefully sluggish production).

Sedona Principle 11 thus notes that a party may satisfy its “good faith obligation to preserve and produce relevant information” by using electronic tools and processes, such as data sampling or use of selection criteria to identify ESI reasonably likely to contain relevant information. This may involve targeted searches designed to employ “reasonably well-defined search for information in likely sources,” which be accomplished by searching “centralized” repositories. There is now a considerable body of case law dealing with the selection, testing, application and flaws of automated search technologies for review of large masses of information.

The Sedona Principles encourage parties to act in a reasonable and good faith manner in executing their search strategy. When parties are unable or unwilling to agree on appropriate search terms, both federal and state courts are increasingly willing to make decisions for them. More recently, although the case law is nonexistent, advanced techniques such as predictive coding are also becoming useful and widely used.

There is, of course, a tension between the responsibility of a party to select its material subject to production and the quest for cooperative activity. Sedona Principle 6 suggests that responding parties are “best situated” to evaluate technologies appropriate for producing their own information. However, unilateral action which does not result in an adequate search is sanctionable when it results in a delayed or deficient production.

There are serious barriers, however, to use of automated techniques to winnow material subject to litigation holds other than in discrete storage silos such as email archives. At least to date, a broader search with the risk of over-preservation is more typical at the earlier phase.

---

318 Oracle v. SAP AG, 566 F. Supp. 2d 1010, 1014 (N.D. Calif. July 3, 2008)(ordering targeted searches of “logical places, such as of relevant centralized repositories, if any”).
321 See, e.g., Clearone Communications v. Chaing, 2008 WL 920336, at *2 (D. Utah April 1, 2008)(approving use of search terms but cautioning that revisit may be needed if “a surprisingly small or unreasonably large number of documents” are identified as potentially responsive).
322 Mosley v. Conte, 2010 WL 3536810 (Supreme Ct. (New York Co.) August 17, 2010)(ordering use of specific keyword searches).
324 Surowiec v. Capital Title Agency, 2011 WL 1671925, at *11 (D. Ariz. May 4, 2011)(finding that an “unreasonably narrow search” using only Plaintiff’s name and escrow number” was “inexcusable” and concluding that the party acted willfully in “failing timely and adequately to respond to the document requests”).
325 There is an overlap between the processes of identification for purposes of preservation and culling information for purposes of pre-review in production, but they are by no means the same. See generally,
Historically, automated searches have used “keywords,” which may or may not be augmented by Boolean logic. As explained in the Sedona Conference® Best Practices Commentary on The Use of Search and Information Retrieval Methods in E-Discovery,326 care is needed to ensure that the terms used are not overly inclusive or too narrow. Input from knowledgeable ESI custodians on the use of words and abbreviations can be helpful to assure accuracy in retrieval and elimination of “false positives.”327

The role of quality control and assurance of accuracy is a theme of both the Sedona Conference Commentary on the topic328 and of the case law, including use of sampling as a means of verifying accuracy.329

One court has opined that “[c]ommon sense dictates that sampling and other quality assurance techniques must be employed to meet requirements of completeness.”330

(11) Cost Allocation (Shifting)

While the traditional American rule is that each party bears its own costs of litigation – and that the “loser pays” rule is inapplicable – there are exceptions.331

Discretionary Cost-Shifting

The 2006 Amendments acknowledged in Rule 26(b)(2)(B) the authority to “specify conditions” when ordering production from inaccessible sources for “good cause.”332

326 8 SEDONA CONF. J. 189 (Fall 2007); see also The Sedona Conference® Commentary On Achieving Quality in The E-Discovery Process, 10 SEDONA CONF. J. 299 (Fall 2009).
328 The Sedona Conference® Commentary On Achieving Quality in the E-Discovery Process, 10 SEDONA CONF. J. 299, 302 (Fall 2009)(purpose of Commentary is to raise awareness of “greater use of project management, sampling, and other means to verify the accuracy of what constitutes the ‘output’ of e-discovery”).
329 Id. at 302.
330 See In re Seroquel Products Liability Litig., 244 F.R.D. 650, 662 (M.D. Fla. 2007); accord, Victor Stanley v. Creative Pipe, supra, 250 F.R.D. 251, 262 (D. Md. May 29, 2008)(“they failed to demonstrate there was quality-assurance test”).
332 Committee Note, Rule 26(b)(2)(B)(2006)(“The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonable accessible”). The Note did not purport to restrict the authority to shift costs to the factual context covered by the Rule.
In an early Zubulake opinion, issued prior to the Amendments, the court attempted to “cabin” cost-shifting to inaccessible sources of ESI only, and, even then, “only the costs of restoration and searching should be shifted.” It also fashioned a multi-factor test for general use. Some – but not all – courts have followed this rule blindly, without independent analysis.

A number of courts appear to have accepted this “bright line” test without examination. However, Federal courts are empowered to shift excessive discovery costs – arguably including attorney fees – under the authority of courts to protect parties from undue burden or expense under Rule 26(c). The Supreme Court in Oppenheimer Fund has stated that this includes the power to allocate the “costs of discovery” to deal with undue burdens. In one patent case where privilege review was a “daunting task,” however, the costs of review and preparation of a privilege log were accumulated for further discussion and possible shifting.

Individual examples of cost-shifting are often included in Standing Orders or local rules. This is especially true in the e-discovery context, as recently exemplified by the adoption of a Model Order for patent cases that provides that “the discovering party shall bear all reasonable costs of “disproportionate ESI production requests.” Many states have adopted provisions similar to Rule 26(b)(2)(B) as part of their E-Discovery provisions. Sedona Principle 13 provides that if “information sought is not reasonably available” to the responding party in the “ordinary course of business,” the costs of retrieving and reviewing “may be shared by or shifted to” the requesting party.

---

333 216 F.R.D. 280, 284 (S.D. N.Y. July 24, 2003) (“it is worth emphasizing again that cost-shifting is potentially appropriate only when inaccessible data is sought”); see also Peskoff v. Faber (“Peskoff III”), 244 F.R.D. 54 (D.D.C. August 27, 2007).
334 Id. at 324 (listing seven factors to be used in conducting the cost-shifting analysis).
335 See, e.g., Helmert v. Butterball, 2010 WL 2179180, at *10 (refusing to shift costs as “inappropriate” since “a court should consider cost-shifting only when digital data is relatively inaccessible, such as in backup tapes”).
336 See, e.g., Bradley T. Tennis, Cost-Shifting in Electronic Discovery, 119 YALE L.J. 1113 (March, 2010).
338 Id., at 358 (a party may “invoke the district court’s discretion under Rule 26(c) to grant orders protecting the party from ‘undue burden or expense’ in [complying with discovery] including orders conditioning discovery on the requesting party’s payment of the costs of discovery”); Spieker v. Quest Cherokee, LLC, 2008 WL 4758604 (D. Kan. Oct. 30, 2008)(refusing to act where estimated costs of production were three times the stated amount in controversy).
341 Michigan Staff Comments, MCR 2.302 (2010)(a court may “shift the cost of discovery to the requesting party”); Commentary, CA. C.C.P. ART. 1462 (2010)(trial court may “shift all or part of the cost or burden of producing electronically stored information to the requesting party when considering a motion to compel”).
Mandatory Cost-Shifting

In contrast to the optional cost shifting referenced in the 2006 Amendments, Texas earlier mandated that requesting parties pay “the reasonable expenses of any extraordinary steps required to retrieve and produce” ESI ordered to be produced over an objection that it was not “reasonably available to the responding party in its ordinary course of business.” No reported decisions exist on use of this provision, but anecdotal evidence has been asserted by practitioners that the clause is effective in reducing unwarranted or excessive demands.

California requires that the reasonable costs of translating data compilations into a useable form be at the requesting party’s expense and has applied this to backup tape production. In New York, cases support a presumption “in favor of requiring that the costs of e-discovery, potentially including attorney’s fees, be borne by the requester.” Accordingly, “[u]nlike a party seeking discovery in federal court, a state court litigant has a strong incentive to formulate its discovery requests in a manner as minimally burdensome as possible, since the litigant will bear the costs of production.”

However, the doctrine may be confined to instances where the ESI is not readily available. The New York CPLR is silent on the issue and no definitive appellate rulings exist.

Taxing of Costs

Other sources of authority to impose costs exist. For example, attorney fees are available to parties that prevail in litigation under parts or all of their claims or defenses.

---

344 CAL CODE CIVIL PROC. §§ 1985.8(g)(subpoenas); 2031.280(e). See Toshiba America Electronic Components, Inc. v. Superior Court, 124 Cal App. 4th 762, 21 Cal. Rptr. 3d 532 (C.A. 6th Dist. 2004)(predecessor version of the statute [§2031(g)(1)] held to require a requesting party to share in the reasonable expenses of restoring backup media).
346 T.A. Ahern Contractors v. Dormitory Authority, 24 Misc.3d 416, 875 N.Y.S. 2d 862, 868 (Sup. Ct. N.Y. Co. March 19, 2009)(conditioning order to produce from extensive email collection until requesting party communications it is willing to bear costs incurred, subject to possible reallocation of costs at trial).
under certain specialized statutes. Costs may be taxed in favor of the prevailing party under Fed. R. Civ. P. 54(d) and, more generally, under 28 U.S.C. § 1920(4).

In cases awarding costs to prevailing parties under Fed. R. Civ. P. 54(d) and, more generally, under 28 U.S.C. § 1920(4), courts have awarded vendor costs of preserving, collecting and processing ESI since were not the type of service that attorneys or paralegal are capable of providing. In Tibble v. Edison, the court affirmed an award of $530,000 for the costs of “utilizing the expertise of computer technicians in unearthing the vast amount of computerized data sought by Plaintiffs in discovery.” The costs of production of ESI in New York must be allocated to a requesting party when a subpoena is served upon a non-party.

(12) Privilege Waiver

The 2006 Amendments added a procedure for claiming privilege and work product after inadvertent production during discovery. It did not resolve the issue of whether the production constituted a waiver, a process that required Congressional action, which came in 2008. The did encourage, in Rules 26(f) and 16(b) that parties consider entering into agreements resolving these issues which could be adopted as court orders. This approach – discussions and binding court orders – was been widely adopted by states.

In 2008, Congress, acting on the recommendation of the Federal Evidence Advisory Committee, enacted Federal Evidence Rule 502 (“FRE 502”) which acknowledges, in FRE 502 (d) & (e) the authority of a federal court to bind both parties

---

349 Fed. R. Civ. P. 54(d)(1)(“Unless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney fees – should be allowed to the prevailing party.”).
350 28 U.S.C. 1920(4)(“A judge or clerk of any court of the United States may tax as costs . . . (4) fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case”).
351 Fed. R. Civ. P. 54(d)(1)(“Unless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney fees – should be allowed to the prevailing party.”).
352 28 U.S.C. 1920(4)(“A judge or clerk of any court of the United States may tax as costs . . . (4) fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case”).
355 Id. at *6.
358 12 OKLA. ST. § 3226(5)(2010)(“[t]his mechanism” does not alter the standards governing whether the information is privileged or subject to protection as trial preparation material or whether such privilege or protection has been waived).
359 See, e.g., ARIZ. R. CIV.P. 16 (b)(iii)(requiring discussion of “adopting any agreements the parties reach for asserting claims of privilege or of protection as to trial preparation materials after production”). See N.D. EV. RULE 510 (harmonizing other rules with N.D. R. Civ. P. 26(b)(6)(B)).
and non-parties – whether in state or federal courts – to the resolution of privilege and trial-preparation issues adopted by the court for a case, including a “quick peek” approach to waiver-free production.\footnote{Jonathan M. Redgrave and Jennifer J. Kehoe, New Evidence Rule 502: Privileges, Obligations and Opportunities, 56- JAN FED. LAW 34, 37 (January, 2009)(arguing that the rule authorizes orders which “virtually abandon the privilege review process”); See Rajala v. McGuire Woods, 2010 WL 2949582 (D.Kan. July 22, 2010)( inadvertently produced privileged information may be retrieved without proof that the party took the reasonable steps normally required under 502(b) to avoid waiver).}

FRE 502 (b) provides for non-waiver of inadvertently produced materials when reasonable precautions are undertaken to prevent disclosure and are promptly taken to of rectify the error, including following Rule 26(b)(5)(B).\footnote{See N.D. EV. RULE 510 (harmonizing other rules with N.D. R. Civ. P. 26(b)(6)(B)).} As the case law has evolved, courts have opined on the role that automated methods – described in the Explanatory Note as “advanced analytical software applications and linguistic tools in screening for privilege and work product” – may play in the process. The federal cases are split on whether such use constitutes “reasonable precautions” for the second prong of Rule 502(b).\footnote{See Mt. Hawley Insur. v. Felman Production, 2010 WL 1990555 (S.D. W. Va. May 18, 2010)( search techniques, including quality assurance tests, were not “reasonable precautions” under Rule 502(b)(2)); cf. Datel Holdings v. Microsoft, 2011 WL 866993 (N.Cal. March 11, 2011)( reasonable precautions were taken since “unbeknownst to defendant, [software used in the review process] suffered a software failure” without a “sufficiently obvious clue[s]”).}

A number of states, including Arizona, Arkansas, Florida, Iowa, Louisiana, Maryland, New Hampshire, Oklahoma, Tennessee, Texas and Washington have enacted rules roughly corresponding to FRE 502.\footnote{A.R.C.P. 26(b)(5)(D) and A.R.E. 502 (selective non-waiver for production made to state agencies).}\footnote{12 OKLA. ST. ST. § 2502(2)(f)(selective non-waiver of attorney-client or work product matter furnished to governmental agencies).}\footnote{ARIZ. R. EVID. 502(c)(if disclosure is made in federal court or another state without a court order governing waiver, it is not a waiver if it would not be waived in the other forum).} Arkansas and Oklahoma acknowledge non-waiver for disclosures made to governmental entities, an approach dropped from the final version of the federal rule. Arizona expressly deals with the impact of disclosures made in other federal or state courts.\footnote{ARIZ. R. EVID. 502(c)(if disclosure is made in federal court or another state without a court order governing waiver, it is not a waiver if it would not be waived in the other forum).}
IV. Potential Federal Rulemaking

In 2010, concerns about e-discovery discovery expressed at Duke Litigation Conference, especially involving preservation and spoliation, started a process in which the efficacy of the 2006 Amendments - or lack thereof - have been questioned.

Lawyers for Civil Justice and other defense bar representatives contended that the problems justified a comprehensive reevaluation of the existing rules regarding litigation, including preservation, cost-shifting, scope of discovery and limitations on discovery requirements. Representatives of the plaintiffs’ bar countered with advocacy of “[m]ore cooperation, more early planning and [judicial] cases management” before concluding whether the 2006 amendments have been effective. They also argued that any rulemaking is “premature” and the preservation problems are overstated.

However, one panel, on which the author served, unanimously recommended that the issues of preservation, especially pre-litigation preservation, deserved a detailed review regardless of the efficacy of the other aspects of the 2006 Amendments.

According, the Rules Committee assigned responsibility to its Discovery Subcommittee to take up the issues involved in preservation spoliation. The Subcommittee in turn conducted a Mini-Conference in Dallas in September, 2011. According to some of invited witnesses, concerns about risks in being branded as “spoliators” had resulted in systemic and costly “over-preservation.” The author’s summary of the meeting can be found on the web.

A number of competing proposals are on the table. One approach would be to spell out trigger and scope obligations in Rule 26 and authorize use of the sanctions

---

382 Courts have long recognized the unique impact of an adverse inference on juries. See, e.g., Morris v. Union Pacific, 373 F.3d 886, 900 (8th Cir. June 28, 2004)( An adverse inference brands one part as a bad actor, guilty of destroying evidence that it should have retained for use by the jury”).
provisions of Rule 37 for any failures to meet the obligations. Variants on this approach were made by Lawyers for Civil Justice (“LCJ”) and the New York State Bar Association.

A contrasting approach would deal only with sanctions, thereby finessing the difficult issues over pre-litigation rulemaking authority and emphasizing the role of proportionality in preservation. It might list “factors” for courts to consider in assessing conduct, which would, in turn, provide a “backwards” shadow to help those making preservation decisions. Something like this approach has been attempted by Ohio on a more modest scale in the state counterpart to Rule 37(e).

The author proposed a variant which would broadened Rule 37(e) and resolve confusion over the degree of culpability required to overcome the limitation on sanctions. Connecticut has already done so by providing that sanctions due to “routine, good-faith operation of a system or process” are not applicable in the absence of a showing of intentional actions designed to avoid known preservation obligations.”

Several attendees at the Dallas Mini-Conference raised the issue as to whether the onset of litigation or service of discovery requests would not be a preferable point at which to trigger the duty to preserve. In Florida and Illinois, for example, there is precedent to the effect that a duty to preserve does not exist prior to commencement of litigation. If that were the case, it was argued, a party would not have an affirmative

385 See also Thomas Y. Allman, Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments, 13 RICH. J. L. & TECH. 9, ¶26 (2007)(“[J]ust as the duty to produce is tempered by the principle of proportionality, so should courts take the same approach in regard to preservation decisions”).
386 Id., 51.
387 OHIO CIV. R. 37(F)(2010)(listing five “factors” for the court to “consider” in “determining whether to impose sanctions under this division;” namely (1) whether and when the duty was triggered (2) whether resulted from “ordinary use” (3) timely intervention (4) steps taken under agreements or orders and (5) “any other factors relevant” to the determination.
391 Royal & Sunalliance v. Lauderdale Marine, 877 So.2d 843, 846 (Fla. 4th DCA. July 7, 2004)(“we find [the] argument that there was a common-law duty to preserve the evidence in anticipation of litigation to be without merit”)
392 Boyd v. Travelers, 166 Ill.2d 188, 652 N.E. 267, 270 (S.Ct. Ill. June 22, 1995)(“[t]he general rule is that there is no [pre-litigation] duty to preserve evidence”).
393 Courts in those states address pre-litigation spoliation by use of evidentiary inferences. See, e.g., Shimanovsky v. GM, 181 Ill. 2d 112, 692 N.E.2d 286 (S.Ct. Ill. Feb. 20, 1998)(applying rule-based sanctions because “a potential litigant owes a duty to take reasonable measures to preserve the integrity of
duty to undertake steps to preserve prior to the onset of litigation, but traditional “evidentiary” remedies would be available for any affirmative acts of spoliation.

As of January, 2012, it is unclear whether further Amendments to the Federal Rules of Civil Procedure are likely to be proposed in the near future, or whether the process will stall in response to the suggestions of the Department of Justice and others that action at this time is premature in light of the 2006 Amendments. Moreover, even if are proposed and adopted by the Supreme Court, and not altered or prevented by Congress, the full rulemaking process typically takes 4-6 years before the rules are effective.

Nonetheless, the Subcommittee on Discovery is continuing to work on drafting a proposed rule for further discussion.

relevant and material evidence’’); Nationwide Lift Trucks v. Smith, 832 So. 2d 824, 826 (Fla. 4th DCA Nov. 13, 2002), but see In re Electric Machinery Enterprises, 416 B.R. 801, 874-875 (Bkcy Ct. M.D. Fla. Aug. 28, 2009)(refusing to apply sanctions to pre-litigation failure to preserve in light of authority that parties were under no duty to preserve evidence under Florida law).


APPENDIX
State-by-State Summaries

The discussion below is believed to be current as of January 2012, but the reader interested in a particular state would be wise to check and verify. In addition to the links and summaries below, useful information is also available through the periodic updates published by KL Gates, Kroll and Navigant.


2. **Alaska.** The Alaska Supreme Court has adopted comprehensive e-discovery rule amendments which became effective on April 15, 2009. They include requirements of early disclosure and meetings to discuss ESI discovery (but not preservation) prior to a scheduling conference. See [http://www.state.ak.us/courts/sco/sco1682leg.pdf](http://www.state.ak.us/courts/sco/sco1682leg.pdf). Treatment of email under Alaska civil rules prior to the amendments was discussed in Jonathan B. Ealy and Aaron M. Schutt, *What – If Anything – is an Email?*, 19 Alaska L. Rev. 119 (2002).


---

397 KrollOnTrack provides both a visual aid (map) and details at: [http://www.krollontrack.com/library/staterules_krollontrack_july2010.pdf](http://www.krollontrack.com/library/staterules_krollontrack_july2010.pdf)
obligations are “far broader” than federal rule). Arizona has also modified its Family Court procedures to include the e-discovery rules previously adopted for civil proceedings. See [link to Arizona rules]. Effective January 1, 2010, the state adopted a version of Evid. Rule 502 (Ariz. R. Evid. R. 502) with nuanced amendments dealing with uniformity of impact of disclosures in sister states.

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

5. **California.** In June 2009, the California Legislature adopted Assembly Bill 5 (the “Electronic Discovery Act”) involving amendments to the California Code of Civil Procedure (hereinafter “CCP”) which largely incorporate the basic principles of the 2006 Federal Amendments. The 2009 bill (essentially identical to the 2008 version vetoed in a budget dispute between the Governor and the Legislature) took effect immediately. The legislation was initially recommended by a 2008 Report of the California Judicial Council, copy at [link to report]. California employs a unique concept of non-exclusive “misuses” of the discovery process for which sanctions may be imposed. See Cal. Civ. Ctrm. Hbook. & Desktop Ref. §21:28 (2011). See CCP §2023.010 (listing misuses) and CCP §2023.030 (sanctions for misuse). There is disagreement over whether these provisions apply to spoliation absent a court order, in contrast to §§ 2031.300 (roughly equivalent to FRCP Rule 37(a) & 2031.310 (roughly equivalent to FRCP Rule 37(b)) [both of which – in contrast to §§ 2023.010 & 2023.030 – were subsequently modified to include a safe harbor provision] Under amended CCP §2031.210(d), a party may object to discovery of ESI on the grounds that it is from a source that is not reasonably accessible and must include in its objection the type or category of the source. CCP §2031.310(d) & (2) acknowledge and regulate burdens of resolving any objections based on ESI from a source that is not reasonably accessible. Modified provisions analogous to FRCP 37(e) are included in CCP §§ 1985.8(l)(subpoenaed person); 2031.060(l); 2031.300(d); 2031.310(j); and 2031.320 (d). They extend the exemption from sanctions to subpoenaed non-parties and attorneys and provide that they are not to be “construed to alter any obligation to preserve discoverable information.” The exemptions appear to apply the prohibition to sanctions exercised under inherent powers. The Electronic Discovery Act continued existing
language mandating payment by a “demanding party” of the “reasonable expense” of
translating “any data compilations” into “reasonably usable form” [CCP §§1985.8(g)(re
subpoenas)(Sec. 2) & 2031.280(e)(Sec. 17)] and added a reference to setting conditions
for good cause production “including allocation of the expense of discovery.” See CCP
§§1985.8(f)(re subpoenas)(Sec. 2), 2031.060(e)(Sec. 9), 2031.310(f)(Sec. 21). The
continued applicability of Toshiba v. Superior Court, 124 Cal. App.4th 762 (C.A. 6th Dist.
Dec. 3, 2004)(holding that the predecessor of 2031.280(e) required the lower court to
consider cost-shifting of costs of recovering data from backup tapes) is open, as no
reported decisions have applied the case since the Electronic Discovery Act. In August,
2009, the Judicial Council of California amended Cal. Rules of Court 3.724 so as to
mandate early discussion of key e-discovery issues in preparation for case management
conferences. See generally Barrad and Holland, Spotlight on E-Discovery: The Cutting
Edge, 51 Orange County Lawyer 18 (2009) and Garrie and Hon. Maureen Duffy-Lewis,
E-Discovery: Federal Rules versus California Rules – the Devil is in the Details, 63
Consumer Fin. L. Q. Rep. 218 (Fall-Winter 2009). In June, 2011, the California Judicial
Council closed a comment period on certain “clean-up” amendments deemed appropriate
to cover gaps in the earlier effort. See Invitation To Comment (Leg11-01), copy at

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

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

8. Delaware. Effective May 1, 2010, The Superior Court established a Commercial
Litigation Division, which will handle cases above $1M in controversy or as designated.
The court has adopted an Appendix B, E-Discovery Plan Guidelines, copy at
The Guidelines require preparation of an “e-Discovery Plan and Report” which may include objections to production from inaccessible sources of ESI and provide “safe harbors,” including one for destruction of ESI not ordered to be produced when a party acts in compliance with an e-discovery order. On January 19, 2011, the Court of Chancery issued Guidelines for Preservation of ESI, directed at parties, in-house and outside counsel, which also noted that while sanctions may apply when relevant ESI is lost, it would consider “the good-faith preservation efforts of a party and its counsel.” The Court stated that it “is continuing to monitor” electronic discovery and has not proposed any specific rules or guidelines which apply generally to the topic. The Guidelines are available at http://www.delawarelitigation.com/uploads/file/int50(1).pdf. The Chancery court has rendered a number of decisions on preservation and spoliation of ESI which appear to reject the application of Zubulake and Pension Committee strict liability for severe sanctions. See Beard Research v. Kates, 981 A.2d 1175 (Ct. Chan. Del. May 29, 2009)(spoliation opinion); see also 8 A.3d 573 (Ct. Chan. Del. April 23, 2010)(merits opinion incorporating spoliation sanction), aff’d. ASDI, Inc. v. Beard Research, 11 A.3d 749 (S.C. Del. Nov. 23, 2010). In Genger v. TR Investors, __ A.3d __, 2011 WL 2802832 (S.C. Del. July 18, 2011), The Supreme Court affirmed a Chancery Court contempt finding (at 2009 WL 469062), including a sanction of $3.2 million for the intentional destruction of information in unallocated space by use of a wiping software at a time the party was under a duty to preserve information imposed by court order. The Superior Court has refused to render either a default judgment or an adverse inference instruction where a moving party failed to demonstrate “intentional or reckless destruction or suppression of evidence.” Cruz v. G-Town Partners, 2010 WL 5297161, at *10 (Sup. Ct. New Castle Co. Dec. 3, 2010).

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

10. Florida. Since 2009, the Florida Supreme court has had a rule dealing with complex litigation under which parties must discuss and include, if a case management conference occurs, some aspects of ESI production. See Rule 1.201, at http://www.floridasupremecourt.org/decisions/2009/sc08-1141.pdf. In January 2011, Florida adopted Civil R. P. 1.285 providing for assertion of privilege as to inadvertently disclosed materials, combining an equivalent to Fed. R. Civ. P. 26(b)(5)(B) with a process for determining if the privilege has been waived. In late 2011, the Supreme Court of Florida published a proposal for comment (due by October 17, 2011), which provides for e-discovery amendments based on the 2006 Federal Amendments. See Case No. SC11-1542, copy at http://www.floridasupremecourt.org/decisions/probin/sc11-1542_PublicationNotice.pdf. The Committee expressed concern (but took no action) about the possibility that Florida common law does not require pre-litigation obligations. See Gayer v. Fine Line Construction, 970 So.2d 424, 426 (C.A. 4th Dist. Nov. 28, 2007)(“a duty to preserve does not exist at common law” citing to Royal & Sunalliance v.
Lauderdale Marine, 877 So. 2d 843, 846 (C.A. 4th Dist. July 7, 2004); see also Robert H. Thornburg, Electronic Discovery in Florida, 80 Fla. Bar J. 34 (Oct. 2006), http://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/F3CEE9EEFD8CF899852571F5005A3E37 (asserting that no pre-litigation duty exists until “the lawsuit is served”) (at text associated with n. 26); accord, In re Electric Machinery Enterprises, 416 B.R. 801, 874-875 (Bkcy Ct. M.D. Fla. Aug. 28, 2009) (refusing to apply sanctions to pre-litigation failure to preserve in light of authority that parties were under no duty to preserve evidence under Florida law); cf Martino v. Wal-Mart Stores, 908 So. 2d 342 (S.Ct. Fla. July 7, 2005) and Coleman (Parent) Holdings v. Morgan Stanley, 2005 WL 4947328 (Cir. Ct. March 1, 2005) (AMENDED ORDER) (citing to Martino, supra); see also Wm. Hamilton, Florida Moving to Adopt Federally-Inspired E-discovery Rules (Sept. 20, 2011), posted at http://ediscovery.quarles.com/2011/09/articles/rules/florida-moving-to-adopt-federallyinspired-ediscovery-rules/print.html (arguing that “traditional Florida spoliation remedies are in play when a party intentionally destroys relevant information to thwart the judicial process – whether before or during litigation”); Michael D. Starks, Deconstructing Damages for Destruction of Evidence, 80-AUG Fla. B. J. 36 (July/August 2006) (noting that both sanctions and tort damages are available under Florida law, although Martino “destroyed the first-party spoliation tort”). The Starks article also notes that “the adverse inference concept is not based on a strict legal ‘duty’ to preserve evidence” but arises in any situation where damaging evidence is in the possession of a party, which “either loes or destroys the evidence.” (at 40).


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

14. Illinois. To date, Illinois has not enacted comprehensive e-discovery rules. Illinois acknowledges electronic discovery in amended Rule 201 (b)(1995) which includes “retrievable information” in “computer storage” as part of the definition of “documents.” The related production provision, Rule 214, requires production in printed form to prevent from producing in a manner which “tends to frustrate” access to information in computer storage, according to the Committee Note.
For a comprehensive Illinois trial court opinion relying upon the Sedona Principles and federal precedent, including Zubulake, see Vision Point of Sale v. Haas, 2004 WL 5326424 (Cir. Ct. Ill. Sept. 27, 2004)(dealing with transfer of information to newer computers and purging files from older computers as well as cost shifting). It has been pointed out that existing Illinois law and the 2006 Amendments have differences, some fairly subtle, which will require reconciliation. Jeffery A. Parness, E-Discovery in Illinois Civil Actions, 95 Ill. B. J. 150 (March 2007)(emphasizing role of discussions pursuant to Fed. R. Civ. P. 26(f) to deal with preservation); see also Wetzel, Spoiling an Illinois Personal Injury Plaintiff’s Spoliation Claim for Routinely Maintained Items, 28 S. Ill. U. L. J. 455 ( Winter 2004). Illinois treatment of the duty to preserve is unique. On the one hand, stating that there is no general duty to preserve, the Illinois Supreme Court has found that the negligent failure to preserve when a duty is acknowledged is enforceable as a matter of tort law. Boyd v. Travelers Insurance, 166 Ill.2d 188, 652 N.E. 2d 267, 270-271 (Jan. 19, 1995)(“[t]he general rule is that there is no duty to preserve evidence” but such a duty may arise under some circumstances and “can be stated under existing negligence law without creating a new tort”). In addition, the duty to preserve – even pre-litigation – is acknowledged and enforceable as a matter of sanctions where a party fails to take “reasonable measure to preserve the integrity of relevant and material evidence.” See Shimanovsky v. General Motors, 181 Ill. 2d 112, 692 N.E. 2d 286, 290 (Feb. 20, 1998)(permitting sanctions for pre-litigation spoliation as a matter of policy despite fact that Rule 219(c) limits sanctions to violations of court orders). Unlike other states which acknowledge a tort duty, Illinois has not distinguished its cases in terms of first party or third party duties and some commentators merge the two lines of cases. See Miller and Collier, Avoiding the Innocent Spoliation of Evidence, 24-May CBA Rec. 40 (May 2010)(implying that a sanctionable duty to preserve requires existence of Boyd factors, when, in fact, the Boyd case is focused on third party spoliation, not sanctions); see also Zuckerman, Yes, I Destroyed the Evidence – Sue Me? Intentional Spoliation of Evidence in Illinois, 27 J. Marshall J. Computer & Ino. L. 235 [27 JMARJCIL 235] (Winter 2009)(confusing concepts and arguing that Illinois recognizes a “quasi-cause of action that permits a plaintiff to state a claim for spoliation under an existing cause of action such as negligence”).


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

19. **Louisiana.** In 2007, the Legislature passed and the Governor signed Act 140 (2007 La. ALS 140), a limited e-discovery bill, with comments, which included non-waiver due to inadvertent production, now located at La. C.C.P. Art. 1424(D)(scope of discovery). It also amended Art. 1460 (option to produce business records) and Art. 1461 (production) (providing direct access and with extensive comments). A copy of the enrolled bill is at [http://www.legis.state.la.us/billdata/streamdocument.asp?did=447007](http://www.legis.state.la.us/billdata/streamdocument.asp?did=447007). See William R. Forrester, *New Technology & The 2007 Amendments to the Code of Civil Procedure*, 55 La. B. J. 236, 238 (2008). In 2008, the Legislature added a counterpart to Rule 37(e) at La. C.C.P. Art. 1471(B)(2010). In the 2009 session, further amendments (SB 65) which would have increased the threshold in the safe harbor bill failed as the result of a tie vote in the Senate. In the 2010 Session, the Legislature added La. C.C.P. Article 1462(B)(2) based on Fed.R.Civ.P.26(b)(2)(B) and also a sentence to Article 1462(C) to require a producing party to identify the means which must be used to access ESI being produced. The amendments take effect on January 1, 2011 and August 15, 2010, respectively.

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

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


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

26. **Missouri.** Status unknown.


29. **Nevada.** Status unknown.

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


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

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

34. North Carolina. The General Assembly passed and the Governor has signed amendment to the General Statutes amending the Rules of Civil Procedure, effective October 2011, to accommodate electronic discovery. A copy of Session Law 2011-199 (H380) is at http://www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H380v4.pdf. Amended Rule 26 defines ESI to include “reasonably accessible” metadata that will enable a party to have certain ability to access date sent, received, author and recipients but other metadata is not included unless agreed or ordered for good cause [Rules Civ. Proc., G.S. § 1A-1, Rule 26 (2011)]; and other detailed enhancements from the 2006 Federal Amendments provisions for early discussion, discovery plans, objections to requested form. The ESI safe harbor was adapted unchanged. The North Carolina Business Court, part of the trial division (see http://www.ncbusinesscourt.net/) has, since 2006, operated with “Amended Local Rules” (July 31, 2006) which included provisions designed to encourage discussion by parties of disputed e-discovery issues at an early case management meeting prior to meeting with the Court (NC R. Bus Ct Rule 17.1) and prior to filing motions and objections relating to ESI. (NC R. Bus Ct 18.6(b)). The

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

36. **Ohio.** The Supreme Court adopted rules based largely on the 2006 Amendments, with significant modifications. The safe harbor provision includes factors for court use when deciding if sanctions should be imposed and the pre-trial discussion topics include the methods of “search and production” to be used in discovery. The rules are at [http://www.sconet.state.oh.us/RuleAmendments/documents/2008%20Amend.%20to%20Appellate,%20Criminal%20&%20Civil%20as%20published%20(Final).doc](http://www.sconet.state.oh.us/RuleAmendments/documents/2008%20Amend.%20to%20Appellate,%20Criminal%20&%20Civil%20as%20published%20(Final).doc).

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

38. **Oregon.** On December 11, 2010, the Oregon Council on Court Procedures promulgated an amendment to Rule 43 of the ORCP regarding electronic discovery, a copy of which is found at [http://legacy.lclark.edu/~ccp/Promulgated_Amendments_12-11-10.pdf](http://legacy.lclark.edu/~ccp/Promulgated_Amendments_12-11-10.pdf). The proposals have been submitted to the Oregon Legislature and, unless amended, repealed or supplemented by the Legislature, will automatically go into effect on January 1, 2012.

39. **Pennsylvania.** The Supreme Court published for Comment the Proposed Recommendation No. 249, with a June, 2011 deadline. The Proposal makes minimal changes to accommodate electronically stored information, while including ESI in the types of discovery covered by Rule 4011 limiting the scope of discovery for material sought in bad faith which would cause unreasonable annoyance, embarrassment,
oppression, burden or expense. In an “Explanatory Comment” the recommendation states that “there is no intent to incorporate the federal jurisprudence surrounding the discovery of [ESI]” and that discovery of ESI is “to be determined by traditional principles of proportionality under Pennsylvania law.” The Comment also suggest that parties should consider “tools” and agreements covering ESI. For a copy of the Proposal, see [link]. Some commentators have criticized the failure to incorporate provisions from the 2006 Amendments designed to speed up ESI production. See, e.g., Leonard Deutchman, Pros and Cons of Pennsylvania’s Proposed E-Discovery Rules Changes, LTN Law Technology News, May 11, 2011, copy at [link].

Pennsylvania has robust case law on the spoliation inference. See, e.g., McHugh v. McHugh, 186 Pa. 197, 40 A. 410 (1898)(explaining that spoliation gives rise to a presumption that a party’s conduct may be attributed to knowledge that the truth would operate against the party).


41. South Carolina. In Jan. 2011, the Supreme Court adopted and sent to the Legislature Amendments to Rules 16, 26, 28, 33, 34, 37 and 45 of the rules of Civil Procedure, which have now become effective. See [link].

42. South Dakota. Status unknown.

43. Tennessee. The Supreme Court adopted Amendments effective on July 1, 2009 which borrow from the Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information issued by the Conference of Chief Justices (2006). See the analysis in Lawrence C. Maxwell, New Rules for E-Discovery, 45-JUN Tenn. B.J. 12 (June, 2009). Tenn. R. Civ. P. 26.02(5) mirrors the federal rules in allowing a party to claw back privileged information, but does not provide whether the privilege or protection that was asserted was waived by production. Effective July 1, 2010, Tenn R. Evid. Rule 502 provides for limitations on waiver due to inadvertent disclosure of privileged information or work product, based on Fed. R. Evid. 502(b).

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

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

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

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

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

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