

ANNUAL REPORT
OF THE
COMMITTEE ON DISCOVERY PROCEDURES
TO THE ILLINOIS JUDICIAL CONFERENCE

Hon Mary Anne Mason, Chair

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October 2008

I. STATEMENT ON COMMITTEE CONTINUATION

The purpose of the Committee on Discovery Procedures (Committee) is to review and assess discovery devices used in Illinois. It is the goal of the Committee to propose recommendations that expedite discovery and eliminate any abuses of the discovery process. To accomplish this goal, the Committee researches significant discovery issues and responds to discovery-related inquiries. The Committee therefore believes that it provides valuable expertise in the area of civil discovery. For this reason, the Committee requests that it be permitted to continue its work in Conference Year 2009.

II. SUMMARY OF COMMITTEE ACTIVITIES

A. Committee Charge

The Committee is charged with studying and making recommendations on the discovery devices used in Illinois. The Committee also is charged with investigating and making recommendations on innovative means of expediting pretrial discovery and ending any abuses of the discovery process so as to promote early settlement discussions and to encourage civility among attorneys. Finally, the Committee's charge includes reviewing and making recommendations on proposals concerning discovery matters submitted by the Supreme Court Rules Committee, other committees, or other sources.

1. Supreme Court Rule 204

In conjunction with its charge, the Committee considered a proposal, forwarded by the Supreme Court Rules Committee, to amend Supreme Court Rule 204 (Compelling Appearance of Deponent) by creating a new paragraph (d) entitled "Non-Compliance by Non-Parties: Body Attachment." Specifically, the proposed amendment provides that an order of body attachment upon a non-party for non-compliance with a discovery order or subpoena shall not issue without proof of personal service of the rule to show cause or order of contempt upon the non-party. The proposed amendment also provides that a court may order a body attachment without proof of personal service upon a non-party, following a showing that there exists a reasonable likelihood of imminent and irreparable harm. In response to the Committee's concern about the type of circumstances warranted for a body attachment to issue without proof of personal service, the Committee was informed that the proposed amendment attempts to address situations where the statute of limitations or other such time constraint is at issue and the testimony of a witness is needed in a timely fashion. It also addresses situations, such as abuse of minors cases, where there is a need to bring the witness in and get his or her testimony immediately.

After considering the proposed amendment, the Committee rejected that portion permitting a body attachment without proof of personal service. Although the Committee recognized the

drafter's intent to allow for exigent circumstances, the Committee determined that personal service upon a non-party should not be excused. The Committee, however, agreed with the portion of the proposal that permits an order of body attachment upon a non-party provided that there is proof of personal service. Pursuant to Supreme Court Rule 3, the Committee forwarded its decision to the Supreme Court Rules Committee.

2. Supreme Court Rules 216/222

In further adherence with its charge, the Committee continued its reconsideration of its proposed amendments to Supreme Court Rule 216 (Admission of Fact or Genuineness of Documents) in light of concerns raised at the Annual Public Hearing and the Illinois Supreme Court's decision in *Vision Point of Sale, Inc. v. Haas et al.*, 226 Ill. 2d 334 (2007). Initially, the Committee determined that abuses surrounding the use of Rule 216 often occur in small cases in high volume courtrooms, where many of the law firms are "bulk filers," who represent credit card companies and collection agencies, and many of the litigants are *pro se*. The Committee responded to such abuses by proposing certain narrow amendments to Rule 216, including requiring prior leave of court before serving a request to admit; proper notice to all parties; and prohibiting such requests from (a) being bundled with interrogatories and document requests and (b) being served more than 120 days after the filing of a responsive pleading unless there is agreement otherwise or the court so orders. The Committee limited application of its proposed amendments to civil actions not in excess of \$50,000. In limiting the scope of its proposed amendments, the Committee sought to curb the misuse of Rule 216 requests and yet retain the original purpose of the rule to clarify and simplify evidentiary issues at trial.

The Committee's proposed amendments to Rule 216 generated significant comments at the Annual Public Hearing regarding the limited application of the amendment, the time for filing requests, and requiring leave of court. As noted above, the Committee in this past Conference year reconsidered its proposed amendments in light of the comments raised at the public hearing and in conjunction with concerns in the legal community that requests are issued before discovery is completed and that requests are high in number. The Committee also considered the impact of the Illinois Supreme Court's decision in *Vision Point of Sale, Inc.*, 226 Ill.2d 334, which recognized the trial court's discretion with respect to resolving requests for admission.

In addressing the above concerns, the Committee focused on limiting the number of requests and requiring prior leave of court in all cases. The Committee sought to provide discretion to the trial court regarding the timing for issuance of requests to admit and whether discovery is, or is not, needed to provide the proper response. From a trial court's perspective, the most troubling aspect of Rule 216 is its self-executing language that carries with it the potential for resolving obviously disputed issues of fact through inadvertence by the recipient of the request. Although *Vision Point* certainly alleviates some of the more "automatic" outcomes under prior caselaw, it does not articulate, nor could it, the circumstances under which a trial court would be justified in relieving the recipient of the adverse effect of a failure to respond. Amending Rule 216

to require trial court approval prior to issuance of requests to admit will eliminate many *post hoc* disputes about whether “good cause” under Rule 183 for the failure to adhere to Rule 216’s time limitations has been shown. Given the gamesmanship often involved in utilizing requests to admit, the Committee intended to provide the trial court with the ability to control the conduct of the parties and to eliminate the “gotcha” aspect of the present rule. The Committee also sought to limit the number of requests to be consistent with Rule 213(c), in light of the experience of trial judges in dealing with dozens, if not hundreds, of requests to admit.

In conjunction with Rule 216, the Committee proposed amendments to Supreme Court Rule 222, which applies to cases seeking damages not in excess of \$50,000. Specifically, the Committee proposed limiting the timing of requests in the above cases. The Committee forwarded its revised amendments to Rules 216/222 to the Supreme Court Rules Committee.

3. Supreme Court Rule 214

In addition to Rules 216 and 222, the Committee further continued its discussion of Supreme Court Rule 214 in light of comments raised at the Annual Public Hearing. As noted in last year’s Committee report, the Committee proposed changes to Rule 214 to address the problems associated with sorting through various and often voluminous documents submitted pursuant to a written request to produce. Specifically, the Committee recommended that documents, produced pursuant to a Rule 214 request, be labeled to correspond with the specific categories in the written request so as to allow the requesting party to reasonably identify the specific category in the request that corresponds to each produced document. Comments at the public hearing focused on the potential burden resulting from the obligation to categorize documents. In its subsequent discussion on this issue, the Committee continued its support of labeling documents pursuant to a Rule 214 request to produce. Members of the Committee indicated that it is a great aid in moving a case along to label and organize documents. The Committee also discussed the possibility of the trial court being authorized to require a producing party to organize and label documents following a showing of good cause by a party obtaining the documents. Nonetheless, the Committee noted that Rule 214 arises in e-Discovery issues. Therefore, the Committee decided to defer additional discussion on proposed changes to Rule 214 until the Court considers the Committee’s e-Discovery report, and directs the Committee to propose changes to discovery rules relating to e-Discovery.

B. Conference Year 2007 Continued Projects/Priorities

The following subjects represent the projects/priorities assigned by the Court to the Committee for consideration in Conference Year 2007, which were extended into Conference Year 2008.

1. e-Discovery

During the past Conference year, the Committee continued its study of e-Discovery (*i.e.* discovery of electronically stored information). In particular, the Committee explored the electronic discovery provisions of the Federal Rules of Civil Procedure, which became effective December 1, 2006. The Committee also collected the rules from states providing for e-Discovery, and examined caselaw along with numerous articles written on this subject. The Committee concluded its study of e-Discovery by preparing a report, which is attached, for the Court's consideration.

The report discusses the current status of federal and state rules, case law and guidelines promulgated by various organizations regarding e-Discovery. The purpose of the report is to summarize the current state of the law on e-Discovery and to point out the issues commonly faced in the discovery of electronically stored information such as preservation, retrieval, production, disclosure of privileged or confidential communications and cost allocation. The Committee concludes its report by providing the Court with options for addressing e-Discovery issues, including whether to revamp the Supreme Court Rules to incorporate all federal amendments; to amend select rules to conform to federal amendments; and/or to promulgate standards/guidelines for trial judges.

In addition to the report, the Committee considered proposed amendments to select Supreme Court Rules addressing discovery. The Committee, however, deferred further discussion of any recommended rule changes relating to e-Discovery pending further direction from the Court following its review of the Committee's report.

2. Mandatory Disclosure

The Committee was assigned the task of exploring the feasibility and nuances of a rule requiring mandatory disclosure of relevant documents given the increasing problem of parties not receiving relevant information before trial. The Committee decided to defer its discussion of mandatory disclosure because of the potential impact of e-Discovery. The Committee further decided that, prior to resuming its discussion on this matter, it would explore how well mandatory disclosure is working in the federal court.

3. Remaining Projects

Due to the Committee's focus on e-Discovery and the aforementioned rules proposals, the following assigned projects were not addressed in the past Conference year:

- Define work product and privilege for purposes of objecting to discovery under Supreme Court Rule 201(b)(2) (Scope of Discovery);
- Review the use of depositions by telephone under Supreme Court Rule 206(h) (Remote Electronic Means Depositions) without requiring a stipulation or court order;

- Explore the feasibility of contention discovery as used in the federal rules;
- Study and make recommendations on whether Supreme Court Rule 210 (Depositions on Written Questions) can be used in conjunction with Supreme Court Rule 204(c) (Depositions of Physicians) to permit the formulation of questions addressed to non-party physicians prior to deciding whether to take their depositions;
- Examine whether documents obtained during discovery should be presumptively admissible without requiring foundation testimony; and
- Study and report on whether general objections to interrogatories/requests to produce should be permissible.

III. PROPOSED COMMITTEE ACTIVITIES FOR THE NEXT CONFERENCE YEAR

During the 2009 Conference year, the Committee requests that it be permitted to address its remaining projects continued from the prior Conference year. The Committee also requests that, following direction from the Court, it be permitted to address any rule changes relating to e-Discovery. The Committee further requests that it be permitted to address whether the disclosures required under Rule 213(f) should include a list of any other case in which the witness has testified as an expert within the preceding four years. Finally, the Committee will review any proposals submitted by the Supreme Court Rules Committee.

IV. RECOMMENDATIONS

The Committee recommends that the Conference forward its e-Discovery report to the Court for consideration.

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APPENDIX

**REPORT OF THE COMMITTEE ON DISCOVERY
PROCEDURES TO THE ILLINOIS SUPREME COURT
REGARDING E-DISCOVERY¹**

February 29, 2008

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Hon. James J. Mesich

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¹ The Committee wishes to thank Timothy Cox and Seth Jaffe, Law Clerks to the Honorable Mary Anne Mason, and Martin Syvertsen and Long Truong, judicial externs, for their assistance in the preparation of this Report.

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INTRODUCTION

Much has been written of late regarding the proliferation of issues relating to the discovery of electronically stored information (“ESI”). As individuals and businesses increasingly conduct their everyday affairs in a “paperless” environment, the importance of understanding and accessing ESI has engaged lawyers, legal scholars and, certainly, judges. Although the body of law concerning e-discovery is relatively young, it is a fertile ground for debate in the legal community. The federal courts and several states have enacted new or revised existing rules to address recurring issues regarding the discovery of ESI. The purpose of this Report is to summarize for the Court the current state of rule-based and decisional law on the subject with a view toward enacting or revising rules in Illinois on this topic.

The problems posed by “big document” cases are not new. In such cases, to accommodate the sheer volume of discoverable material, opposing counsel have sometimes agreed to lease warehouse space as a common document depository with established guidelines for access and copying or have jointly hired a third party to oversee the process. Some of these same techniques translate into cases involving ESI, but there is clearly a difference in scale. The potential volume of discoverable material in these cases exceeds by many multiples the warehouse of documents in past cases.¹ Given the speed with which information systems become obsolete or are upgraded, discovery of ESI also entails issues relating to preservation, accessibility and the cost of restoration not

¹ See, e.g., Committee on Rules of Practice and Procedures of the Judicial Conference of the United States, *Report of the Civil Rules Advisory Committee*, p. 3 (Washington, D.C. August 3, 2004): “A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes: each terabyte represents the equivalent of 500 [m]illion typewritten pages of plain text.”

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encountered in a typical document case. Daunting as these problems may seem, they must be viewed (and particularly from a judicial perspective) with the following truism in mind: there is, in most cases, no correlation between the volume of ESI available and the volume of evidence that is relevant to the issues presented in a particular case. In other words, the information that is relevant to resolution of the issues is likely the same whether it is available in hard copy or electronically and the fact that there is a greater volume and variety of electronic information does not mean that there necessarily exists a correspondingly greater volume of relevant information. Nevertheless, when relevant information is maintained electronically, litigants and courts must address the most efficient and inexpensive way to obtain that information.

In any case likely to involve discovery of ESI, an early, proactive role, primarily by counsel and, secondarily, by the trial judge can avoid many of the more controversial issues discussed in published opinions. For example, because many organizations have e-mail retention policies that require e-mails to be deleted periodically, a discussion among the court and opposing counsel at the outset of litigation can avoid spoliation claims or motions related to the cost of restoring "inaccessible" information. The earlier issues relating to ESI are addressed and the sooner a common understanding regarding the obligations of the parties and their counsel is reached, the less problematic those issues will be.

In this Report, the Committee will discuss the current status (as of the date of this Report) of federal and state rulemaking regarding e-discovery as well as common themes emerging from caselaw on the subject. The Report will also discuss "guidelines" and "protocols" promulgated by various organizations regarding e-discovery. The final

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section of this Report will discuss a variety of approaches this Court could adopt to address e-discovery issues.

I.

FEDERAL AND STATE RULES REGARDING E-DISCOVERY

A. Amendments to the Federal Rules of Civil Procedures (Appendix A)

Effective December 1, 2006, amendments to the Federal Rules of Civil Procedure (“FRCP”) addressing issues relating to e-discovery went into effect. Those amendments affected Rules 16, 26, 33, 34 and 37² (collectively, the “Federal Amendments”). The Federal Amendments are designed to cover ESI “stored in any medium” and are intended “to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.” Advisory Committee Notes to Rule 34. This expansive definition of ESI permeates the amendments to the federal rules. The Federal Amendments will be discussed grouped according to the phase of e-discovery they address.

1. Early Attention to E-Discovery Issues (Rules 16, 26(a), (f))

FRCP 16(b) mandates the entry of a Scheduling Order addressing deadlines for various phases of litigation such as the amendment of pleadings and the filing of dispositive motions. The amendments expand the list of suggested topics to include the following:

16(b)(5): provisions for disclosure or discovery of electronically stored information;

16(b)(6): any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production.

² Rule 45, dealing with subpoenas to non-parties, was also amended to correspond to the amendments relating to party discovery with additional emphasis on avoiding the imposition of undue burdens on non-parties.

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Form 35, which memorializes the report of the parties' planning meeting (conducted pursuant to Rule 26(f) in advance of the Scheduling Conference), is likewise modified to include provisions corresponding to the amendments of subsections (b)(5) and (b)(6) above. The Committee Notes to Rule 16 recognize that early consideration of issues relating to the discovery and production of ESI "will help avoid difficulties that might otherwise arise."

Rule 26 has also been amended to clarify parties' duty of disclosure with respect to ESI. In particular, subsection (a)(1)(B) requires that the parties must, without awaiting a discovery request, disclose "a copy of, or a description by category and location of, all documents, electronically stored information, and other tangible objects that are in the possession, custody or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment."³ Subsection (f) of Rule 26 requires the parties to add to the topics discussed prior to the Scheduling Conference "any issues relating to preserving discoverable information, and to develop a discovery plan that indicates the parties' views and proposals concerning:

* * *

- (3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;
- (4) any issues related to claims of privilege or of protection as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order;

Under the amendments to Rules 16 and 26, responsibility for initiating and resolving issues related to ESI falls primarily on counsel for the litigants, with assistance

³ The amendments also deleted "data compilations" from the list of materials to be produced because the term was a subset of both "documents" and "electronically stored information."

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from the court as necessary at the Scheduling Conference. As will be discussed below, the current version of the Illinois Supreme Court Rules places no such burden on counsel for the parties in cases pending in Illinois.

2. Necessity of and Form of Production of ESI (Rules 26(b)(2), 33 & 34 (a)&(b))

Retrieval and production of ESI entail special considerations not generally encountered in cases involving primarily documentary evidence. Because of 1) the frequency with which many businesses change their systems for storing information electronically and 2) routine deletion or alteration of ESI in the normal course of business, certain of the Federal Amendments address issues relating to the accessibility of information sought through discovery as well as the form in which such information must be produced.⁴

Rule 26(b)(2)(B) addresses the accessibility of ESI and provides:

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

The Committee Notes to this section are extensive. Although not explicit in the amendments, the Notes explain that a party responding to a discovery request that entails a search of ESI must advise the requesting party of sources of ESI that the responder is neither searching nor producing. (“The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither

⁴ The amendments discussed in this section pertain to discovery between and among parties to litigation. Corresponding amendments were also made to Rule 45 concerning subpoenas for ESI directed to non-parties.

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searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.”) The Committee Notes recognize that it is impossible to define by rule all of the factors that go into the determination in any given case that ESI is not “reasonably accessible” and that its location, retrieval and production will cause an undue burden. Among the factors the Committee suggests be considered in this regard are 1) the specificity of the discovery request; 2) the quantity of information available from other and more easily accessed sources; 3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; 4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; 5) predictions as to the importance and usefulness of further information; 6) the importance of the issues at stake in the litigation; and 7) the parties’ resources.⁵

The responding party bears the burden of demonstrating that the requested ESI is not accessible. The Committee Notes contemplate that if a claim is made that identified sources of information are not reasonably accessible, the requesting party may need discovery – production of a sample of the information contained on the identified sources, some form of inspection of such sources or the deposition of an individual knowledgeable about the responder’s information systems – to test that assertion. Once it is established that the particular source of ESI is not reasonably accessible, the burden shifts to the requesting party to show good cause for its production through examination of the factors enumerated above. Ultimately, the Committee Notes conclude that “[a]

⁵ The application of these, as well as other factors developed by courts is discussed, *infra*, Section II.

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requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery."

Rule 33 governs interrogatories to parties. The 2006 amendments to subsection (d) provide that when the answer to an interrogatory may be derived from a party's business records, including ESI, and the burden of deriving or ascertaining the answer is substantially the same for both the requesting and responding party, it is a sufficient response to specify the records from which the answer may be derived. The ability to provide ESI in lieu of a detailed answer to an interrogatory can greatly streamline the burden of responding to discovery in appropriate cases. Assume, for example, that the subject matter of litigation is the breach of a contract between two corporations. An interrogatory would reasonably ask for details regarding the dates of all internal communications regarding the contract or performance thereof. It would be burdensome to require the responding party to prepare such a detailed answer when, with appropriate search terms, the requesting party could just as easily derive the answer from a review of all the responding company's internal e-mails. The Committee Notes to Rule 33(d) caution, however, that in such situations, the responding party may be required to "provide some combination of technical support, information on application software, or other assistance."

The Amendments also address the form of production of ESI. ESI is dynamic in that it is constantly subject to change in the normal operation of an information system. In addition, ESI is maintained on any given information system in a variety of forms,

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some more or less “reasonably usable” than others. Therefore, the form that production of such information will take is an important consideration.

Rule 34(a) governing the scope of production of tangible evidence in discovery was amended to provide that the scope of a request for production may include a request to “inspect, copy, test, or sample any designated documents or electronically stored information . . ., including data compilations in any medium from which information can be obtained – translated, if necessary, by the respondent into reasonably usable form. . . .” Subsection (b) of Rule 34 governs the form of production. The requesting party may specify the form in which ESI is to be produced. The responding party may object to the specified form of production, stating the reasons for the objection and indicating the form it intends to use. The default standard for the form of production is found in Rule 34(b)(ii): if a request does not specify a particular form for production of ESI, “a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.” Subsection (iii) provides that a party need not produce ESI in more than one form.

The Committee Notes acknowledge that courts and practitioners have long understood that the term “documents”, as used in Rule 34, encompasses ESI. However, given the proliferation of “dynamic databases” and other forms of ESI “far different from fixed expression on paper”, the amendments now make clear that discovery of ESI “stands on equal footing with discovery of paper documents.” The amendments to Rule 34 further make explicit that parties may request the opportunity to test or sample materials sought under the rule in addition to inspecting or copying them. The Notes recognize that “testing” or “sampling” in the context of ESI may entail direct access to a

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party's information system and thus may raise confidentiality or privacy issues. They further caution that the inclusion of testing or sampling as a means of obtaining information "is not meant to create a routine right of direct access to a party's electronic information system."

As to the form of production, the Committee Notes indicate that different types of ESI may call for different forms of production. Requiring the parties to discuss (Rule 26(f)(3)) and expressly specify the form or forms of production of ESI is designed to "resolve disputes before the expense and work of production occurs." Although the amendments provide the option to the responding party to produce ESI in a "reasonably usable" form as opposed to the form in which it is ordinarily maintained by the party, the Notes indicate that this "does not mean that a responding party is free to convert [ESI] from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation." In particular, if the ordinary form of the ESI is searchable by electronic means, the form of production, if different, should not "remove[] or significantly degrade[] this feature."

3. Procedures for Asserting Privilege and Work Product Protection for ESI (Rule 26(b)(5))

Because of the volume of information involved, production of ESI often entails enormous burdens in terms of identifying and segregating information to which either the attorney-client or work product privilege may apply. ESI poses a far greater likelihood of inadvertent disclosure of privileged information than do traditional documents. Furthermore, imposing a rigid obligation on the producing party to conduct a privilege review prior to production will, in many cases, significantly increase the time and

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expense involved in producing relevant information. In recognition of the foregoing, new subsection (B) to Rule 26(b)(5) addresses the procedure for asserting a claim of privilege after production of information in discovery:

If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Subsection (B) does not address whether the disclosure of the allegedly privileged material operates as a waiver, but instead provides the procedure by which the claim of privilege, as well as any waiver determination can be made. Whether a waiver has occurred under the circumstances of any given case is left for the court to decide.

The Committee Notes indicate that new subsection (B) is designed to be read in tandem with the amendments to Rule 26(f) (regarding the parties' obligations to discuss privilege issues) and those to Rule 16(b) (providing for the entry by the court of an order reflecting any agreements the parties have reached regarding privilege issues). Thus, if the parties have previously agreed on a mechanism for asserting privilege claims, which is later embodied in a court order, that mechanism will ordinarily control over the provisions of Rule 26(b)(5)(B).

4. "Safe Harbor" for Loss of ESI (Rule 37)

One of the more controversial amendments to the federal rules involves the addition of a "safe harbor" provision to Rule 37. The Rule itself governs the award of

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sanctions for failure to make disclosures or cooperate in discovery. The amendments added a new subsection (f), which provides:

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Again, because of the ephemeral and changeable nature of ESI and because the ordinary operation of an information system may result in the alteration or loss of ESI without any intention to do so on the user's part, the amendment creates a rebuttable presumption that ESI lost as a result of the routine, good-faith operation of an information system is not sanctionable. The Committee Notes state that preservation obligations relating to ESI – whether imposed by common law, statute, regulation or court order - may require a party to take affirmative steps to suspend or modify the normal operations of an information system in order to prevent the loss of information. The Notes specifically recognize that, notwithstanding the “safe harbor” provisions, “a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing the operation to continue in order to destroy specific stored information that it is required to preserve.” The Notes emphasize that the amendment is limited to a court's ability to impose sanctions “under these rules” and that it does not affect “other sources of authority to impose sanctions.” Further, even if it is found that the responding party acted in good faith, a court may still take steps to ameliorate the effect of the loss of relevant information, such as providing for additional oral or written discovery.

Following passage of the 2006 Amendments, certain district courts have enacted local “guidelines” or “protocols” relating to ESI. See U.S. District Court for the District of Kansas, “Guidelines for the Discovery of Electronically Stored Information”,

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<http://www.ksd.uscourts.gov>; U.S. District Court for the District of Maryland, “Suggested Protocol for Discovery of Electronically Stored Information”, <http://www/mdd.uscourts.gov>; and U.S. District Court for the Northern District of Ohio, “Default Standard for Discovery of Electronically Stored Information (“E-Discovery”)”, <http://www.ohnd.uscourts.gov>. The Federal Judicial Center has also published a handbook entitled, “Managing Discovery of Electronic Information: A Pocket Guide for Judges,” which is available at www.fjc.gov. Regarding such efforts, one publication observed: “There is much to be gained by such experimentation, but a serious risk exists that these [formal local rules or informal guidelines] will lead to rigidity and defeat the purpose of the Amended Rules to require parties, not courts, to make the tough choices that fit the particular discovery needs of a case.” See “The Sedona Principles (2d ed.), Best Practices Recommendations & Principles for Addressing Electronic Document Production”, Comment 12.c, p. 65 (June 2007).

B. State Rules Regarding ESI (Appendix B)⁶

A number of state courts, both before and after passage of the 2006 Amendments to the Federal Rules of Civil Procedure, have enacted local rules relating to the discovery of ESI. As of the date of this Report, 11 states have passed rules relating to the discovery of ESI. Of those, four have incorporated the Federal Amendments - in whole or with slight modifications - as the state standard regarding ESI. (See App. B, Arizona Rules of Civil Procedure; Minnesota Rules of Civil Procedure; Montana Rules of Civil Procedure; Utah Rules of Civil Procedure).⁷ Several other states enacted provisions regarding the discovery of ESI that track some, but not all of the Federal Amendments, generally

⁶ For convenience, Appendix B is arranged alphabetically by state.

⁷ In addition, the District of Columbia is required by law to follow the Federal Rules of Civil Procedure.

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eliminating the “meet and confer” obligations and Scheduling Conference provisions.

(Id., Idaho Rules of Civil Procedure; Indiana Rules of Trial Procedure; Louisiana Code of Civil Procedure; New Jersey Rules of Civil Procedure). It is presumed that those states that have incorporated the Federal Amendments, in whole or in part, into state law will follow federal precedents on the interpretation and application of those provisions.

Certain other states, like Illinois, have included the concept of ESI in their discovery rules, but have not enacted detailed provisions regarding applicable procedures. (Id., Mississippi Rule 26; Rules of the Superior Court of the State of New Hampshire; Texas Rule of Civil Procedure 196.4).

Texas was the first state to enact a rule regarding discovery of ESI. In 1999, Rule 196 of the Texas Rules of Civil Procedure was amended to include the following provision:

196.4 *Electronic or magnetic data.* To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot – through reasonable efforts – retrieve the data or information requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

(App. B). The Texas rule differs from the Federal Amendments in certain significant respects including requiring the requesting party to “specifically request” “electronic or magnetic data.” Further, no “default” form of production is provided for; the requesting party “must” specify the form of production. Finally, in the event that production is ordered over the responding party’s objection, the court “must” order the requesting party

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to pay the reasonable expenses of production. The court lacks the discretion to engage in the balancing test contemplated by the Federal Amendments. Mississippi enacted a similar provision in 2003 that differs only with respect to the discretion of the court in cost-shifting: “the court **may** also order that the requesting party pay” (Id.)

C. Other Promulgations Regarding ESI

In addition to rulemaking, the discovery of ESI has been addressed by a variety of other bodies, including the Conference of Chief Justices, the National Conference of Commissioners on Uniform State Laws, the American Bar Association and the Sedona Conference Working Group on Electronic Document Retention & Production. Each group’s work product is discussed below.

1. Conference of Chief Justices: “Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information” (Appendix C)

The Conference of Chief Justices is an organization, founded in 1949, whose membership consists of the highest judicial official in each state, territory and commonwealth of the United States. It is dedicated to improving the administration of justice throughout the United States.

In August 2006, the Conference approved “Guidelines For State Trial Courts Regarding Discovery of Electronically-Stored Information.” The Conference describes the purpose of the Guidelines as follows: “The Guidelines should not be treated as model rules that can simply be plugged into a state’s procedural scheme. They have been crafted only to offer guidance to those faced with addressing the practical problems that the digital age has created” (App. C, p. vii). The Guidelines were promulgated in recognition of the fact that in many jurisdictions, discovery decisions are rarely, if ever, the subject of reported appellate decisions and, therefore, the development of a definable

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body of law will proceed at a glacial pace. The Guidelines are “intended to help in identifying the issues and determining the decision-making factors to be applied in the circumstances presented in a specific case.” (Id., p. ix).

The Guidelines define ESI as “any information created, stored, or best utilized with computer technology of any type,” and goes on to identify a non-exclusive list of types of ESI. “Accessible information” is defined as ESI “that is easily retrievable in the ordinary course of business without undue cost and burden.” (Id., Guideline 1, p. 1).

Guideline 2 defines the responsibility of the parties’ counsel to be informed regarding their respective client’s relevant information management systems and suggests that the trial judge should, “when appropriate,” encourage counsel to be well-informed about their clients’ electronic records. Guideline 3 addresses the court’s involvement in facilitating the production of ESI. Subsection A provides that the court should encourage counsel to come to agreement on the types of ESI to be disclosed as well as the manner and scheduling of disclosure. In the absence of an agreement, subsection B provides that the trial judge should direct counsel to exchange certain information including:

- 1) a list of the persons most knowledgeable regarding the relevant computer systems or networks;
- 2) a list of the most likely custodians of relevant ESI other than the party, together with a description of the custodian’s responsibilities and the ESI maintained by each custodian;
- 3) a list of each electronic system that may contain relevant ESI and each potentially relevant system that was operating during relevant time periods;
- 4) an indication whether relevant ESI may be of limited accessibility or duration of existence;
- 5) a list of relevant ESI stored off-site or off-system;
- 6) a description of efforts taken to preserve ESI;

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- 7) the form of production preferred by the party; and
- 8) notice of problems reasonably anticipated to arise in connection with requests for ESI.

The comments to Guideline 3 observe that in an effort to alleviate perceived burdens on responding parties, the party need only list those information systems believed to store relevant ESI. Obviously, requiring a large corporation to list and describe (by indicating the hardware and software used by each system, and the scope, organization and formats each system employs) all of its information systems would be unreasonable when only certain systems would be expected to store relevant ESI.

Guideline 4 outlines the procedure for an initial discovery conference at which the court and the parties will address what ESI is to be produced, the form of production, what steps the parties will take to preserve relevant ESI, procedures for the inadvertent disclosure of privileged ESI and the allocation of costs. Regarding the scope of discovery of ESI, Guideline 5 lists 13 factors a trial judge may consider in deciding whether to require production of ESI. These include, stated variously, the factors enumerated in the Committee Comments to Federal Rule 26(b)(2)(B), as well as a number of other factors, including the responding party's need to protect privileged, proprietary or confidential information, whether the information or software necessary to access the ESI is itself proprietary or confidential and whether the ESI is stored in such a way that makes it more costly or burdensome to access than is reasonably warranted by legitimate personal, business or other non-litigation-related reasons. Unlike the two-step process envisioned by the Federal Amendments (responding party establishes that ESI not "reasonably accessible"; then burden shifts to requesting party to show good cause

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for its production), the Guidelines include consideration of all of the relevant factors in the context of a motion to compel or for a protective order. The Comments to Guideline 5 note that this approach is unlike the presumption approach embodied in the Federal Rule 26(b)(2)(B) (“reasonably accessible” vs. “not reasonably accessible”) and the Sedona Principles (“active data” vs. “deleted” information) and is designed instead to provide a framework for decisionmaking.

With respect to the form of production of ESI, Guideline 6 provides that the judge should ordinarily require ESI to be produced in only one form and should select the form in which the ESI is ordinarily maintained or one that is reasonably usable. Guideline 6 presumes that the parties have been unable to agree and have provided the court with information sufficient to determine the appropriate form of production. This Guideline generally tracks the provisions of Federal Rule 34(b).

Reallocation of discovery costs is addressed in Guideline 7. To large extent, these considerations overlap with those enumerated in Guideline 5 as relevant to the determination of whether ESI should be produced in the first instance and include consideration of the specificity of the discovery request, the availability of the information from other sources, the cost of production compared to both the amount in controversy and the relative resources of the parties, the parties’ ability and incentive to control costs, the importance of the issues at stake and the relative benefits of obtaining the information. The comment to Guideline 7 indicates that it is largely drawn from the analysis in Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003), discussed in more detail below.

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Guideline 8 concerns inadvertent disclosure of privileged information. Unlike the Federal Amendments and various state rules, which provide the process for asserting a claim of privilege after inadvertent disclosure, but do not purport to address whether the disclosure acts as a waiver, Guideline 8 lists those factors to be taken in to account in determining whether a waiver has occurred. In addition to the existence of agreements reflecting the common understanding of counsel regarding the disclosure of privileged information, four other factors are listed as relevant in this regard:

- The total volume of information produced by the responding party;
- The amount of privileged information disclosed;
- The reasonableness of the precautions taken to prevent inadvertent disclosure; and
- The promptness of the actions taken to notify the receiving party and otherwise remedy the error.

Guideline 8 thus addresses the substantive law of waiver and provides a framework for resolving such issues in the context of ESI.⁸

Guideline 9 concerns preservation orders for ESI and states that generally, “a judge should require a threshold showing that the continuing existence and integrity of the [ESI] is threatened” before entering a preservation order.⁹ Once that showing is

⁸ It is debatable whether addressing substantive determinations such as waiver specifically in the context of ESI is necessary. Most jurisdictions have developed a body of common law on the subject of whether the inadvertent disclosure of privileged or confidential information constitutes a waiver. Although there are certainly considerations unique to the production of ESI – the sheer volume of information being produced and the cost and burden of conducting a comprehensive privilege review prior to production – it is not apparent that the principles articulated in existing caselaw are inadequate to address this issue.

⁹ Again, the issuance of preservation orders is not a judicial function unique to cases involving ESI and Guideline 9, like Guideline 8, articulates substantive considerations applicable to such motions. Judges have often been called upon to decide at the outset of litigation whether an order requiring the preservation of evidence should be entered. Such orders are used sparingly given the common law obligation of preservation attaching upon the filing of litigation. It is not clear that a different approach should apply in cases involving ESI.

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made, Guideline 9 suggests consideration of the following factors in determining the nature and scope of any preservation order:

1. The nature of the threat to the continuing existence or integrity of the ESI;
2. The potential for irreparable harm in the absence of a preservation order;
3. The ability of the responding party to maintain the ESI in its original form; and
4. The burden on the responding party of ordering preservation.

Finally, Guideline 10 addresses the imposition of sanctions as a result of the destruction of ESI, which the Comments indicate was designed to closely track the then pending amendment to Federal Rule 37. Like Rule 37, Guideline 10 establishes a presumption against the imposition of sanctions “absent exceptional circumstances.” Unlike Federal Rule 37, however, which appears to place the burden on the responding party to show that the loss of ESI was due to the “routine, good-faith operation of an electronic information system”, Guideline 10 instead provides that sanctions should be imposed “only if” a) there was a legal obligation to preserve the information at the time of its destruction; b) the destruction was **not** the result of the routine, good faith operation of the relevant system; and c) the destroyed information was subject to production under the applicable state standard for discovery (e.g., relevant or designed to lead to the discovery of relevant evidence). The phrasing of the foregoing standards implies that the burden of persuasion falls on the requesting party. The Comments further distinguish these standards from the “stringent standards” for the imposition of sanctions proposed in the *Sedona Principles*, discussed in more detail below.

2. National Conference of Commissioners on Uniform State Laws: “Uniform Rules relating to Discovery of Electronically Stored Information” (Appendix D)

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The National Conference of Commissioners on Uniform State Laws (“NCCUSL”) is a 116-year-old organization, based in Chicago, which, according to its website, “provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law.” www.nccusl.org. NCCUSL members must be lawyers and its current membership consists of lawyer-legislators, private attorneys, state and federal judges, law professors and legislative staff attorneys. Members are appointed by state governments, the District of Columbia, Puerto Rico and the U.S. Virgin Islands.

In August 2007, the NCCUSL approved “Uniform Rules Relating to Discovery of Electronically Stored Information.” (“Uniform Rules”). The Uniform Rules contemplate the enactment of legislation, which would supplement each jurisdiction’s code of civil procedure. As discovery in Illinois is governed not by the Illinois Code of Civil Procedure, but by this Court’s Rules, the Uniform Rules are discussed only to compare their provisions to those of the Federal Rules and other materials discussed above.

The Uniform Rules contain procedural provisions that largely track the Federal Amendments. For example, Uniform Rule 3 imposes “meet and confer” obligations upon counsel and requires that such a conference take place “not later than 21 days after each responding party first appears....” (Compare Fed.R.Civ.P 26(f): conference to take place at least 21 days prior to Scheduling Conference under Fed. R. Civ. P. 16, which itself must take place “as soon as practicable but in any case within 90 days after the appearance of a defendant.”). While Uniform Rule 3 requires the parties to memorialize the discovery plan reached (or any areas of disagreements that remain following the conference) in a written submission to the court, the Federal Amendments contain no such requirement. Finally, although Uniform Rule 3 refers to a conference with the court at which the results of the

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parties' conference will be addressed, it does not specify a time by which such a conference should occur.

Uniform Rule 4 provides that a court may issue an order governing the discovery of ESI on motion of a party, by stipulation or on its own motion. The order may address whether discovery of ESI is reasonably likely to be sought and, if so, may also address preservation of the information, the form of production, time limits for production, the permissible scope of discovery, procedures for asserting privilege claims, the method for preserving confidential or proprietary information belonging to a party or a third party and allocation of the expense of production. With slight, non-substantive variations, Uniform Rule 5 mirrors the "safe harbor" provisions of Fed. R. Civ. P. 37(f) regarding the loss of ESI as a result of the routine, good-faith operation of an electronic information system.

Uniform Rule 6 governs requests for production of ESI. It provides for requests for production of ESI and "for permission to inspect, copy, test, or sample the information." The responding party must serve a response that states with respect to each category of ESI sought either that the copying, testing, etc., will be permitted or an objection to the request stating the reasons for the objection. This provision runs counter to the presumption in the Federal Amendments that an order allowing testing or sampling of ESI should not be routine. (See, Committee Comments, Fed. R. Civ. P. 34: the inclusion of testing or sampling as a means of obtaining ESI "is not meant to create a routine right of direct access to a party's electronic information system.") Uniform Rule 7, which addresses the form of production, generally tracks the provisions of Fed. R. Civ. P. 34(b).

With respect to the allocation of expenses, Uniform Rule 8, entitled "Limitations on Discovery", provides that a court may direct the production of ESI from a source that is not

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“reasonably accessible” if the requesting party demonstrates that the likely benefit of the discovery outweighs the likely burden or expense taking into account the amount in controversy, the resources of the parties, the importance of the issues and the importance of the requested discovery in resolving the issues. Although Uniform Rule 8 is more specific than Amended Fed. R. Civ. P. 26(b)(2)(B) regarding the necessary showing by the requesting party (i.e., Rule 26(b)(2)(B) requires a showing of “good cause” for the production of ESI that is not “reasonably accessible”), the factors that go into the balancing determination under Uniform Rule 8 are less expansive than those suggested by the Comments to Rule 26 and the caselaw to date.

Inadvertent disclosure of privileged information is addressed in Uniform Rule 9. Again, like Fed. R. Civ. P. 26 (b)(5)(B), the Provisions of Uniform 9 are purely procedural and define the parties’ respective responsibilities following the disclosure of ESI later claimed to be privileged. The procedure outlined in Uniform Rule 9 closely tracks Rule 26, but does not include the explicit obligation on the producing party imposed by Rule 26 to preserve the information on its information system until the claim of privilege is resolved.

3. The Sedona Principles (2d ed.) (Appendix E)

The mission of the Sedona Conference, founded in 1997, is “to allow leading jurists, lawyers, experts, academics and others, at the cutting edge of issues in the area of antitrust law, complex litigation, and intellectual property, to come together – in conferences and mini-think tanks (Working Groups) – and engage in true dialogue, not debate, all in an effort to move the law forward in a reasoned and just way.”

www.thesedonaconference.org/tsc_mission. The first Working Group (“WG1”) was formed in mid-2002 to address “best practices” in the area of electronic document

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retention and production. The first version of “The Sedona Principles for Electronic Document Production” was issued in 2004. The second edition was issued in 2007 to reflect changes as a result of the passage of the Federal Amendments. See “The Sedona Principles (Second Edition): Best Practices Recommendations & Principles for Addressing Electronic Document Production” (June 2007) (collectively, “the Principles”), available at www.thesedonaconference.org.¹⁰

In many respects, the Principles address issues that are beyond the scope of court rules. For example, Principle 1 states, in part, that “[o]rganizations must properly preserve electronically stored information that can reasonably be anticipated to be relevant to litigation.” Comment 1.b to Principle 1 addresses the importance of proper internal records and information management policies and programs applied uniformly and in advance of litigation. (Id., Principle 1, Comment 1.b, p. 13: “Implementing policies ... can provide a solid basis to plan for the treatment of electronic documents during discovery. By following objective, preexisting policy, an organization can formulate its responses to electronic discovery not by expediency, but by reasoned consideration.”) Principle 2 concerns the balancing involved in determining whether ESI should be preserved, retrieved, reviewed and/or produced, but also addresses in Comment 2.d the need for coordination of internal efforts in these areas. (“The team approach permits an organization to leverage available resources and expertise in ensuring that the organization addresses its preservation and production obligations thoroughly, efficiently and cost-effectively.” Id., Principle 2, Comment 2.d, p. 19). Similarly, Principle 5,

¹⁰ In order not to burden the Court with too much information, only the Principles themselves are included in the Appendix. The Second Edition is accompanied by extensive commentary and annotations, which may be accessed on the website. WG1 has also published a Glossary of relevant ESI terms, which may also be accessed via the website.

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which concerns preservation obligations, addresses the necessity for organizations to prepare in advance for production requests relating to ESI (Id., Principle 5, Comment 5.b, p. 30) as well as the manner and form of communicating “litigation holds” when litigation is threatened (Id., Comment 5.d, p.32). While these discussions of “best practices” are enlightening and could guide decisionmaking in certain circumstances, they concern pre-litigation conduct and thus are not an appropriate subject of rulemaking.

Many of the Principles address the subject matter of the Federal Amendments and, as noted above, the Principles were revised following the latter’s enactment. With respect to the obligation to produce ESI, the concept of “accessibility” in the Federal Amendments has been incorporated into the Principles, although the focus of the Principles is still somewhat different. As discussed above, under amended Rule 26(b)(2)(B), a party “need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost.” In its original formulation, Principle 8 provided:

The primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval. Resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the cost, burden and disruption of retrieving and processing the data from such sources.

“The Sedona Principles: Best Practices recommendations & Principles for Addressing Electronic Document Production” (January 2004) (hereafter, “The Sedona Principles (January 2004)”), Principle 8.

As revised, Principle 8 states:

The primary source of [ESI] should be active data and information. Resort to disaster recovery backup tapes and other sources of [ESI] that are not reasonably accessible requires the requesting party to demonstrate need and relevance that

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outweigh the costs and burdens of retrieving and processing [ESI] from such sources, including the disruption of business and information management activities.

App. E, Principle 8. Under the revised formulation of Principle 8, once the responding party establishes that the ESI requested is not comprised of “active data”, it will be presumed that the information is not “reasonably accessible.” Comment 8.b to Principle 8 notes that the revised version “addresses the technical accessibility and the purpose of the storage, rather than simply the burdens and costs associated with access.” (Principle 8, Comment 8.b, p. 46). In contrast, under Rule 26(b)(2)(B), the burden falls on the responding party to demonstrate that the information is not “reasonably accessible because of undue burden or cost.”

The Principles also address the form of production. The 2004 version of Principle 12 provided that “[u]nless it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court.”

The Sedona Principles (January 2004), Principle 12. As revised, Principle 12 provides:

Absent party agreement or court order specifying the form or forms of production, production should be made in the form or forms in which the information is ordinarily maintained or in a reasonably usable form, taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case.

App. E, Principle 12.

Issues relating to metadata have surfaced in many cases involving the discovery of ESI. Metadata is information embedded in the document or in the system that created

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it that is not ordinarily visible to the naked eye.¹¹ For example, a document created using Microsoft Office software transmitted by e-mail will normally display only the final text, but if the recipient accesses the “Details” view of the folder and right clicks on the column titles, metadata embedded in the document will reveal information such as the date of its creation, the author and revisions made to the document.¹² Depending on the issues presented in any given case, production of ESI in a form that allows the recipient to access metadata may be appropriate and, in certain circumstances, crucial. Metadata can also be useful in authenticating documents stored electronically.¹³

The revisions to Principle 12 follow the amendments to Rule 34 that require production of ESI either in the form in which it is ordinarily maintained or in a “reasonably usable” form. Although neither Rule 34 nor the Committee Notes specifically address the production of metadata, the requirement of production of ESI in the “form in which it is ordinarily maintained” (i.e., enabling the user to access metadata), implies that the default standard for production generally includes metadata. The burden would then fall on the producing party to demonstrate that disclosure of

¹¹ For an informative discussion of the types and uses of metadata, see, Craig Ball, “Understanding Metadata: Knowing Metadata’s Different Forms And Evidentiary Significance Is Now An Essential Skill For Litigators,” 13 Law Tech. Prod. News 36 (Jan. 2006).

¹² Several states have issued ethics opinions regarding the producing lawyer’s, as well as the receiving lawyer’s obligations regarding the production of ESI containing metadata. See, Alabama Sate Bar, Office of General Counsel Formal Op. 2007-02 (lawyer has affirmative duty to take reasonable precautions to ensure that confidential metadata is properly protected, but receiving lawyer may not ethically mine metadata); Florida Bar Assn. Comm. On Professional Ethics, Formal Op. 06-2 (2006) (lawyers have duty to pay attention to metadata); Maryland Bar Assoc. Comm. on Ethics Op. 2007-09 (receiving attorney does not have ethical obligation to notify sender of inadvertent transmission of privileged information, but producing attorney has affirmative duty to avoid such inadvertent disclosures); New York Ethics Opinions 749 (2001) (lawyer has duty to use reasonable care when transmitting a document by e-mail to prevent disclosure of metadata containing client confidences or secrets; receiving lawyer has duty not to exploit the inadvertent or unauthorized transmission of client confidences or secrets); Id., Op. 782 (2004); but see, ABA Standing Committee on Ethics and Professional Responsibility, Formal Op. 06-442 (2006) (no specific prohibition against receiving lawyer reviewing and using embedded metadata).

¹³ See Ball, supra, fn 11.

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metadata is either not relevant or is unwarranted given other considerations such as privilege or confidentiality.

The Principles also address cost-shifting in the context of an order requiring production of ESI. Initially, Principle 13 adopted the approach of Texas Rule 196.4, which requires cost-shifting in the event that “unavailable” ESI is ordered produced. (“If the data or formatting of the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information **should** be shifted to the requesting party.” The Sedona Principles (January 2004), Principle 13 (emphasis supplied). Consistent with the discretion embodied in Rule 26 (“The court may specify conditions for the discovery”), Principle 13 now provides that in the event that the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the cost of retrieving and reviewing the information “**may** be shared by or shifted to” the requesting party. However, unlike the neutral provisions of Rule 26, Principle 13 persists in the presumption that cost-shifting or sharing is the norm “absent special circumstances”, a phrase not found in Rule 26.

Finally, Principle 14 deals with sanctions for the loss of ESI. In its original version, Principle 14 provided: “Sanctions, including spoliation findings, should only be considered by the court if, upon a showing of a clear duty to preserve, the court finds that there was an intentional or reckless failure to preserve and produce relevant electronic data” The Sedona Principles (January 2004), Principle 14. As revised, Principle 14 contemplates consideration of sanctions only if the court finds, inter alia, “a culpable

failure to preserve and produce relevant” ESI. This standard, although certainly less limiting than the “intentional or reckless” standard embodied in the original version, is nevertheless more stringent than amended Rule 37’s “good faith” standard.

II.

CASELAW ADDRESSING ISSUES RELATING TO DISCOVERY OF ESI

Courts have been faced with issues relating to the discovery of ESI for many years. Although most published decisions, both before and after the Federal Amendments, have been in federal cases, issues relating to the discovery of ESI are surfacing in state court decisions as well. In this section, this Report will discuss, by subject matter, some of the more salient reported decisions.

A. Scope of Electronic Discovery

The language of Rule 34(a), while broad, does not allow unfettered access to a responding party’s electronic files.¹⁴ While “it is not unusual for a court to enter an order requiring the mirror image of the hard drives of any computers that contain documents responsive to an opposing party’s request for production of documents,” where the request is extremely broad or the nexus between the computers and the cause of action unsubstantiated, courts are very reluctant to do so.¹⁵ Discovery involving mirror imaging

¹⁴ *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production (Second Edition 2007)* (“*The Sedona Principles*”), Principle 6, Comment 6.b; In re Ford Motor Co., 345 F.3d 1315, 1317 (11th Cir. 2003) (“Rule 34(a) does not give the requesting party the right to conduct the actual search.”); *McCurdy Group v. Am. Biomedical Group, Inc.*, 9 Fed. Appx. 822, 831 (10th Cir. 2001) (finding that mere skepticism that defendant had not produced everything from the relevant computers, without more, did not justify physical inspection of defendant’s hard drives) (unpublished opinion).

¹⁵ *Balboa Threadworks, Inc. v. Stucky*, 2006 U.S. Dist. LEXIS 29265 (D. Kan. Mar. 24, 2006); see also *Ameriwood Indus., Inc. v. Liberman, et al.*, 2006 U.S. Dist. LEXIS 93380 at *8 (E.D. Mo. Dec. 27, 2006) (“Courts have found that such access is justified in cases involving both trade secrets and electronic evidence, and granted permission to obtain mirror images of the computer equipment”) (internal quotes omitted).

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or expert inspection necessarily raises issues of court-appointed experts and privilege concerns, both of which are discussed in more detail below.

B. Form of Production

Although courts have not yet articulated a cohesive analysis regarding issues relating to the form of production under amended Rule 34, one thing is clear: where ESI is requested and the data is maintained in electronic form, courts will require production in some comparable electronic format.¹⁶ Courts have given effect to Rule 34's provisions allowing the responding party, in the absence of a specified form of disclosure, to select the form in which the ESI will be produced.¹⁷ If the responding party chooses to provide the data as it is kept in the ordinary course of business, generally, no labeling is required, as in normal document discovery.¹⁸ This does not mean that documents can be produced in an unreadable or unintelligible form, e.g., e-mail attachments must be produced along with the corresponding e-mail.¹⁹

Courts have not specifically addressed maintenance in the "ordinary course of business" in the context of ESI. As discussed above, the same ESI may be stored in multiple locations and formats, all of which are kept in the ordinary course of business. Courts have held that the burden rests on the producing party to show that the documents

¹⁶ See *Goss Int'l Americas, Inc. v. Graphic Mgmt. Assoc., Inc.*, 2007 U.S. Dist. LEXIS 3601 (N.D. Ill. Jan. 11, 2007) ("[T]he Swiss Defendants misunderstand the nature of Goss's request; Goss is not asking the Swiss Defendants to scan copies of the paper documents onto a CD but rather to produce the e-mails and attachments in native format.")

¹⁷ See *MGP Ingredients, Inc. v. Mars, Inc.*, 2007 U.S. Dist. LEXIS 76853, *14 (D. Kan. Oct. 15, 2007) (finding that responding party met its burden under Rule 34 where it was not asked to provide data in specific format and it subsequently decided to provide it as kept in the ordinary course of business); *CP Solutions PTE, LTD., v. General Electric Co.*, 2006 U.S. Dist. LEXIS 27503, *11 (D. Conn. May 4, 2006);

¹⁸ *MGP Ingredients*, 2007 U.S. Dist. LEXIS 76853 at 10 ("If the producing party produces documents in the order in which they are kept in the usual course of business, the Rule imposes no duty to organize and label the documents").

¹⁹ *CP Solutions*, 2006 U.S. Dist. LEXIS at *14.

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were disclosed as kept in the normal course of business.²⁰ Where hard copies are scanned into electronic format, the documents are not produced in the normal course of business, and courts may require further labeling by the producing party to make the production meaningful.²¹ Moreover, some courts have found that converting electronic documents into a TIFF format does not constitute documents as kept in the ordinary course of business.²² In fact, converting the files to TIFF format creates a new set of documents.²³ The better practice in general is to provide documents in native format, including metadata, because the data may contain important chronological information.²⁴

Nevertheless, when production of ESI in native format would result in a voluminous number of additional documents, courts may be hesitant to order production absent specific need and a defined method to protect privileged information.²⁵ Courts are also hesitant to order discovery in the format requested where the responding party would be unduly burdened because it does not keep the documentation in the specific format.²⁶ Courts have noted, however, that the parties may agree to the form of production, or the requesting party may petition the court to order a specific form before any requests are propounded. If the requesting party requests discovery in such a manner that leaves

²⁰ *Bergersen v. Shelter Mut. Ins. Co.*, 2006 U.S. Dist. LEXIS 17452, *4 (D. Kan. Feb. 13, 2006).

²¹ *Id.* at *5.

²² TIFF format is simply a picture of the electronic document as it exists on a hard drive. *See Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L.*, 2006 U.S. Dist. LEXIS 10838, *6 (N.D. Ill. Mar. 8, 2006).

²³ *Id.*

²⁴ *Id.* Moreover, this court found that providing such data that included chronological information did not constitute “fishing” or “unfettered access” as described in *In re Ford Motor Co.* *Id.*; note 14 and accompanying text.

²⁵ *CP Solutions*, 2006 U.S. Dist. LEXIS at *13.

²⁶ *Equal Employment Opportunity Com’n., v. Lexus Serramonte*, 2006 U.S. Dist. LEXIS 58915, *5–6 (N.D. Cal. Aug. 9, 2006) (holding that if responding party did not maintain the information in the requested format, then it would produce the information in whatever format it was maintained, because it would be unduly burdensome to require responding party to create a new electronic format for production).

format uncertain or so general that the disclosure is overwhelming, courts may require the requesting party to live with the requests it made.²⁷

C. Computer Access, Mirror Images, and Experts

A party may bring a motion to compel seeking to inspect the adverse party's hard drives or make a mirror image of such hard drives. Direct inspection by an opposing party, however, is the exception to the normal rule.²⁸ Imaging a computer hard drive or otherwise having access is appropriate where the court finds that the party's production has been inadequate, inconsistent, or the computer was used to commit the wrong.²⁹ For example, where a party has allegedly downloaded trade secrets onto a hard drive or there exists evidence that files were deleted intentionally or unintentionally, access may be warranted.³⁰ However, mere suspicion by the requesting party that discovery was

²⁷ See *MGP Ingredients*, 2007 U.S. Dist. LEXIS 76853 at 12 ("Plaintiff was the party who formulated the requests in the manner it did and Plaintiff must take responsibility for undertaking the task of determining which documents relate to each set of its twenty-some requests.").

²⁸ *Diepenhorst v. City of Battle Creek*, 2006 U.S. Dist LEXIS 48551, *3 (W.D. Mich. Jun. 30, 2006); see also FED. R. CIV. P. 34(a) ("Rule 34(a) . . . is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances.").

²⁹ *Diepenhorst*, 2006 U.S. Dist. LEXIS 48551 at *3; see also *Calyon v. Mizuho Sec. U.S.A., Inc.* 2007 U.S. Dist. LEXIS 36961, *17 (S.D. N.Y. May 18, 2007) (not allowing expert inspection of computer hard drives where the proponent did not argue lack of production, discrepancies or inconsistencies, or deletion that would entitle them to inspection); *Cenveo Corp. v. Slater*, 2007 U.S. Dist. LEXIS 8281, *1-3 (E.D. Pa. Jan. 31, 2007) (finding inspection and mirror imaging appropriate where the issue in the case was transmission of trade secrets and confidential information through the computers in question); *Orrell v. Motorcarparts of Am., Inc.*, 2007 U.S. Dist. LEXIS 89524, *19 (E.D. La. Aug. 29, 2007) (allowing inspection and mirror imaging of computer where relevant data was lost either because the computer crashed or was wiped clean); *Experian Info. Solutions, Inc. v. I-Centrix, LLC*, 2005 U.S. Dist. LEXIS 42868, *2 (N.D. Ill. July 21, 2005) (finding a mirror image solution appropriate where appropriation of trade secrets was involved); *Simon Prop. Group L.P. v. MySimon, Inc.* 194 F.R.D. 639, 640 (S.D. Ind. 2000) (finding that plaintiff was entitled to inspection of computers because of troubling discrepancies in the discovery record); *Playboy Enters. v. Welles*, 60 F. Supp. 2d 1050, 1053-54 (S.D. Cal. 1999) (allowing party to inspect adverse party's computers where deleted emails could be recovered and relevant emails were not produced during the first round of discovery); *In re Ford Motor Co.*, 345 F.3d at 1317 (noting that improper conduct during discovery may necessitate the requesting party to check data compilations).

³⁰ *Balboa*, 2006 U.S. Dist. LEXIS 29625 at *7-8; *Cenveo*, 2007 U.S. Dist. LEXIS 8281 at *1-3; *Ameriwood*, 2006 U.S. Dist LEXIS 93380 at *8, *13; *Orrell*, 2007 U.S. Dist. LEXIS 89524 at 19; *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652 (D. Minn. 2002) (ordering forensic inspection of computer equipment where relevant emails and files had been deleted); *In re Honza*, 2008 Tex. App. LEXIS 20, *6 (10th Dist. 2008) (following federal procedure in granting access to computer hard drives to retrieve deleted files and to create a timeline for file alteration).

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inadequate or incomplete will not suffice to show access or imaging is needed.³¹

When a court does grant access or imaging, it will also outline specific protocols to protect against “fishing” and to protect confidential information. The court generally will outline each step in the process of imaging or inspecting, including the appointment or approval of an independent expert to inspect the computer.³² The exact list of procedures may vary from case to case and among jurisdictions, but most include an independent computer expert inspecting the data, the requesting party creating search terms agreeable to both parties, the responding party reviewing the data for privileged or confidential information, and the responding party’s objections to specific data on confidentiality grounds.³³ Once the data is imaged, the court, the expert, or both will keep the imaged or copied data, usually under a protective order.

D. Privilege and Confidentiality

Each jurisdiction has already developed a body of common law relating to disclosure of privileged or confidential information. Many of the principles articulated in

³¹ See, e.g., *Scotts Co. LLC v. Liberty Mut. Ins. Co.*, 2007 U.S. Dist. LEXIS 43005, *6 (S.D. Ohio Jun. 12, 2007); *Williams v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 144, 146 (D. Mass. 2005) (declining to allow inspection based on highly speculative conjecture, because “permitting such an intrusion” was inappropriate absent reliable information of misleading or inaccurate discovery); *Powers v. Thomas M. Cooley Law Sch.*, 2006 U.S. Dist. LEXIS 67706, *14 (W.D. Mich. Sept. 21, 2006) (denying a motion to compel that requested inspection and production of computer hard drives because such “intrusive examination” should not be granted as a matter of course or on mere suspicion).

³² See, e.g., *Cenveo*, 2007 U.S. Dist. LEXIS 8281 at *5–9 (establishing a procedure consisting of (1) plaintiff choosing forensic expert, (2) expert executing confidentiality agreement with parties and submitting to jurisdiction of court, (3) expert making images at defendant’s place of business, (4) expert taking away imaging data and inspecting it with defendant’s expert present, (5) expert to provide defendant with recovered materials, (6) defendant to review for privilege and responsiveness); *Ameriwood*, 2006 U.S. Dist. LEXIS 93380 at 16–21 (providing a three phase protocol of imaging, recovery, and disclosure); *Balboa*, 2006 U.S. Dist. LEXIS 29265 at 14–16 (allowing computer hard drive imaging and instructing the parties to establish a protocol to do so to protect privileged and non-business related personal information); *Antioch*, 210 F.R.D. 645 at 653–54; *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 432–433; *Quotient, Inc. v. Toon*, 2005 WL 4006493, *4 (Md. Cir. Ct. 2005) (outlining a ten-point protocol for the limited production and imaging of hard drives for recovery of unintentional deletions, including an independent expert, defendant observation of process, and secure holding by the expert of the data).

³³ See *id.*

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those decisions apply to ESI as well.³⁴ Yet, ESI discovery presents special challenges regarding the disclosure of privileged information in two areas. First, when hard drive imaging or copying occurs, as described above, courts must create protocols sufficient to protect privileged or confidential information. Second, inadvertent disclosures of privileged information are more likely to occur in connection with production of ESI because of the enormous volume of ESI.

In the first instance, courts handle confidentiality concerns when imaging or copying data from computer hard drives by appointing independent experts.³⁵ Most courts then allow some type of privilege review by the responding party before disclosing the contents.³⁶ In contrast, some courts will allow the requesting party to review the ESI first under an “attorney eyes only” policy.³⁷ The requesting party will then turn over information it deems relevant to the responding party for privilege review. Many courts will also have the independent expert execute a protective order, further protecting confidential materials.³⁸

The second major area concerns the inadvertent disclosure of privileged information, which is more likely given the volume of data stored electronically. Courts

³⁴ Courts still need to update normal confidentiality and privilege rules to ESI. *See, e.g.,* Expert Choice, Inc. v. Gartner, Inc., 2007 U.S. Dist. LEXIS 21208, *19 (D. Conn. Mar. 27, 2007) (finding that emails simply forwarded to attorneys or ones in which simply copy the attorney do not fall within the attorney client privilege); Bitler Investment Venture II, LLC v. Marathon Ashland Petroleum LLC, 2007 U.S. Dist. LEXIS 9231, *16–17 (N.D. Ind. Feb. 7, 2007) (finding that where an expert was forwarded emails, expert printed them off and placed them in his court file, expert had “considered” them for purposes of Rule 26(a)(2)(B), and disclosure was required).

³⁵ *Cenveo*, 2007 U.S. Dist. LEXIS 8281 at 5; *G.D. v. Monarch Plastic Surgery, P.A.*, 239 F.R.D. 641, 648 (D. Kan. 2007); *Ameriwood*, 2006 U.S. Dist. LEXIS 93380 at 17; *Quotient*, 2005 WL 4006493 at 4; *Rowe*, 205 F.R.D. 421 at 433.

³⁶ *Cenveo*, 2007 U.S. Dist. LEXIS 8281 at 5; *Monarch*, 239 F.R.D. 641 at 648; *Ameriwood*, 2006 U.S. Dist. LEXIS 93380 at 17; *Quotient*, 2005 WL 4006493 at 4.

³⁷ *Rowe*, 205 F.R.D. 421 at 433.

³⁸ *See* notes 35–37 and accompanying text.

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routinely follow normal precedent in their respective jurisdictions to determine whether waiver of the attorney-client or work product privilege has occurred for ESI documents.³⁹

Courts have not fashioned one test in determining whether waiver occurs, but most courts have developed at least two tests: (1) whether the responding party took reasonable precautions to prevent possible inadvertent disclosure and (2) whether disclosure of the privileged information was timely objected to once the party had notice of the disclosure.⁴⁰ While no universal test exists, several cases regarding the inadvertent disclosure of ESI are instructive. A Texas court found waiver where a privileged e-mail was disclosed to opposing counsel, no objection was raised when the providing party's witness was questioned about the e-mail during deposition, and a second witness was questioned during deposition where an objection was waived.⁴¹ The court stated that objection to the e-mail was not timely enough under common law to protect privilege against inadvertent waiver.⁴² In a separate case, a New York court found waiver where a non-attorney employee at a company forwarded a CD with privileged material to outside counsel, who in turn forwarded it to opposing counsel without any privilege review.⁴³ The court stated that the party seeking non-waiver did not take reasonable precautions to prevent disclosure.⁴⁴ Finally, a Rhode Island court found that a two-week delay in

³⁹ See *Hopson v. City Council of Baltimore*, 232 F.R.D. 228, 232–34 (D. Md. 2005) (stating that courts have developed principles for determining whether waiver occurs in particular cases, but there is no uniform position taken by the different districts); see also *Hernandez v. Esso Standard Oil Company*, 2006 U.S. Dist. LEXIS 47738 (D.P.R. Jul. 11, 2006) (summarizing the tests districts have utilized and stating that districts have adhered to three separate tests: (1) privilege is never waived where the disclosure was inadvertent, (2) a balancing test weighing the totality of the circumstances, and (3) a strict waiver test).

⁴⁰ See notes 41–44 and accompanying text.

⁴¹ *Crossroads Systems, Inc. v. Dot Hill Systems*, 2006 U.S. Dist. LEXIS 36181 (W.D. Tex. May 31, 2006).

⁴² *Id.*

⁴³ *Gragg v. International Mgmt Group*, 2007 U.S. Dist. LEXIS 25780, 18–19 (N.D.N.Y. Apr. 5, 2007).

⁴⁴ *Id.* (stating that the procedure was “woefully deficient”); see also *Hernandez*, 2006 U.S. Dist. LEXIS 47738 at *15 (“This Court is not compelled to protect privileged information inadvertently disclosed by an errant mouse click.”).

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providing a privilege log after learning of an inadvertent disclosure, coupled with lack of reasonable precautions in providing the documents waived any privilege.⁴⁵

In light of the problems posed by the inadvertent disclosure of privileged materials, courts have endorsed the use of party agreements, court orders approving of those agreements, or protective orders that provide for initial disclosure without waiving privilege.⁴⁶ Several courts, addressing both ESI discovery and normal document discovery, have approved of such agreements.⁴⁷ These agreements are not any guarantee of non-waiver, however, because some courts have declined to adhere to them.⁴⁸ Further, it has been observed that such agreements may not be binding on non-parties.⁴⁹

E. Data Preservation and Spoliation

It is clear that the common-law duty to preserve evidence related to pending or

⁴⁵ *Corvello v. New England Gas Co., Inc.*, 243 F.R.D. 28, 37 (D. R.I. 2007).

⁴⁶ *See, e.g., Id.* 232–234 (finding that initial agreements are advantageous, even though there are sometimes drawbacks in their application).

⁴⁷ *See Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (stating that the parties are free to enter into such “claw-back” agreements to forego privilege review); *VLT Corp. v. Unitrode Corp.*, 194 F.R.D. 8 (D. Mass. 2000) (approving of party stipulation to non-waiver of inadvertently produced privileged documents); *Ames v. Black Entertainment T.V.*, 1998 U.S. Dist. LEXIS 18503 (S.D.N.Y. Nov. 20, 1998) (finding no waiver where parties agreed in a deposition that witness could answer question without waiving any privilege); *Dowd v. Calabrese*, 101 F.R.D. 427 (declining to entertain party’s waiver argument where parties had stipulated to non-waiver of privileged statements in deposition); *Western Fuels Assoc. v. Burlington N.R. Co.*, 102 F.R.D. 201 (D. Wyo. 1984) (finding that a Magistrate’s order allowing expedited discovery without waiving privilege prevented parties from raising argument in the later proceedings); *Eutectic Corp. v. Metco*, 61 F.R.D. 35 (following language in protective order, which stated that privilege was not waived); EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE*, 278–88 (4th ed. 2001) (“Because courts will give effect to [non-waiver agreements], the parties by contract . . . can avoid the general rule that partial disclosure on a given subject matter will bring in its wake total disclosure.”).

⁴⁸ *See, e.g., Koch Materials Co. v. Shore Slurry Seal Inc.*, 208 F.R.D. 109, 118 (D.N.J. 2002) (declining to follow party agreement because of the fear that such agreements could lead to sloppy attorney review and jeopardize client cases); *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 192 F.R.D. 575, 579 (M.D. Tenn. 2000) (rejecting the doctrine of selective waiver and finding an agreement to produce without waiver invalid).

⁴⁹ *See, The Sedona Principles*, Principle 10, Comment 10.d., p. 54.

reasonably anticipated litigation encompasses electronically stored information (“ESI”).⁵⁰ It is also clear that the policies and sanctions for spoliation of evidence apply as well to ESI.⁵¹ Novel issues arise, however, in the application of these established discovery practices to the increasingly important area of e-discovery, including when the duty to preserve attaches, what ESI must be preserved, how the duty to preserve affects existing corporate procedures for the routine backup and/or destruction of ESI, and how the rules for imposing sanctions for spoliation of ESI differ from the traditional rules.

F. The Duty to Preserve ESI

1. *When Does the Duty to Preserve Attach?*

The consensus rule for when the duty to preserve attaches is the same for ESI as for other discoverable evidence.⁵² Generally, the duty to preserve potential evidence arises when a party knows or should know that the evidence may be relevant to pending or anticipated litigation.⁵³ The litigation need not be imminent; if litigation is probable, the duty to preserve will attach.⁵⁴ Notice may be express, for example through the filing of a lawsuit or through a “preservation letter,” in which a party notifies another party that

⁵⁰ AAB Joint Venture v. United States, 75 Fed. Cl. 432, 441 (2007) (citing Renda Marine, Inc. v. United States, 58 Fed. Cl. 58, 61 (2003); Thompson v. United States HUD, 219 F.R.D. 93, 100 (D. Md. 2003); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216-17 (S.D.N.Y. 2003) (commonly and hereinafter referred to as “Zubulake IV”). See also *The Sedona Principles*, Principle 5, Comment 5.a.

⁵¹ *The Sedona Principles*, Principle 14.

⁵² *Id.*

⁵³ See, e.g., Silvestri v. General Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001); Rambus, Inc. v. Infineon Techs. AG, 220 F.R.D. 264, 281 (E.D. Va. 2004); *Zubulake IV*, 220 F.R.D. at 216-217.

⁵⁴ In Re Napster, Inc. Copyright Litigation, 462 F. Supp. 2d 1060, 1068 (N.D. Cal. 2006).

litigation is anticipated.⁵⁵ The duty to preserve may also arise when a party is on notice that the evidence may be relevant to contemplated litigation.⁵⁶ Whether and when the duty to preserve has attached is a factual question that must be decided on a case-by-case basis.⁵⁷

2. *What is the Scope of the Duty to Preserve?*

Because of the myriad ways ESI can be created, duplicated, transmitted, stored, and backed up, it is virtually impossible to fashion a single rule for requiring its preservation.⁵⁸ Generally speaking, the preservation obligation requires that a party “preserve what it knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation.”⁵⁹ Courts have held that this duty extends only to evidence that is in the party’s possession, custody, or control, whether directly or indirectly.⁶⁰ An entity’s duty to preserve extends to its “key players,” meaning those

⁵⁵ See, e.g., *King Lincoln Bronzeville Neighborhood Ass’n v. Blackwell*, 448 F. Supp. 2d 876, 879 (S.D. Ohio 2006); *Krumwiede v. Brighton Assoc., LLC*, No. 05 C 3003, 2006 U.S. Dist. LEXIS 31669, at *22-23 (E.D. Ill. May 8, 2006); *Wiginton v. Ellis*, No. 02 C 6832, 2003 WL 22439865, at *5 (N.D. Ill. Oct. 27, 2003). Courts have held that such a letter must be unequivocal in its terms. See *AAB Joint Venture*, 75 Fed. Cl. at 441-42 (“letter did not provide sufficient certainty or specificity of impending litigation, nor did it apprise Defendant of the scope of the claims which would be filed”); *Cache La Poudre Feeds, LLC v. Land O Lakes, Inc.*, 244 F.R.D. 614, 623 (D. Colo. 2007) (letters from opposing party prior to litigation that did not explicitly threaten litigation or demand preservation were inadequate to trigger duty to preserve).

⁵⁶ *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998); *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 342 (M.D. La. 2006).

⁵⁷ *Cache La Poudre Feeds, Inc.*, 244 F.R.D. at 621.

⁵⁸ See generally *The Sedona Principles, Principle 5 and Comments*.

⁵⁹ *MOSAID Techs., Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 336 (D.N.J. 2004) (quoting *Scott v. IBM Corp.*, 196 F.R.D. 233, 247-48 (D.N.J. 2000)); accord *Zubulake IV*, 220 F.R.D. at 217.

⁶⁰ *Phillips v. Netblue, Inc.*, No. C-05-4401 SC, 2007 WL 174459, at *3 (N.D. Cal. Jan. 22, 2007) (plaintiff was under a duty to preserve emails, which it did, but was not required to preserve the images linked thereto) (citing *MacSteel, Inc. v. Eramet North America*, No. 05-74566, 2006 WL 3334011, at *1 (E.D. Mich. 2006)); *Towsend v. Am. Insulated Panel Co.*, 174 F.R.D. 1, at *5 (D. Mass. 1997)). But see *World Courier v. Barone*, No. C-06-3072 TEH, 2007 WL 1119196, at *1 (N.D. Cal. April 16, 2007) (wife was under an affirmative duty to preserve hard drive of home computer that was destroyed by her husband because she “maintained indirect control” over it) (citing *King v. Am. Power Conversion Corp.*, 181 Fed. Appx. 373 (4th Cir. 2006); *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001)).

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employees who are likely to have relevant information.⁶¹ Thus, depending on the nature of the claims and defenses in any given suit and the types of ESI generated by the parties, the scope of the duty to preserve can vary widely.⁶²

3. *How Does the Duty to Preserve Affect Corporate Policy?*

Most entities that maintain a computer network have in place a routine system for storing and backing up data. These computer networks often are programmed to archive data or create “disaster recovery” sources such as backup tapes or optical discs, and to delete files that have not been recently used.⁶³ These backup media in turn are often recycled, destroying data that is itself outdated.⁶⁴ Even those backup tapes that do contain relevant information are often designed only to restore entire systems, rather than to identify and produce specific files or data, making it extremely expensive and inefficient to do so.⁶⁵ For obvious reasons, this may have an impact on the extent to which an entity is under a duty to preserve ESI in its daily operations.

Further complicating matters is the number of people who are in some way responsible for managing an organization’s ESI.⁶⁶ Aside from the people who create the files initially, there are system analysts, IT staff people, and in many cases outside contractors and internet service providers, all of whom play some role in the entity’s duty to preserve ESI.⁶⁷ Unfortunately, most entities do not have formal lines of

⁶¹ *Zubulake IV*, 220 F.R.D. at 218, followed in *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 341 (M.D. La. 2006).

⁶² *The Sedona Principles Principle 5, Comment 5.c.*

⁶³ Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 189 (2006).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 179.

⁶⁷ *Id.* at 179-80.

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communication among these data custodians to ensure compliance once a duty to preserve arises.⁶⁸

Once a party's duty to preserve has attached, courts have generally held that an entity must suspend its routine document destruction and/or retention policies in order to ensure that no potentially relevant evidence is lost.⁶⁹ This has come to be known as a "litigation hold," and entities are required to communicate this hold to all those who have the potential to destroy discoverable information.⁷⁰ When the failure of an entity to suspend its routine document retention processes results in the loss of relevant evidence, the entity may be subject to sanctions.⁷¹ Courts have not mandated the form in which potentially relevant ESI must be preserved; however, courts will not allow a party's

⁶⁸ *Id.* at 180.

⁶⁹ *See, e.g.*, *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 342 (M.D. La. 2006); *Reino de Espana v. Am. Bureau of Shipping*, No. 03 Civ. 3573 LTS/RLE, 2006 WL 3208579, at *8 (S.D.N.Y. Nov. 3, 2006) (Spain's failure to issue a litigation hold until one year after the casualty of the *Prestige*, which was the subject of the litigation, was not timely and constituted a "failure to adequately preserve evidence"); *Zubulake IV*, 220 F.R.D. at 218. *But see* *Crandall v. City and County of Denver, Colorado*, No. 05-cv-00242-MSK-MEH, 2006 WL 2683754, at *2 (D. Colo. Sept. 19, 2006) ("Mere existence of a document [in this case e-mail] destruction policy within a corporate entity, coupled with a failure to put a comprehensive "hold" on that policy once the corporate entity becomes aware of litigation, does not suffice to justify a sanction absent some proof that, in fact, it is potentially relevant evidence that has been spoiled or destroyed").

⁷⁰ *Miller v. Holzmann*, No. 95-01231 (RCL/JMF), 2007 WL 172327 (D.D.C. Jan. 17, 2007); *Alcoa*, 244 F.R.D. at 341-42; *3M Innovative Prop. Co. v. Tomar Elec., Inc.*, No. 05-756 MJD/AJB, 2006 U.S. Dist. LEXIS 80571, at *20 (D. Minn. July 21, 2006); *Zubulake IV*, 220 F.R.D. at 218. *See also* *The Sedona Principles, Second Edition (2007)*, *cmt. 5.c*; *Withers, supra* note 63, at 189-90.

⁷¹ *See, e.g.*, *Aero Prod. Int'l, Inc. v. Intex Recreation Corp.*, No. 02 C 2590, 2005 U.S. Dist. LEXIS 44169, at *9 (N.D. Ill. Feb. 11, 2005) (allowing an adverse-inference jury instruction regarding evidence lost as a result of routine retention policy). *See also infra*, Section I.B. Under the new Rule 37, "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." FED. R. CIV. P. 37(e). The comment to this section notes that suspension of such a system is required in order to show good faith once an entity's duty to preserve has attached: "When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a 'litigation hold.'" FED. R. CIV. P. 37 note to Subdivision (f) of Advisory Committee on 2006 amendments. *See also* *Doe v. Norwalk Cmty. Coll.*, No. 3:04-CV-1976 (JCH), 2007 WL 2066497, at *4 (D. Conn. July 16, 2007) ("in order to take advantage of the good faith exception [in Rule 37], a party needs to act affirmatively to prevent the system from destroying or altering information, even if such destruction would occur in the regular course of business").

decision in this respect to affect its responsibility to produce evidence in response to discovery requests.⁷²

4. Preservation Orders

Because of the inherent duty to preserve potential evidence, courts generally do not enter preservation orders over a party's objection absent a showing of necessity by the moving party.⁷³ Courts have been more responsive to agreed preservation orders, which can help to resolve discovery disputes before they arise.⁷⁴ Ex parte preservation orders are very rarely entered by courts.⁷⁵

G. Spoliation of ESI and Sanctions

As discussed above, a party who fails to preserve potentially relevant evidence once its duty to preserve has attached may be subject to sanctions.⁷⁶ This situation often

⁷² AAB Joint Venture v. United States, 75 Fed. Cl. 432, 441 (2007) (where defendant decided to preserve emails on backup tapes, it was still under an obligation to produce relevant emails) (citing Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 316-17 (S.D.N.Y. 2003) (commonly and hereinafter referred to as "Zubulake I"); In Re Brand Name Prescription Drugs, Nos. 94 C 897, MDL 997, 1995 WL 360526, at *1 (N.D. Ill. July 15, 1995)).

⁷³ See, e.g., Capricorn Power Co. v. Siemens Westinghouse Power Corp., 220 F.R.D. 429, 433-34 (W.D. Pa. 2004), cited in *The Sedona Principles, Second Edition (2007)*, cmt. 5.f (setting out three considerations to weigh in considering a preservation order: "1) the level of concern the court has for the continuing existence and maintenance of the integrity of the evidence in question in the absence of an order directing preservation of the evidence; 2) any irreparable harm likely to result to the party seeking the preservation of evidence absent an order directing preservation; and 3) the capability of an individual, entity, or party to maintain the evidence sought to be preserved, not only as to the evidence's original form, condition or contents, but also the physical, spacial and financial burdens created by ordering evidence preservation"). But see ACS Consulting Co. v. Williams, No. 06-11301, 2006 U.S. Dist. LEXIS 16785, at *23 (E.D. Mich. April 6, 2006) (entering protective order prohibiting defendant from deleting data or "wip[ing] clean" any computer hard drive); Quotient, Inc. v. Toon, No. 13-C-05-64087, 2005 WL 4006493, at *3 (Md. Cir. Ct. 2005) (granting a preservation order allowing plaintiff's expert to make a mirror image of defendant's hard drive to avoid a "substantial probability" that relevant evidence could be lost by defendant's routine computer use).

⁷⁴ See, e.g., Palgut v. City of Colo. Springs, No. CIVA 06CV01142 WDMMJ, 2006 WL 3483442, at *1 (D. Colo. Nov. 29, 2006) (entering a jointly stipulated e-discovery plan); *The Sedona Principles, Second Edition (2007)*, cmt. 5.f.

⁷⁵ See, e.g., Adobe Sys., Inc. v. South Sun Prod., Inc., 187 F.R.D. 636, 641 (S.D. Cal. 1999) ("The extraordinary remedy of *ex parte* injunctive relief cannot be justified by merely pointing to the obvious opportunity every defendant possesses to engage in such unlawful deceptive conduct [as destruction or concealment of evidence]. Rather, a plaintiff must present specific facts showing that the defendant it seeks to enjoin will likely conceal, destroy, or alter evidence if it receives notice of the action.").

⁷⁶ See *supra*, notes 69-72 and accompanying text.

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arises when a party fails to issue a “litigation hold,” allowing its routine data retention policies to continue uninterrupted, resulting in the loss of actually relevant evidence.⁷⁷ It may also occur where a party is simply negligent in fulfilling its duty to preserve.⁷⁸ Sanctions for this kind of infraction are limited in some jurisdictions to awarding costs to the aggrieved party, based on the relatively low level of culpability on the part of the offending party.⁷⁹ In other jurisdictions, however, more severe sanctions may be warranted by a party’s failure to preserve, even if that party’s conduct was merely negligent.⁸⁰

Spoliation, on the other hand, is defined as the intentional destruction of evidence.⁸¹ The concept of spoliation carries with it the inherent implication of wrongful conduct on the part of the offending party, and therefore the sanctions for its commission

⁷⁷ See *supra* notes 69-71 and accompanying text.

⁷⁸ Even where data that is the subject of a discovery request has been lost in this fashion, courts have held that the party seeking sanctions harsher than mere costs must make a showing that the lost evidence was relevant. *Doe v. Norwalk Cmty. Coll.*, No. 3:04-CV-1976 (JCH), 2007 WL 2066497, at *7 (D. Conn. July 16, 2007), *Crandall v. City and County of Denver, Colorado*, No. 05-cv-00242-MSK-MEH, 2006 WL 2683754, at *2 (D. Colo. Sept. 19, 2006); *Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837(HB), 2006 WL 1409413, at *4 (S.D.N.Y. May 23, 2006).

⁷⁹ See, e.g., *Optowave Co., Ltd. v. Nikitin*, No. 6:05-cv-1083-Orl-22DAB, 2006 WL 3231422, at *8 (M.D. Fla. Nov. 7, 2006) (“An adverse inference is drawn from a party’s failure to preserve evidence only when the absence of that evidence is predicated on bad faith; thus, negligence in losing or destroying records is not enough for an adverse inference”); *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 346 (M.D. La. 2006) (declining plaintiff’s request for an adverse-inference instruction in part because plaintiff “failed to convince the Court that the email deletions at issue were motivated by ‘fraud or a desire to suppress the truth’ or that Alcoa ‘intended to prevent use of the [emails] in this litigation.’”) (quoting *Concord Boat Corp. v. Brunswick Corp.*, No. LR-C-95-781, 1997 WL 33352759, at *6 (E.D. Ark. Aug. 29, 1997)).

⁸⁰ See, e.g., *World Courier v. Barone*, No. C-06-3072 TEH, 2007 WL 1119196, at *2 (N.D. Cal. April 16, 2007) (noting evidence that the defendant was at least negligent in her duty to preserve her home computer in awarding plaintiff an adverse-inference instruction); *Easton Sports, Inc. v. Warrior Lacrosse, Inc.*, No. 05-72031, 2006 WL 2811261, at *3-5 (E.D. Mich. Sept. 28, 2006) (finding defendant negligent for failing to prevent its employee from canceling an email account and allowing an adverse-inference instruction as a sanction); *In Re Napster, Inc. Copyright Litigation*, 462 F. Supp. 2d 1060, 1077-78 (N.D. Cal. 2006) (finding that defendant’s failure to suspend routine deletion of emails that resulted in the loss of relevant evidence was grossly negligent, and constituted grounds for imposing adverse-inference jury instructions and the preclusion of evidence, even absent a showing of willful or intentional conduct); *Phoenix Four, Inc.*, 2006 WL 1409413, at *4 (noting that a party seeking an adverse inference instruction must show, among other things, that the party had a “culpable state of mind,” and stating that “[t]he ‘culpable state of mind’ requirement is satisfied in this circuit by a showing of ordinary negligence.”); *Doe*, 2007 WL 2066497, at *5 (same).

⁸¹ BLACK’S LAW DICTIONARY 1401 (6th ed. 1990).

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may be more severe. There are three main ways a court may sanction a party who is guilty of spoliation of ESI: by giving an adverse-inference instruction to the jury, by excluding evidence, or, in extreme cases, by dismissing or defaulting the responsible party.⁸² The rules for determining which type of sanction is appropriate for spoliation of ESI in any given case are substantially the same as those in cases of spoliation of traditional evidence.⁸³

H. Costs and Cost Allocation

1. Cost-Shifting

The most widely adopted approach to the issue of cost-shifting problem was first articulated in *Zubulake v. UBS Warburg LLC*, in which the court stressed that “[w]hen evaluating cost-shifting, the central question must be, does the request impose an ‘undue burden or expense’ on the responding party? Put another way, ‘how important is the sought-after evidence in comparison to the cost of production?’”⁸⁴ The court in *Zubulake* identified seven factors to be considered in determining whether a request is unduly burdensome, in descending order of the weight they should be accorded: 1) the extent to which the request is specifically tailored to discover relevant information; 2) the availability of such information from other sources; 3) the total cost of production, compared to the amount in controversy; 4) the total cost of production, compared to the resources available to each party; 5) the relative ability of each party to control costs and

⁸² *Phillips v. Netblue, Inc.*, No. C-05-4401 SC, 2007 WL 174459, at *2 (N.D. Cal. Jan. 22, 2007) (citing *In Re Napster, Inc. Copyright Litigation*, 462 F. Supp. 2d 1060, 1068 (N.D. Cal. 2006)).

⁸³ *See, e.g.*, *In Re Napster, Inc. Copyright Litigation*, 462 F. Supp. 2d at 1070-78; *Gen. Med., P.C. v. Morning View Care Ctrs.*, No. 2:05-cv-439, 2006 WL 2045890, at *5 (S.D. Ohio July 20, 2006)

⁸⁴ *Zubulake I*, 217 F.R.D. 309, 322-23 (S.D.N.Y. 2003).

its incentive to do so; 6) the importance of the issues at stake in the litigation; and 7) the relative benefits to the parties of obtaining the information.⁸⁵

This approach is very fact-intensive, and the court in *Zubulake* warned against performing the required balancing analysis based on speculation about what evidence might be found from the inaccessible sources in question.⁸⁶ The court instead endorsed the “test run” approach articulated in *McPeek v. Ashcroft* as a means to establish a factual basis that will inform the analysis.⁸⁷ This approach requires the responding party to produce a sampling of the requested data in order to determine its probable relevance and probity, from which the court can make a determination about whether production of all the requested data will ultimately be required.⁸⁸ The *Zubulake* approach has been widely, though not uniformly, followed in the federal courts, as well as in some state courts.⁸⁹

2. Costs of Non-party ESI Discovery

While the approach outlined above is generally applicable to the discovery of ESI from parties to a lawsuit, a different analysis is required when the responding party is a

⁸⁵ *Id.* at 322.

⁸⁶ *Id.* at 323.

⁸⁷ *Id.* (citing *McPeek v. Ashcroft*, 202 F.R.D. 31, 34-35 (D.D.C. 2001)).

⁸⁸ *Id.* at 323-24 (citing *McPeek*, 202 F.R.D. at 34-35). The court in *McPeek* introduced the economic concept of “marginal utility” to the cost-shifting analysis when one party is a government agency, stating that “[t]he more likely it is that the [inaccessible source] contains information that is relevant to a claim or defense, the fairer it is that the government agency search at its own expense.” *McPeek*, 202 F.R.D. at 34. This approach is still sometimes followed in the District of Columbia. *See, e.g.*, *J.C. Assoc. v. Fid. & Guar. Ins. Co.*, No. 01-2437 (RJL/JMF), 2006 WL 1445173, at *2 (D.D.C. May 25, 2006).

⁸⁹ *See, e.g.*, *AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 443-44 (2007); *Semsroth v. City of Wichita*, 239 F.R.D. 630, 636 (D. Kan. 2006); *Hagemeyer N. Amer., Inc. v. Gateway Data Scis. Corp.*, 222 F.R.D. 594, 602-03 (E.D. Wisc. 2004); *OpenTV v. Liberate Techs.*, 219 F.R.D. 474, 477 (N.D. Cal. 2003); *Xpedior Creditor Trust v. Credit Suisse First Boston (USA), Inc.*, 309 F. Supp. 2d 459, 465-67 (S.D.N.Y. 2003); *Delta Fin. Corp. v. Morrison*, 819 N.Y.S.2d 908, 917 (Sup. Ct. 2006). *But see* *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 572-73 (N.D. Ill. 2004) (modifying the *Zubulake* factors by adding an eighth: “the importance of the requested discovery in resolving the issues at stake in the litigation”); *Analog Devices, Inc. v. Michalski*, No. 01 CVS 10614, 2006 WL 3287382, at *40 (N.C. Super. Nov. 1, 2006) (rejecting the *Zubulake* approach and others in favor of analyzing cost-shifting under the North Carolina Rules of Civil Procedure); *Toshiba Am. Elec. Components, Inc. v. Superior Court of Santa Clara County*, 21 Cal. Rptr. 3d 532, 540-41 (Ct. App. 2004) (rejecting trial court’s cost-shifting analysis under federal law, citing a controlling California statute).

non-party. This becomes important when one considers the nature of ESI dispersion and preservation – there are multiple layers of data custodians and recipients all of whom may control relevant and probative ESI.⁹⁰ Federal Rule of Civil Procedure 26, from which the *Zubulake* analysis descended, applies only to parties to the litigation.⁹¹ On the other hand, discovery from non-parties in federal court is governed by Federal Rule 45, which provides greater protection to non-party discovery respondents than exists for parties under Federal Rule 26.⁹² Under Rule 45, a non-party objecting to a request for production need only make a showing that to comply with the request would be unduly burdensome.⁹³ Courts applying this rule to non-party discovery of ESI have generally been more sympathetic to the non-party from whom the data is sought, and are usually more apt to require the requesting party to pay for all or part of the costs of production.⁹⁴

III.

OPTIONS FOR ADDRESSING ESI IN ILLINOIS

There are a variety of options available for addressing issues relating to the discovery of ESI in Illinois. At a minimum, it would appear that the Supreme Court Rules should be revised to reflect the modern view that a request for production of ESI should be addressed on a par with a traditional request for documents, but with certain important caveats. Although Rule 201's definition of "documents" has, since 1995,

⁹⁰ See *supra* notes 66-68 and accompanying text.

⁹¹ FED. R. CIV. P. 26.

⁹² FED. R. CIV. P. 45. See also *United States v. Amerigroup Ill., Inc.*, No. 02 C 6074, 2005 WL 3111972, at *4-5 (N.D. Ill. Oct. 21, 2005) ("it has been consistently held that 'non-party status' is a significant factor to be considered in determining whether the burden imposed by a subpoena is undue" (citing cases)), cited in *Withers*, *supra* note 63, at 205.

⁹³ FED. R. CIV. P. 45(c)(3)(A)(iv) ("the issuing court must quash or modify a subpoena that ... subjects a person to undue burden"). See also *Withers*, *supra* note 63, at 205.

⁹⁴ See, e.g., *Guy Chem. Co., Inc. v. Romaco AG*, 243 F.R.D. 310, 313 (N.D. Ind. 2007) ("Simply put, it is not [the non-party's] lawsuit and they should not have to pay for the costs associated with someone else's dispute"); *Amerigroup Ill., Inc.*, 2005 WL 3111972, at *7 (quashing a subpoena directed at non-party Illinois Department of Healthcare and Family Services requiring it to produce ESI).

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included “all retrievable information in computer storage”, the direction is that such information will be produced “on paper.” (Definition of “documents” to include “all retrievable information in computer storage” “obligates a party to produce on paper those relevant materials that have been stored electronically.” Committee Comments to Illinois Supreme Court Rule 201; Rule 214: “A party served with the written request shall (1) produce the requested documents, including in printed form all retrievable information in computer storage...”). Given the evolution of technology since 1995, production “on paper” is likely the most expensive and least efficient form of production. Further, the concept of “retrievable” information needs to be revisited in light of the reality that any ESI is literally “retrievable”, but potentially at a cost and effort disproportionate to the issues at stake in the litigation. Therefore, it would appear that, at a minimum, certain language of the existing Rule and the Committee Comments should be revised to reflect current circumstances.

Beyond these rather minor modifications, the Committee sees three options: 1) revamp the Rules entirely to incorporate all of the Federal Amendments, including the “meet and confer” obligations of counsel and the requirement of a Scheduling Conference early in the litigation; 2) selectively amend the Rules regarding interrogatories, discovery of documents, subpoenas to non-parties and, possibly, sanctions, to conform to the Federal Amendments; and 3) separately, or in conjunction with the foregoing option, promulgate standards along the line of the CCJ Guidelines as the standards to be used under Illinois law. Each of these options is discussed below.

The incorporation of the Federal Amendments in their entirety into the Court’s Rules would require significant changes affecting not only the manner in which discovery

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is conducted, but also the procedures to be followed throughout litigation. Many of the Federal Amendments are premised on the obligation of counsel to meet and confer regarding various issues prior to a Scheduling Conference with the court. While Supreme Court Rule 218 requires that a Case Management Conference be held no later than 182 days following the filing of the complaint and specifies the issues to be addressed, the Rule imposes no obligation upon counsel to resolve or even address any issues, including discovery issues, prior thereto. In practice, counsel often meet each other for the first time at the Initial Case Management Conference and have no meaningful views regarding what issues relevant discovery may entail.

There is a general consensus in the literature that waiting any substantial period of time following the filing of a lawsuit to address concerns regarding the discovery of ESI greatly enhances the likelihood of disputes over accessibility and spoliation. Given the importance of early consultation among counsel and, if necessary, court intervention with respect to the discovery of ESI, the Court's Rules would have to be amended to require consultation among counsel (and, in particular, regarding discovery of ESI) prior to the Initial Case Management Conference, which itself would ideally be held earlier. The Rules, if amended in this manner, should also specify the court's ability to enter orders reflecting the parties' agreements or, in the absence thereof, the court's determinations regarding issues relating to the production of ESI.

Revisions of the Court's Rules in this manner would necessarily entail a statewide effort to educate the bar regarding the new responsibilities imposed upon counsel in cases likely to involve the discovery of ESI. Under the current Rules, in the majority of cases, the first time the court sees counsel for the parties is at the Initial Case Management

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Conference, which, as noted above, occurs too late in most cases to effectively address issues relating to ESI. For example, in six months, a corporation that has a legitimate, uniform policy of deleting e-mails every 30, 60 or 90 days, will have relegated potentially relevant information to “not reasonably accessible” status, to use the terminology of the Federal Rules. Therefore, the court will necessarily be required to engage in an after-the-fact analysis of the parties’ conduct to gauge the effect and consequences, if any, of the loss of this information. In order to avoid this result (which itself can entail a significant expenditure of time and expense on an issue not directly related to the merits of the lawsuit), counsel would have to understand their primary responsibility to confer early on regarding these issues and, if necessary, seek the court’s involvement.

The drawback to this approach is that it would necessarily apply generally to all cases, even those that do not potentially involve discovery of ESI. There is no method by which the court can ascertain at the outset of litigation whether discovery of ESI is, or is likely to be involved. Although the ratio will certainly change over time, most cases presently do not involve discovery of ESI or at least not on such a level as to require the court’s early involvement. Creating new Rules requiring counsel to meet and confer and requiring the court to conduct an early Scheduling Conference would necessarily apply to all cases, even those that may not benefit from such provisions. Thus, the drawbacks to engrafting the Federal Amendments onto this Court’s Rules may outweigh the current benefits.

The second option, which, as noted above, has been adopted by several states thus far, is to amend selectively this Court’s Rules to incorporate provisions relating to the discovery of ESI – modeled on the Federal Amendments, but tailored as necessary to

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reflect differences in state practice. Revisions to Rules 201 (General Discovery Provisions), 213 (Written Interrogatories), 214 (Discovery of Documents, Objects and Tangible Things) and, potentially, 219 (Consequences of Refusal to Comply with Rules or Order Relating to Discovery), along with revisions to the Committee Comments, would accomplish this goal. Further, the Committee notes that the Court's Rules do not presently contain provisions regarding subpoenas to non-parties other than Rule 214's general statement that the Rule does not preclude "an independent action against a person not a party for production of documents" Consistent with the need to protect non-parties from being unfairly saddled with the burden and expense of discovery of ESI, it would appear appropriate to enact more detailed provisions regarding non-party subpoenas, either as an amendment to Rule 214 or as a stand-alone Rule.

Finally, in lieu of or in tandem with either of the foregoing options, this Court could promulgate Guidelines to accompany revisions to the Rules and identify factors relevant to the decisions trial judges will be called upon to make in this emerging area of the law. Consistent with the above analysis, the Committee does not recommend promulgation of guidelines on substantive legal issues such as waiver of privilege or the standards for entry of orders to preserve evidence as these are already addressed in caselaw. While Guidelines tailored to the Rules revisions are not essential, particularly given the wealth of information already in existence regarding the discovery of ESI, they would have the advantage of synthesizing for trial judges in Illinois those factors this Court considers important.

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CONCLUSION

The Committee on Discovery Procedures was charged with the task to “study and define e-Discovery, report on its efficacy and potential impact on trial proceedings and current Supreme Court Rules.” The Committee trusts that this Report accomplishes that result and awaits further direction from the Court on these issues.

Respectfully submitted,

Committee on Discovery Procedures

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APPENDIX

- A. 2006 Amendments to the Federal Rules of Civil Procedure**
- B. Various State Rules (Arizona, Idaho, Indiana, Louisiana, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, Texas and Utah)**
- C. Conference of Chief Justices Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information (2006)**
- D. National Conference of Commissioners on Uniform State Laws - Uniform Rules Relating to Discovery of Electronically Stored Information (2007)**
- E. The Sedona Principles for Electronic Document Production (Second Edition)**

Please advise the Administrative Office if you would like a copy of the materials contained in the Appendix