

**STATE E-DISCOVERY RULE-MAKING
AFTER THE 2006 FEDERAL
AMENDMENTS: AN UPDATE
AND EVALUATION**

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I. Introduction

It has been eight years since I wrote to (then) Magistrate Judge John Carroll, Chair of the Civil Rules Discovery Subcommittee,² to suggest adoption of a federal “safe harbor” rule providing that a party should not, without a prior court order, be required to suspend the operation of electronic systems which were operated in good faith.³

As far as I can tell, this was the first explicit suggestion for amendments to the Federal Rules governing e-discovery, which I amplified in subsequent articles. My reasoning was that the Federal Rules should take into account how the significant differences between hard copy and electronic information were

1. ©2008 Thomas Y. Allman. Tom Allman co-chairs the Steering Committee of Working Group One of the Sedona Conference®, authors of the Sedona Principles (2nd Ed. 2007). He formerly served as Senior Vice President and General Counsel of BASF Corporation and was senior counsel to Mayer Brown LLP. This paper was presented in its original form on December 1, 2008 to the Colloquium on the Future of Commercial Litigation in New York and has been updated to reflect additional updates received through the end of February, 2009.

2. Judge Carroll now serves as Dean of the Cumberland School of Law of Samford University, located in Birmingham, Alabama and has continued to be active in the field, having most recently served as the Reporter for the National Conference of Commissioners on Uniform State Laws (NCCUSL) Uniform Rules.

3. A preservation order would issue only for “good cause.” See Letter, Allman to Carroll, December 12, 2000, available at <http://www.kenwithers.com/articles/>.

impacting “both the litigation process and [the] business world.”⁴

Since then, of course, the Civil Rules Advisory Committee mounted an intense rule drafting effort resulting in the 2006 E-Discovery Amendments to the Federal Rules of Civil Procedure (the “2006 Amendments”).⁵ This effort has, in turn, spurred enactments of similar rules and statutes throughout the United States, which is the subject of this article.

It is the author’s opinion that rule-making efforts based on the Federal Rules is quite appropriate.⁶ Uniformity within and among the states creates a larger body of interpretive opinions of the innovations involved and reduces somewhat the risk of “balkanization,” which can unnecessarily raise costs and unfairly penalize the small or under-funded litigant.⁷

II. The Impact of E-Discovery

Pre-trial discovery is essential to the litigation process. As the Supreme Court noted in 1947, “[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.”⁸

Naturally, “discovery, like all matters of procedure, has ultimate and necessary boundaries.”⁹ Those “ultimate and necessary” boundaries have been severely tested by the emerging

4. Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 DEF. COUNSEL J. 206 (2001).

5. The 2006 Amendments (with Committee Notes) came into effect December 1, 2006. They impact Rules 16, 26, 33, 34, 37, 45 and Form 35. See Thomas Y. Allman, *The Impact of the Proposed Federal E-Discovery Rules*, 12 RICH. J. L. & TECH. 13 (2006).

6. Thomas Y. Allman, *Addressing State E-Discovery Issues Through Rulemaking: The Case for Adopting the 2006 Federal Amendments*, 74 DEF. COUNSEL J. 233, 238-239 (July, 2007).

7. The Standing Committee was concerned that “[w]ithout national rules adequate to address the issues raised by electronic discovery, a patchwork of rules and requirements is likely to develop,” resulting in “uncertainty, expense, delays, and burdens” being imposed on both small organizations and individual litigants as well as large public and private organizations. See Report of May 27, 2005, as revised July 25, 2005 (the “Advisory Committee Report”), reproduced as Appendix C to the Report of Judicial Conference of the United States on Rules of Practice And Procedure (the “Standing Committee Report”), at 23, available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf>.

8. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

9. *Id.* at 507.

focus on information found in electronic form. Indeed, an article in *The Economist* recently reported that one general counsel estimates his legal fees on discovery have increased by 25% because of e-discovery concerns.¹⁰

Prompted by passage of the 2006 Amendments and the widespread adoption by district courts of local guidelines and standing orders,¹¹ the efficacy of state e-discovery rules has been a topic for state rule-makers.

The argument has been made that having the same procedural rules in state and federal courts within a state (and among all states) promotes predictability and can lead to reduced litigation costs for practitioners and their clients.¹² Thus, the Study Committee appointed by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) has argued that:

The adoption . . . of uniform rules would [provide] the benefit of decisional law of other jurisdictions whose courts have considered a particular issue.¹³

Although there have been fewer reported decisions involving e-discovery in state courts than in federal courts, there is no reason to believe that e-discovery issues are likely to be any less vexing to litigants in that context than in Federal courts.

10. A recent survey of American College of Trial Lawyer fellows concluded that “electronic discovery, in particular, is too costly” and “[the] issues are not well understood by judges.” See Interim Report & 2008 Litigation Survey of the Fellows of the American College of Trial Lawyers (Sept. 2008) at <http://www.du.edu/legalinstitute/pubs/Interim%20Report%20Final%20for%20web1.pdf>.

11. See, e.g., <http://www.ediscoverylaw.com/2008/10/articles/resources/updated-list-local-rules-forms-and-guidelines-of-united-states-district-courts-addressing-ediscovery-issues/> (Federal District Court Rules).

12. One of the major reasons for adoption of the Federal Amendments was to bring about uniformity of practice within the federal system to forestall increasing numbers of diverse local rules. See Report of the Committee on Rules of Practice and Procedure, September 2005 (hereinafter “Standing Committee Report (2005)”), <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf> (providing introductory comments and background to the new rules). Compare Local Rules, E.D.&W.D. Ark. Loc. R. 26.1; D. Del. R. 16(4)(b); D.N.J. Loc. Civ. R. 26.1; D. Wyo. Loc. R. 26.1& Appendix D and D. Kan. (“Electronic Discovery Guidelines”).

13. Dated June 17, 2005 and prepared by Rex Blackburn (Chairman) (citing the *Sedona Principles* in addition to the proposed Federal Rule amendments) (Copy on file with Author). The Author served as an Observer to the drafting Committee led by Dean Carroll.

III. State Action to Date

State rulemaking invokes a wide variety of approaches ranging from Supreme Court action based on committee input to direct action by legislative bodies. It is no longer the case, however, that changes in the federal discovery rules are automatically adopted by state rulemaking authorities.¹⁴ As in the early years of the federal rulemaking process, there are reservations in some quarters about the necessity or wisdom of addressing state e-discovery issues via rule changes.

Including Texas and Mississippi, which acted before the Federal Amendments, as of January, 2009, a total of twenty-two states have incorporated e-discovery provisions in some portion of their civil procedure rules or codes.¹⁵

Generally speaking, the states can be classified into three groups:

- (1) Those which have adopted, with some minor variations, most of the 2006 Amendments (Arizona, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Maryland, Montana, New Jersey, North Dakota, Ohio and Utah).¹⁶
- (2) Those which utilized some of the concepts from the 2006 Amendments to make limited changes¹⁷ (Arkansas, Louisiana, Nebraska,¹⁸ New York,¹⁹ New Hampshire and North Carolina).
- (3) Those which adopted a different approach based on the earlier Texas e-discovery enactment (Idaho, Mississippi and Texas).²⁰

14. See Oakley, *A Fresh Look at the Federal Rules in State Courts Symposium: Perspectives on Dispute Resolution in the Twenty-First Century*, 3 Nev. L. J. 354, 355 (Winter 2002/2003) (“[T]he FRCP have lost credibility as avatars of procedural reform.”).

15. The twenty-two states which have enacted some form of changes to their civil provisions are, in alphabetical order, Arkansas, Arizona, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Texas, and Utah. The individual actions by these states — and others who have not yet acted (including the District of Columbia) — are discussed in the Appendix to this paper.

16. Generally speaking, none of the states adopted provisions for early disclosures or “meet and confers.” Maryland, Ohio and Utah added significant embellishments to their provisions.

17. Louisiana, Nebraska and New Hampshire repackaged some of the federal amendment concepts and Arkansas only dealt with inadvertent production (and waiver).

18. Nebraska adopted only the provisions relating to scope of discovery and form of production.

19. New York Commercial Division (statewide).

20. Texas permits objection to production of electronic data that is “not reasonably available” and mandates payment of any extraordinary steps required, should its production be ordered. Idaho and Mississippi have adopted similar provisions with the payment discretionary with the court.

The remaining states and the District of Columbia continue to hesitate, in some cases with obvious skepticism about the need to act.²¹ Three of these states, Alaska, Tennessee and Virginia, are awaiting final action on proposals before their respective Supreme Courts.²² Many states are awaiting the accumulation of practical experience under the Federal Amendments before acting, thus ensuring that the process will take some time to reach fruition. Some states may ultimately conclude that no urgent need exists to make any changes at all.

The Appendix summarizes the current information available on a state-by-state basis.

IV. Typical Provisions of State Rules

In undertaking their efforts, state rule-makers had access to an extensive “toolkit” of resources in addition to the Federal Amendments. The two most prominent examples are the *Uniform Rules Relating to the Discovery of Electronically Stored Information* (“Uniform Rules”)²³ and the “Guidelines for State Trial Courts on Discovery of Electronically Stored Information” (“Guidelines for State Trial Courts”).²⁴ The *Uniform Rules* and the *Guidelines for State Trial Courts* were developed separately during 2005-2006 and are intended to play significantly different roles.²⁵

The former, a project of the Uniform Law Commissioners, was developed as a “stand-alone” set of model rules, while the

21. At the Connecticut Supreme Court Rules Committee meeting in September, 2008, “[s]everal members of the [Rules] Committee questioned why our current discovery rules were not sufficient.” http://www.jud.ct.gov/Committees/rules/rules_minutes_DRAFT_091508.pdf.

22. California completed legislative action on e-discovery amendments in 2008 only to have them vetoed. See *California e-Discovery Proposal Vetoed*, <http://www.bingham.com/Media.aspx?MediaID=7631>.

23. The Uniform Rules were adopted in August 2007 at the Annual Meeting of NCCUSL and can be found at http://www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.htm.

24. The Guidelines were developed by the Conference of Chief Justices (“CCF”) and are available through the National Center for State Courts, at <http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf>.

25. Compare Koppel, *Toward a new Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure through a Collaborative Rulemaking Process*, 58 VAN. L. REV. 1167, 1247-1252 (2005) (advocating collaboration among the NCCUSL and CCF to prepare a “national code of state civil procedure” based on empirical data and controlled experimentation).

latter, a product of the Conference of [State] Chief Justices, is intended to serve as “interim” guidance for trial courts in the absence of specific e-discovery rules. The 2008 California Judicial Conference report recommending e-discovery enactments, for example, relied upon the Uniform Rules in several key respects.²⁶

Another model for state rulemaking is provided by the 1999 e-discovery rules adopted by the Texas Supreme Court.²⁷

Underlying and reinforcing these efforts are the provisions of *The Sedona Principles Best Practices Recommendations & Principles for Addressing Electronic Document Production* (Second Edition (2007) (“*Sedona Principles*”),²⁸ and the *ABA Civil Discovery Standards*²⁹ which, together with the growing body of federal opinions, have been described as providing de facto “national [e-discovery] standards.”³⁰

There is a clear consensus among all these models that effective e-discovery can best be facilitated by candid and early discussion of contentious issues such as preservation obligations.³¹ Parties can thereby “nip in the bud” some of the most obvious and avoidable sanction producing disputes.

Similarly, there is agreement on need for neutral positions on form of production and for limitations on production from inaccessible sources of electronically stored information.³² However, controversy exists over the issue of mandatory cost-

26. April 9, 2008 Report, p. 12, available at <http://www.courtinfo.ca.gov/jc/documents/reports/042508item4.pdf>.

27. See Texas Rules of Civil Procedure, Rule 196.4 (eff. Jan. 1, 1999).

28. The *Sedona Principles* consist of fourteen “best practice” recommendations covering the full range of e-discovery issues, together with commentary. See <http://www.thesedonaconference.org>. A Second Edition issued in 2007 made changes to *Sedona Principles* 8, 12, 13 and 14 and updated the terminology to be consistent with the Federal Amendments. See Thomas Y. Allman, *The Sedona Principles (Second Edition): Accommodating the 2006 E-Discovery Amendments*, 2008 Fed. Cts. L. Rev. 2 (2008).

29. See American Bar Association, Electronic Discovery Task Force, Report 103B, Amendments to the Civil Discovery Standards (2004).

30. See *Zubulake v. UBS Warburg LLC*, 2004 WL 1620866 at *16 (“*Zubulake V*) (S.D.N.Y. 2004).

31. See FED. R. CIV. P. 16(b) and FED. R. CIV. P. 26(f).

32. FED. R. CIV. P. 26(b)(5)(B) (inadvertent production) and FED. R. CIV. P. 34 (form or forms of production).

shifting³³ as well as the need for “safe harbor”³⁴ limitations on rule-based sanctions for preservation losses.³⁵

The following summarizes the trends among the enactments on these and other key e-discovery topics.

Scope. Almost all states³⁶ have adopted the federal approach of describing “electronically stored information” as a category of discoverable material distinct from “documents” or “tangible things.” The ability to seek to “test or sample” to secure such information, a new feature of the 2006 Amendments, is also widely recognized.³⁷

Early Attorney Conferences (“Meet and Confers”). Only New Hampshire and Utah have adopted an explicit requirement that counsel “meet and confer” outside the presence of the court to discuss electronically stored information issues. However, the North Carolina Business Court and New York Commercial Division of the Supreme Court require early conferences to discuss electronically stored information.³⁸

Discovery Conferences/Discovery Orders. Some states achieve the same end by authorizing courts to hold “discovery” conferences when electronically stored information is anticipated to

33. See Texas Civ. Proc. Rule 196.4 (mandating shifting of extraordinary costs associated with production).

34. FED. R. CIV. P. 37(e). See Thomas Y. Allman, “The Case for a Preservation Safe Harbor in Requests for E-Discovery,” 70 Def. Couns. J. 417(2003)(recommending consideration of a safe harbor); See also Thomas Y. Allman, “Defining Culpability: The Search for a Limited Safe Harbor in Electronic Discovery,” 2006 Fed. Cts. L. Rev. 7 (2006) and Thomas Y. Allman, “Rule 37(f) Meets Its Critics: The Justification for a Limited Safe Harbor for ESI,” 5 NW. J. Tech. & Intell. Prop. 1 (2006)(explaining the scope and rebutting criticism of Rule 37(f) [now Rule 37(e)] as enacted).

35. The “safe harbor” provision was opposed by Dean Carroll when initially advocated by the author. See Carroll, “E-Discovery: A Case Study in Rulemaking by State and Federal Courts,” (2005)(advocating rejection of safe harbor and accessibility rules in state rulemaking), available at www.roscoepound.org/new/updates/2005Forum.htm.

36. New Jersey defines electronically stored information as a type of “document,” Idaho speak of “data” and Mississippi and Texas refer to “data or “electronic or magnetic data.”

37. Louisiana allows access for good cause where a party believes production is not in compliance and includes a detailed comment on the limits of “direct access” citing *In re Ford Motor*, 345 F.3d 1315 (11th Cir. 2003).

38. The New York City Bar Committee on Courts of Superior Jurisdiction recently proposed an analogous provision in Uniform Rule 202.12 for courts of general jurisdiction. See <http://www.nycbar.org/pdf/report/bar%20comm%20e-discovery%20ltr.pdf>.

be sought,³⁹ while others with “pre-trial” or “case management” conferences⁴⁰ have modified their rules to include discussion of electronically stored information issues, including form of production, inadvertent production of privileged information.⁴¹ However described, these early conferences reflect the widely held view that reduction of unnecessary sanction practice can best be achieved by candid and early discussion of contentious issues.

Early Disclosures Without Discovery. Only Arizona⁴² and Utah mandate early disclosures in the absence of discovery requests regarding electronically stored information.

Preservation Standards. Standards relating to the trigger or implementation of preservation obligations have not typically been the subject of rulemaking, other than the implicit requirements of “good faith” implicit in the “safe harbor” rule.⁴³ However, Arizona, New Hampshire and Utah explicitly require early discussion of preservation issues⁴⁴ and Michigan notes that “[a] party has the same obligation to preserve electronically stored information as it does for all other types of information.”⁴⁵

Inadvertent Production. All states except Montana and Nebraska provide a mechanism for claiming and retrieving inadvertently produced privileged information in documents or

39. Minnesota and Iowa envision a “discovery” conference about electronically stored information and mention form of production and privilege agreements. Montana does the same, although the listed topics do not include claims of privilege.

40. A “case management” conference may be held in New Jersey to “address issues relating to discovery of electronically stored information.”

41. For example, Indiana authorizes pre-trial conferences and requires counsel to “familiarize” themselves with all aspects of a case in advance of a conference of attorneys held prior to a pre-trial conference.

42. See Schaffer and Austin, *New Arizona E-Discovery Rules*, 44-FED Ariz. Att’y 24 (February 2008)(Arizona disclosure obligations are “far broader” than those of the federal rule).

43. See Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, 13 Rich. J.L. & Tech. 9 (2007).

44. New Hampshire requires parties to meet to discuss “the need for and the extent of any holds” to prevent the destruction of electronic information. See <http://www.courts.state.nh.us/rules/sror/sror-h3-62.htm>. Utah added “preservation” as one of the topics which must be included in a discovery plan presented to the court.

45. The Michigan “safe harbor” analogue to Fed.R.Civ.P.37(e) immediately follows this provision.

electronically stored information.⁴⁶ Arkansas,⁴⁷ Louisiana, and Maryland also included provisions governing the substantive issue of waiver under those circumstances.⁴⁸ Recent Congressional action enacting Federal Rules of Evidence 502 to address the substantive waiver issue suggests a broader opportunity for state action in this area.⁴⁹

Form of Production. All but New Hampshire⁵⁰ have adopted the default standard in the 2006 Amendments that production of electronically stored information should be made in either the form in which the information is maintained or in other usable forms.

Limitations on Burdensome Production. All states except Nebraska, Mississippi, Texas and Idaho have adopted or described⁵¹ a “two-tiered” approach barring the necessity of production from sources which are inaccessible because of “undue burden or cost” absent a court order issued for good cause.⁵² Mississippi, Texas and Idaho address the same issue with a different format. They frame the distinction in regard to production in terms of whether the information is “reasonably available to the responding party in its ordinary course of business.”

Cost-Shifting. Cost-shifting (or “allocation”) for extraordinary or unduly burdensome costs associated with production of electronically stored information is acknowledged as a matter of discretion in all states. Only Texas has adopted mandatory cost-shifting.

Safe Harbor. Limits on rule-based sanctions for losses of electronically stored information due to “routine good faith”

46. The Ohio Staff Notes refer to the provision as a “clawback” provision.

47. Arkansas included a provision acknowledging the validity of selective waiver to governmental agency, a provision dropped from the comparable Federal Evidence Rule 502.

48. For a current summary, see Note, *Look Before You Leap: A Guide to the Law of Inadvertent Disclosure of Privileged Information in the Era of E-Discovery*, 93 Iowa L. Rev. 627 (February 2008).

49. Evidence Rule 502 regarding waiver was passed by Congress and signed by the President in late 2008. <http://www.uscourts.gov/newsroom/2008/S2450EnrolledBill.pdf>. It does not include a provision authorizing selective waiver.

50. New Hampshire alludes to discussion of the topic without specifying a standard for assessing waiver.

51. Louisiana includes the limitation in a Comment.

52. Maryland substituted direct linkage to the proportionality standard for the “good cause” standard.

operation of an information system have been adopted by Arizona, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Montana, New Jersey, North Dakota, Ohio⁵³ and Utah.⁵⁴ The Maine Advisory Committee Note, uniquely among the federal and state descriptions, defines “routine” as meaning that “the operation [must] be in the ordinary course of business.”

IV. Are E-Discovery Rules Necessary?

Recently, the Special Reporter to the Federal Rules Advisory Committee, Richard Marcus, addressed the question of whether the 2006 Amendments were worth the effort.⁵⁵ While conceding that there “is much force to the argument” that unique e-discovery rules were not needed, he concluded that “it [is] implausible that doing e-discovery without rules is really superior to having rules to provide guidance.”⁵⁶ Based on my experience and the information available to me, I am in agreement.

Nonetheless, there is room for further improvement. Some observers argue that the failure of the 2006 Amendments to provide “certainty” as to preservation obligations inhibits the usefulness of the 2006 Amendments in reducing costs of over-preservation.⁵⁷ Others are already suggesting the need to “re-

53. Ohio adds five “factors” for a court to consider in deciding whether to impose sanctions [despite] the rule, including “whether and when any obligation to preserve the information was triggered.”

54. Utah adopted Rule 37(e) but adds that “nothing in this rule limits the inherent power of the court” to act if a party “destroys, conceals, alters, tampers with or fails to preserve: information “in violation of a duty.” The proposed California version of the Rule (not adopted given the veto by the Governor) also included a provision that “[t]his subdivision shall not be construed to alter any obligation to preserve discoverable information.” See Section 2031.060(i)(2), Assembly Bill No. 926 (vetoed, September 2008).

55. Richard L. Marcus, *E-Discovery Beyond the Federal Rules*, 37 U. BALT. L. REV. 321, 340 (Spring 2008).

56. Professor Marcus also addresses the issue of whether the rules are “so bad that they are worse than no rules at all.” Ultimately, he rejects this possibility because of the “wide spread emulation of provisions of the Federal Rules Amendments in state court rules dealing with e-discovery.”

57. See Hon. Paul W. Grimm, et al, *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381, 402 at n. 91 (Spring, 2008) (“In view of the serious sanctions that may be imposed for breaching the duty to preserve, potential litigants need greater certainty.”). The chief problem is the inability to predict when an otherwise inaccessible source must be preserved without expending the time and costs to examine it in detail. See Nelson and Rosenberg, *A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation to*

visit” the limitations on production from inaccessible sources of electronic information.⁵⁸ I

The type of aggressive early preparation advocated by the 2006 Amendments has had a direct and measurable impact on reducing discovery disputes.⁵⁹ Creative efforts such as the Sedona Conference® Cooperation Proclamation hold out the promise of even more progress in the future.⁶⁰ The author has already documented a success in one contentious area building on this approach.⁶¹

On balance, therefore, the 2006 Amendments are an excellent starting point for the type of experimentation at which states have long been adept.⁶²

Electronic Discovery, 12 RICH. J.L. & TECH. 14 at 4 (2006) (contending that Rule 37(f) fails to “thoroughly address” the problem). Compare Carroll, “E-Discovery: A Case Study in Rulemaking by State and Federal Courts” (2005) (advocating rejection of safe harbor and accessibility rules in state rulemaking), available at www.roscoe-pound.org/new/updates/2005Forum.htm.

58. See Rachel Hytken, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875 (Fall 2008).

59. Rachel Hytken, *Electronic Discovery: To What Extent Do The 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875, 886 (Fall 2008) (since passage, percentage of orders granting sanctions has dropped from 65% to 50% of those sought).

60. The Sedona Conference® Cooperation Proclamation (2008) (“The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system.”) downloadable at <http://www.the-sedonaconference.org>.

61. 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 *67 (2008) (“Parties are increasingly tempering their demands and reaching practical and effective accommodations under circumstances which did not exist before”).

62. As Justice Brandeis noted in *New State Ice v. Liebman*, 285 U.S. 262, 387 (1932), “a single courageous state may, if its citizens choose, serve as a laboratory . . . without risk to the rest of the country.”

APPENDIX

Alaska. The Alaska Supreme Court is currently considering e-discovery rule proposals for amendments which largely mirror the Federal Amendments.

Arizona. The Arizona Supreme Court adopted a comprehensive set of e-discovery rules which became effective on January 1, 2008. See http://www.supreme.state.az.us/rules/ramd_pdf/r-06-0034.pdf. Unlike other states, the amended Arizona Rules require early disclosure of electronically stored information and explicitly authorize a court to enter pretrial orders requiring measures to preserve documents and ESI. See Schaffer and Austin, *New Arizona E-Discovery Rules*, 44-FED ARIZ. ATT'Y 24 (February 2008) (discussing implications of fact that Arizona disclosure obligations are "far broader" than federal rule).

Arkansas. In January, 2008, the Arkansas Supreme Court adopted a rule allowing a presumptive claim of inadvertent production of privilege and work product information. A copy of the text is available at http://courts.arkansas.gov/rules/rules_civ_procedure/v.cfm. Separately, Arkansas also adopted Evidence Rule 502(f) including provisions holding that selective disclosure to the government does not operate as a waiver. http://courts.arkansas.gov/rules/rules_of_evidence/article5/index.cfm#2. See R. Ryan Younger, *Recent Developments*, 61 ARK. L. REV. 187 (2008).

California. The California Legislature adopted comprehensive e-discovery amendments to its Code of Civil Procedure in August, 2008. See http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0901-0950/ab_926_bill_20080808_enrolled.html.

The provisions evolved from those originally recommended in an April, 2008 Report prepared by the California Judicial Council, found at <http://www.courtinfo.ca.gov/jc/documents/reports/042508item4.pdf>. The legislation was vetoed in September, 2008. The legislation differed in a number of respects from the Federal Amendments, including the fact that it does not explicitly acknowledge that no duty exists to produce information from an inaccessible source. The safe harbor provisions mirror Rule 37(e) but add that they "shall not be construed to alter any obligation to preserve discoverable information." The legislation was reintroduced on December 1, 2008 as Assembly

Bill No. 5 without change and is currently pending before the appropriate committees in the Legislature.

Connecticut. The Connecticut Supreme Court Rules Committee has referred a proposal based on the Uniform Rules to its Civil Task Force for review and recommendation at its September, 2008 meeting.

District of Columbia. The District of Columbia Court of Appeals has stayed the deadline for compliance with the Federal Amendments to enable the Superior Court and its advisory committee time to revise the local rules.

Idaho. Idaho amended its Rules of Civil Procedure in 2006 modeled on Tex. R. Civ. P. 196.4, but made the cost-shifting of reasonable expense of any extraordinary steps a matter of discretion, not mandated as in Texas. See http://www.isc.idaho.gov/rules/Discovery_Rule306.htm.

Indiana. The Indiana Supreme Court adopted Amendments, effective on January 1, 2008, largely replicating the Federal Amendments. See www.in.gov/judiciary/orders/rule-amendments/2007/trial-091007.pdf See Lisa J. Berry-Tayman, *Indiana Sate E-Discovery Rules: Comparison to Other State E-Discovery Rules and to the Federal E-Discovery Rules*, 51-APR Res Gestae 17 (April, 2008).

Iowa. The Iowa Supreme Court amended the Iowa Rules of Civil Procedure effective May 1, 2008 based on the 2006 Amendments. See <http://www.judicial.state.ia.us/wfdata/frame6210-1671/File58.pdf>.

Kansas. The Legislature adopted and the Governor signed Kansas Bill SB 434 to amend the Kansas Rules to largely mirror the Federal Amendments, effective July 1, 2008. The text is available on the Legislature website at <http://www.kslegislaure.org/bills/2008/434.pdf>. See J. Nick Badgerow, *ESI Comes to the K.S.A.: Kansas adopts Federal Civil Procedure Rules on Electronic Discovery*, 77-AUG J. Kan. B.A. 30 (July/August 2008).

Louisiana. The legislature adopted some of the 2006 Federal Amendments and has been considering additional amendments. The first wave of changes in 2007 involved limits on production from inaccessible sources which are to be handled

as objections, per the Comments, and the process for claiming inadvertent production includes a waiver rule.

<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).

Maine. The Supreme Judicial Court of Maine adopted e-discovery amendments based on the 206 Amendments effective August 1, 2009. See http://www.courts.maine.gov/rules_forms_fees/rules/MRCivPAmend7-08.pdf. Minor corrections were quickly made with the same effective date http://www.courts.state.me.us/rules_forms_fees/rules/MRCivPAmend7-30.pdf. The Advisory Committee Notes are quite informative, especially in regard to defining “routine” and “good faith” in Rule 37(e).

Maryland. The Court of Appeals (the highest court) adopted e-discovery based on the provisions of the 2006 Amendments. See <http://www.courts.state.md.us/rules/rodocs/ro158.pdf>. Instead of requiring “good cause” for production from inaccessible sources, a party requesting discovery must establish that the “need” outweighs the burden and cost of “locating, retrieving, and producing” it. Also, the amendment relating to disclosure of privileged material includes a substantive waiver provisions.

Michigan. The Michigan Supreme Court has adopted a series of e-discovery provisions similar to the 2006 Amendments. See http://www.icle.org/contentfiles/milawnews/rules/mcr/AMENDED/2007-24_12-16-08_UNFORMATTED-ORDER_AMENDMENT.PDF.

Minnesota. The Minnesota Supreme Court adopted amendments to its Rules of Civil Procedure which largely mirror the 2006 Amendments. http://www.courts.state.mn.us/documents/0/Public/Rules/RCP_effective_7-1-2007.pdf. See Megan E. Burkhammer, *New Turns in the Maze: Finding your Way in the New Civil Rules*, 64-JUN Bench & B. Minn 23 (May/June 2007).

Mississippi. Mississippi adopted e-discovery amendments in 2003 to its Rule 26 (“General Provisions Governing Discovery”).

Montana. The Supreme Court of Montana adopted amendments to its civil rules largely incorporating the 2006 Amend-

ments in 2008. <http://courts.mt.gov/orders/AF07-0157.pdf>, as amended, 32-APR Mont. Law 23 (2008). See *Montana Lawyer, Court Issues Major Rule Changes on Civil Procedure and Court Records*, 32-MAR Mont. Law. 12 (March 2007).

Nebraska. The Supreme Court has adopted limited amendments regarding discoverability and form of production of ESI effective in July, 2008. See <http://www.supremecourt.ne.gov/rules/pdf/Ch6Art3.pdf>.

New Hampshire. The Supreme Court has added a “scheduling conference” to its standing orders to discuss key e-discovery topics such as accessibility, costs, form of production and the need for and extent of efforts to implement preservation. <http://www.courts.state.nh.us/rules/sror/sror-h3-62.htm>.

New Jersey. The New Jersey Civil Rules, effective September 1, 2006, incorporate the provisions of the 2006 Amendments with certain minor exceptions. See <http://www.judiciary.state.nj.us/rules/part4toc.htm>

30. **New York.** The Civil Practice Law & Rules Advisory of the New York State Bar Association has prepared Report including a possible set of e-discovery rule amendments, as approved by the State Bar Association. See <http://www.nycbar.org/pdf/report/bar%20comm%20ediscovery%20ltr.pdf>

A bill based on the report has been introduced into the Legislature in February, 2009. Rule 8 of the statewide rules of the Commercial Division of the Supreme Court (§202.70) requires consultations regarding e-discovery issues prior to conferences. On December 28, 2007, an amendment modeled on Rule 8 was proposed to Uniform Rule 202.12 by the New York City Bar Committee on State Courts of Superior Jurisdiction for preliminary conferences.

North Carolina. A North Carolina State Bar Committee has proposed a number of innovative e-discovery amendments to the North Carolina Civil Rules, presumably to be considered at the next legislative session. See http://litigation.ncbar.org/Newsletters/Newsletters/Downloads_GetFile.aspx?id=6996.

The North Carolina Business Court included provisions relating to discussion of disputed e-discovery issues in their rules. See <http://www.ncbusinesscourt.net/new/localrules/> (Rule 18.6).

North Dakota. The Joint Procedure Committee adopted amendments based on the 2006 Amendments effective March 1, 2008. See <http://www.court.state.nd.us/rules/civil/frameset.htm>

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

Tennessee. The Tennessee Supreme Court has adopted amendments which require legislative action before they become effective. See <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/proposals/2008/Tn%20Rules%20Civil%20Procedure%20e-discovery%20amend%20publ%20comm%20ord%206-20-08.pdf>

Texas. Texas was the first state to enact e-discovery rules, having added §196.3 and §196.4 to its Civil Procedure code in 1999. It requires payment of reasonable expenses of any extraordinary steps required to retrieve and produce information which is not reasonably available to the responding party in its ordinary course of business.

Utah. The Utah Supreme Court approved a set of e-discovery rules based on the Federal Rules, effective on November 1, 2007. Unlike most other state enactments, preservation obligations are among the topics included in the pre-trial provisions, the power to sanction under inherent powers is expressly recognized and early disclosure requirements are mandated. <http://www.utcourts.gov/resources/rules/urcp/>

Virginia. The Virginia Advisory Committee prepared a revised draft of e-discovery amendments which was open for Public Comments until March, 2008.

Washington. A subcommittee of the Washington State Rules Committee proposed adoption of the provisions of the Federal Amendments. Credible sources report that the proposal has not yet been considered by the Supreme Court.