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**State E-Discovery Rulemaking after the 2006 Federal  
Amendments: An Update and Evaluation**

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**I. Introduction**

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

As far as I can tell, this was the first explicit suggestion for amendments to the Federal Rules governing e-discovery, which I amplified in subsequent articles. My reasoning was that the Federal Rules should take

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<sup>2</sup> Judge Carroll now serves as Dean of the Cumberland School of Law of Samford University, located in Birmingham, Alabama and has continued to be active in the field, having most recently served as the Reporter for the NCCUSL Uniform Rules.

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

into account how the significant differences between hard copy and electronic information were impacting “both the litigation process and [the] business world.”<sup>4</sup>

Since then, of course, the Civil Rules Advisory Committee mounted an intense rule drafting effort resulting in the 2006 E-Discovery Amendments to the Federal Rules of Civil Procedure (the “2006 Amendments”).<sup>5</sup> This Paper reports on the extent to which states have adopted provisions in their civil procedure analogous to or based on those changes.

The Appendix summarizes the known activity in the states for which we have current information.

## II. E-Discovery

Pre-trial discovery is essential to the litigation process. As the Supreme Court noted in 1947, “[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.”<sup>6</sup>

Naturally, “discovery, like all matters of procedure, has ultimate and necessary boundaries.”<sup>7</sup> Those “ultimate and necessary” boundaries have been severely tested by the emerging focus on information found in electronic form. Indeed, the Economist Magazine reports that one General Counsel estimates his legal fees on discovery have increased by 25% because of e-discovery concerns.<sup>8</sup>

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<sup>4</sup> See Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 Def. Counsel J. 206 (2001).

<sup>5</sup> The 2006 Amendments (with Committee Notes) came into effect December 1, 2006. They impact Rules 16, 26, 33, 34, 37, 45 and Form 35.

<sup>6</sup> *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

<sup>7</sup> *Id.* at 507.

<sup>8</sup> May, 2007. A recent survey of American College of Trial Lawyer fellows concluded that “electronic discovery, in particular, is too costly” and “[the] issues are not well understood by judges.” See Interim Report & 2008 Litigation Survey of the Fellows of the American College of Trial Lawyers, (Sept. 2008) at <http://www.du.edu/legalinstitute/pubs/Interim%20Report%20Final%20for%20web1.pdf>

Although the number of disputes involving e-discovery reported by state courts is less than in federal courts, there is no reason to believe that e-discovery issues are likely to be any less vexing to litigants in that context.

### **III. State Action to Date**

Including Texas and Mississippi, which acted before the Federal Amendments, a total of seventeen states have now incorporated e-discovery provisions in their general civil procedure rules or codes.<sup>9</sup> Two other states have modified their specialized rules for their business courts.

Generally speaking, the states can be classified into four groups. Arizona, Indiana, Iowa, Kansas, Minnesota, Maryland, Montana, New Jersey, North Dakota, Ohio and Utah have adopted, with some minor variations, most of the 2006 Amendments.<sup>10</sup> Arkansas, Louisiana, Nebraska<sup>11</sup> and New Hampshire utilized some of the concepts from the 2006 Amendments to make limited changes.<sup>12</sup> Three states – Idaho, Mississippi and Texas – adopted a different approach based on the Texas enactment.<sup>13</sup> Finally, New York and North Carolina made limited changes only to the rules governing their business courts.<sup>14</sup>

The remaining states and the District of Columbia continue to hesitate, in some cases with obvious skepticism about the need to act.<sup>15</sup> However, three of these states, Alaska, Michigan and Virginia, are awaiting final action on proposals before their respective Supreme Courts, Tennessee is currently accepting comments on a proposal and both California and New York anticipate action in 2009.<sup>16</sup>

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<sup>9</sup> The seventeen states which have enacted changes to their civil provisions are Arizona, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, North Dakota, Ohio, Texas, and Utah. The actions by these states – and 23 others (including the District of Columbia) – are discussed in the Appendix to this paper.

<sup>10</sup> Generally speaking, none of the states adopted provisions for early disclosures or “meet and confers.” Maryland, Ohio and Utah added significant embellishments to their provisions.

<sup>11</sup> Nebraska adopted only the provisions relating to scope of discovery and form of production.

<sup>12</sup> Louisiana, Nebraska and New Hampshire repackaged some of the federal amendment concepts and Arkansas only dealt with inadvertent production (and waiver).

<sup>13</sup> Texas permits objection to production of data that is “nor reasonably available” and mandates payment of any extraordinary steps required, should its production be ordered. Idaho and Mississippi make the payment discretionary.

<sup>14</sup> New York Commercial Division (statewide) and the North Carolina Business Court.

<sup>15</sup> At the Connecticut Supreme Court Rules Committee meeting in September, 2008., “[s]everal members of the [Rules] Committee questioned why our current discovery rules were not sufficient.” [http://www.jud.ct.gov/Committees/rules/rules\\_minutes\\_DRAFT\\_091508.pdf](http://www.jud.ct.gov/Committees/rules/rules_minutes_DRAFT_091508.pdf).

<sup>16</sup> California completed legislative action on e-discovery amendments in 2008 only to have them vetoed.

The “toolkit” for state rulemaking contains not only the 2006 Amendments, but also *The Sedona Principles Best Practices Recommendations & Principles for Addressing Electronic Document Production* (Second Edition (2007) (“*Sedona Principles*”),<sup>17</sup> the *Uniform Rules Relating to the Discovery of Electronically Stored Information* (“*Uniform Rules*”),<sup>18</sup> and the “*Guidelines for State Trial Courts on Discovery of Electronically Stored Information*” (“*Guidelines for State Trial Courts*”).<sup>19</sup>

In addition, a number of Federal District Courts have adopted e-discovery rules, guidelines and standing orders.<sup>20</sup>

### III. Typical Provisions

The following “scorecard” summarizes action on key e-discovery topics.

*Scope.* “Electronically stored information” is now generally<sup>21</sup> acknowledged as a category of discoverable material distinct from “documents” or “tangible things.” The ability to “test or sample” to secure such information is also recognized.<sup>22</sup>

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

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See *California e-Discovery Proposal Vetoed*, <http://www.bingham.com/Media.aspx?MediaID=7631>.

<sup>17</sup> The *Sedona Principles* consist of fourteen “best practice” recommendations covering the full range of e-discovery issues, together with commentary. See <http://www.thesedonaconference.org>. A Second Edition issued in 2007 made changes to *Sedona Principles* 8, 12, 13 and 14 and updated the terminology to be consistent with the Federal Amendments. See Thomas Y. Allman, *The Sedona Principles (Second Edition): Accommodating the 2006 E-Discovery Amendments*, 2008 Fed. Cts. L. Rev. 2 (2008).

<sup>18</sup> The Uniform Rules were adopted in August 2007 at the Annual Meeting of NCCUSL and can be found at [http://www.law.upenn.edu/bll/archives/ulc/udoera/2007\\_final.htm](http://www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.htm).

<sup>19</sup> Available at <http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf>.

<sup>20</sup> See, e.g. <http://www.ediscoverylaw.com/2008/10/articles/resources/updated-list-local-rules-forms-and-guidelines-of-united-states-district-courts-addressing-ediscovery-issues/> (Federal District Court Rules)

<sup>21</sup> New Jersey defines electronically stored information as a type of “document,” Idaho speak of “data” and Mississippi and Texas refer to “data or “electronic or magnetic data.”

<sup>22</sup> Louisiana adds an explicit provision authorizing access for good cause where a party believes production is not in compliance and includes a detailed Comment on the limits of “direct access” citing *In re Ford Motor*, 345 F. 3d 1315 (11<sup>th</sup> Cir. 2003).

York Commercial Division of the Supreme Court require early conferences to discuss electronically stored information.<sup>23</sup>

*Discovery Conferences/Discovery Orders.* Some states authorize “discovery” conferences when electronically stored information is anticipated to be sought,<sup>24</sup> and others with “pre-trial” or “case management” conferences<sup>25</sup> have modified their rules to echo changes to Fed. Rule 16(b).<sup>26</sup>

However described, these opportunities respond to the consensus that reduction of unnecessary sanction practice can best be achieved by candid and early discussion of contentious issues.

*Early Disclosures Without Discovery.* No states other than Arizona and Utah require early disclosures patterned after Fed. Rule 26(a) regarding electronically stored information.<sup>27</sup>

*Preservation Standards.* Standards relating to the trigger or implementation of preservation obligations have not been subject of rulemaking. However, Arizona, New Hampshire and Utah explicitly include a discussion of preservation issues among suggested topics for discussion.<sup>28</sup>

*Inadvertent Production.* All states except Montana and Nebraska have included provisions to provide a mechanism for claiming and retrieving inadvertently produced privileged information in documents or electronically stored information.<sup>29</sup> Arkansas,<sup>30</sup> Louisiana, and Maryland

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<sup>23</sup> The NY City Bar Committee on Courts of Superior Jurisdiction recently proposed an analogous provision in Uniform Rule 202.12 for courts of general jurisdiction. *See* <http://www.nycbar.org/pdf/report/bar%20comm%20ediscovery%20ltr.pdf>

<sup>24</sup> Minnesota and Iowa envision a “discovery” conference about electronically stored information and mention form of production and privilege agreements. Montana does the same, although the listed topics do not include claims of privilege.

<sup>25</sup> A “case management” conference may be held in New Jersey to “address issues relating to discovery of electronically stored information.”

<sup>26</sup> For example, Indiana authorizes pre-trial conferences and requires counsel to “familiarize” themselves with all aspects of a case in advance of a conference of attorneys held prior to a pre-trial conference. .

<sup>27</sup> *See* Schaffer and Austin, *New Arizona E-Discovery Rules*, 44-FED Ariz. Att’y 24 (February 2008)(Arizona disclosure obligations are “far broader” than those of the federal rule).

<sup>28</sup> New Hampshire requires parties to meet to discuss “the need for and the extent of any holds” to prevent the destruction of electronic information. *See* <http://www.courts.state.nh.us/rules/sror/sror-h3-62.htm>. Utah added “preservation” as one of the topics which must be included in a discovery plan presented to the court.

<sup>29</sup> The Ohio Staff Notes refer to the provision as a “clawback” provision.

<sup>30</sup> Arkansas included a provision acknowledging the validity of selective waiver to governmental agency, a provision dropped from the comparable Federal Evidence Rule 502..

also included provisions governing the substantive issue of waiver under those circumstances.<sup>31</sup>

Recent Congressional action enacting Federal Rules of Evidence 502 to address the substantive waiver issue suggests a broader opportunity for state action in this area.<sup>32</sup>

*Form of Production.* All but New Hampshire<sup>33</sup> have adopted the default standard in the 2006 Amendments to the effect that production of electronically stored information should be made in either the form in which the information is maintained or in other usable forms.

*Limitations on Burdensome Production.* All states except Nebraska, Mississippi, Texas and Idaho have adopted or described<sup>34</sup> a “two-tiered” approach barring the necessity of production from sources which are inaccessible because of “undue burden or cost” absent a court order issued for good cause.<sup>35</sup>

Mississippi, Texas and Idaho address the same issue with a different format. They frame the distinction in regard to production in terms of whether the information is “reasonably available to the responding party in its ordinary course of business.”

*Cost Shifting.* Cost-shifting (or “allocation”) for extraordinary or unduly burdensome costs associated with production of electronically stored information is acknowledged as a matter of discretion in all states. No state has adopted mandatory cost-shifting except for Texas.

*Safe Harbor.* Limits on rule-based sanctions for losses of electronically stored information due to “routine good faith” operation of an information system have been adopted by Arizona, Indiana, Iowa, Kansas,

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<sup>31</sup> For a current summary, see Note, *Look Before You Leap: A Guide to the Law of Inadvertent Disclosure of Privileged Information in the Era of E-Discovery*, 93 Iowa L. Rev. 627 (February, 2008).

<sup>32</sup> Evidence Rule 502 regarding waiver was passed by Congress and the signed by the President in October, 2008. <http://www.uscourts.gov/newsroom/2008/S2450EnrolledBill.pdf>. It does not include a provision authorizing selective waiver.

<sup>33</sup> New Hampshire alludes to discussion of the topic without specifying a standard for assessing waiver.

<sup>34</sup> Louisiana includes the limitation in a Comment.

<sup>35</sup> Maryland substituted direct linkage to the proportionality standard for the “good cause” standard.

Maryland, Minnesota, Montana, New Jersey, North Dakota, Ohio<sup>36</sup> and Utah.<sup>37</sup>

Comparable provisions were not adopted by Arkansas, Idaho, Louisiana, Mississippi, Nebraska, New Hampshire or Texas. Neither the New York nor the North Carolina business courts included the provision in their rules.

#### IV. Are E-Discovery Rules Necessary?

Recently, the Special Reporter to the Federal Rules Advisory Committee, Richard Marcus, posted the question “Are Rules Better?”<sup>38</sup> While conceding that there “is much force to the argument” that rules were not needed, he concluded that “it [is] implausible that doing e-discovery without rules is really superior to having rules to provide guidance.”<sup>39</sup>

Most observers have been unable to detect a noticeable reduction in costs or an increase in efficiency as a result of the 2006 Amendments. Some argue that this stems from a failure to provide the type of certainty initially sought in a “safe harbor.”<sup>40</sup> Indeed, one commentator has already suggested the need to “revisit” the two-tiered system given the existence of a world without inaccessible data.<sup>41</sup>

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<sup>36</sup> Ohio adds five “factors” for a court to consider in deciding whether to impose sanctions [despite] the rule, including “whether and when any obligation to preserve the information was triggered.”

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

<sup>38</sup> Richard L. Marcus, *E-Discovery Beyond the Federal Rules*, 37 U. Balt. L. Rev. 321, 340 (Spring 2008).

<sup>39</sup> Marcus also addresses the issue of whether the rules are “so bad that they are worse than no rules at all.” Ultimately, he rejects this possibility because of the “wide spread emulation of provisions of the Federal Rules Amendments in state court rules dealing with e-discovery.”

<sup>40</sup> See Hon. Paul W. Grimm, et al, *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. Balt. L. Rev. 381, 402 at n. 91(Spring, 2008)(“In view of the serious sanctions that may be imposed for breaching the duty to preserve, potential litigants need greater certainty.”). The chief problem is the inability to predict when an otherwise inaccessible source must be preserved without expending the time and costs to examine it in detail. See Nelson and Rosenberg, *A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation to Electronic Discovery*, 12 Rich. J.L. & Tech. 14 at 4 (2006) (contending that Rule 37(f) fails to “thoroughly address” the problem ). Compare Carroll, “E-Discovery: A Case Study in Rulemaking by State and Federal Courts,” (2005)(advocating rejection of safe harbor and accessibility rules in state rulemaking), available at [www.roscoepound.org/new/updates/2005Forum.htm](http://www.roscoepound.org/new/updates/2005Forum.htm).

<sup>41</sup> See Rachel Hytken, *Electronic Discovery: To What extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 Lewis & Clark L. Rev. 875 (Fall 2008).

This angst is hardly surprising, in that context, it is difficult to objectively measure what “might have been” absent the 2006 Amendments.

Nonetheless, I continue to adhere to the conclusion I stated in 2007<sup>42</sup> to the effect that the 2006 Amendments should be incorporated wherever feasible in state rulemaking efforts. They help promote a paradigm shift towards early discussion and practical accommodation of contentious issues.<sup>43</sup> Uniformity creates a larger body of interpretive opinions and reduces somewhat the risk of “balkanization,” which can unnecessarily raise costs and unfairly penalize the small or under-funded litigant.<sup>44</sup>

In the end, therefore, the Federal Amendments can best be seen as a starting point – a point of departure for the type of experimentation at which states have long been adept.<sup>45</sup>

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<sup>42</sup> Thomas Y. Allman, *Addressing State E-Discovery Issues Through Rulemaking: The Case for Adopting the 2006 Federal Amendments*, 74 Def. Counsel. J. 233, 238-239 (July, 2007).

<sup>43</sup> See generally Thomas Y. Allman, *The ‘Two-Tiered’ Approach to E-Discovery: Has Rule 26(b)(2)(B) Fulfilled Its Promise?*, 14 Rich. J. L. & Tech. 7 (Spring, 2008).

<sup>44</sup> The Standing Committee was concerned that “[w]ithout national rules adequate to address the issues raised by electronic discovery, a patchwork of rules and requirements is likely to develop,” resulting in “uncertainty, expense, delays, and burdens” being imposed on both small organizations and individual litigants as well as large public and private organizations. See Report of May 27, 2005, as revised July 25, 2005 (the “Advisory Committee Report”), reproduced as Appendix C to the Report of Judicial Conference Of the United States on Rules of Practice And Procedure (the “Standing Committee Report”), at 23, available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf>.

<sup>45</sup> As Justice Brandeis noted in *New State Ice v. Liebman*, 285 U.S. 262, 387 (1932), “a single courageous state may, if its citizens choose, serve as a laboratory . . . without risk to the rest of the country.”

## APPENDIX

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

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

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

4. **California.** The California Legislature adopted comprehensive e-discovery amendments to its Code of Civil Procedure in August, 2008. See [http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab\\_0901-0950/ab\\_926\\_bill\\_20080808\\_enrolled.html](http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0901-0950/ab_926_bill_20080808_enrolled.html).

The provisions evolved from those originally recommended in an April, 2008 Report prepared by the California Judicial Council, found at <http://www.courtinfo.ca.gov/jc/documents/reports/042508item4.pdf>. The legislation was vetoed in September, 2008 and further action is anticipated in 2009 based on the modified proposal. The legislation differed in a number of respects from the Federal Amendments, including the fact that it does not explicitly acknowledge that no duty exists to produce information from an inaccessible source. The safe harbor provisions mirror Rule 37(e)

but add that they “shall not be construed to alter any obligation to preserve discoverable information.”

5. **Colorado.** The Committee on Rules of Civil Procedure is waiting to see how the federal amendments were working before taking any action.

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

7. **Delaware.** A member of the relevant Delaware Bar Committee reports that the State Rules Committee sees no need to act at this time.

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

9. **Florida.** A Subcommittee of the Rules Committee has been considering possible amendments based on the 2006 Federal Amendments.

10. **Idaho.** Idaho amended its Rules of Civil Procedure in 2006 modeled on Tex. R. Civ. P. 196.4, but made the cost shifting of reasonable expense of any extraordinary steps a matter of discretion, not mandated as in Texas. *See* [http://www.isc.idaho.gov/rules/Discovery\\_Rule306.htm](http://www.isc.idaho.gov/rules/Discovery_Rule306.htm).

11. **Illinois.** A subcommittee of the Judicial Conference is reported to be evaluating the adaptability of the 2006 Amendments.

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

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

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

15. **Kentucky.** Courts have been advised to rely upon the Guidelines for E-Discovery published by the Conference of Chief Justices.

16. **Louisiana.** The legislature adopted some of the 2006 Federal Amendments but not sanction limitations. Limits on production from inaccessible sources are handled as objections, per the Comments and the process for claiming inadvertent production includes a waiver rule. <http://www.legis.state.la.us/billdata/streamdocument.asp?did=447007>. See William R. Forrester, *New Technology & The 2007 Amendments to the Code of Civil Procedure*, 55 La. B. J. 236, 238 (2008).

17. **Maryland.** The Court of Appeals (the highest court) adopted amendments effective January 1, 2008 inspired by the 2006 Amendments. See <http://www.courts.state.md.us/rules/rodocs/ro158.pdf> Instead of requiring “good cause” for production from inaccessible sources, a party requesting discovery must establish that the “need” outweighs the burden and cost of “locating, retrieving, and producing” it. Also, the amendment relating to disclosure of privileged material includes a substantive waiver provisions.

18. **Massachusetts.** The Advisory Committee on Rules is monitoring experience with e-discovery under the Federal rules and in the state courts to determine the need for rules. In the meantime, the Chief Justice has distributed and posted copies of the Guidelines issued by the Conference of Chief Justice Guidelines.

19. **Michigan.** The Michigan Supreme Court is considering action on a proposal with provisions similar to the 2006 Amendments. See <http://courts.michigan.gov/supremecourt/Resources/Administrative/2007-24.pdf>

20. **Minnesota.** The Minnesota Supreme Court adopted amendments to its Rules of Civil Procedure which largely mirror the 2006 Amendments. [http://www.courts.state.mn.us/documents/0/Public/Rules/RCP\\_effective\\_7-1-2007.pdf](http://www.courts.state.mn.us/documents/0/Public/Rules/RCP_effective_7-1-2007.pdf). See Megan E. Burkhammer, *New Turns in the Maze: Finding your Way in the New Civil Rules*, 64-JUB Bench & B. Minn 23 (May/June 2007).

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

22. **Missouri.** The Judicial Rules Committee is considering the issue of the need for e-discovery rules.

23. **Montana.** The Supreme Court of Montana adopted amendments to its civil rules largely incorporating the 2006 Amendments in 2008. <http://courts.mt.gov/orders/AF07-0157.pdf>., as amended, 32-APR Mont. Law 23 (2008). See Montana Lawyer, *Court Issues Major Rule Changes on Civil Procedure and Court Records*, 32-MAR Mont. Law. 12 (March 2007).

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

25. **Nevada.** There are no known efforts to consider e-discovery rules.

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

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

28. **New Mexico.** The Rules Committee has been working on series of proposed e-discovery amendments based on the Federal Amendments.

29. **New York.** The state bar CPLR advisory Committee has prepared a possible set of e-discovery rule amendments, which have been approved by the State Bar Association. Legislative action in 2009 is considered likely.

Rule 8 of the statewide rules of the Commercial Division of the Supreme Court (§202.70) requires consultations regarding e-discovery issues prior to conferences. On December 28, 2007, an amendment modeled on Rule 8 was proposed to Uniform Rule 202.12 by the NY City Bar Committee on State Courts of Superior Jurisdiction for preliminary conferences. See <http://www.nycbar.org/pdf/report/bar%20comm%20ediscovery%20ltr.pdf>

30. **North Carolina.** A North Carolina State Bar Committee has proposed a number of innovative e-discovery amendments to the North Carolina Civil Rules, presumably to be considered at the next Legislative Session. See [http://litigation.ncbar.org/Newsletters/Newsletters/Downloads\\_GetFile.aspx?id=6996](http://litigation.ncbar.org/Newsletters/Newsletters/Downloads_GetFile.aspx?id=6996). The North Carolina Business Court included provisions relating to discussion of disputed e-discovery issues in their rules. See <http://www.ncbusinesscourt.net/new/localrules/> (Rule 18.6).

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

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

33. **Oregon.** The Council on Court Procedures has thus far not identified discovery as a subject of rulemaking during this cycle.

34. **South Carolina.** The South Carolina Bar Association Practice and Procedure Committee has created a subcommittee to study and evaluate the issue of e-discovery amendments.

35. **Tennessee.** The Tennessee Supreme Court is receiving comments on a series of proposed e-discovery amendments at this time. See <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/proposals/2008/Tn%20Rules%20Civil%20Procedure%20e-discovery%20amend%20publ%20comm%20ord%206-20-08.pdf>

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

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

38. **Vermont.** The Rules Committee plans to take up consideration of e-discovery amendments in 2008.

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

40. **Washington.** A subcommittee of the Washington State Rules Committee has proposed adoption of the provisions of the Federal Amendments. The proposal will be considered by the Supreme Court in 2008 and would not come into effect until 2009 at the earliest.