Over the last few years, numerous legal organizations have proposed model rules and standards regarding the emerging and complicated issues surrounding the production of electronically-stored information ("ESI")\(^1\). Not coincidentally, various courts – most notably the federal judiciary in December 2006 – have adopted rules designed specifically to ensure that parties to civil litigation 1) work together to identify electronic discovery issues early on; and 2) produce electronic information completely and efficiently. A handful of states have also integrated some form of electronic discovery provisions into their rules of civil procedure. Clearly, the issue of how to handle electronic discovery is prevalent in all types of litigation in both state and federal court.

For an attorney practicing in federal court or in one of the six states – Idaho, Mississippi, New Hampshire, New Jersey, New York, and Texas – that have adopted some additional rules

\(^1\) Electronically-stored information has been defined as “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.” Conference of Chief Justices, National Center for State Courts, *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information*, at 1, at http://www.ncsconline.org/WC/Publications/CS_ElDiscCCJGuidelines.pdf (August 2006) (hereinafter “State Court Guidelines”).
regarding electronic discovery, the answer to a question about electronic document production will likely be found by reviewing the relevant civil rules for that jurisdiction. What should you do though when you are litigating in a state that hasn’t adopted those rules? Or what about a situation where your state has adopted some rules on e-discovery but not one that speaks to your particular concern? You need to be knowledgeable about the various proposed rule amendments in order to argue effectively for your client where the law is unsettled. This paper will provide an overview of the various rule proposals made by the American Bar Association (“ABA”) and the National Center for State Courts (“NCSC”) and examine how they differ from each other and the new federal rules.

By and large, the amended federal rules provide a good basis for starting an analysis of electronic discovery issues. The amendments are found in Federal Rules of Civil Procedure 16, 26, 34, and 37, though not all of the amendments will necessarily translate to a state court discovery dispute.

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2 For example, New Hampshire’s and New York’s rules only require that a conference concerning electronic discovery be held and do not address the issue of actually producing them. Other states have adopted much broader rule changes to deal with all aspects of e-discovery.


A. SCOPE OF DISCOVERY

Rule 26 contains a few provisions that may be instructive on electronic discovery issues. Rule 26(b)(2)(B) states generally that a party “need not provide discovery of electronically stored information from sources that a party identifies as not reasonably accessible because of undue burden or cost.” This rule addresses a very common problem in electronic discovery: What obligation does a party have to produce electronic information that is difficult to access and who should bear the cost of that production? That subsection of Rule 26 imposes on the party from whom discovery is sought the burden of proving that the information is inaccessible. Once that showing is made, the burden passes to the requesting party to show good cause before the court will allow the discovery.

Unfortunately, none of the rules or proposed standards provide much guidance as to what constitutes “reasonable accessibility.” Perhaps it would be futile to do so. As technology evolves and retrieval of information becomes cheaper, what is inaccessible and unduly burdensome today may be less so tomorrow. That issue will likely need to be worked out on a case-by-case basis. One way to establish inaccessibility and undue burden is to obtain testimony in the form of a recorded statement or affidavit from your client’s information technology manager. That person will likely be in the best position to provide the court with an overview of

5 Rule 16(b)(5), for example, provides that a district judge or magistrate judge may include provisions for disclosure or discovery of electronically stored information in the case’s scheduling order.

6 The federal courts and the State Court Guidelines do provide some guidance on this issue. Judge Scheindlin in the Southern District of New York has noted that electronic data is considered more or less accessible based on how that data is stored. From most accessible to least accessible, the way data is stored ranges from “active, online data,” “near-line data,” “offline storage/archives,” “backup tapes,” and “erased, fragmented or damaged data.” Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 318-319 (S.D.N.Y 2003). The State Court Guidelines define accessible information as “electronically-stored information that is easily retrievable in the ordinary course of business without undue cost or burden.” State Court Guidelines, at 1.
the client’s computer systems and information storage techniques, as well as the time and effort it would take to extract the requested information. This information will also be important in dealing with cost-shifting issues, as discussed below.

The various proposed standards do provide some guidance as to the factors a court should consider in determining whether or not to order production of electronically stored information, once it has been deemed unreasonably inaccessible. The federal rules list some factors: whether the discovery sought is cumulative or duplicative, and whether it can be obtained from another, less burdensome source; whether the requesting party has had sufficient opportunity through discovery to obtain the information sought; and, most importantly, whether the burden or expense of the discovery outweighs its benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues in the litigation, and the importance of the proposed discovery in resolving those issues.\(^7\)

In addition to those outlined by the federal rules, the National Center for State Courts includes some additional factors that courts should consider on this issue. Those items include the need to protect privileged, proprietary or otherwise confidential information, including trade secrets; the relative ability of each party to control costs and its incentive to do so; whether the requesting party has offered to pay some or all of the production costs; and the manner in which the information is stored; and whether the responding party had deleted electronic information after it was aware that litigation had commenced or was probable.\(^8\) The NCSC guidelines also


\(^8\) See State Court Guidelines, at 5.
suggest that courts order that an inspection of a sample of the electronically stored information be done, if possible, so as to determine whether additional production is warranted.\footnote{Id. at 5 (Rule 5(H)).}

The ABA has also proposed some additional factors for courts to consider, beyond those mentioned above. That organization also lists as potential factors: the need to protect the attorney-client privilege or attorney work product, including the burden and expense of a privilege review by the producing party and the risk of inadvertent disclosure of privileged or protected information despite reasonable diligence on the part of the producing party; the effect of production on the normal business operations of the responding party; and whether responding to the request would impose the burden or expense of converting electronic information into hard copies, or converting hard copies into electronic format.\footnote{See ABA Standards, at 60-61.}

B. INADVERTENT DISCLOSURE OF PRIVILEGED INFORMATION

Federal Rule 26 also contains a “claw-back provision” dealing with inadvertent disclosure of privileged information.\footnote{Fed. R. Civ. P. 26(b)(5)(B).} That provision requires that where a party receiving mistakenly disclosed information is notified of the disclosure, that party is required to gather the information and return it until the claim of privilege is ruled upon.\footnote{Id.} While not dealing with ESI directly, the risk of inadvertently disclosing privileged material will be greater with the shear volume of production made possible by electronic storage.

\footnote{Id. at 5 (Rule 5(H)).}
\footnote{See ABA Standards, at 60-61.}
\footnote{Fed. R. Civ. P. 26(b)(5)(B).}
\footnote{Id.}
The State Court Guidelines go a step further, providing a roadmap for the court to use in determining whether privilege has been waived. Those guidelines recommend that the court should consider the following: the total volume of information produced; the amount of privileged information disclosed; the reasonableness of the precautions taken to prevent the inadvertent disclosure of privileged ESI; the promptness of the actions taken to remedy the error; and the expectations and agreements, if any, of counsel.\textsuperscript{13}

The ABA Standards also prove helpful on this issue and recommend affirmative steps to be taken prior to discovery so as to hopefully avoid any errant disclosures. The ABA suggests that the parties agree on both a referee or special master and an independent technology expert to resolve disputes over technology issues and facilitate discovery.\textsuperscript{14} These guidelines also propose that the parties enter into a stipulation agreeing that inadvertent disclosure of privileged information does not constitute a waiver of that privilege.\textsuperscript{15} Finally, the ABA Standards offer a protocol for the production of ESI so as to minimize these concerns.\textsuperscript{16}

C. METHODS OF PRODUCTION

The various rules and proposed standards also provide guidance on exactly how and under which circumstances a party is to produce electronically-stored information. Federal Rule 34 deals generally with the production of documents and has been amended to explicitly include

\begin{footnotesize}
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\item[	extsuperscript{13}] State Court Guidelines, at 8.
\item[	extsuperscript{14}] ABA Standards, at 71.
\item[	extsuperscript{15}] Id.
\item[	extsuperscript{16}] Id. at 71-72.
\end{enumerate}
\end{footnotesize}
ESI in the list of items that can be requested pursuant to the rule. However, the ability of a party to request ESI comes along with the burden to specify the manner in which it should be produced. If a party fails to specify how the requested ESI should be produced, the responding party is required to produce it in the form it is ordinarily maintained or in a form that is reasonably usable. Importantly, ESI need not be produced in more than one form.

The ABA Standards are more detailed and instructive as to how to request electronic information. These standards recommend that a request state clearly whether electronic documents are sought and in what form and format the ESI should be produced. They advise that a request be as detailed as possible in that regard, such as specifying that 1) the ESI be provided in a searchable form; 2) the necessary software be provided to review the ESI; and 3) metadata be produced as well. Certainly, the ABA Standards are invaluable to any party needing to request electronic information and to ensure that as much information is obtained as possible.

The State Court Guidelines place discretion in the hands of the judge on this issue. The Guidelines state that where the parties cannot agree as to the form of production, the judge should require ESI to be produced in the form in which the information is normally maintained.

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19 Id.
21 ABA Standards, at 58.
22 Id. at 58-59.
or in a form that is reasonably usable.\textsuperscript{23} While the federal rules place this option in the hands of the responding party, the State Court Guidelines instruct the court to make the determination on format. Depending on whether you are the requesting or responding party, one of these regimes may be better than the other. Knowing each set of rules, however, will allow you to be prepared to argue either way.

D. ALLOCATING THE COSTS OF PRODUCTION

Once ESI has been determined to be discoverable and subject to production, the question becomes, who will assume the costs of that production? First of all, if the ESI is easily accessible, then the responding party will likely bear the cost of production. When the ESI is not easily accessible, the court must then determine who must pay. This issue has been litigated heavily in the federal courts and has resulted in a number of written orders called the “Zubulake opinions.” The Zubulake opinions – particularly Zubulake III\textsuperscript{24} – set forth guidelines for courts to use in analyzing this issue and determine how best to allocate costs among the parties. The Zubulake test set forth seven factors to be considered: 1) the extent to which the request is specifically tailored to discover relevant information; 2) the availability of such information from other sources; 3) the total cost of production compared to the amount in controversy; 4) the total cost of production compared to the resources available to each party; 5) the relative ability of each party to control costs and its incentive to do so; 6) the importance of the issues at stake in the litigation; and 7) the relative benefits of obtaining the information. Though the federal rules have not adopted this standard, it is echoed by the State Court Guidelines.

\textsuperscript{23} State Court Guidelines, at 6.

\textsuperscript{24} Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 284 (S.D.N.Y. 2003) (Zubulake III).
E. SANCTIONS FOR SPOLIATION

The final issue to be aware of is whether the loss of a particular piece of ESI is sanctionable. Because of the nature of electronic information, very often you will encounter a situation where an email correspondence or an electronic document has been deleted from your client’s system. The timing and circumstances of that deletion will determine whether it is sanctionable, however. The various rules and standards differ on the issue. Federal Rule 37(f) states: “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”25 Unfortunately, the rule does not explain which party has the burden of proof on this issue. Presumably, it would be on the responding party since that party would be in the best position to speak on its own business operations and document storage procedures.

The State Court Guidelines require more than the federal rules for sanctions to be imposed. They state that a judge should only impose sanctions if 1) there was a legal obligation to preserve the information when it was destroyed; 2) the destruction of the information was not the result of the routine, good-faith operation of an electronic information system; and 3) the destroyed information was subject to production under the applicable state standard for discovery. Clearly, a responding party is better off in a jurisdiction with this type of sanction rule. In any event, regardless of the jurisdiction, if a party can prove that ESI was deleted in the normal course of business or pursuant to some established protocol, then the party should be safe from sanctions.

F. CONCLUSION

Navigating through the murky waters of electronic discovery will be a difficult task for even the most seasoned litigators. Because of the nature of technology, new issues and information formats will continue to increase, causing additional concerns for you and your clients. The problems are exacerbated when you find yourself in a jurisdiction where the state’s rules of civil procedure provide no clear method to dealing with electronic discovery. However, by being aware of the various existing rules and proposed standards available, you will be better prepared to advise your client on these sticky issues and advocate when the time comes.