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HOW TO GET YOUR SOCIAL MEDIA, EMAIL AND TEXT EVIDENCE ADMITTED (AND KEEP THEIRS OUT)

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Top Admission Mistakes Made with ESI

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INTRODUTION AND BACKGROUND:

ESI (electronically stored information) is electronic discovery. ESI includes, but is not limited to, emails, documents, presentations, databases, voicemail, audio and video files, social media, and web sites. Social media includes Facebook, Instagram, Snapchat, Twitter and other account based services.

I. Pennsylvania ESI

Effective August 2012, Pennsylvania made additions to the Rules of Procedure to accommodate the emerging issues with electronic discovery. The following language was added to Pa. R.C.P. 4009.1 dealing with production of documents and things: "Any party may serve a request upon a party to produce…**electronically created data, and other compilations of data from which information can be obtained, translated, if necessary, by the respondent party or person upon whom the request or subpoena is served through detection or recovery devices into reasonably useable form** and electronically stored information), or to inspect, copy, test or sample any tangible things or **electronically stored information, which constitute or contain matters within the scope of Rules 4003.1 through 4003.6 …**[;], and may do so one or more times."

A party requesting electronically stored information may specify the format in which it is to be produced and a responding party or person not a party may object. If no format is specified by the requesting party, electronically stored information may be produced in the form in which it is ordinarily maintained or in a reasonably usable form. Requests must

be made in paragraph format, seeking on item per paragraph, and described with reasonable particularity and as specific as possible. Time and scope should be limited and parties are encouraged to agree upon production format. Pa.R.C.P. 4009.11.

Scope of discovery must be properly limited to avoid drawing a Pa. R.C.P. 4011 objection. Discovery of electronically stored information must not be sought in bad faith or cause unreasonable annoyance, embarrassment, oppression, burden or expense. This limitation provides a powerful objection and exclusion potential. Pa.R.C.P. 4011

The 2012 Explanatory Comment to Pa.R.C.P. 4009.1 is cited in many leading Pennsylvania decisions on Electronically Stored Information. This comment sheds light on the Pennsylvania legislature's intent regarding electronic discovery. Pennsylvania e-discovery is governed by the Proportionality Standard, which is substantially different than the Federal standard, to obtain the just, speedy and inexpensive determination and resolution of litigation disputes. To that end, the Court must evaluate each request within the purpose of discovery, giving each party the opportunity to prepare its case, to consider:

1. The nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake;
2. The relevance of electronically stored information and its importance to the court's adjudication in the given case;
3. The cost, burden, and delay that may be imposed on the parties to deal with electronically stored information; and
4. The ease of producing electronically stored information and whether substantially similar information is available with less burden; and
5. Any other factors relevant under the circumstances.

The proportionality doctrine at work is illustrated in PTSI, Inc. v. Haley, 71 A.3d 304, (Pa. Super. Ct. 2013). In Haley, a large fitness corporation sued two former employees, Haley and Piroli. Haley worked as the director of operations, and Piroli worked as a personal trainer. Both were at-will employees and not subject to non-compete,

nondisclosure or non-solicitation agreements. While employed with PTSI, the Defendants decided to open their own fitness facility. When they informed PTSI of this, PTSI filed a multi-count complaint against Haley and Piroli alleging conversion, breach of duty of loyalty, and breach of fiduciary duty of loyalty.

During discovery, PTSI requested sanctions for spoliation of evidence, i.e., the deletion of electronic files. The Defendants motions for summary judgment were granted, and PTSI appealed. On appeal, PTSI questioned the Court's decision to deny their motion for sanctions.

Spoliation is the **non-preservation** or **significant alteration** of evidence for **pending** or **future litigation**. Schroeder v. Commonwealth, Department of Transportation, 551 Pa. 243, 710 (1998). This definition is significant, as it requires knowledge and intent on the part of the deleting party. If a party does not know the information is significant or potential evidence in litigation, there is no ill intent present.

To ensure the preservation of valuable evidence, or, in the alternative, an order for sanctions, is to send a specific preservation letter as early in the litigation phase as possible. The letter places the other party on notice of the information that should be preserved. If the party decides to delete the material, they have committed spoliation.

The factors enumerated in the 2012 Explanatory Comment rely heavily on the facts of each case. In Haley, the Court stated:

1. The legal dispute was brought by a large, established multi-location business attempting to derail a small start-up and the amounts at stake are relatively minor, weighing against granting a discovery sanction;
2. The ESI was not exceptionally relevant or important to the Court's decision;
3. It would be burdensome, costly and difficult to produce all electronically stored information especially in light of Haley and Piroli's routine habit of deleting text messages;

4. PTSI's requests were far-reaching, making it exceedingly difficult to produce the information requested and the discovery was available from other sources; and
5. Even if entitled to a spoliation inference, that inference would not defeat Defendants' Motion for Summary Judgement.

The court further noted that most relevant ESI would have been created on or before April 29, 2011 when Haley and Piroli were still employees, litigation was not pending or foreseeable and the protective order was not in effect. Even though Defendants deleted text messages after the protective order was in place, the Court was convinced the action was routine and not motivated by bad faith.

Privileged Information

To obtain discovery of private information contained on social networking sites, a party must, at a minimum, demonstrate that the information sought is relevant and the requested may establish the requisite relevancy by showing that publicly accessible information published by the user on the social networking account arguably controverts the account holder's claims or defenses in the underlying action. Brogan v. Roseann, Jenkins & Greenwald, LLP, 28 Pa.D.&C.5th 553 (C.P. Lackawanna 2013).

Social media cites

Facebook

i. Stats
    1. **Worldwide, there are over 2.23 billion monthly active Facebook users for Q2 2018 (Facebook MAUs) which is an 11 percent increase year over year.** (Source: Facebook 07/25/18)
    2. **There are 1.15 billion mobile daily active users (Mobile DAU) for December 2016, an increase of 23 percent year-over-year.** (Source: Facebook as of 2/01/17)
    3. **Photo uploads total 300 million per day.** (Source: Gizmodo)

ii. Public profile v. private profile – Privacy settings
    1. Facebook gives users the option for privacy settings
    2. Settings range from extremely limited, cannot search, tag, or access a users profile, to complete public access.
iii. Photos
    1. Generally, Facebook limits the accessibility of photos
iv. Number of friends (aka how far reaching the information goes)
    1. https://www.brandwatch.com/blog/47-facebook-statistics/
        a. 338 as of March 5, 2018
v. How do PA courts treat Facebook?
    1. Trail v. Lesko, No. GD-10-017249 (Allegheny C.P. July 5, 2012) (Wettick, J.)
        a. Facts • Plaintiff suffers serious pain from car accident, which limits activities. • Defendant admits liability. • Both parties seek access to the other's Facebook.
        b. Holding • Motions to compel access to non-public portion of social networking sites denied. Intrusion from requests not offset by showing discovery would assist in the case.
        c. Reasoning
            i. Plaintiff's Motion: – Defendant's liability was not in issue. – Defendant's Facebook information not relevant to remaining issue, i.e., damages.
            ii. Defendant's Motion: – Defendant's request was unreasonable. – Defendant presented photographs from Plaintiff's public page, showing Plaintiff drinking. – Photographs did not reveal date. – Photographs not inconsistent with Plaintiff's claimed injuries.
            iii. Pa.R.C.P. 4011 (discovery must not cause unreasonable annoyance, embarrassment, oppression…) •

"Reasonableness" requires consideration of the "level of intrusion" compared to the potential value of discovery. • "Level of intrusion" measured on a scale of 1(lowest) to 10 (highest) • Typical intrusion if information has been voluntarily made available to many other people=2

iv. "For a level 2 intrusion, the party seeking the discovery needs to show only that:

1. [1] the discovery is reasonably likely to furnish relevant evidence;
2. [2] not available elsewhere; and
3. [3] that will have an impact on the outcome of the case."

d. Considerations relevant to intrusion – Number and relation of Facebook friends. – Has material been widely disseminated? – Was recipient subject to legal obligation to keep information confidential?

e. To use information from social media sites and the internet in the court room, you must be mindful of the best evidence rule and make sure your proffered evidence can be identified by a witness.

b. Instagram https://www.omnicoreagency.com/instagram-statistics/

i. Statistics

1. Monthly active users:1 billion
2. Daily active users: 500 million
3. Number of photos and videos uploaded per day: 100 million

ii. Public profile v. private profile

c. Twitter https://zephoria.com/twitter-statistics-top-ten/

i. Statistics

1. Monthly active users: 335 million

d. Snapchat https://www.omnicoreagency.com/snapchat-statistics/

i. Statistics
    1. Total monthly active users: 300 million
    2. Daily active users: 188 million
ii. “Stories” available for 24 hours
iii. Photos are user to user, only saved if user chooses to

If concerned about the unintentional waiver of privilege, consider hiring or requesting appointment of a forensic expert who will review a party’s digital filed to identify any relevant and responsive material.

A. Preparation, Coordination and Submission

In order to prepare, coordinate and submit these materials, you first need to find them. Look on computers, networks, tablets, cell phones and coordinate with the clients IT/ESI provider, if any. Searches can be pretty detailed; just imagine the simplicity of searching a name, date or topic on your own emails. Other locations are removable hard drives, company servers, backups like thumb drives, discs. Now, even wearable technology like Fitbits – anything that records data – can be subject to that location. It's helpful to submit to each client a list of locations and devices to search. Proportionality – which we will get into shortly – and the reasonableness of the search/cost is going to give you some boundaries to predict where and when these materials can be found.

What we will be looking for are databases, spreadsheets, documents save electronically – think PDF copies of word documents, for example; emails and their attachments, which are all often either saved or archived; photographs and social media. Text and instant messages can also be located and preserved, once a device or location is identified.

It's helpful to understand exactly what the client has, how it’s put together and any material retention policies that apply. Some company/individuals have no policy; some have years or months. And there may be degrees of preservation/disposal. For example, present emails can be removed from devices and archived; then, disposed either as needed

– depending on amount of storage space; or pursuant to a defined timeframe policy. Most parties get rid of ESI as new hardware is installed; and only specific intended materials are migrated. The migration process itself, dependent on how it's done, when it's done, what fields are selected, will provide not only the scope of what you expect to see, but an explanation for why what you were looking for may not be present. Ask your client how much email or ESI materials might be in their possession. Then you and the client can develop an understanding of what might be relevant to the case.

Do you know how many devices there are? Where are they? Are they all owned/possessed by the company; or, does everyone's phone get added to the email system; and then when the device is deleted, does it take its data with it? Where are all the devices located?

How is the network is designed? Does it archive/dispose of things automatically; or does this need to be done intentionally. How is the dissemination of data handled? Does the hardware or software track download? Does it identify the devices that download and/or the type of device/structure it's downloaded to, and when?

Is there an IT provider? What access do they have and what is there role in storage, preservation, migration of data or disposal? Is any of the data stored off-site, or in a “cloud". If so, who has possession and control of those materials? How can they be accessed and, of course, at what cost.

Ask frankly what the client has already done to preserve materials. If nothing, then begin that process immediately.

You also need to know/have a handle on the history of the information storage for the client. Do they often lose materials? What have they done in the past to recover them? Finally, who is the person that can testify about this client's ESI – along with all of these topics.

A complete copy of Fed. R. C. P. 26 is attached for reference. Rule 26 "requires that the parties must discuss any issues regarding electronic discovery that are likely to arise in the case. This discussion would naturally include the potential volume of the materials, type of systems used, and who would be the most knowledgeable. In both Federal court and Pennsylvania courts, preservation Orders can be entertained - usually mutual - at the beginning of the case. Once you identify the relevant subject matter can assist in preserving those materials that you may need.

As far as pinning down adverse parties on ESI issues, document requests identify the devices, data, search terms (general and specific) and types of ESI sought provide an additional basis for identifying, discovering and admitting these materials at trial. Pennsylvania doesn't have any specific numeric limitation on Interrogatories; Federal Courts do. In anticipation of the initial Rule 16 Pretrial Conference, parties are required to work on core provisions for disclosure or discovery of electronically stored information; and any agreements the parties reach for asserting claims of privilege or protection as trial – preparation material after that production.

The initial discovery conference provides a forum for potential agreements. You can agree on formats for production, depending on cost and sophistication, PDF versions work well. And those materials can be sought in a searchable format. Who pays for that really depends on the volume, how much is in dispute and exactly what the dispute is? You'll see fewer ESI demands in a premises liability case then you will in a Patent dispute.

B. Weighing the Duty to Mitigate with the Duty to Hold Evidence for Trial

There really isn't much discretion in production/delay. If it exists, and you're aware of it, and, there doesn't appear to be much discretion and timing. Simply stated, you can't wait until trial to "see if comes up". And, intentional destruction could end the claim or suppress defenses.

C. Duty to Produce and Preserve

ESI evidence is no different than any other evidence. Its access and interpretation and, even, readability might be subject to interpretation. But, the duty to preserve "relevant" evidence that a party may use to support its claims or defenses is not in question. And, evidence that might support the claims or defenses of another party is subject to the same obligation.

The scope of the duty to preserve ESI applies to persons or entities over whom you have a "legal right" or "practical control" over the ESI – where you have the "right, authority or practical ability to obtain the documents from a non-party to the action.". Genon Mid-Atlantic, LLC, v. Stone & Webster, Inc. 280 F.R.D. 346 (S.D.N.Y. 2012). And, the duty is triggered upon receipt of a claim or complaint, document request, subpoena, written request for preservation, any complaint or written demand letter that lays out the claim threatens litigation.

D. Spoliation Pitfalls

In order to avoid issues of spoliation, legal hold letters, demand for preservation of materials and responses to those demands often provide opportunities to either establish the obligation, or control the relevance, breadth and cost of preservation.

First, you need to preserve and perhaps produce it. Timing issues may be explained by preservation and admission of these materials.

Fed. R. C. P. 26 (B)(2)(C) addresses proportionality, which I read is essential fundamental fairness.

And, the discovery requests themselves require analysis – signature subject to Fed. R. C. P. 11 and the P. R. C. P. 1023 that the request is reasonable, not unduly burdensome or expensive and, considering the needs of the case amount in controversy and the importance of the issues at stake in the litigation is an appropriate request.

Objections need to be particular and have a factual basis to demonstrate excessive burden and expense. The discovery sought needs to be obtained from the most

convenient, least burdensome and least expensive sources.

E. Sanctions and Proportionality

Sanctions for destruction, disposal or loss of relevant ESI can be monetary, like attorneys' fees, preclusion of evidence, and adverse inferences, up to the dismissal of claims or suppression of defenses. The sanction, if any, depends on the importance of what was lost and the intentionality of the effort not to preserve/destroy it - it's a sliding scale.

F. Protective Orders, Production and Privilege Logs

The National Conference of Chief Justices publishes a "Guidelines for State Trial Court Regarding Discovery of Electronically – Stored Information" as well as a "Best Practices for Courts and Parties Regarding Electronic Discovery in State Courts". (Both are attached)

If an item is privileged, privilege logs should be produced that identify for example, the document's title, general subject matter, it's date, the author/recipients and why it's privileged.

G. Defensible Legal Holds.

Legal holds start with a demand – anything that might typically impose an obligation to preserve and/or produce. Although most Rules of Civil Procedure impose a duty to supplement, docket a reminder to adverse parties throughout the discovery portion of the case. And, remind your clients, including key individuals with relevant knowledge in the case or key individuals with relevant knowledge of the IT system, so they don't "forget" that these materials needed to be preserved as they receive.

As far as privilege materials, while not dispositive, email and other communications should have a privilege/non-waiver warning. Ultimately, the disclosure obligation rests with counsel.

H. Privileged ESI that is Discoverable. (Exceptions)

The flowchart for the analysis of whether the privilege materials might also be discoverable is the same flowchart applicable to all other evidence. Is it relevant? Is it unduly burdensome to identify, collate and produce? Is it attorney-client privileged or work product?

I. Clawback Agreements.

Federal Rule of Evidence 502 identifies the attorney-client privilege and work product as well as limitations on waiver.

> ***a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.*** *When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:*
>
> ***(1)*** *the waiver is intentional;*
>
> ***(2)*** *the disclosed and undisclosed communications or information concern the same subject matter; and*
>
> ***(3)*** *they ought in fairness to be considered together.*
>
> ***(b) Inadvertent Disclosure.*** *When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:*
>
> ***(1)*** *the disclosure is inadvertent;*
>
> ***(2)*** *the holder of the privilege or protection took reasonable steps to prevent disclosure; and*

(3) *the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B).*

(c) Disclosure Made in a State Proceeding. *When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:*

(1) *would not be a waiver under this rule if it had been made in a federal proceeding; or*

(2) *is not a waiver under the law of the state where the disclosure occurred.*

(d) Controlling Effect of a Court Order. *A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.*

(e) Controlling Effect of a Party Agreement. *An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.*

(f) Controlling Effect of this Rule. *Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.*

(g) Definitions. *In this rule:*

(1) *"attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and*

(2) *"work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.*

Pennsylvania has not adopted Rule 502. Those limitations on waiver can be accommodated in an agreement. They are also addressed in PA. R. C. 4.4(b).

In Pennsylvania, the attorney work product doctrine is codified in P. R. C. P. 4003.3:

"Subject to the provisions of... 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under... 4003.1 even though prepared in anticipation of litigation or trial by or for another party or buyer for that party's representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent. The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other then the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics."

* The Attorney-Client Privilege

In both criminal and civil proceedings, the General Assembly has provided that 'counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.' 42 Pa.C.S. §§ 5916 (criminal matters) and 5928 (civil matters).

*Generally, evidentiary privileges are not favored, as they operate in derogation of the search for truth. Nevertheless, the privileges exist where appropriate, and they [**11] serve important interests. Although the attorney-client privilege is deeply rooted in the common law, several statutes now define the parameters of such privileges in this*

Commonwealth. In re Thirty-Third Statewide Investigating Grand Jury, 624 Pa. 361, 86 A.3d 204, 216 (Pa. 2014).

The attorney-client privilege is intended to foster candid communications between counsel and client, so that counsel may provide legal advice based upon the most complete information from the client. The central principle is that a client may be reluctant to disclose to his lawyer all facts necessary to obtain informed legal advice, if the communication may later be exposed to public scrutiny. 'Recognizing that its purpose is to create an atmosphere that will encourage confidence and dialogue between attorney and client, the privilege is founded upon a policy extrinsic to the protection of the fact-finding process. The intended beneficiary of this policy is not the individual client so much as the systematic administration of justice which depends on frank and open client-attorney communication.' Investigating Grand Jury of [Phila. Cty.], 527 Pa. 432, 593 A.2d [402, 406 [(Pa. 1991)] (internal citations omitted). In re Thirty-Third, 86 A.3d at 216-17.

*Previously, the following four elements were required to establish [**12] the attorney-client privilege: (1) that the asserted holder of the privilege is or sought to become a client; (2) that the person to whom the communication was made is a member of the bar of a court, or his or her subordinate; (3) that the communication relates to a fact of which the attorney was informed by the client, without the presence of strangers, for the purpose of securing an opinion of law, legal services or assistance in a legal matter; and, (4) that the claimed privilege has not been waived by the client. In Gillard v. AIG Ins. Co., . . . 609 Pa. 65, 15 A.3d 44 ([Pa.] 2011), the Pennsylvania Supreme Court expanded the attorney-client privilege by broadly construing Section 5928 of the Judicial Code.8 The [Gillard] Court held that 'in Pennsylvania, the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-clientcommunications made for the purpose of obtaining or providing professional legal advice.' Id. . . . at 59 (emphasis added). Consequently, the privilege now also protects the confidential communications [*474] made by an attorney to his or her client. Dages v. Carbon County, 44 A.3d 89 (Pa. Cmwlth. 2012)*

Government entities may assert the privilege because they qualify for the protection of the attorney-client privilege. Such entities may claim the privilege for communications between their attorney and their agents or

employees who are authorized to act on behalf of the entities. Gould v. City of Aliquippa, 750 A.2d 934, 937 (Pa. Cmwlth. 2000).

"The party asserting the privilege has the initial burden to prove that it is properly invoked, and the party seeking to overcome the privilege has the burden to prove an applicable exception to the privilege." Joe v. Prison Health Servs., Inc., 782 A.2d 24, 31 (Pa. Cmwlth. 2001) (emphasis added). Federal courts have held that "[t]o sustain this burden of proof, the party asserting the privilege must show, by record evidence such as affidavits, 'sufficient facts as to bring the [communications at issue] within the narrow confines of the privilege.'"9 Delco Wire & Cable, Inc. v. Weinberger, 109 F.R.D. 680, 688 (E.D. Pa. 1986) (bold emphasis added) (quoting Barr Marine Prods. Co. v. Borg-Warner Corp., 84 F.R.D. 631, 636 (E.D. Pa. 1979)).10 "[T]he attorney client-privilege must be asserted with respect to each question sought to be avoided or document sought to be withheld, 'rather than as a single, blanket assertion.' [U.S. v.] Rockwell Int['l], 897 F.2d [1255,] 1265 [(3d. Cir. 1990).]" Yang v. Reno, 157 F.R.D. 625, 636 (M.D. Pa. 1994).

K. Making Email Evidence Usable in the Courtroom

First, the materials have to be identified as authentic. A deposition of a records custodian and request for admissions can be used to authenticate and determine/prove the emails genuine nature. Can one of the parties to the email – the author preferably – identify it.

It is it an adverse party statement/admission? Is what you want to prove in the email admissible for other purposes? Does it demonstrate control, notice, knowledge of an event/fact? This is a fundamental hearsay point. The analysis required under P. R. E. Hearsay and Fed. R. E. P. 801 800 are necessary for review.

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing,

or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

VII. **Legal Ethics and ESI**

3:30 - 4:30, Thomas J. Wagner

A. Duties Owed to Clients, Opposing Counsel and the Courts

B. ESI Issues to Address in the Courtroom

C. Privilege Waivers

D. Searching Social Networking Sites

E. Personal Privacy Concerns Arising From Modern Database Searches

F. Ethical Duties When Mining Metadata

Rule 1.1 Competence

> *A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*

Rule 1.6 Confidentiality of Information

> *(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).*
>
> *(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.*
>
> *(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:*
>
> *(1) to prevent reasonably certain death or substantial bodily harm;*
>
> *(2) to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another;*

(3) to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used; or

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to secure legal advice about the lawyer's compliance with these Rules; or

(6) to effectuate the sale of a law practice consistent with Rule 1.17; or

(7) to detect and resolve conflicts of interest from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(e) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Rule 3.3 Candor Towards the Tribunal

(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact

or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false. (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6. (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.4 Fairness to Opposing Party and Counsel.

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness' testimony or the outcome of the case; but a lawyer may pay, cause to be paid, guarantee or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying,

(2) reasonable compensation to a witness for the witness' loss of time in attending or testifying, and

(3) a reasonable fee for the professional services of an expert witness;

(c) when appearing before a tribunal, assert the lawyer's personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the lawyer may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

(d) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information and such conduct is not prohibited by Rule 4.2.

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.2 Communications with Person Represented by Counsel

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating

with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Rule 4.3 Dealing with Unrepresented Person

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

(b) During the course of a lawyer's representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the lawyer knows or reasonably should know the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

(c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

Rule 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document, including electronically stored information, relating to the representation of the lawyer's client and knows or reasonably should know that the document, including electronically stored information, was inadvertently sent shall promptly notify the sender.

Rule 5.3 Responsibilities Regarding Non-lawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures

giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and in either case knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

APPENDIX E

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

Introduction

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

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

Preservation of ESI

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Production of ESI

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Status of E-Discovery Rulemaking in State Courts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Notes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conference of Chief Justices

Guidelines For State Trial Courts Regarding Discovery Of Electronically-Stored Information

Approved August 2006

Richard Van Duizend, Reporter

Table Of Contents

Introduction[1]

Overview of Electronic Discovery

Most documents today are in digital form. "Electronic (or digital) documents" refers to any information created, stored, or best utilized with computer technology of any sort, including business applications, such as word processing, databases, and spreadsheets; Internet applications, such as e-mail and the World Wide Web; devices attached to or peripheral to computers, such as printers, fax machines, pagers; web-enabled portable devices and cell phones; and media used to store computer data, such as disks, tapes, removable drives, CDs, and the like.

There are significant differences, however, between conventional documents and electronic documents—**differences in degree, kind, and costs.**

Differences in degree. The volume, number of locations, and data volatility of electronic documents are significantly greater than those of conventional documents.

> A floppy disk, with 1.44 megabytes, is the equivalent of 720 typewritten pages of plain text. 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.[2]

One paper document originating from a corporate computer network and shared with other employees who commented on it may result in well over 1,000 copies or versions of that document in the system. A company with 100 employees sending or receiving the industry average 25 e-mail messages a day produces 625,000 e-mail messages a year, generally unorganized and full of potentially embarrassing or inappropriate comments. Document search locations not only include computer hard drives, but also network servers, backup tapes, e-mail servers; outside computers, servers, and back up tapes; laptop and home computers; and personal digital assistants or other portable devices. Electronic documents are easily damaged or altered – e.g., by simply opening the file. Computer systems automatically recycle and reuse memory space, overwrite backups, change file locations, and otherwise maintain themselves automatically—with the effect of altering or destroying computer data without any human intent, intervention, or even knowledge. And, every electronic document can look like an original.

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[1] Much of the material in this introduction is condensed directly from a presentation on electronic discovery by Ken Withers, former Senior Judicial Education Attorney at the Federal Judicial Center, to the National Workshop for United States Magistrate Judges on June 12, 2002.

[2] 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, DC: August 3, 2004).

Differences in kind. One difference in kind between digital discovery and conventional paper discovery is that digital transactions (creation of an electronic airline ticket, for example) often create no permanent document in electronic or any other form. There are only integrated databases containing bits and pieces of millions of transactions. After a customer has printed out an e-ticket and moved to a different screen, the e-ticket "disappears." In addition, unlike conventional documents, electronic documents contain non-traditional types of data including metadata, system data, and "deleted" data. Metadata refers to the information embedded in an electronic file about that file, such as the date of creation, author, source, history, etc. System data refers to computer records regarding the computer's use, such as when a user logged on or off, the websites visited, passwords used, and documents printed or faxed. "Deleted" data is not really deleted at all. The computer has merely been told to ignore the "deleted" information and that the physical space that the data takes up on the hard drive is available for overwriting when the space is needed. The possibility that a deleted file can be restored or retrieved presents a temptation to engage in electronic discovery on a much broader scale than is usually contemplated in conventional paper discovery.

Differences in costs. Cost differences are often thought to include differences in the allocation of costs as well as the amount of costs. In conventional "big document" cases, for example, when responding parties simply make boxes of documents available for the requesting party to review, the costs of searching through the boxes typically fall on the requesting parties. On the other hand, the cost to the responding parties of locating, reviewing, and preparing vast digital files for production is perceived to be much greater than in conventional discovery proceedings. One reported case, for example, involved the restoration of 93 backup tapes. The process was estimated to cost $6.2 million before attorney review of the resulting files for relevance or privilege objections. Complete restoration of 200 backup tapes of one of the defendants in another prominent reported decision was estimated to cost $9.75 million, while restoration of eight randomly selected tapes to see if any relevant evidence appeared on them, could be done for $400,000.

The high costs of electronic discovery frequently include the costs of experts. Systems experts know the computers, software, and files at issue in the case. Outside experts are often brought in to conduct electronic discovery. Their role is to take the data collections, convert them into indexed and reviewable files, and ready them for production. Forensic examiners, the most expensive of all, may be brought in to search for deleted documents, missing e-mail, and system data.

On the other hand, electronic discovery can also greatly reduce the costs of discovery and facilitate the pretrial preparation process. When properly managed, electronic discovery allows a party to organize, identify, index, and even authenticate documents in a fraction of the time and at a fraction of the cost of paper discovery while virtually eliminating costs of copying and transport.

Purpose and Role of the Guidelines

Until recently, electronic discovery disputes have not been a standard feature of state court litigation in most jurisdictions. However, because of the near universal reliance on electronic records both by businesses and individuals, the frequency with which electronic discovery-related ques-

tions arise in state courts is increasing rapidly, in all manner of cases. Uncertainty about how to address the differences between electronic and traditional discovery under current discovery rules and standards "exacerbates the problems. Case law is emerging, but it is not consistent and discovery disputes are rarely the subject of appellate review."[3]

Accordingly, the Conference of Chief Justices established a Working Group at its 2004 Annual Meeting to develop a reference document to assist state courts in considering issues related to electronic discovery. The initial draft of the first four Guidelines was sent to each state's chief justice in March, 2005. A Review Draft was circulated for comment in October 2005 to each Chief Justice and to a wide array of lawyer organizations and e-discovery experts. Seventeen sets of comments were received[4] and were reviewed by the Working Group in preparing the March 2006 version of the Guidelines. The Working Group wishes to express its deep appreciation to all those who took the time to share their experience, insights, and concerns.

These Guidelines are intended to help reduce this uncertainty in state court litigation by assisting trial judges faced by a dispute over e-discovery in identifying the issues and determining the decision-making factors to be applied. 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 and should be considered along with the other resources cited in the attached bibliography including the newly revised provisions on discovery in the Federal Rules of Civil Procedure[5] and the most recent edition of the American Bar Association Standards Relating to Discovery.[6]

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[3] *Id.* at 3.

[4] From: The American College of Trial Lawyers (ACTL); The Association of Trial Lawyers of America (ATLA); Courtney Ingraffia Barton, Esq., LexisNexis® Applied Discovery; Gary M. Berne, Esq., Stoll Stoll Berne Lokting & Shlachter PC, Portland, OR; Richard C. Broussard, Esq., Broussard & David, Lafayette, LA; David Dukes, Esq., President, The Defense Research Institute (DRI); Walter L. Floyd, Esq., The Floyd Law Firm, PC, St. Louis, MO; Thomas A. Gottschalk, Executive Vice President – Law & Public Policy and General Counsel, General Motors; Robert T. Hall, Esq., Hall, Sickells, Frei and Kattenberg, PC Reston, VA; Justice Nathan L. Hecht, Supreme Court of Texas; Andrea Morano Quercia, Eastman Kodak Company; Prof. Glenn Koppel, Western State University Law School; Michelle C. S. Lange, Esq., & Charity J. Delich, Kroll Ontrack Inc.; Lawyers for Civil Justice (LCJ), U.S. Chamber Institute for Legal Reform, DRI, the Federation of Defense and Corporate Counsel, & the International Association of Defense Counsel; Charles W. Matthews, Vice President and General Counsel, Exxon Mobil; Harry Ng, American Petroleum Institute; Clifford A. Rieders, Esq., Riders, Travis, Humphrey, Harris, Waters & Waffenschmidt, Williamsport, PA.

[5] The revised rules were approved by the United States Supreme Court on April 12, 2006, and will take effect on December 1, 2006, unless Congress enacts legislation to reject, modify, or defer the amendments."

[6] American Bar Association Standards Relating to Civil Discovery, (Chicago, IL: August 2004).

Preface

Recognizing that:

- there are significant differences in the discovery of conventional paper documents and electronically stored information in terms of volume, volatility, and cost;
- until recently, electronic discovery disputes have not been a standard feature of state court litigation in most jurisdictions;
- the frequency with which electronic discovery-related questions arise in state courts is increasing rapidly, because of the near universal reliance on electronic records both by businesses and individuals; and
- uncertainty about how to address the differences between discovery of conventional and electronically-stored information under current discovery rules and standards exacerbates the length and costs of litigation; and
- discovery disputes are rarely the subject of appellate review;

the Conference of Chief Justices (CCJ) established a Working Group at its 2004 Annual Meeting to develop a reference document to assist state courts in considering issues related to electronic discovery.

A review draft of proposed Guidelines was widely circulated for comment in October, 2005. Many sets of thorough and thoughtful comments were received and discussed by the Working Group in preparing a final draft for consideration by the members of CCJ at its 2006 Annual Meeting. At its business meeting on August 2, 2006, CCJ approved the ***Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information*** as a reference tool for state trial court judges faced by a dispute over e-discovery.

These *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. They should not be treated as model rules or universally applicable standards. They have been crafted only to offer guidance to those faced with addressing the practical problems that the digital age has created. The Conference of Chief Justices recognizes that the *Guidelines* will become part of the continuing dialogue concerning how best to ensure the fair, efficient, and effective administration of justice as technology changes. They should be considered along with the other resources such as the newly revised provisions on discovery in the Federal Rules of Civil Procedure and the most recent edition of the American Bar Association Standards Relating to Discovery. Although the *Guidelines* acknowledge the benefits of uniformity and are largely consistent with the revised Federal Rules, they also recognize that the final determination of what procedural and

evidentiary rules should govern questions in state court proceedings (such as when inadvertent disclosures waive the attorney-client privilege) are the responsibility of each state, based upon its legal tradition, experience, and process.

The *Guidelines* are being sent you to because of your interest in the civil justice process generally and electronic discovery issues in particular. Additional copies can be downloaded from the National Center for State Courts' website – www.ncsconline.org.

Conference of Chief Justices

Guidelines For State Trial Courts Regarding Discovery Of Electronically-Stored Information

1. Definitions

A. Electronically-stored information is any information created, stored, or best utilized with computer technology of any type. It includes but is not limited to data; word-processing documents; spreadsheets; presentation documents; graphics; animations; images; e-mail and instant messages (including attachments); audio, video, and audiovisual recordings; voicemail stored on databases; networks; computers and computer systems; servers; archives; back-up or disaster recovery systems; discs, CD's, diskettes, drives, tapes, cartridges and other storage media; printers; the Internet; personal digital assistants; handheld wireless devices; cellular telephones; pagers; fax machines; and voicemail systems.

B. Accessible information is electronically-stored information that is easily retrievable in the ordinary course of business without undue cost and burden.

COMMENT: The definition of electronically-stored information is based on newly revised section 29 of the American Bar Association *Standards Relating to Civil Discovery* (August 2004). It is intended to include both on-screen information and system data and metadata that may not be readily viewable. The list included in the Guideline should be considered as illustrative rather than limiting, given the rapid changes in formats, media, devices, and systems.

The definition of accessible information is drawn pending Federal Rule 26(b)(2)(B) (2006). *See also Zubulake v. UBS Warburg LLC*, 217 F.R.D. 390 (S.D.N.Y. 2003)*(Zubulake* III). What constitutes an undue cost or burden will need to be determined on a case by case basis. However, examples of information that may not be reasonably accessible in all instances include data stored on back-up tapes or legacy systems; material that has been deleted; and residual data.

2. Responsibility Of Counsel To Be Informed About Client's Electronically-Stored Information

In any case in which an issue regarding the discovery of electronically-stored information is raised or is likely to be raised, a judge should, when appropriate, encourage counsel to become familiar with the operation of the party's relevant information management systems, including how information is stored and retrieved. If a party intends to seek the production of electronically-stored information in a specific case, that fact should be communicated to opposing counsel as soon as possible and the categories or types of information to be sought should be clearly identified.

COMMENT: This provision is drawn from the Electronic Discovery Guidelines issued by the U.S. District Court for the District of Kansas (para. 1) and is consistent with other rules and proposed rules that place a responsibility on counsel, when appropriate and reasonable, to learn about their client's data storage and management systems and policies at the earliest stages of litigation in order to facilitate the smooth operation of the discovery process. [See e.g., pending Federal Rules of Civil Procedure 26(f) (2006)]. While the manner in which this encouragement should be given will, of necessity, depend on the procedures and practices of a particular jurisdiction and the needs of the case before the court, the court should establish the expectation early that counsel must be well informed about their clients' electronic records. Voluntary resolution of issues involving electronically-stored information by counsel for the parties should be encouraged. Such agreements can be facilitated if the party seeking discovery clearly indicates the categories of information to be sought so that counsel for the producing party may confer with its clients about the sources of such information and render advice regarding preservation obligations.

3. Agreements By Counsel; Pre-Conference Orders

A. In any case in which an issue regarding the discovery of electronically-stored information is raised or is likely to be raised, a judge should encourage counsel to meet and confer in order to voluntarily come to agreement on the electronically-stored information to be disclosed, the manner of its disclosure, and a schedule that will enable discovery to be completed within the time period specified by [the Rules of Procedure or the scheduling order].

B. In any case in which an issue regarding the discovery of electronically-stored information is raised or is likely to be raised, and in which counsel have not reached agreement regarding the following matters, a judge should direct counsel to exchange information that will enable the discovery process to move forward expeditiously. The list of information subject to discovery should be tailored to the case at issue. Among the items that a judge should consider are:

(1) A list of the person(s) most knowledgeable about the relevant computer system(s) or network(s), the storage and retrieval of electronically-stored information, and the backup, archiving, retention, and routine destruction of electronically stored information, together with pertinent contact information and a brief description of each person's responsibilities;

(2) A list of the most likely custodian(s), other than the party, of relevant electronic data, together with pertinent contact information, a brief description of each custodian's responsibilities, and a description of the electronically-stored information in each custodian's possession, custody, or control;

(3) A list of each electronic system that may contain relevant electronically-stored information and each potentially relevant electronic system that was operating during the time periods relevant to the matters in dispute, together with a general description of each system;

(4) An indication whether relevant electronically-stored information may be of limited accessibility or duration of existence (e.g., because they are stored on media, systems, or formats no longer in use, because it is subject to destruction in the routine course of business, or because retrieval may be very costly);

(5) A list of relevant electronically-stored information that has been stored off-site or off-system;

(6) A description of any efforts undertaken, to date, to preserve relevant electronically-stored information, including any suspension of regular document destruction, removal of computer media with relevant information from its operational environment and placing it in secure storage for access during litigation, or the making of forensic image back-ups of such computer media;

(7) The form of production preferred by the party; and

(8) Notice of any known problems reasonably anticipated to arise in connection with compliance with e-discovery requests, including any limitations on search efforts considered to be burdensome or oppressive or unreasonably expensive, the need for any shifting or allocation of costs, the identification of potentially relevant data that is likely to be destroyed or altered in the normal course of operations or pursuant to the party's document retention policy.

COMMENT: This Guideline combines the approaches of the pending Federal Rules of Procedure 26(f)(3) (2006) and the rule proposed by Richard Best that relies heavily on the Default Standard for Discovery of Electronic Documents promulgated by the U.S. District Court for the District of Delaware. The Guideline expresses a clear preference for counsel to reach an agreement on these matters. Because not all states follow the three-step process contemplated by the Federal Rules[7] or require initial party conferences, paragraph 3(A) recommends that trial judges "encourage" counsel to meet in any case in which e-discovery is or is likely to be an issue.

When counsel fail to reach an agreement, the Guideline recommends that judges issue an order requiring the exchange of the basic informational foundation that will assist in tailoring e-discovery requests and moving the discovery process forward. While not all of these items may be needed in every case, the list provides the elements from which a state judge can select to craft an appropriate order.

In order to address concerns regarding the Delaware Default Order expressed by defense counsel, the Guideline inserts a standard of relevance.[8] For example, unlike the proposed California rule and the Delaware Default Standard, it requires a list of only those electronic systems

[7] Step 1: Counsel exchange basic information and become familiar with their client's information systems; Step 2: Counsel confer to attempt to resolve key discovery issues and develop a discovery plan; and Step 3: A hearing and order to memorialize the plan and determine unsettled issues.

[8] Relevance in this context refers to a state's standard of relevance for discovery purposes, not the standard used to determine admissibility at trial.

on which relevant electronically-stored information may be stored or that were operating during the time periods relevant to the matters in dispute, rather than the broader "each relevant electronic system that has been in place at all relevant times." It is hoped that in this way, the burden on the responding party may be reduced by being able to focus solely on the systems housing the actual electronically-stored information or data that is or will be requested. Of course, the best way of limiting the burden is for counsel to agree in advance, thus obviating the need to issue a pre-conference order.

Subparagraph 2(B)(3) suggests that the parties be required to provide a general description of each electronic system that may contain relevant electronically-stored information. Ordinarily, such descriptions should include the hardware and software used by each system, and the scope, character, organization, and formats each system employs.

Subparagraph 2(B)(7) of the Guideline includes one issue not covered in the proposed California rule or Delaware Default Standard -- the form of production preferred by the party. [See the pending *Federal Rules of Civil Procedure* 26(f)(3) (2006).] Including an exchange of the format preferences early will help to reduce subsequent disputes over this thorny issue.

4. Initial Discovery Hearing Or Conference

Following the exchange of the information specified in Guideline 3, or a specially set hearing, or a mandatory conference early in the discovery period, a judge should inquire whether counsel have reached agreement on any of the following matters and address any disputes regarding these or other electronic discovery issues:

A. The electronically-stored information to be exchanged including information that is not readily accessible;

B. The form of production;

C. The steps the parties will take to segregate and preserve relevant electronically stored information;

D. The procedures to be used if privileged electronically-stored information is inadvertently disclosed; and

E. The allocation of costs.

COMMENT: This Guideline is derived from Electronic Discovery Guidelines issued by the U.S. District Court for the District of Kansas. It addresses the next stage of the process, and lists for the trial judge some of the key issues regarding electronic discovery that the judge may be called upon to address. The intent is to identify early the discovery issues that are in dispute so that they can be addressed promptly.

5. The Scope Of Electronic Discovery

In deciding a motion to protect electronically-stored information or to compel discovery of such information, a judge should first determine whether the material sought is subject to production under the applicable standard for discovery. If the requested information is subject to production, a judge should then weigh the benefits to the requesting party against the burden and expense of the discovery for the responding party, considering such factors as:

A. The ease of accessing the requested information;

B. The total cost of production compared to the amount in controversy;

C. The materiality of the information to the requesting party;

D. The availability of the information from other sources;

E. The complexity of the case and the importance of the issues addressed;

F. The need to protect privileged, proprietary, or confidential information, including trade secrets;

G. Whether the information or software needed to access the requested information is proprietary or constitutes confidential business information;

H. The breadth of the request, including whether a subset (e.g., by date, author, recipient, or through use of a key-term search or other selection criteria) or representative sample of the contested electronically stored information can be provided initially to determine whether production of additional such information is warranted;

I. The relative ability of each party to control costs and its incentive to do so;

J. The resources of each party compared to the total cost of production;

K. Whether the requesting party has offered to pay some or all of the costs of identifying, reviewing, and producing the information;

L. Whether the electronically-stored information is stored in 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; and

M. Whether the responding party has deleted, discarded, or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable.

COMMENT: This Guideline recommends that when a request to discover electronically-stored information is contested, judges should first assess whether the information being sought is subject to discovery under the applicable state code, rules, and decisions (e.g., whether the material sought is relevant to the claims and defenses of the party, or relevant to the subject matter under dispute, or could lead to admissible evidence). Once this question has been answered, the Guideline suggests that judges balance the benefits and burdens of requiring discovery, offering a set of factors to consider derived from the revised American Bar Association *Standards Relating to Civil Discovery,* Standard 29.b.iv. (August 2004). In so doing, it sets out a framework for decision-making rather than specific presumptions regarding "reasonably accessible" vs. "not reasonably accessible" data; active data vs. "deleted" information; information visible on-screen vs. metadata; or forensic vs. standard data collection. *But see e.g.,* Pending Federal Rule of Civil Procedure 26(b)(2)(2006); The Sedona Conference Working Group on Best Practices for Electronic Document Retention and Production, *The Sedona Principles,* Principles 8, 9, and 12 (Silver Spring, MD: The Sedona Conference 2004). It is unlikely that all of the factors will apply in a particular case, though the first six will arise in most disputes over the scope of electronically stored information. *See e.g., Public Relations Society of America, Inc. v. Road Runner High Speed Online,* 2005 WL 1330514 (N.Y. May 27, 2005).

Depending on the circumstances and the decision regarding the scope of discovery, the judge may wish to consider shifting some or all of the costs of production and review in accordance with the factors cited in Guideline 7, *infra.*

6. Form Of Production

In the absence of agreement among the parties, a judge should ordinarily require electronically-stored information to be produced in no more than one format and should select the form of production in which the information is ordinarily maintained or in a form that is reasonably usable.

COMMENT: In conventional discovery, the form of production was seldom disputed. In electronic discovery, there are many choices besides paper. While a party could produce hard-copy printouts of all electronic files, doing so would likely hide metadata, embedded edits, and other non-screen information. It also would be voluminous and cumbersome to store, and costly to produce and search. On the other hand, producing all data in "native format" (i.e. streams of electrons on disks or tapes exactly as they might be found on the producing party's computer) would provide all the "hidden" data and be more easily stored, but would be just as difficult to search without the word-processing, e-mail, or database software needed to organize and present the information in a coherent form.

This Guideline is based on pending Federal Rule of Civil Procedure 34(b)(ii) and (iii) (2006). It recommends that parties should not be required to produce electronically-stored information in multiple formats absent a good reason for doing so. See also comment 12.c of *The Sedona Principles.* [The Sedona Conference Working Group on Best Practices for Electronic Document Retention and Production, *The Sedona Principles* (Silver Spring, MD: The Sedona Conference 2004).] Requests for multiple formats should be subject to the same cost-benefit analysis as suggested in Guideline 5.

The Guideline, like the pending Federal Rule, suggests rendition in the form in which the information is ordinarily maintained or in another form that is reasonably useable. The Guideline, thus, assumes that the information's standard format is reasonably usable or it would be of no benefit to the party who has produced it, but allows substitution of another format that may still be helpful to the requesting party. Whether the production of metadata and other forms of hidden information, are discoverable should be determined based upon the particular circumstances of the case.

7. Reallocation of Discovery Costs

Ordinarily, the shifting of the costs of discovery to the requesting party or the sharing of those costs between the requesting and responding party should be considered only when the electronically-stored information sought is not accessible information and when restoration and production of responsive electronically-stored information from a small sample of the requested electronically-stored information would not be sufficient. When these conditions are present, the judge should consider the following factors in determining whether any or all discovery costs should be borne by the requesting party:

A. The extent to which the request is specifically tailored to discover relevant information;

B. The availability of such information from other sources;

C. The total cost of production compared to the amount in controversy;

D. The total cost of production compared to the resources available to each party;

E. The relative ability of each party to control costs and its incentive to do so;

F. The importance of the issues at stake in the litigation; and

G. The relative benefits of obtaining the information.

COMMENT: This Guideline reflects the analysis conducted in *Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003)(Zubulake* III), the leading federal case on the issue. The Court in *Zubulake* established a three-tiered test for determining when it is appropriate to require a requesting party to pay or contribute to the cost of producing discoverable material. The first tier is a determination of whether the electronically-stored information is accessible. The second tier is a determination that a less-costly method of obtaining the needed information such as restoration of a representative sample of the tapes, disks, or other storage media would not be feasible. The final step is a cost-benefit analysis similar to that recommended in Guideline 5 for determining the appropriate scope of discovery.

The *Zubulake* litigation involved a sex discrimination complaint in which the plaintiff requested e-mail messages beyond the approximately 100 pages produced by the defendants.

> "She presented substantial evidence that more responsive e-mail existed, most likely on backup tapes and optical storage media created and maintained to meet SEC records retention requirements. The defendants objected to producing e-mail from these sources, which they estimated would cost $175,000 exclusive of attorney review time." Withers, K.J., *Annotated Case Law and Further Reading on Electronic Discovery* 17 (June 16, 2004).

The Court found the requested material to be relevant and ordered restoration of 5 of the total of 77 back-up tapes at a cost of approximately $19,000. After determining that 600 of the restored messages were responsive to the plaintiff's discovery request, the Court ordered restoration of the remaining tapes at an estimated cost of $165,954.67 for restoration and another $107,695 for review, requiring the plaintiff to bear 25% and the defendants 75% of the costs of restoration and the defendants to pay 100% of the costs of reviewing the material for privileged information. *Id.,* 30.

Like Zubulake, the Guideline treats cost-shifting as a matter for the judge's discretion. (*But see* Texas Rule of Civil Procedure 196.4 which requires that whenever a court orders a responding party to produce information that is not 'reasonably available," the court must require the requesting party to pay "the reasonable expenses of any extraordinary steps required to retrieve and produce the information.") It anticipates that the proposed cost/benefit analysis will both encourage requesting parties to carefully assess whether all the information sought is worth paying for, while discouraging the producing party from storing the information in such a way as to make it extraordinarily costly to retrieve.

8. Inadvertent Disclosure of Privileged Information

In determining whether a party has waived the attorney-client privilege because of an inadvertent disclosure of attorney work-product or other privileged electronically stored information, a judge should consider:

A. The total volume of information produced by the responding party;

B. The amount of privileged information disclosed;

C. The reasonableness of the precautions taken to prevent inadvertent disclosure of privileged information;

D. The promptness of the actions taken to notify the receiving party and otherwise remedy the error; and

E. The reasonable expectations and agreements of counsel.

COMMENT: Inadvertent disclosure of privileged information is sometimes unavoidable because of the large amounts of information that are often involved in electronic discovery, and the time and cost required to screen this voluminous material for attorney work product and other privileged materials. As indicated in Guideline 4, the best practice is for the parties to agree on

the process to use if privileged information is inadvertently disclosed and that such a disclosure shall not be considered a waiver of attorney-client privilege. While "claw-back" or "quick peek" agreements[9] are not perfect protections against use of privileged information by third parties not subject to the agreement or by the receiving party in another jurisdiction, they do allow the litigation to move forward and offer significant protection in many cases, especially when coupled with a court order recognizing the agreement and declaring that inadvertent production of privileged information does not create an express or implied waiver. [*See* The Sedona Conference Working Group on Best Practices for Electronic Document Retention and Production, *The Sedona Principles*, Comment 10.d (Silver Spring, MD: The Sedona Conference 2004); and Report of the Judicial Conference Committee on Practice and Procedure, pp 33-34 (September 2005).]

This Guideline applies when the parties have not reached an agreement regarding the inadvertent disclosure of electronically stored information subject to the attorney-client privilege. The first four factors are based on *Alldread v. City of Grenada*, 988 F.2d, 1425, 1433, 1434 (5th Cir. 1993). [*See also United States v. Rigas*, 281 F. Supp. 2d 733 (S.D.N.Y. 2003). The fifth factor listed by the Court in *Alldread* – "the overriding issue of fairness" – is omitted, since the four factors listed help to define what is fair in the circumstances surrounding a disclosure in a particular case, but the reasonable expectations and agreements of counsel has been added to reinforce the importance of attorneys discussing and reaching at least an informal understanding on how to handle inadvertent disclosures of privileged information.

Unlike Texas Rule of Civil Procedure 193.3(d) and the most recent revisions to Federal Rule of Civil Procedure 26(b)(5)(B), the Guideline does not create a presumption against a waiver when, within 10 days after discovering that privileged material has been disclosed, "the producing party amends the response, identifying the material or information produced and stating the privilege asserted." While the Texas rule has apparently worked well, creation of a presumption is a matter for state rules committees or legislatures and goes beyond the scope of these Guidelines.

9. Preservation Orders

A. When an order to preserve electronically-stored information is sought, a judge should require a threshold showing that the continuing existence and integrity of the information is threatened. Following such a showing, the judge should consider the following factors in determining the nature and scope of any order:

(1) The nature of the threat to the continuing existence or integrity of the electronically-stored information;

(2) The potential for irreparable harm to the requesting party absent a preservation order;

[9] Claw-back agreements are a formal understanding between the parties that production of privileged information is presumed to be inadvertent and does not waive the privilege and the receiving party must return the privileged material until the question is resolved. Under "quick peek" agreements, counsel are allowed to see each other's entire data collection before production and designate those items which they believe are responsive to the discovery requests. The producing party then reviews the presumably much smaller universe of files for privilege, and produces those that are responsive and not privileged, along with a privilege log. K.J., Withers, "Discovery Disputes: Decisional Guidance," 3 Civil Action No. 2, 4,5 (2004).

(3) The capability of the responding party to maintain the information sought in its original form, condition, and content; and

(4) The physical, technological, and financial burdens created by ordering preservation of the information.

B. When issuing an order to preserve electronically stored information, a judge should carefully tailor the order so that it is no broader than necessary to safeguard the information in question.

COMMENT: One consequence of the expansion in the volume of electronically-stored information resulting from the use of computer systems, is the reliance on automated data retention programs and protocols that result in the periodic destruction of defined types of files, data, and back-up tapes. These programs and protocols are essential for smooth operation, effectively managing record storage, and controlling costs. The factors for determining when to issue a preservation order apply after existence of a threat to the sought information has been demonstrated. They are drawn from the decision in *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429 (W.D. Pa. 2004). They require balancing the danger to the electronically stored information against its materiality, the ability to maintain it, and the costs and burdens of doing so.

Because electronically-stored information, files, and records are seldom created and stored with future litigation in mind, they cannot always be easily segregated. An order directing a business to "halt all operations that can result in the destruction or alteration of computer data, including e-mail, word-processing, databases, and financial information . . . can effectively unplug a computer network and put a computer dependent company out of business." K.J. Withers, "Electronic Discovery Disputes: Decisional Guidance," 3 *Civil Action* No. 2, p.4 (NCSC 2004). Thus, the Guideline urges that when a preservation order is called for, it should be drawn as narrowly as possible to accomplish its purpose so as to limit the impact on the responding party's operations.

10. Sanctions

Absent exceptional circumstances, a judge should impose sanctions because of the destruction of electronically-stored information only if:

A. There was a legal obligation to preserve the information at the time it was destroyed;

B. The destruction of the material was not the result of the routine, good faith operation of an electronic information system; and

C. The destroyed information was subject to production under the applicable state standard for discovery.

COMMENT: This Guideline closely tracks pending Federal Rule of Civil Procedure 37(f) (2006), but provides greater guidance to courts and litigants without setting forth the stringent standards suggested in the *Sedona Principles* ["a clear duty to preserve," "intentional or reckless failure to preserve and produce," and a "reasonable probability" of material prejudice]. [The Sedona Conference Working Group on Best Practices for Electronic Document Retention and Production, *The Sedona Principles*, Principle 14 (Silver Spring, MD: The Sedona Conference 2004).]

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- B. Weighing the Duty to Mitigate with the Duty to Hold Evidence for Trial
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- D. Spoliation Pitfalls
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- F. Protective Orders, Production and Privilege Logs
- G. Defensible Legal Holds
- H. Citing Online Content Properly
- I. Privileged ESI That is Discoverable (Exceptions)
- J. Clawback Agreements
- K. Making Email Evidence Usable in the Courtroom

II. **What to Look for, Where to Find it and What to do With it: Email, Social Media, Texts and Video**
9:45 - 10:45, Gary F. Seitz
- A. Types of Data, Production Specifications and Formats - in Detail
- B. Obtaining Evidence: Smartphones, PCs and Tablets, Third Parties, Flash Drives and External Hard Drives, Cloud Storage
- C. Using Apps on Your Client's Smartphone to Collect Evidence
- D. Predictive Coding Do's and Don'ts
- E. Metadata Explained
    1. Defining Different Types and Formats
    2. Metadata Landmines to Avoid
    3. "Scrubbing" Metadata to Remove it From Documents
    4. Producing Responsive, Non-Privileged ESI With Appropriate Metadata and OCR
- F. Working with and Subpoenaing Social Media Companies
- G. Facebook's Archive Feature
- H. Using Friending/Following to Obtain Info
- I. What Can Be Done if the Account's Been Closed?
- J. Obtaining Deleted Data
- K. Processing, Review and Production Pitfalls

III. **Applying Hearsay Exceptions and Overcoming Relevancy Issues**
11:00 - 11:45, Gary F. Seitz
- A. Is Computer-Generated and Cell Phone Information Hearsay?
- B. Adhering to the Hearsay Rule
- C. Applying Hearsay Exceptions to Email, Text and Social Media
- D. Relevancy Hurdles
- E. How to Avoid Privilege Pitfalls

IV. **Establishing Authenticity & Satisfying the Best Evidence Rule: The Unsurmountable Challenge**
12:45 - 1:45, Michael J. Needleman
- A. Proactively Ensuring Authenticity of ESI
- B. Has the ESI Changed? What Evidence is Needed to Prove it Hasn't?
- C. How to Prove Electronic Documents Have Not Been Modified
- D. Have the Systems Been Altered? How to Prove Reliability
- E. Identifying Who Made the Post and Linking to the Purported Author
- F. Is the Evidence What the Proponent Claims?

G. Does the ESI have Distinctive Characteristics?
H. Examination of Circumstantial Evidence
I. State Interpretation of Federal Rule 901
J. Prima Facie Demonstration
K. Proven Methods for Testing ESI (Comparison, Control, Hash Tags, Encryption and Metadata)
L. Self-Authentication Methods
M. Real-Life Examples and Recent Case Law

V. **Using Expert Witnesses to Get Your Evidence in (and Keep Theirs Out)**
1:45 - 2:30, Michael J. Needleman

VI. **Real-World Examples, Handy How-to's and Sample Screen Shots**
2:45 - 3:30, Randy C. Greene

A. Preservation, Spoliation and Authentication Obstacles
B. Facebook, Twitter, LinkedIn and Tumblr
C. Emails (Work-Related and Personal)
D. Video Surveillance (Private and Public)
E. Computerized Versions of Contracts and Other Documents
F. Text Messages and Voicemail
G. Chats and Instant Messages
H. YouTube
I. Instagram, Pinterest and Snapchat

VII. **Legal Ethics and ESI**
3:30 - 4:30, Thomas J. Wagner

A. Duties Owed to Clients, Opposing Counsel and the Courts
B. ESI Issues to Address in the Courtroom
C. Privilege Waivers
D. Searching Social Networking Sites
E. Personal Privacy Concerns Arising From Modern Database Searches
F. Ethical Duties When Mining Metadata

Who Should Attend

This **intermediate level** legal program is designed for attorneys. Paralegals may also benefit.

Event Description

A Practical How-to Guide for Turning ESI into Evidence and Getting it Admitted

With all of the changes surrounding social media and email, it's critical to get up to speed on the latest rules, procedures and case law. This full-day, cutting-edge course will walk you through state processes, procedures and the latest case law while equipping you with handy how-to's, sample screen shots, real world examples and shortcuts along the way. Expert attorney faculty, who know the ins and outs of these groundbreaking new forms of evidence, will provide practical tech advice that you can actually understand and start using right away. From email to Facebook, Twitter and Snapchat, to YouTube, Pinterest and video surveillance, this comprehensive ESI guide will give you invaluable insight into proven ways for identifying, preserving, producing, admitting and blocking ESI. Register today!

- Recognize key social media, email and text evidence and traverse obstacles to ensure relevancy, authenticity and that the best evidence rule is satisfied.
- Examine the latest rules, case law and procedures regarding the admission of email evidence.
- Identify common spoliation pitfalls, sanctions and defensible legal hold hurdles.
- Find out critical mistakes attorneys make when collecting Facebook and LinkedIn evidence.
- Gain an in-depth understanding of metadata, how to scrub it, remove it from documents and produce responsive, non-privileged ESI with appropriate metadata and OCR.
- Skillfully obtain ESI from smartphones, third parties, flash drives and external hard drives.
- Learn how to effectively work with social media companies to obtain deleted information.
- Apply business record and excited utterance hearsay exceptions to email, text messages and more.
- Learn proven methods for testing ESI, including comparison, hash tags, encryption and metadata.

Faculty Biographical Information

RANDY C. GREENE is the resident partner for the Dugan, Brinkmann, Maginnis and Pace's New Jersey office. His practice includes property subrogation, general civil litigation, auto, premises and product liability litigation. Mr. Greene also handles matters involving information technology including internet privacy. He was admitted to practice in Pennsylvania and New Jersey in 1991. Mr. Greene graduated from Franklin and Marshall College and from Temple University School of Law, where he earned, cum laude, honors and numerous academic awards. He was a national semi-finalist as a member of Temple University's National Trial Team. Mr. Greene is a member of the Philadelphia Association of Defense Counsel. He has participated on the faculty of various National Institute of Trial Advocacy programs. Mr. Greene has assisted in the coaching of the Temple Law School Trial Teams.

MICHAEL J. NEEDLEMAN is a partner in the Philadelphia law firm of Fineman, Krekstein & Harris, P.C., where he focuses on and handles insurance defense, insurance coverage, and employment litigation matters. Mr. Needleman has delivered lectures to the insurance industry on such topics as federal diversity litigation, the scope of the duty to defend and has taught several CLE classes on a variety of subjects. He is a member of the Philadelphia Volunteer Lawyers for the Arts, and is occasionally appointed by the District Court for the Eastern District of Pennsylvania to assist in civil rights cases. Mr. Needleman is a graduate of American University and Widener University School of Law, where he as a member of the *Delaware Journal of Corporate Law*.

GARY F. SEITZ is an attorney at Gellert Scali Busenkell & Brown LLC. He concentrates his practice in the areas of commercial bankruptcy, commercial litigation and admiralty and maritime law. Mr. Seitz serves as a Chapter 7 Panel Trustee in the U.S. Bankruptcy Court for the Eastern District of Pennsylvania and acts as Trustee in Chapter 7 and Chapter 11 cases in the Eastern District of Pennsylvania and the District of Delaware. He has extensive experience handling bankruptcy matters for creditors, asset purchasers and trustees. Mr. Seitz also has expertise in admiralty and maritime litigation and transactions with particular emphasis on marine financing and vessel foreclosures. He is admitted to practice in Delaware, Pennsylvania and New Jersey. Mr. Seitz is admitted to practice before the U.S. Court of Appeals for the 3rd and 5th circuits; and the U.S. District Courts for the Eastern, Middle and Western districts of Pennsylvania, the District of New Jersey and the District of Delaware. He graduated magna cum laude from Buena Vista University and from the University of Iowa College of Law. Mr. Seitz also earned his master's degree from Tulane University. In the course of obtaining his law degree, he studied at the Shanghai Law Research Institute in the Peoples Republic of China and at the Bentham House Faculty of Laws of the University of London. Mr. Seitz has obtained the designation of "Proctor in Admiralty" from the Maritime Law Association of the U.S. He is a member of the National Association of Bankruptcy Trustees, the Eastern District of Pennsylvania Bankruptcy Conference; and the Pennsylvania, New Jersey State and American bar associations. Mr. Seitz is a member of the Philadelphia Maritime Association and the Transportation Lawyers Association.

THOMAS J. WAGNER is a trial lawyer who focusses on civil litigation. A veteran of more than 50 civil jury trials and hundreds of bench trials, arbitrations (AAA & common law) and mediations, Mr. Wagner and the Firm have been assigned an "AV" rating by Mr. Wagner's peers through the Martindale Hubbell peer review. He has been designated by his colleagues and peers as a Super Lawyer for 2014, 2015 & 2016. Mr. Wagner founded the Law Offices of Thomas J. Wagner, LLC in 1998 to defend self-insureds in catastrophic loss litigation. Mr. Wagner has developed unique expertise in defending and trying cases on behalf of Firm Clients that involve admiralty/maritime, products liability, transportation, wrongful death, traumatic brain injuries (“TBI”), commercial and contract disputes and claims, multi-party construction,

cargo/freight, professional liability of attorneys, architects and accountants, directors and officers claims, premises liability law - including environmental/toxic exposure damage claims and Fire cases - as well as defense of civil rights, employment and workers compensation claims in Pennsylvania and New Jersey. Mr. Wagner's clients rely upon the Firm to investigate and respond to false or fraudulent claims in casualty, employment, civil rights and workers compensation claims. He is designated by his colleagues as a pre-eminent lawyer in his practice areas and listed in the Bar Register of Pre-Eminent Lawyers. Ã‚Â Locally, Mr. Wagner serves as a Judge Pro Tem in the Major Jury Program for the Pennsylvania Court of Common Pleas in Philadelphia County. He is admitted to all State and Federal Courts in Pennsylvania and New Jersey, including the United States Court of Appeals for the Third Circuit. Ã‚Â Mr. Wagner has been a member of the American Trucking Association, its Litigation Center, the Transportation Lawyers Association, the Risk and Insurance Management Society and the Trucking Industry Defense Association ("TIDA"). In addition to regular trial success, Mr. Wagner counsels clients on risk and litigation management and regularly presents updates to firm clients and friends in the transportation, product liability, employment, fire casualty and risk fields. He received his B.S degree from St. Joseph’s University and his J.D. degree from Temple University.

In Order to Make This Seminar Successful and Beneficial for the Attendees, Please Consider the Following:

- Please discuss different types of ESI (Facebook, Email, Texts, Tumblr, YouTube, Pinterest, Snapchat, Video Survelliance, etc.) throughout your discussion.

- Include industry or practice specific forms, checklists, motions, pleadings, policies, letters, contracts and agreements where appropriate in your materials. Attendees always appreciate sample documents.

- Use of visual aids, case studies, real life examples, hypotheticals and case law to generate good discussions between faculty and attendees.

- The level of the seminar indicates how to gear your presentation:

    - Basic – Cover fundamental "how-to's"

    - Intermediate – Review the basics but speak beyond fundamentals

    - Advanced – Provide sophisticated practical tips and techniques and complex dilemmas

Written Material Preparation Requirements

Please ensure that your material is submitted by the required due date indicated on your speaker confirmation letter. Send your material attached to an email addressed to EventMaterials@nbi-sems.com. If that is not possible, please contact us at 1-800-777-8707.

Please:

- Prepare your material in **written narrative form** using **Microsoft Word.**
  - Sample forms may be submitted using Adobe PDF format.
  - For on-site venue seminars we suggest approximately 10 pages of written material per hour of speaking.
  - For teleconferences we suggest approximately 25 pages of written material per 90 minutes of speaking.
- Set all margins at 1.25" and set line spacing at 1.5.
- Use Times New Roman, 12-point font.
- Organize your material to follow the advertised agenda and separate each agenda section.
- Proofread and spell-check your work carefully. NBI, Inc. does not proofread or spell-check your work.

Please Do Not:

- Do not include page numbers, company logos or a table of contents with your material.
- Do not use previously copyrighted material. Without a copyright release, the material will not be published in the manual.
  - If you want to use copyrighted material you must obtain written permission from the copyright holder. NBI, Inc. must have a copy of the letter of authorization from the copyright holder to reprint the material.
  - When including copies of cases or statutes, please ensure that they are obtained from a source that does not require a copyright release.

FACULTY
Presentation Guide

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INTRODUCTION

This guide for National Business Institute (NBI) faculty was developed to help answer questions you may have regarding your seminar presentation. This brochure will explain some of our procedures and what is needed to make the seminar a success.

HOW NBI SEMINARS WORK

Our goal is to provide a smooth-running, successful seminar. To reach our goal, we have a number of departments working closely together to coordinate faculty, locations, topics, publications, facilities and direct mail services.

At any one time, we have hundreds of seminars in various stages of production. Advertising for each is done by direct mail.

Due to the tight schedule between the printer and other departments, we need your cooperation in submitting your written materials to us on time. We sincerely appreciate your prompt attention to phone calls or other correspondence from our office regarding your written materials for the reference manual.

NON-CANCELLATION POLICY

Each National Business Institute seminar is scheduled with the expectation that once the brochure is mailed, everyone involved is committed to the success of the seminar. Our customers commit a day from their busy schedules to attend one of our seminars. As a matter of professional courtesy, we will not cancel the seminar and expect faculty to fulfill their responsibilities come what may.

THE DAY OF THE SEMINAR

Meeting Room

The meeting room is generally set in classroom style, with a platform for the faculty in the front. The platform will have a podium, microphone, ice water and chairs.

Program Manager

On-site program managers handle the mechanics and coordination of National Business Institute seminars. If there is anything they can reasonably do to assist you, just ask them.

They are responsible for:

- arriving early and ensuring the room is properly arranged and that the equipment and refreshments have been provided
- handling registrations, distributing materials and welcoming the attendees as they arrive
- keeping the seminar on schedule and for handling any problems as they arise
- introducing the faculty unless other arrangements have specifically been made

Note: *If you wish to introduce yourself or have them mention anything in particular in your introduction, feel free to discuss this with them directly before the program.*

Audio Recording

Each NBI seminar is recorded in its entirety. Audio sets are offered for sale to those who may not have been able to attend the seminar. The program manager is responsible for recording the event and appreciates your cooperation concerning the placement of recording equipment.

HINTS FOR YOUR PRESENTATION

We ask all attendees to evaluate our seminars. From their comments, we have found the following to be of great importance to a good presentation:

Agenda

Try to follow the published agenda as closely as possible.

Presentation Length

Plan your presentation for the time allotted. Presentations that are too long or too short can cause animosity with the audience, regardless of the quality of the material being presented. In addition, programs that end before the time specified result in reductions in continuing education credit. It is imperative that programs start and end on time to ensure our ability to award full credit to the attendees.

The Reference Manual

The manual should enhance your presentation, not be your presentation. The attendees should be able to follow along, and take notes, but the material should not be read to them.

Questions

When you take questions from the audience, please repeat the question so it can be heard on the audio recording as well as benefit the other attendees.

If you know other professionals who would like to participate as faculty for our seminars, please contact us at **800 777 8707**. For more information about our company and seminars, visit us online at **www.nbi-sems.com**.

SEMINAR MATERIAL

A bound reference manual is published as handout material for each seminar. The manual, which is written by the faculty, is intended to provide the attendees with a valuable reference book for future use, as well as assist them in following the seminar presentation. Therefore, the manual should be organized to follow the order of your presentation as closely as is practical.

We request the materials you submit to our office for inclusion in the manual be sent **electronically** and:

- **In Microsoft Word format**
- **page size - 8.5 x 11**
- **line spacing - 1.5**
- **margins on all sides - 1.25 in**

We prefer to have the **materials in prose form** vs. outline format. You will receive written confirmation regarding the date your materials are due in our office. This date allows production time to assemble, print and ship a copy of the manual to you in advance of the seminar.

COPYRIGHTS

Every NBI manual published is copyrighted. As an author, you retain rights to use your materials in any way you see fit. If you plan to use previously copyrighted material in the manual, please get permission from the copyright holder **BEFORE** submitting the material.

COMPENSATION

Faculty for NBI seminars are not paid for their time, preparation, handout material or presentation. Normally, faculty will be paid an honorarium for their participation. Every such case will be specifically confirmed in writing in advance of mailing seminar brochures. If you have any questions about compensation, please raise them immediately.

AUDIO-VISUAL EQUIPMENT

National Business Institute works closely with faculty to provide the equipment necessary for delivering the most informative presentation possible.

EXPENSES

Expenses incidental to preparing for National Business Institute seminars (e.g. long distance charges, copying charges, postage, Federal Express/UPS charges, etc.) are not reimbursed.

IN CONCLUSION

We hope this presentation guide has answered any questions you may have had about speaking at a National Business Institute seminar. We are proud of the relationships we have developed and maintained with faculty members. We look forward to working with you and your firm.

NBI | NATIONAL BUSINESS INSTITUTE™