

March 2012

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Kevin Bradberry

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### Recommended Citation

Kevin Bradberry, *Electronic Discovery in Georgia: Bringing the State Out of the Typewriter Age*, 26 GA. ST. U. L. REV. (2012).  
Available at: <https://readingroom.law.gsu.edu/gsulr/vol26/iss2/2>

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## ELECTRONIC DISCOVERY IN GEORGIA: BRINGING THE STATE OUT OF THE TYPEWRITER AGE

Kevin Bradberry \*

### INTRODUCTION

On August 12, 2008, U.S. Magistrate Judge Laporte of the U.S. Northern District of California imposed hundreds of thousands of dollars in sanctions on a party who failed to preserve certain electronically stored documents.<sup>1</sup> Not only did the judge set record high fines, but she also ordered an adverse jury instruction at the trial.<sup>2</sup> Earlier that year in *Qualcomm v. Broadcom*, another judge meted out an eight-and-a-half *million* dollar sanction against a party and its attorneys for failure to use “crucial search terms” in retrieving electronic documents.<sup>3</sup> Although technology has changed, those changes have not altered the duty of counsel to satisfy discovery obligations.

“It is refreshing to be able to cite authorities from the last century . . . and to experience the rare and unusual assurance that . . . the law changes slowly or not at all.”<sup>4</sup> Nonetheless, old rules that have served

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\* J.D. Candidate, 2010, Georgia State University College of Law. He thanks his family and friends for their love and support, and thanks the editors of the Georgia State University Law Review for this opportunity.

1. David Narkiewicz, *E-Discovery: The Essentials*, 30-DEC PA. LAW. 18, 19 (2008) (citing Keithley v. Homestore.com, Inc., No. C-03-04447 SI (EDL), 2008 WL 3833384 (N.D. Cal. Aug. 12, 2008)). Although the adverse jury instruction was later overturned, this case illustrates the wide variety of tools judges have at their disposal to punish negligent parties. See Keithley v. Homestore.com, Inc., No. C-03-04447 SI (EDL), 2008 WL 4830752, at \*4 (N.D. Cal. Nov. 6, 2008).

2. Narkiewicz, *supra* note 1, at 19 (citing Keithley v. Homestore.com, Inc., No. C-03-04447 SI (EDL), 2008 WL 3833384 (N.D. Cal. Aug. 12, 2008)).

3. Laura Lewis Owens & Anna A. Summer, *Discovery About Discovery*, 783 PLI/LIT 343, 347 (2008). Missing search terms were not the only omissions Qualcomm made—the court found that Qualcomm failed to perform basic searches, did not search the computers of the most relevant employees, and did not attempt to correct its mistake once it knew the searches had been inadequate. Thus, the court concluded that Qualcomm “intentionally withheld tens of thousands of decisive documents from its opponent in an effort to win this case.” *Id.* at 347–48 (citing Qualcomm, Inc. v. Broadcom Corp., No. 05cv1958-B (BLM), 2008 WL 66932, at \*9 (S.D. Cal. Jan. 7, 2008)).

4. JAY E. GRENIG & WILLIAM C. GLEISNER, III, 1 EDISCOVERY & DIGITAL EVIDENCE § 1:2 (2007) (citing Quick v. State, 569 So. 2d 1197, 1199 (Miss. 1990)).

the community for some time must now adapt to new technology, producing a less than seamless transition.<sup>5</sup> The advent of the Digital Age and the widespread use of computers for document processing, information storage, and analytical computing present one such area of difficulty.<sup>6</sup> In a world populated by people who still remember (and sometimes prefer) the use of typewriters and slide rules, computerized information confronts litigation attorneys with difficult and expensive questions about what information is discoverable, what should be protected, and what digital information is completely irrelevant.<sup>7</sup> This problem is exacerbated for attorneys practicing within Georgia because the state has made little or no effort toward adopting comprehensive electronic discovery (e-discovery) rules.

The purpose of this Note is to assist lawmakers in building a template for addressing the arising issues with electronic discovery. Part I of this Note contrasts the differences between conventional discovery and electronic discovery, highlights some of the difficulties that electronic documents present and explains why having a particularized set of rules is important.<sup>8</sup> Part II discusses the various approaches adopted in pursuing comprehensive e-discovery guidelines,<sup>9</sup> and Part III concludes that Georgia should adopt the 2006 e-discovery amendments to the Federal Rules of Civil Procedure with a few improvements and modifications.<sup>10</sup>

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5. A potential cause of problems, for example, may arise from the fact that an estimated thirty-five percent of electronic documents have never been translated into a paper format. Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 591 (2001).

6. GRENIG & GLEISNER, *supra* note 4, § 1:2; Steven C. Bennett & Cecilia R. Dickson, *E-Discovery May Be a Job for Special Masters*, NAT'L L.J., at S5 (July 17, 2006) (more than ninety percent of information is created and stored electronically); NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM RULES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION (2007) [hereinafter UNIFORM RULES].

7. GRENIG & GLEISNER, *supra* note 4, § 1:3. Typical assumptions related to paper documents such as assuming that litigants know what information they possess, and counting on counsel to have the abilities to procure all that information are not always accurate in a digital world.

8. See discussion *infra* Part I.

9. See discussion *infra* Part II.

10. See discussion *infra* Part III.

## I. WHY ADAPT? DIFFERENCES BETWEEN CONVENTIONAL AND ELECTRONIC DISCOVERY

### A. Comparative Differences

Considering society's increasing reliance on electronic documents and their consequent use in litigation, the need for a standardized set of rules is evident.<sup>11</sup> Differences arising from digital and conventional discovery are numerous but may be subdivided into three general categories: volume, retrieval, and translation.<sup>12</sup> More specifically, e-discovery presents special problems due to differences in volume, dynamicism, dispersion, persistence, and environment/structure dependence.<sup>13</sup>

#### 1. Volume

Digital information may take the form of e-mails, word processing documents, spreadsheets, graphics, images, voice mail, electronic calendars, internet bookmarks, cookies, and history logs.<sup>14</sup> Further increasing the amount of discoverable documents is the fact that

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11. See David K. Isom, *Electronic Discovery Primer for Judges*, 2005 FED. CTS. L. REV. 1, 6 (2005) ("The duties of lawyers to raise, negotiate and resolve discovery issues, and the need for courts to manage discovery actively, are more important for electronic discovery than they were for paper discovery."); GREINIG & GLEISNER, *supra* note 4, § 6:5 (citing Corinne L. Giacobbe, *Allocating Discovery Costs in the Computer Age: Deciding Who Should Bear the Costs of Electronically Stored Data*, 57 WASH. & LEE L. REV. 257, 258 (2000) (defendant who stored all materials potentially relevant to litigation incurred costs in excess of three million dollars responding to discovery requests)).

12. GREINIG & GLEISNER, *supra* note 4, at § 6:5; see also UNIFORM RULES, *supra* note 6, at 1 ("Principle among these differences is the sheer volume of information in electronic form, the virtually unlimited places where the information may appear, and the dynamic nature of the information.").

13. THE SEDONA CONFERENCE WORKING GROUP, THE SEDONA PRINCIPLES: SECOND EDITION, BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (2007), available at [http://www.thesedonaconference.org/content/miscFiles/publications\\_html](http://www.thesedonaconference.org/content/miscFiles/publications_html) (follow "TSC\_PRINCP\_2nd\_ed\_607.pdf" hyperlink; then enter name and e-mail address to download) [hereinafter SEDONA PRINCIPLES (SECOND EDITION)]. Environment/structure dependence refers to electronic data's coded format, without which the document may not be properly viewable.

14. GREINIG & GLEISNER, *supra* note 4, § 1.2. For further discussion of how phones, faxes, and PDAs might have discoverable information in electronic discovery, see *id.* § 6:8 (citing MICHAEL R. ARKFELD, ELECTRONIC DISCOVERY AND EVIDENCE § 2.05[F] (2004) (noting that cell phones present another potential source of electronic information, especially considering that they store addresses, names, e-mail information, conversations, calendars, and in the case of voice-mail, metadata about the caller and the length of the call)).

many systems automatically save multiple copies of documents on digital backup tapes, several users may have copies of e-mails or reports, and users typically save documents on both a private and common drive.<sup>15</sup> With the advent of digital technology and the widespread use of personal computers, personal communication devices, and digital storage systems, vastly more electronic documents exist than ever before, resulting in a significantly higher number of documents that attorneys may discover in preparation of litigation.<sup>16</sup> For example, in 1998 the U.S. Postal Service processed only 1.98 billion pieces of hard copy mail, whereas electronic users managed to send an estimated 182.5 billion e-mails in that same year.<sup>17</sup> With such copious amounts of information it is important that attorneys have clear rules governing discovery.

Electronic data is also “dynamic” in that it is “designed to change over time even without human intervention.”<sup>18</sup> Data modification can occur quite easily and inadvertently; for example, simply moving or opening a digital document can alter its composition.<sup>19</sup> Many software programs, such as word processing software, will automatically save backups of documents without any specific authorization by the user.<sup>20</sup>

Due to the ease of modification, electronic data is also characterized by a potential for dispersion that would not normally

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15. SEDONA PRINCIPLES (SECOND EDITION), *supra* note 13, at 2.

16. *Id.* For further practical differences between electronic and traditional discovery, see *Byers v. Illinois State Police*, 2002 U.S. Dist. LEXIS 9861 (N.D. Ill. 2002); *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446 (2008) (“A floppy disk, with 1.44 megabytes is the equivalent of 720 typewritten pages of plain text. A CD-ROM . . . can hold up to 325,000 typewritten pages.”). For a discussion of types of electronic data, *see generally* GRENIG & GLEISNER, *supra* note 4, § 7:4 (discoverable information includes “active,” “replicant,” and “deleted” data).

17. SEDONA PRINCIPLES (SECOND EDITION), *supra* note 13, at 3.

18. *Id.*; *see also* UNIFORM RULES, *supra* note 6, at 1 (“The ordinary operation of computers—including the simple act of turning a computer on and off or accessing a particular file—can alter or destroy electronically stored information.”); GRENIG & GLEISNER, *supra* note 4, § 11:3 (citing *Gates Rubber Co. v. Bando Chem. Indus.*, 167 F.R.D. 90 (D. Colo. 1996) (an action as simple as clicking on and opening a file will alter its “last-accessed” date, which could lead to the prejudicial conclusion that someone altered the document)).

19. SEDONA PRINCIPLES (SECOND EDITION), *supra* note 13, at 3.

20. *Id.*

occur in conventional documents.<sup>21</sup> In the course of an electronic document's life, it may be copied multiple times, including drafts and comments. Documents saved on a "network computer, which is [supported by] a server, which, in turn, is being backed up on tape . . . on a daily, weekly [,] or monthly basis" can create hundreds or thousands of documents located in many unexpected places.<sup>22</sup> Locating and examining multiple copies of the same document ultimately forces litigants to spend much more time and money on document examination.

Further, digital categorization does not always share the simplicity of human filing systems. Although electronic information may be well categorized and sorted in one system, users operating on another system may encounter difficulties in accessing these same files. Magnetic backup tapes, for example, are intended for purposes of disaster system recovery, and they store information in a mass of data not easily recognizable by anything other than the native computer system.<sup>23</sup> Production of such vast and often incomprehensible stores of information requires comprehensive discovery rules.

## 2. Retrieval

The high volume of electronic data underscores the potential difficulties in retrieving data. Appropriate electronic document retrieval can pose a serious challenge for litigators because gaining access to copies or originals can present an extremely difficult and expensive venture, often requiring "the retention of high-priced forensic experts."<sup>24</sup> For example, restoring particular documents from magnetic backup tapes is impossible without restoring the entire contents of the tape, which may contain thousands upon thousands of

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21. See GRENIG & GLEISNER, *supra* note 4, § 6:8 (in the short time it may take a document to travel around the world, there is a high possibility it has been subsequently saved on multiple different systems); John L. Carroll, *Discovery Disputes and Electronic Media*, SG045 ALI-ABA 421, 425 (2001).

22. Cameron G. Shilling, *Electronic Discovery: Litigation Crashes into the Digital Age*, 22 LAB. LAW. 207, 212 (2006) (quoting *McPeck v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001)).

23. *Id.*

24. See Redish, *supra* note 5, at 590.

documents.<sup>25</sup> Unfortunately, parties have to endure the enormous costs of restoring backup tapes anyway because it is highly doubtful that a responding party would simply hand over an entire tape without taking the time to remove nonessential and privileged documents.<sup>26</sup> Further, responding parties must take particular care to hand the data over in a usable, convenient format. Doing otherwise could lead to court-ordered sanctions.

The persistence of digital information compounds this difficulty. Whereas shredding a paper document more or less destroys it permanently,<sup>27</sup> “deleting” an electronic file does not actually erase the file.<sup>28</sup> Upon deletion, the computer simply removes the file name and makes the space available to write over. As a result, a document “deleted” years ago could still persist on the drive.<sup>29</sup>

The existence of metadata further complicates the process.<sup>30</sup> An electronic document includes not only visible text but also hidden text, formatting codes, formulae, and other information associated with a file.<sup>31</sup> These often-unseen components are called metadata. Metadata may include, but is not limited to, document create and edit dates, authorship information, and comments.<sup>32</sup> This hidden “data about data” is typically only viewable in the native format of the document and even then its natural camouflage may persist.<sup>33</sup> In addition to retrieval issues, metadata itself presents numerous

25. Shilling, *supra* note 22, at 212; see *Zublake v. UBS Warburg L.L.C.*, 217 F.R.D. 309, 314 (S.D.N.Y. 2003) (discussing how restoring data from backup tapes becomes a lengthy and complicated process). A backup tape takes about five days to restore, and although this professional service can accomplish the task, that option costs much more money. Shilling, *supra* note 22.

26. See Redish, *supra* note 5, at 591.

27. But see Douglas Heingartner, *Back Together Again*, N.Y. TIMES, July 17, 2003, at G1 (describing technology that can reconstruct shredded paper documents).

28. SEDONA PRINCIPLES (SECOND EDITION), *supra* note 13, at 3; see also GREINIG & GLEISNER, *supra* note 4, § 1:4 (2007) (citing David Kesmodel, *Not Fade Away: Lawyers' Delight: Old Web Material Doesn't Disappear*, WALL ST. J., July 27, 2006, at A1 (a “deleted” file may, in fact, be admissible as evidence in court)); FED. R. CIV. P. 34.

29. See SEDONA PRINCIPLES (SECOND EDITION), *supra* note 13, at 3.

30. See GREINIG & GLEISNER, *supra* note 4, § 1:5 (2007) (a hardcopy version of an electronic document is rarely the same thing as the document as it exists in its native electronic format); see also *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 656 (D. Kan. 2005) (holding that when producing documents, lawyers should take care to ensure the metadata remains intact).

31. SEDONA PRINCIPLES (SECOND EDITION), *supra* note 13, at 60.

32. *Id.* at 3.

33. Marjorie A. Shields, *Discoverability of Metadata*, 29 A.L.R.6th 167, § 2 (2007).

potential problems. Given metadata's hidden nature, attorneys may fall prey to inadvertent disclosure.<sup>34</sup> In order to prevent accidental disclosure, many companies have taken to "scrubbing" electronic documents clean of metadata.<sup>35</sup> Such electronic alteration raises the possibility of destruction or inadvertent transmission of metadata that could constitute an ethical violation.<sup>36</sup> Electronic discovery rules should therefore attempt to specifically define litigants' role in retrieval and in the ethical handling of metadata.

### 3. Translation

Finally, electronic documents differ from conventional documents in that they may require translation into a native format.<sup>37</sup> "A paper document is simply a matter of reading. An electronic document, on the other hand, may have been stored in any one of hundreds of different formats."<sup>38</sup> Unlike paper documents, which have little or no translation difficulties, electronic documents may become "incomprehensible when separated from [their] environment."<sup>39</sup> Further, "thirty-five percent of electronically stored data have never been transformed into paper form," so there is no base of reference for translation.<sup>40</sup> For example, it is a matter of common knowledge

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34. *Id.*; see GRENIG & GLEISNER, *supra* note 4, § 7:1 (2007) (pointing out that for every hardcopy of a document that exists there is probably an electronic document that "tell[s]" an interesting story" about that document).

35. Shields, *supra* note 33, § 2 (explaining that some available software can "scrub" electronic documents and remove the metadata from a document).

36. *Id.* For further discussion of the interplay between ethical implications and professional responsibility concerning the use of metadata, see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-422 (2006).

37. See GRENIG & GLEISNER, *supra* note 4, at § 1:3. "Native format" refers to the format in which the document was created. Since a document is a "structured set of data," removing the digital document from that structure, as can occur when e-mailing a document or saving it, may render the document incomprehensible and thereby useless. For example, viewing only the raw data, formulas, and numbers of a business spreadsheet is useless if one cannot also see the columns, labels, and other markings in the document. Electronic translation into a different format can result in the inadvertent modification of those important markings.

38. Redish, *supra* note 5, at 591 n.121 (quoting ALAN M. GAHTAN, ELECTRONIC EVIDENCE 1, 7 (1999)); see SEDONA PRINCIPLES (SECOND EDITION), *supra* note 13, at 8 (stating that the existence of documents in electronic format may make discovery easier if documents can be translated efficiently from their native formats).

39. SEDONA PRINCIPLES (SECOND EDITION), *supra* note 13, at 4.

40. Redish, *supra* note 5, at 591.



that a document created with new word processing software may not be readable in an older version of that same program, and anyone who has received a document full of squares, triangles, and hyphens has encountered translation problems firsthand.<sup>41</sup>

Even if a party is willing to produce a document on paper for simplicity's sake, an opposing party may still seek the document in its original native format.<sup>42</sup> The proliferation of processing platforms and frequent upgrades to those environments exacerbates the problem since information "cannot be easily accessed outside the operating system that created it."<sup>43</sup> As newer platforms render old ones obsolete, attorneys will likely face increasing difficulty in finding technicians familiar with the older systems.<sup>44</sup>

### *B. Why Courts Need Specific Standards for Electronic Discovery*

Electronic discovery raises difficult and divisive questions about how traditional concepts of fairness should be expressed in the courts.<sup>45</sup> In many cases, the dramatically different nature of electronic documents requires updating existing rules.<sup>46</sup> Notions of preservation, privilege, and proportionality are perhaps the most important in this new arena.<sup>47</sup>

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41. Environment dependence is not simply limited to software dependence, but may also include passwords, encryption, and other security features that disable viewing of a document without the proper authorization. SEDONA PRINCIPLES (SECOND EDITION), *supra* note 13, at 4 n.8.

42. Redish, *supra* note 5, at 591 n.123 ("Even though many companies and individuals continue to store paper copies of various documents, it is important to recognize that . . . an adversary can still demand the same information in a usable electronic format." Such a tactic may be especially useful, for example, when metadata exists that identifies the true author of a document.) (citing Corinne L. Giacobbe, Note, *Allocating Discovery Costs in the Computer Age: Deciding Who Should Bear the Costs of Electronically Stored Data*, 57 WASH. & LEE L. REV. 257, 262 (2000)).

43. Shilling, *supra* note 22, at 211.

44. SEDONA PRINCIPLES (SECOND EDITION), *supra* note 13, at 4.

45. See discussion *supra* Part I.

46. See discussion *supra* Part I.

47. See generally Steven C. Bennett, *Managing E-Discovery: Some Essential Issues*, 859 PLI/PAT 219 (2006).

### 1. *Preservation Obligations*

Although an attorney's duty to preserve documents remains the same in the electronic world, the question of how to do so has become increasingly complicated.<sup>48</sup> Preservation issues pose difficulties particularly because (1) preservation obligations usually arise before the parties have met and conferenced, (2) the vast amount of data can make costs of preservation astronomical, (3) consequences of failure to preserve can be extreme, and (4) electronic data cannot be easily categorized.<sup>49</sup> The duty to preserve material evidence typically arises when a party reasonably should know that the evidence may be relevant to anticipated litigation.<sup>50</sup> The failure to do so can and often will prompt punishment by sanction.<sup>51</sup> Despite this seemingly clear definition, determining when the duty to preserve arises, and resolving what information is "material evidence" continues to plague courts.<sup>52</sup> The only useful standard litigants have is that they do not have to "preserve every shred of paper" but only "unique, relevant evidence that might be useful to an

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48. *Id.* at 223. The duty to preserve refers to a duty not to destroy certain documents. *Id.* ("All lawyers know that it would be a violation of a preservation obligation to destroy 300,000 pages of relevant material. But now they must be aware that that is exactly what can happen if someone reuses, overwrites or erases a single computer disk."); THE SEDONA CONFERENCE WORKING GROUP, THE SEDONA PRINCIPLES (FIRST EDITION) (2005), available at <http://www.thosedonaconference.org/content/miscFiles/publications.html> (follow "7\_05TSP.pdf" hyperlink; then enter name and e-mail address to download) [hereinafter SEDONA PRINCIPLES (FIRST EDITION)] ("A preservation order to save 'all records pertaining to the manufacture of X' could, if all documents were paper documents, be applied logically by a party . . . [but] in the electronic age, such a command could present intractable problems."); see also Isom, *supra* note 11, at 11 (companies have a responsibility to preserve documents normally, but court ordering of preservation of some documents can substantially increase the likelihood that parties will observe preservation requirements).

49. Bennett, *supra* note 47, at 223; SEDONA PRINCIPLES (FIRST EDITION), *supra* note 48, at 7 (stating that unfair burdens in discovery could be minimized if litigants had available a set of standardized and formalized rules).

50. GRENIG & GLEISNER, *supra* note 4, § 11:4, (considering *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104, 112 (8th Cir. 1988) (holding that frequent discovery requests for a particular type of document may establish reasonable foreseeability of the document's use in future litigation)).

51. *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001).

52. Redish, *supra* note 5, at 619 n.213 (citing Richard F. Ziegler & Seth A. Stuhl, *Spoliation Issues Arise in Digital Era*, NAT'L L.J., Feb 16, 1998, at B9 ("The murkiest aspect of spoliation law is the determination of when the obligation to preserve evidence arises . . . . Judges seem to take a fact based, 'I know it when I see it' approach.")).

adversary.”<sup>53</sup> Such subjective considerations lead to hopeful guesswork at best and serious abuse at worst.

These general guidelines prompt interesting questions of what information is material and what documents the responding party must produce.<sup>54</sup> What happens, for example, when relevant evidence is not in the physical possession of a party or if a party fails to produce duplicative documents that are stored in a different format?<sup>55</sup> In answering such questions, a court usually considers the burden imposed by such extensive discovery.<sup>56</sup> As with traditional discovery, many courts hold that inconvenience and expense are not valid reasons for the denial of electronic discovery.<sup>57</sup> These holdings, however, demonstrate a basic misunderstanding of the burdens in this area, since the sheer volume of electronic documents can make any production request unduly burdensome.<sup>58</sup>

Potential litigants may encounter serious difficulties in isolating and preserving important material, but they must also take care to prevent “spoliation.” Spoliation is the “destruction, significant alteration, or non preservation of evidence relevant to pending or

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53. Martha J. Dawson, *Electronic Discovery Today*, 716 PLI/LIT 7, 30 (2004) (citing *Zublake v. UBS Warburg L.L.C.*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003)).

54. See SEDONA PRINCIPLES (SECOND EDITION), *supra* note 13, at ii (parties should meet early on in the litigation process and seek to determine the scope of any electronic discovery and which parties will bear the burden).

55. Bennett, *supra* note 47, at 228–29 (2006) (“[Many] cases make clear that litigants need to ask—and answer—this question: Who has (or where is) the electronic evidence relating to this case?”); see, e.g., *United States v. Int’l Union of Petroleum & Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989) (“A corporation must produce documents possessed by a subsidiary that the parent corporation owns.”); *In re Uranium*, 480 F. Supp. 1138, 1156 (holding that the physical location of documents is irrelevant and granting motions to compel defendants to produce foreign documents); *Keir v. UnumProvident Corp.*, No. 02 Civ. 8781(DLC), 2003 WL 21997747 at \*7, \*12 (S.D.N.Y. Aug 22, 2003) (finding that defendant failed to communicate in a timely manner preservation obligation to a third-party provider of e-mail and other computer services).

56. *Zublake*, 217 F.R.D. at 324.

57. Redish, *supra* note 5, at 574–75.

58. *Id.* at 575. Some courts, however, have shown less reluctance to protect parties from undue burden. See, e.g., *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 932 (9th Cir. 1982) (district court denied production request); *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050, 1053 (S.D. Cal. 1999) (holding that the producing party must be “protected against undue burden and expense and/or invasion of privileged matter”).

reasonably foreseeable litigation,”<sup>59</sup> and it occurs quite frequently in electronic discovery cases.<sup>60</sup> Spoliation may come about intentionally or unintentionally. It can even occur as a result of honest good faith efforts, including, for example, routine virus scans that delete temporary files in order to protect the computer.<sup>61</sup> Spoliation, in whatever form it may take, creates an “imbalance between the litigating parties,” and the court may choose to remedy the imbalance by imposing sanctions.<sup>62</sup> Litigants should be aware that sanctions have been imposed for intentional misconduct, negligence, and even “purposeful sluggishness.”<sup>63</sup> The volume of electronic documents also has the potential to increase the volume of sanctions—courts are not afraid of imposing record high sanctions on attorneys guilty of spoliation.<sup>64</sup>

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59. GRENIG & GLEISNER, *supra* note 4, § 11:2. See *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001); *Zublake*, 220 F.R.D. at 216; *Barsoum v. NYC Hous. Auth.*, 202 F.R.D. 396, 399 (S.D.N.Y. 2001).

60. Isom, *supra* note 11, at 14 (“Spoliation cases are much more prevalent in electronic discovery than in paper discovery, perhaps because electronic information is more likely to be destroyed inadvertently than paper and because, whether information is destroyed intentionally or accidentally, the destruction of all copies of electronic information is so much more difficult to accomplish and difficult to hide than with paper.”); see, e.g., *United States v. Triumph Capital Group, Inc.*, 211 F.R.D. 31, 46 n.8 (D. Conn. 2002) (discussing that most deleted documents can be recovered with the proper amount of expertise unless the storage unit has been completely physically destroyed).

61. See GRENIG & GLEISNER, *supra* note 4, § 11:2; *Id.* § 11:6 (when determining whether to impose sanctions, the court should consider whether a party that has destroyed documents had a culpable state of mind); see also *AMLI Residential Props., Inc. v. Ga. Power Co.*, 667 S.E.2d 150, 155 (Ga. Ct. App. 2008) (“In determining whether sanctions for spoliation are warranted, the trial court must weigh the degree of the spoliator’s culpability against the prejudice to the opposing party.”).

62. GRENIG & GLEISNER, *supra* note 4, § 11:2.

63. Isom, *supra* note 11, at 26 (citing *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 113 (2d Cir. 2002) (holding that district courts “should not countenance ‘purposeful sluggishness’ . . . and should be prepared to impose sanctions where they encounter it”)); *Trull v. Volkswagen of Am., Inc.*, 187 F.3d 88, 95 (1st Cir. 1999) (“Bad faith is not essential. If such evidence is mishandled through carelessness . . . the district court is entitled to consider imposing sanctions.”); *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994) (discussing the considerations a court should use when deciding whether to use sanctions). But see *SEDONA PRINCIPLES (SECOND EDITION)*, *supra* note 13, at ii (stating that a court should only consider sanctions when “there was a clear duty to preserve, a culpable failure to preserve and produce relevant electronically stored information, and a reasonable probability that the loss of evidence has materially prejudiced the adverse party”).

64. See *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932, at \*20 (S.D. Cal. Nov. 7, 2008) (imposing eight and a half million dollars of sanctions on attorneys guilty of gross spoliation misconduct); *In re Telxon Corp. Sec. Litig. v. PricewaterhouseCoopers, L.L.P.*, No. 5:98CV2876, 1:01CV1078, 2004 WL 3192729, at \*36 (N.D. Ohio July 16, 2004) (holding that a default judgment against defendant who destroyed or failed to preserve electronic documents was acceptable); see also *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104, 1112 (8th Cir. 1988) (a reasonable retention

## 2. *Privilege*

Determining whether privilege exists presents another murky concept when electronic discovery is involved. The increase in potentially discoverable material has unsurprisingly prompted an increase in material that companies may want to protect.<sup>65</sup> In particular, attorneys have faced confusion concerning whether e-mails qualify for attorney-client privilege. Although e-mail communications between the attorney and client concerning a legal issue typically qualify, courts still have to determine whether there exists a “reasonable expectation” of confidentiality.<sup>66</sup> Storing documents in databases presents another dilemma: attorneys must balance a desire to create a centralized repository of potentially relevant information against the hazard of creating a prime target for parties requesting documents.<sup>67</sup>

## 3. *Proportionality*

When complying with e-discovery requests, producing parties are often confronted by the potential for significant expense. As mentioned previously, the large volume of electronic documents can mean great expense for those producing documents.<sup>68</sup> While the rules normally assume that a “responding party bears the expense of

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policy may not be sufficient to avoid sanctions, especially when future litigation is reasonably foreseeable). *But see, e.g., State v. Int'l Fidelity Ins. Co.*, 181 Misc.2d 595, 599 (N.Y. Sup. Ct. 1999) (where litigation looms “merely possible,” routine document disposal is unlikely to result in spoliation sanctions); *Szymanska v. Abbott Labs.*, No. 93 C 3033, 1994 WL 118154, at \*11 n.7 (N.D. Ill. Mar. 29, 1994) (“The mere possibility of litigation . . . does not trigger the duty to keep documents.”).

65. Martha J. Dawson, *Electronic Discovery Today*, 716 PLI/LIT 7, 39 (2004).

66. Bennett, *supra* note 47, at 237 (citing *State ex rel. U.S. Fid. & Guar. Co. v. Canady*, 460 S.E.2d 677, 689 (W. Va. 1995) (holding that e-mail involving an attorney communicating as either a sender or recipient may not automatically qualify for protection)); *see also United States v. Maxwell*, 45 M.J. 406, 418–19 (U.S. Ct. App. Armed Forces 1996) (holding that an expectation of privacy in an e-mail is subject to the type of e-mail sent and the recipient).

67. A company that efficiently stores all its records in one large database, for example, may become extremely vulnerable if a court orders production of that database. Bennett, *supra* note 47, at 239 (“Typically, a party who develops a litigation support system will look to the work product doctrine as the principle source for protecting the system. . . . As a general rule, the greater the [ ] input by counsel, the greater the degree of protection.”).

68. GRENIG & GLEISNER, *supra* note 4, § 6:5.

complying with discovery requests,”<sup>69</sup> courts may place limits or conditions on electronic discovery.<sup>70</sup> In the seminal case of *Zublake v. UBS Warburg L.L.C.*, the court articulated a new test in order to allow parties to obtain the “fullest possible knowledge of the issues and facts before trial.” The three step analysis clearly laid out how discovery costs should be allocated.<sup>71</sup> In particular, the court modified an old factor test to clarify the factors a court should consider in cost balancing. That seven factor balancing test serves as the most influential step in the analysis.<sup>72</sup> The test includes components such as the extent to which the request is specifically tailored, the availability of the information from other sources, and the total cost of production compared to the amount in controversy.<sup>73</sup>

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69. Robert S. Shwartz, *The Age of the Electronic Workplace*, 762 PLI/LIT 625, 655 (2007) (citing *Oppenheimer Fund, Inc., v. Sanders*, 437 U.S. 340, 358 (1978)); SEDONA PRINCIPLES (SECOND EDITION), *supra* note 13, at ii (“Absent a specific objection, party agreement or court order, the reasonable costs of retrieving and reviewing electronically stored information should be borne by the responding party, unless the information sought is not reasonably available to the responding party in the ordinary course of business.”).

70. GRENIG & GLEISNER, *supra* note 4, § 9:1 (citing Fed. R. Civ. P. 26(c) (stating that the court may order protection for information that may not be easily discovered because of undue cost.”)); *see also In re Auto. Refinishing Paint*, 229 F.R.D. 482, 496–97 (E.D. Pa. 2005) (holding that producing parties may receive compensation for the discovery requests of third parties); *see generally* ABA Discovery Standards 57–65 (2004), available at <http://www.abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf> (articulating standards for electronic discovery).

71. *Zublake v. UBS Warburg L.L.C.*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003) (holding the necessary analysis to include: (1) a presumption that the responding party should pay the costs of production, and a court should consider cost-shifting *only* when electronic data is relatively inaccessible; (2) if the responding party is required to produce relatively inaccessible information, such as backup tapes, requiring the responding party to restore and produce documents from a small sample of requested backup tapes will lessen the burden; and (3) seven weighted factors should be considered).

72. *Id.* at 321. The original test was articulated in *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 428–32 (S.D.N.Y. 2002) (factoring (1) specificity of discovery requests; (2) likelihood of discovering relevant information; (3) availability of that information from other sources; (4) purposes for which data is maintained; (5) relative benefits to the parties; (6) total cost of production; (7) relative ability of each party to control costs; and (8) the resources available to each party). The *Zublake* court considered the *Rowe* test incomplete, noting in particular the fact that *Rowe* did not mention either the amount in controversy or the importance of the issues at stake, and eliminated the factor that took into account the resources available to each party. Despite the presentation of the factors, the court noted that the “factors should not be weighed equally,” saying that courts often are “tempt[ed] to treat the factors as a check-list, resolving the issue in favor of whichever column has the most checks.” *Zublake*, 217 F.R.D. at 322.

73. *Id.* at 324 (finding that the plaintiff was entitled to all e-mails and electronic documents relevant to the claim, including those only preserved on backup tapes, but because the expense of exploring and recovering the tapes was sufficiently high, cost-shifting became appropriate); *see also* Shwartz, *supra*

Despite the codification of electronic discovery rules in the Federal Rules of Civil Procedure, the cost-shifting issue persists.<sup>74</sup>

## II. APPROACHES TO SOLVING THE E-DISCOVERY ISSUE

Part I suggested some of the difficulties that may arise in confronting electronic discovery and discussed the reasons that directed e-discovery rules are necessary.<sup>75</sup> Part II will address several of the approaches taken by the federal government and the states.<sup>76</sup>

### A. 2006 Amendments to the Rules of Federal Procedure

The new federal rules, as amended, attempt to address the problems inherent in electronic discovery.<sup>77</sup> Members of the Advisory Committee, who were charged with the task of formulating the new rules, sought to “[a]mend the rules to make it clear that e-mail and other computer information are subject to discovery [,] . . . to get clients to take this discovery seriously,” and to tell litigators “exactly what to do.”<sup>78</sup> Therefore, the drafters intended to provide an enduring, uniform set of guidelines that helpfully tackle the issues of burdens and expenses in electronic discovery, while also providing procedures for judges’ managerial roles.<sup>79</sup> The new amendments apply to all cases filed after December 1, 2006.<sup>80</sup>

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note 69, at 657–58 (noting that the weight placed on certain factors “reinforced . . . the traditional presumption that the producing party bears the cost” of production).

74. *Zublake*, 217 F.R.D. at 318 (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (protecting a party from “undue burden or expense” may include conditioning discovery on the requesting party’s payment of the costs)).

75. See discussion *infra* Part I.

76. See discussion *infra* Part II.

77. Rachel Hytken, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875, 884 (2008).

78. Richard L. Marcus, *E-Discovery Beyond the Federal Rules*, 37 U. BALT. L. REV. 321, 331 (2008).

79. Hytken, *supra* note 77, at 884–86 (2008); see also FED. R. CIV. P. 26(b)(2) advisory committee’s note (2006 Amendment) (discussing the difficulties of providing a standardized rule that takes into account “the different types of technological features that may affect the burdens and costs of accessing electronically stored information”).

80. Colleen M. Kenney, *Electronic Discovery in State Courts After the New Federal Rules Amendments*, 766 PLI/LIT 341, 343 (2007).

### 1. *Production and Proportionality*

The new rules now consider “electronically stored information” (ESI) within the scope of initial disclosures mandated by Rule 26.<sup>81</sup> The rule recognizes the role that ESI plays in modern litigation and also attempts to limit the costs of production.<sup>82</sup> Thus, Rule 26 provides that a party does not have to provide ESI from sources “that the party identifies as not reasonably accessible because of undue burden of costs.”<sup>83</sup> The rule effectively creates a two-tiered system of discovery, the first of which includes all information available and relevant to any party’s claim or defense.<sup>84</sup> The second “tier” protects parties from having to produce information that is not reasonably accessible thereby creating a presumption of non-discoverability for that tier.<sup>85</sup> The responding party must show that the information is not “reasonably accessible” due to burden or high cost, and to rebut this presumption the requesting party must show “good cause, considering the limitations of Rule 26(b)(2)(C).”<sup>86</sup>

In its commentary to the rules, the Advisory Committee offers several factors reminiscent of those in *Zublake* to help determine “good cause.”<sup>87</sup> Rule 26 establishes a proportionality test to

81. FED. R. CIV. P. 26(b)(2)(B); *see also* FED. R. CIV. P. 26(b)(2) advisory committee’s note (2006 Amendment) (“[ESI] has the same broad meaning in Rule 26(a)(1) as in Rule 34(a).”).

82. FED. R. CIV. P. 26(b)(2) advisory committee’s note (2006 Amendment) (“The amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information.”).

83. FED. R. CIV. P. 26(b)(2)(B).

84. *See* Hytken, *supra* note 77, at 890 (noting that the courts treat reasonably accessible ESI as presumptively discoverable because production would not require too much time or effort); FED. R. CIV. P. 26(b)(2)(B).

85. Hytken, *supra* note 77, at 890.

86. *Id.* Fed. R. Civ. P. 26(b)(2)(C) allows a court to limit the frequency or extent of discovery otherwise allowed if it determines that: (1) the discovery is unreasonably cumulative or duplicative, or can more easily be obtained from another source; (2) the party seeking discovery has had ample time to obtain the information by discovery; (3) the burden or expense presented outweighs its likely benefit.

Although the presumption of non-discoverability seems to protect responding parties from undue cost associated with production, “more courts than not have made a ‘good cause’ finding” and address the factors in 26(c) somewhat broadly. *See* Geoff Howard, *Trends in Electronic Discovery After the December 1, 2006 Amendments to the Federal Rules of Civil Procedure*, 766 PLI/LIT 13, 18–19 (2007) (“Of the nine cases available for electronic searching that reached the step of an inquiry into ‘good cause’ under Rule 26(b)(2)(B), courts found the requesting party had established ‘good cause’ in seven of them . . .”).

87. *Compare* FED. R. CIV. P. 26(b)(2) advisory committee’s comment (2006 Amendment) (“Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of



determine production and directs courts to consider not only whether burdens and costs of production are prohibitively high, but also whether those burdens can be justified in the circumstances of the case.<sup>88</sup> The test asks whether the discovery is “unreasonably cumulative,” whether the burden outweighs the benefit, and other similar factors.<sup>89</sup>

Amended Rules 33, 34, and 45 further simplify discovery procedures relating to ESI.<sup>90</sup> Rule 34(b)(2)(E) places ESI within the scope of production requests, mandates that parties produce documents “as they are kept in the usual course of business,”<sup>91</sup> and “permits requesting parties to ‘test’ or ‘sample’ (in addition to inspect or copy) both [ESI] and hard copy materials.”<sup>92</sup> Rule 33(d) allows a party to use ESI in response to a request to produce business documents, and Rule 45 now treats discovery of ESI from non-parties in a “manner similar to discovery of such materials from parties,” including requirements that production be in a “reasonably usable” form.<sup>93</sup> Rule 45 also permits use of a subpoena for purposes of “testing and sampling” documents, but cautions courts to “enforce [the protective provisions of Rule 45(c)] with vigilance when such demands are made.”<sup>94</sup>

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information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties’ resources.”), *with* Zublake v. UBC Warburg, L.L.C., 217 F.R.D. 309, 324 (S.D.N.Y. 2003).

88. FED. R. CIV. P. 26(b)(2) advisory committee’s note (2006 Amendment).

89. *Id.* But see Howard, *supra* note 86, at 17–18 (“This determination may be complicated, however, because the court and the parties ‘may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation.’”) (citing FED. R. CIV. P. 26(b)(2) advisory committee’s note (2006 Amendment)).

90. FED. R. CIV. P. 33, 34, 45. See generally Kenney, *supra* note 80, at 343.

91. FED. R. CIV. P. 34(b)(2)(E).

92. Kenney, *supra* note 80, at 344.

93. *Id.*; see FED. R. CIV. P. 33 (recognizing that “discovery of [ESI] . . . may impose burdens on the responding person”); FED. R. CIV. P. 45 advisory committee’s note (2006 Amendment) (“[Rule 45] provides protection against undue impositions on nonparties.”).

94. FED. R. CIV. P. 45(a)(1) advisory committee’s note (2006 Amendment).

## 2. *Spoliation*

The federal rules also define parties' preservation responsibilities and make sure that innocent parties do not face punishment for good faith mistakes.<sup>95</sup> The Advisory Committee recognized that parties requesting and producing ESI might face thousands or millions of easily corruptible documents and that simply due to the number of documents, some would inevitably fall through the cracks.<sup>96</sup> Rule 37(e) now provides that "[a]bsent exceptional circumstances, a court may not impose sanctions . . . on a party for failing to provide [ESI] lost as a result of the routine, good-faith operation of an electronic information system."<sup>97</sup> This "safe harbor" rule helps to protect parties who maintain ordinary in-house cleaning measures, and at the same time, establishes a basis for sanctions when necessary.<sup>98</sup> The rule reflects an understanding of normal day-to-day business operations and allows producing parties to avoid large, formerly unavoidable sanctions.<sup>99</sup>

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95. See FED. R. CIV. P. 37.

96. Hytken, *supra* note 77, at 891; see also Civil Rules Advisory Committee, Minutes of the April Meeting, at 18 (Apr. 15–16, 2004), available at <http://www.uscourts.gov/rules/Minutes/CRAC0404.pdf> ("Reasonable steps do not always preserve everything. Things slip through. That is the point of the safe harbor.").

97. FED. R. CIV. P. 37(e); see also Kenney, *supra* note 80, at 344 ("FRCP 37 adds a new 'safe harbor' provision that protects a party under certain limited circumstances from being sanctioned for non-production of electronically stored information that has been lost."). See generally Thomas Y. Allman, *Defining Culpability: The Search for a Limited Safe Harbor in Electronic Discovery*, 2 FED. CTS. L. REV. 65, 75 (2007) (noting that early versions of the Rule strongly considered the voluminous nature of ESI, and would have protected a party unless it "violated an order in the action requiring it to preserve [ESI]"). But see Thomas Y. Allman, *Addressing State E-Discovery Issues Through Rulemaking: The Case for Adopting the 2006 Federal Amendments*, 74 DEF. COUNS. J. 233, 236 n.25 (2007) (noting that safe harbor provisions could cause companies to purge information and hide behind the shield of "routine business practice").

98. Hytken, *supra* note 77, at 892. A party may benefit from the safe harbor provision when it acts in good faith, implements a litigation hold, and ESI loss results from "the routine operation of an electronic information system." *Id.* at 893 (citing FED. R. CIV. P. 37(f) advisory committee's note (2006 Amendment)). The author also notes that the burden faced by corporations trying to preserve back up tapes that saved information lost in the course of normal operations was incredibly high before Rule 37. *Id.* In many cases, the "expense of preservation often overwhelmed parties, leading them to settle." *Id.* (citing Andrew M. Scherffius et al., *Conference on Electronic Discovery, Panel Four: Rule 37 and/or a New Rule 34.1: Safe Harbors for E-Document Preservation and Sanctions*, 73 FORDHAM L. REV. 71, 79 (2004)).

99. Hytken, *supra* note 77, at 891.

### 3. *Privilege*

The new rules encourage the use of “claw back” or “quick peek” agreements: a method used to protect parties against accidental production of privileged documents.<sup>100</sup> Those agreements allow the requesting party to examine documents while preserving the right of the producing party to assert privilege when necessary.<sup>101</sup> Although such agreements fall more towards evidentiary issues than discovery, the 2006 amendments encourage the party receiving the electronic discovery to respect confidentiality in return for the producing party disclosing documents in an expedited fashion.<sup>102</sup>

### B. *Other Solutions*

Although the Federal Rules promise solutions to a number of problems with e-discovery, state courts have been unwilling to utilize them.<sup>103</sup> Despite common misperceptions that e-discovery litigation takes place only or even primarily on the federal level, “most litigation is in the state courts.”<sup>104</sup> Although many state courts tend to adopt the style of federal analysis, few citations to the new e-

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100. *Id.* at 887. “Quick peek” agreements typically occur when the producing party voluntarily gives electronically stored information to the opposing party without first reviewing it for privilege or confidentiality. The documents are, of course, subject to the highest level of confidence during that time. Once the receiving party has taken a “quick peek” and selected relevant documents, the producing party may “claw back” any documents it deems privileged, without having waived any privilege. While potentially risky, this arrangement allows the producing party to reduce costs associated with preproduction reviews for confidentiality and privilege. *See* SEDONA PRINCIPLES (SECOND EDITION), *supra* note 13, at 54–55.

101. Hytken, *supra* note 77, at 888. Many courts have recognized the value of these agreements—prior to the 2003 *Zublake* case, six courts recognized such provisions. *Id.* (citing *Zublake v. UBS Warburg L.L.C.*, 216 F.R.D. 280 (S.D.N.Y. 2003); *VLT Corp. v. Unitrode Corp.*, 194 F.R.D. 8 (D. Mass. 2000); *Ames v. Black Entm’t Television*, No. 98CIV0226, 1998 WL 812051, at \*1 (S.D.N.Y. Nov. 18, 1998); *Dowd v. Calabrese*, 101 F.R.D. 427, 439 (D.D.C. 1984); *W. Fuels Ass’n v. Burlington N. R.R.*, 102 F.R.D. 201, 204 (D. Wyo. 1984); *Eutectic Corp. v. Metco, Inc.*, 61 F.R.D. 35, 42 (E.D.N.Y. 1973); *United States v. United Shoe Mach. Corp.* 89 F. Supp. 357, 359 (D. Mass. 1950)).

102. Hytken, *supra* note 77, at 889 (“[The rules] cannot ‘limit the consequences of inadvertent disclosure’ because privilege—a substantive, evidentiary issue—lies beyond the reach of the Federal Rules of Civil Procedure.”).

103. Renee T. Lawson, *I Know About the Federal eDiscovery Rules, Now What About the States?*, 766 PL/LIT 357, 364 (2007) (discussing the “federal influence on the state courts—or surprising lack thereof”).

104. Marcus, *supra* note 78, at 333.

discovery rules or crucial court decisions such as *Zublake* exist.<sup>105</sup> Further, as of late 2008, only about a third of the states have adopted or are contemplating adopting portions of the amendments to the Federal Rules.<sup>106</sup>

Many states have stepped up to fill the void by creating their own e-discovery rules.<sup>107</sup> Illinois, for example, has taken a fairly simplistic approach to the problem. Instead of adopting comprehensive rules relating to e-discovery, Illinois Supreme Court rules define “all retrievable information in computer storage” to be within the scope of discovery.<sup>108</sup>

Additionally, substantive differences in state procedure may require a differing interpretation from Federal Rules.<sup>109</sup> Despite these difficulties, however, several unique methodologies have emerged to help states cope with electronic discovery.

### 1. “Wait It Out”

Some states adopt a practical “wait and see” approach and observe how the Federal Rules are treated by courts across the country.<sup>110</sup> In fact, a great many states have declined to review the new rules, preferring to continue with their old system or perhaps waiting to see what happens with the new rules.<sup>111</sup> Alabama has, for example, been debating whether to promulgate regulations “similar to the amendments to the federal rules, [those] along the lines of the [Uniform Rules] or something else.”<sup>112</sup> California, with “its

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105. Lawson, *supra* note 103, at 364.

106. Kenney, *supra* note 80, at 346–51.

107. Illinois, Mississippi, and Texas have elected to pursue their own independent systems. Kenney, *supra* note 80, at 352.

108. Kenney, *supra* note 80, at 352. (citing ILL. SUP. CT. R. 201(b)(1), available at [http://www.state.il.us/court/SupremeCourt/Rules/Art\\_II/ArtII.htm#201](http://www.state.il.us/court/SupremeCourt/Rules/Art_II/ArtII.htm#201)).

109. Illinois, for example, has different preservation obligations than federal courts, and makes available a separate cause of action for spoliation of evidence. Such claims must be resolved before preservation agreements can be made between parties. Jeffrey A. Parness, *E-Discovery in Illinois Civil Actions*, 95 ILL. B.J. 150, 151 (2007).

110. Lawson, *supra* note 103, at 362.

111. For a discussion of which states have yet to adopt the Federal Rules, see Kenney, *supra* note 80, at 345; Lawson, *supra* note 103, at 367.

112. George M. Dent, III, *Discovery of Electronically Stored Information—Potential Alabama Civil Procedure Rules*, 69 ALA. LAW. 106, 107 (2008).

significant inventory of litigation,” initially hesitated to adopt new regulations,<sup>113</sup> but has since “moved forward on proposed rules and statutes for e-discovery.”<sup>114</sup>

This approach obviously disadvantages state lawyers who need to know how to conduct electronic discovery, but, on the other hand, allows states to remain flexible to see what works. Such a method, however, may include a long wait period—the Advisory Committee drafted the rules with endurance in mind, specifically choosing not to incorporate a list of current technologies in favor of long term flexibility.<sup>115</sup> Therefore, waiting for full and complete interpretations of the rules could leave state attorneys in an informational vacuum for many years to come.

## 2. “Grab Life by the Horns”—the Texas Approach

In 1996, Texas became the first state to adopt rules regulating e-discovery, ten years before its federal counterparts.<sup>116</sup> Texas rules require that requesting parties specifically identify requested information, while also specifying what form the documents should take.<sup>117</sup> The responding party need only produce information that “is reasonably available to the responding party in its ordinary course of business.”<sup>118</sup> Texas rules protect privilege and preserve proportionality in an effective manner by their treatment of cost shifting. Texas courts shift costs when documents requested are not reasonably accessible, and they direct the requesting party to pay the costs of such “extraordinary steps.”<sup>119</sup> Texas also has a safe harbor

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113. Lawson, *supra* note 103, at 362.

114. Marcus, *supra* note 78, at 336–37. See generally CAL. R. CIV. PROC.

115. FED. R. CIV. P. 34(a) advisory committee’s note (2006 Amendment) (“[The] list of forms, media, and technologies would be ridiculously long and would be superseded by new forms, media, and technologies by the time the reader was finished.”). See generally Hytken, *supra* note 77, at 895–96.

116. Marcus, *supra* note 78, at 334; see also Lawson, *supra* note 103, at 362.

117. TEX. R. CIV. PROC. 196.4; see Thomas Y. Allman, *Addressing State E-Discovery Issues Through Rulemaking: The Case for Adopting the 2006 Federal Amendments*, 74 DEF. COUNS. J. 233, 238 (2007).

118. Allman, *supra* note 117, at 238 n.37 (“Texas practitioners argue that this approach has reduced abusive and excessive discovery requests while providing adequate discovery.”); see Lawson, *supra* note 103, at 362.

119. Lawson, *supra* note 103, at 362 (citing TEX. R. CIV. PROC. 196.4); see also Allman, *supra* note 117, at 238.

provision, but slightly different from its federal counterpart—Texas litigants have a ten-day window after the production of documents in which they may still assert privilege.<sup>120</sup> So far, courts have not further interpreted the Texas provision, “perhaps proof of its success.”<sup>121</sup> Mississippi and Idaho recently adopted guidelines similar to Texas’s, further evidence of the state’s success.<sup>122</sup>

### 3. *The Uniform Rules*

Texas lawyers were not the only ones to anticipate the problems inherent in electronic discovery—both the Conference of Chief Justices and the National Conference of Commissioners on Uniform State Laws (NCCUSL) have drafted and promulgated models for states to follow in adopting rules for e-discovery.<sup>123</sup>

The NCCUSL “decided not to reinvent the wheel,” and their *Uniform Rules Related to the Discovery of Electronically Stored Information* (Uniform Rules) “mirror[] the spirit and direction of the recently adopted amendments.”<sup>124</sup> In fact, the Uniform Rules adopt much of the federal amendments’ language, “modified, where necessary, to accommodate the varying state procedures and are presented in a form that permits their adoption as a discrete set of rules applicable to discovery of [ESI].”<sup>125</sup> The advantage of the Uniform Rules stems from the fact that they comprehensively attempt to deal with electronic discovery.<sup>126</sup> They include “all of the major

120. Lawson, *supra* note 103, at 362 (citing TEX. R. CIV. P. 193.3).

121. Marcus, *supra* note 78, at 334.

122. See Lawson, *supra* note 103, at 363; Kenney, *supra* note 80, at 352.

123. Marcus, *supra* note 78, at 336; see UNIFORM RULES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION 1 (2007) [hereinafter UNIFORM RULES]; CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION (Richard van Duizend reporter, Aug. 2006) [hereinafter STATE GUIDELINES].

124. UNIFORM RULES, *supra* note 123, Prefatory Note at 2.

125. *Id.* The rules attempt to: “(1) provide early attention to electronic discovery issues, (2) provide better management of discovery into [ESI], (3) set out a procedure for assertions of privilege after production, (4) clarify the application of the rules relating to interrogatories and requests for production of documents to [ESI], and (5) clarify the application of the sanctions rules to [ESI].” Similar to the Federal Rules, NCCUSL defines ESI in such a way that it “encompass[es] future developments in computer technology.” UNIFORM RULES, *supra* note 123, comment to Rule 1.

126. *But see* Allman, *supra* note 117, at 238 (despite the best efforts of the NCCUSL, the author notes that the Uniform Rules are “pithier and have less extensive explanatory comments than the Federal Amendments”).

attributes of the Federal Rules—inclusion of [ESI]; early meet and confer conference and order; sanctions limitation in good faith circumstances; form of production rules,” to name a few.<sup>127</sup> The Uniform Rules attempt to “encourage states to adopt rules consistent with the Federal Rule on e-discovery,” while incorporating the fact that state systems are not always similar.<sup>128</sup>

Conformity between the federal and uniform rules is not problem free. Since the Uniform Rules do not substantially depart from the Federal Rules, they leave the problematic areas of e-discovery unsolved. The Uniform Rules have been criticized by groups arguing that differences in state rulemaking procedures make adopting uniform rules impractical.<sup>129</sup> Therefore, although the Uniform Rules are a useful start, as they stand they probably do not present the best option for adoption by the state of Georgia.

#### 4. *The State Guidelines*

The Conference of Chief Justices created a document entitled “Guidelines for State Trial Courts Regarding Discovery of [ESI],” State Guidelines designed to help cope with the “emergence of electronic data systems . . . in the discovery of electronic-based . . . evidence.”<sup>130</sup> The State Guidelines differ from the federal amendments in several ways: the obligation of counsel to meet and confer, the scope and format of production, whether metadata must be produced, cost shifting, inadvertent disclosure, preservation orders, and safe harbor.<sup>131</sup> The most significant difference between

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127. Lawson, *supra* note 103, at 363.

128. Larry Hunter, *Conditional Admission, 75-Percent Pass Rate, and E-Discovery*, 51-MAY ADVOC. 30 (2008).

129. Thomas Y. Allman, *The Forgotten Cousin: State Rulemaking and Electronic Discovery*, 766 PLI/LIT 317, 331 (2007) (noting that the American Trial Lawyers Association criticized the Uniform Rules on the idea that no new rules were needed, and that an educational approach emphasizing the “intricacies of electronic storage, retention, and production” would be more practical).

130. Roland C. Goss, *A Comparison of the December 2006 Amendments to the Federal Rules of Civil Procedure and the Guidelines for State Trial Courts Regarding the Discovery of Electronically-Stored Information*, SM085 A.L.I.-A.B.A 295, 297–98 (2007) (the Guidelines were approved by the Conference of Chief Justices on August 2, 2006, and sent to the highest courts of each state for their consideration).

131. See generally Goss, *supra* note 130 (describing in great detail the differences between the Federal Rules and the State Guidelines). Compare FED. R. CIV. P., with STATE GUIDELINES.

the State Guidelines and the Federal Rules exists in their treatment of metadata.<sup>132</sup> The Advisory Committee to the Federal Rules suggested that hidden metadata was important only in very few cases, despite subsequent federal case law to the contrary.<sup>133</sup> On the other hand, the State Guidelines note the importance of producing metadata, saying that a judge should require ESI to be produced in a way that preserves the substantive information of the relevant data.<sup>134</sup> The guidelines, however, do not provide much in the way of practical guidance in the area, going so far as to imply that production of metadata is voluntary at best.<sup>135</sup> This treatment is surprising, especially considering metadata's prominence among electronic discovery issues.<sup>136</sup> So, while the Guidelines go a step further than the Federal Rules, the Guidelines's treatment of metadata illustrates the need for additional clarification.

Further differences between the two documents abound. For example, while the Federal Rules "work general disclosures and discussions of electronic discovery into the existing Rule 26 structure," the State Guidelines provide "much more specific requirements."<sup>137</sup> In terms of production and privilege, the State Guidelines find data accessible if it is "easily retrievable in the ordinary course of business." The Guidelines could therefore be interpreted to prevent transmission of information that is not easily retrievable. The Federal Rules, on the other hand, maintain a higher

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132. *Id.* at 313–17.

133. The Federal Rules do not contain a specific provision with reference to metadata, "relying on the developing case law to provide guidance," while also referring to Rule 34(b)(ii) and its requirement that production be in a form "in which it is ordinarily maintained or in a form or forms that are reasonably useable." *Id.* at 314–15 (referencing *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640 (D. Kan. 2005) and *Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L.*, No. 04 C 3109, 2006 WL 665005 (N.D. Ill. Mar. 8, 2006)).

134. STATE GUIDELINES, *supra* note 123, guideline 6.

135. Goss, *supra* note 130, at 315–17 (noting the guidelines do not define an acceptable format that reveals "non-screen information," and states that "substantive" information should be maintained and produced; the implication is that "non-screen information" is not "substantive" information, and thus that metadata is not typically discoverable) (citing STATE GUIDELINES, *supra* note 123, guideline 6).

136. *Id.* at 316 ("While the evidentiary significance, if any, of different types of metadata will vary from case to case, it is appropriate to provide a basic level of guidance to the parties in this area, so that data preservation efforts may be appropriately guided.").

137. *Id.* at 301, 304 ("Given the current unfamiliarity of many state court judges with e-discovery issues, more detailed guidance appeared appropriate.").



standard: “[d]ata is ‘not reasonably accessible’ if obtaining it would result in ‘undue burden or cost.’”<sup>138</sup>

### III. THE STATE OF THE STATE: PROPOSALS FOR GEORGIA

Part II addressed several of the approaches taken by the federal government and the states to modernize e-discovery rules.<sup>139</sup> Part III recommends that Georgia amend its Civil Practice Act<sup>140</sup> by adopting the amended Federal Rules of Civil Procedure, and suggests several modifications that the state should consider.<sup>141</sup>

#### A. Georgia's State of Being

Georgia is among the many states that have not adopted comprehensive e-discovery rules.<sup>142</sup> “As of February 1, 2008, the State of Georgia does not have a rule governing electronic discovery.”<sup>143</sup> Even though computer records play a crucial role in business and litigation, there has been a startling lack of attention paid to the subject.<sup>144</sup>

Georgia statutes do not distinguish between electronic discovery and conventional discovery, and provide no guidance to litigants struggling with modern discovery issues.<sup>145</sup> Georgia's Civil Practice Act only barely acknowledges the existence of electronic documents.<sup>146</sup> Georgia Code Section 9-11-26(a), for example, states

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138. While the question of whether “technical feasibility of retrieving data should be considered . . . may be implicit in the [Federal Rules] . . . . The State Court Guideline . . . seems to focus more on the technical feasibility of retrieving the data, while also considering the cost and burden of production.” *Id.* at 308 (citing FED. R. CIV. P. 26 and STATE GUIDELINES, *supra* note 123, guideline 5).

139. See discussion *supra* Part II.

140. See generally GA. CODE ANN. §§ 9-11-1 to 9-11-133 (2003). Discovery rules are located in GA. CODE ANN. §§ 9-11-26 to 9-11-37 (2003).

141. See discussion *infra* Part III. Adopting the Federal Rules seems like the obvious approach, as adoption would enable Georgia practitioners in federal court to practice state or federal law under a fundamentally similar series of rules.

142. Allman, *supra* note 118, at 237 (“[Only] seven states and the District of Columbia are currently considering adoption of e-discovery rules based on the 2006 Amendments.”).

143. MARY A. PREBULA, 3 GEORGIA PROCEDURE, DISCOVERY § 1:6 (2009).

144. WAYNE M. PURDOM, GEORGIA CIVIL DISCOVERY § 13-6 (6th ed. 2008).

145. PREBULA, *supra* note 143, § 1:6 (citing *Demido v. Wilson*, 582 S.E.2d 151 (2003)).

146. GA. CODE ANN. § 9-11-26 (2003).

that parties may obtain discovery by, among other things, “production of documents.” Georgia Code Section 9-11-26(b)(1) provides that “parties may obtain discovery regarding any matter, not privileged, which is relevant.” Georgia Code Section 9-11-34(a)(1) allows a party to serve upon another a request for production, but limits its treatment of electronic documents to “data compilations from which information can be obtained.”<sup>147</sup>

The courts have likewise neglected to address the topic. No Georgia court has yet undertaken a comprehensive analysis of electronic discovery issues.<sup>148</sup> In fact, Georgia courts have only incidentally touched upon electronic discovery.<sup>149</sup> Instead, Georgia courts currently rely on ad hoc determination of electronic discovery issues, and make use of existing discovery rules to accomplish modern objectives.<sup>150</sup>

Noting this apparent lack of concern, one might be tempted to argue that Georgia’s system seems to work fairly well and there is no reason to fix it. Such a brazen assumption, however, ignores the fact that “more and more, the courts are taking an active role in policing the production of electronic discovery.”<sup>151</sup> It also ignores the punitive capacities of juries. One Florida jury returned a \$1.45 billion award against a company that failed to produce electronic documents in a timely manner.<sup>152</sup> A jury in North Carolina awarded a plaintiff more than \$830,000 in damages, relying in large part on an adverse spoliation instruction issued by the judge.<sup>153</sup> In Connecticut, a court entered a default judgment in the amount of \$5.8 million against a

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147. *Id.* § 9-11-34.

148. The legislature, for its part, has also declined invitations to update Georgia’s rules. In 2009, the General Assembly considered a 129 page bill that was to “substantially revise, supersede, and modernize” Georgia’s evidence code. H.B. 24, 2009 Gen. Assem. (Ga. 2009). The bill died in committee. State of Georgia Final Composite Status Sheet, HB 24, Apr. 3, 2009.

149. *See, e.g., Demido v. Wilson*, 582 S.E.2d 151, 155 (2003) (denying a request for an extension of discovery, noting that plaintiff failed to show how “inspection of . . . servers could produce evidence necessary to establish his remaining claims”).

150. *Id.*

151. Bradley C. Nahrstadt, *A Primer on Electronic Discovery: What You Don’t Know Can Really Hurt You*, 27 TRIAL ADVOC. Q. 17, 31 (2008).

152. *Morgan Stanley & Co. v. Coleman (Parent) Holdings Inc.*, 955 So. 2d 1124, 1126 (Fla. Dist. Ct. App. 4th Dist. 2007).

153. *Arndt v. First Union Nat’l Bank*, 613 S.E.2d 274 (N.C. Ct. App. 2005).

defendant who failed to produce electronic evidence.<sup>154</sup> Dozens of such cases demonstrate that it is vitally important for litigants to fully understand the rules and for courts to be bound by them.<sup>155</sup> Georgia lawmakers must be proactive now in order to avoid bigger issues later. Adopting the Federal Rules of Civil Procedure is one way to do so.

### *B. Georgia Should Adopt the Federal Rules of Civil Procedure*

It is in Georgia's best interests to adopt the 2006 amended Federal Rules of Civil Procedure,<sup>156</sup> because the amendments are "practical and should be incorporated wherever feasible in state rulemaking efforts."<sup>157</sup> Furthermore, adopting the Federal Rules would not entail substantive departure from Georgia's established procedural system.<sup>158</sup> The Civil Practice Act is modeled after the Federal Rules of Civil Procedure and is nearly identical to its federal counterpart, with only "an occasional difference."<sup>159</sup> As a result, Georgia courts often cite federal interpretations of the Federal Rules as persuasive authority when interpreting the Civil Practice Act, and "frequently adopt the federal construction for similar Georgia rules."<sup>160</sup> Therefore, few difficulties in adapting Georgia's current rules to the Federal Rules would result, with the benefit of providing litigators a common set of guidelines.<sup>161</sup>

As important as the Federal Rules are in providing guidance for judges, counsel, and clients, the rules "do not answer many of the

154. *S. New England Tel. Co. v. Golbal NAPs, Inc.*, No. 3:04-cv-2075 (JCH), 2008 WL 2704495 (D. Conn. July 1, 2008).

155. *See, e.g., Broccoli v. Echostar Commc'ns Corp.*, 229 F.R.D. 506 (D. Md. 2005); *Tantivy Commc'ns, Inc. v. Lucent Techs. Inc.*, No. Civ.A.2:04CV79 (TJW), 2005 WL 2860976, at \*1 (E.D. Tex. Nov. 1, 2005); *Paramount Pictures Corp. v. Davis*, 234 F.R.D. 102 (E.D. Pa. 2005); *Sony Computer Entm't Am., Inc. v. Filipiak*, 406 F. Supp. 2d 1068 (N.D. Cal. 2005).

156. *See discussion infra* Part III.

157. Allman, *supra* note 117, at 236, 238 ("[E]arly experience with the Federal Amendments is encouraging. Attorneys and their corporate clients are 'getting it' . . . [and] parties are better prepared for 'meet and confers.'").

158. PREBULA, *supra* note 143, § 1:1 (2006).

159. *Id.*

160. *Id.* (citing *G.H. Bass & Co. v. Fulton County Bd. of Tax Assessors*, 486 S.E.2d 810 (1997); *Bicknell v. CBT Factors Corp.*, 321 S.E.2d 383 (1984)).

161. *See discussion supra* Part II.

most vexing questions judges and litigants face.”<sup>162</sup> For example, the rules do not govern pre-litigation conduct, since procedural rules traditionally only apply once litigation commences. Rule 37(e) has been interpreted to allow a court to impose sanctions for failure to preserve documents only when litigation is reasonably foreseeable or ongoing.<sup>163</sup> The rules also do not speak to “the duty of preservation or the waiver of attorney-client privilege.”<sup>164</sup> Such incompleteness allows Georgia the opportunity to fill in the gaps and provide a more comprehensive approach to e-discovery. Georgia should, therefore, adopt the Federal Rules while also taking the opportunity to provide more detailed guidance.

### C. Additional Modifications

#### 1. The Obligation to Meet and Confer

The Federal Rules are based on “a belief that many of the problems that have occurred in the discovery of electronic data could have been avoided if counsel for all parties had been knowledgeable” about their clients’ electronic data.<sup>165</sup> Rule 26(f) requires parties to confer “as soon as practicable” concerning “any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.”<sup>166</sup>

This general outline could be strengthened by adding specific requirements. For example, the State Court Guidelines provide that trial judges should order counsel to confer and exchange (1) [a] list of

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162. SEDONA PRINCIPLES (SECOND EDITION), *supra* note 13, at iv.

163. See Thomas Y. Allman, *Rule 37(f) Meets Its Critics: The Justification for a Limited Safe Harbor for ESI*, 5 NW. J. TECH. & INTELL. PROP. 1 (2006); Redish, *supra* note 5, at 619 n.212 (the Rule 37 authority granted judges is normally “construed to be confined to situations in which the party destroyed evidence following issuance of a discovery order”); *Capellipo v. FMC Corp.*, 126 F.R.D. 545, 551 n.14 (D. Minn. 1989) (noting that “Rule 37 does not, by its terms, address sanctions for destruction of evidence prior to the initiation of a lawsuit or discovery requests”); Isom, *supra* note 11, at 12 (“[Absent] a document preservation order, no rules-based sanctions are available to be inoculated against by Rule 37(f).”); *ABC Home Health Servs., Inc. v. IBM Corp.*, 158 F.R.D. 180, 182 (S.D. Ga. 1994) (“Rule 37 does not directly apply because the alleged destruction of documents took place before the action was filed and before discovery began.”). See generally FED. R. CIV. P. 37(e).

164. SEDONA PRINCIPLES (SECOND EDITION), *supra* note 13, at iv.

165. Goss, *supra* note 130, at 299.

166. FED. R. CIV. P. 26(f)(1), 26(f)(3)(C).

the person(s) most knowledgeable about the relevant computer system(s) or network(s) . . . ; (2) [a] list of the most likely custodian(s) . . . of relevant electronic data, together with pertinent contact information”; and so on.<sup>167</sup> State courts, unfortunately, “typically do not have the established practice of an early meeting of counsel followed by ‘voluntary’ pre-discovery disclosures.”<sup>168</sup> Given the “current unfamiliarity of many state court judges with e-discovery issues, more detailed guidance [appears] appropriate.”<sup>169</sup> Defining parties’ obligation to meet and confer will ensure that potential problems arising from electronic discovery are discussed at the outset of litigation, not during or afterwards.

## *2. Production of Inaccessible Documents and the “Good Cause” Standard*

Federal Rule 26(b)(2)(B) allows a party to request information that otherwise would not be reasonably accessible due to burden or cost if “good cause” can be shown.<sup>170</sup> What constitutes “good cause,” however, is not defined within the federal amendments, “leaving tremendous discretion to judges.”<sup>171</sup> In fact, the good cause standard can be extraordinarily difficult to define because it is used in several different rules and many differing contexts. For example, Rule 26(c)(1), which allows the issuance of protective orders, provides that “[t]he court may, for good cause, issue an order to protect a party or person.” Due to the fact that a protective order stands in direct

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167. STATE GUIDELINES, *supra* note 123, guideline 3 (other requirements include (3) a list of each electronic system that may contain relevant information; (4) an indication whether relevant information may be of limited accessibility or duration; (5) list of information stored off-site; (6) description of any efforts undertaken to preserve relevant information; (7) form of production; and (8) notice of any known problems reasonably anticipated to arise).

168. Goss, *supra* note 130, at 304.

169. *Id.*

170. This “good cause” standard should not be confused with the good cause standard used by courts in determining whether to allow discovery beyond the subject matter of the complaint. In the latter case, the court looks at whether there is good cause to allow that additional area of discovery. In the case of electronic discovery, however, the court wants to know whether there is good cause to compel a party to produce documents that are only limitedly available.

171. Hytken, *supra* note 77, at 890; *see also* FED. R. CIV. P. 26(b)(2)(B) (stating that a court may order discovery upon a showing of good cause, but provides no standard for action except requesting courts to “consider[] the limitations of Rule 26(b)(2)(C)”).

opposition to the normally liberal rules of discovery, the good cause standard in that rule is “quite demanding.”<sup>172</sup> Rule 26(b)(1) also articulates a good cause standard, providing that “[f]or good cause, the court may order discovery of any matter relevant to the subject matter” of the action. These distinctions have led courts to wonder whether the good cause standards in 26(b) should be considered only in reference to Rule 26(b)(2)(C), or whether the considerations inherent in a 26(c) protective order are meant to apply to 26(b).<sup>173</sup>

The amendment has failed to provide “much other guidance to courts grappling with the new [good cause] standard,” with the result that many courts give the new rules no effect.<sup>174</sup> Although the amended rule’s vagaries were likely “intended to increase judicial discretion,” the larger problem still persists.<sup>175</sup> Many judges, including Judge Scheindlin, who decided *Zublake v. Warburg*, view the factors articulated in the Advisory Committee’s notes as “overlap[ping] the proportionality considerations of Rule 26(b)(2)(C).”<sup>176</sup> As a result, the factors which were meant to clarify the rules may just be a “redundant reminder that all discovery is

172. Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 86 (2007).

173. *Id.* This question can become even more confusing because Rule 26(b)(2)(B) can apply either in the context of a motion to compel or a motion for a protective order. “If a Rule 26(b)(2)(B) objection is raised by motion for protective order pursuant to Rule 26(c), which good cause standard applies?” *Id.* at 86–87.

174. Hytken, *supra* note 77, at 891 (citing Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 52, 86 (2007)); see generally FED. R. CIV. P. 26(b)(2)(C) (The court must consider several factors to determine whether to limit discovery, including whether: “(i) the discovery is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in action; or (iii) the burden of expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issue.”).

175. The problem is that judges hold increased discretion but are increasingly unclear as to how they should appropriately exercise that discretion. Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 90 (2007). Increased judicial discretion in applying the federal rules may indeed have been the intended result. “[J]udges have come to dominate membership on the Civil Rules Advisory Committee in recent years and judges tend to favor broad discretion.” *Id.* (citing Robert G. Bone, *Who Decides?: A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1974 (2007)).

176. Noyes, *supra* note 175, at 72 (citing SHIRA A. SCHEINDLIN, E-DISCOVERY: THE NEWLY AMENDED FEDERAL RULES OF CIVIL PROCEDURE 17 (2006) (supplement to JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE (3d. ed. 2006))).

subject to the limitations of Rule 26(b)(2)(C).”<sup>177</sup> Policymakers should strongly consider either creating distinct factors for each doctrine or clearly applying the same test for both.

The *Sedona Principles* provide a potential solution, and suggest taking into account “the technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing electronically stored information” to achieve balance.<sup>178</sup> Principle 6 “expands the concept by noting that ‘responding parties are best situated’ to evaluate the appropriate procedures, methodologies and technologies to preserve and produce their electronically stored information.”<sup>179</sup>

Other scholars have opined that “clarifying amendments” should be introduced, such as stating “a presumption in favor of cost shifting of production in regard to inaccessible information.”<sup>180</sup> Policy makers also could integrate the *Zublake* factors into the “good cause” or cost shifting analysis, which would be a wise choice considering the amount of attention the factors receive from courts.<sup>181</sup>

### 3. Safe Harbor Provisions and Litigation Holds

Federal Rule 37 provides a “safe harbor” provision in order to protect parties who have inadvertently destroyed discoverable documents.<sup>182</sup> Although this rule generally protects parties acting in good faith, Georgia should consider a more comprehensive and protective approach.<sup>183</sup> The Advisory Committee, in drafting the

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177. *Id.* (citing Thomas Y. Allman, *The Impact of the Proposed Federal E-Discovery Rules*, 12 RICH. J.L. & TECH. 1, 9 (2006)).

178. SEDONA PRINCIPLES (SECOND EDITION), *supra* note 13, at 7.

179. *Id.* at 7.

180. See Allman, *supra* note 117, at 238 n.38; see SEDONA PRINCIPLES (SECOND EDITION), *supra* note 13, at 7 (“[T]he costs of ‘retrieving and reviewing’ electronically stored information that is not ‘reasonably available’ may be shifted to the requesting party.”).

181. See *Zublake v. UBS Warburg L.L.C.*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003); Allman, *supra* note 117, at 237 (noting the impact of federal case law, and the success of states in “converting the underlying principles in federal precedent to contexts unique to state law” (referencing *O’Brien v. O’Brien*, 899 So. 2d 1133 (Fla. App. 2005))).

182. See discussion *supra* Part II; FED. R. CIV. P. 37(e) (the rule currently provides that a court “may not impose sanctions . . . on a party for failing to provide [ESI] lost as a result of the routine, good-faith operation of an electronic information system”).

183. A producing party has the burden of showing that the information was lost as a result of a “routine, good-faith operation of an electronic information system.” FED. R. CIV. P. 37(e).

federal amendments, considered an alternative version of Rule 37 that was an “intermediate standard between negligence and intentional malfeasance.”<sup>184</sup> The original rule would have protected a party unless it “violated an order in the action requiring it to preserve.”<sup>185</sup>

Despite signs that courts are showing a “more balanced approach [when] evaluating the good faith discharge of preservation obligations,”<sup>186</sup> other scholars think that the “safe harbor” provision should presumptively apply “even when information otherwise slips through due to human error, so long as reasonable efforts were made to effectuate a litigation hold.”<sup>187</sup> New rules should carefully balance the pros and cons of each possibility and clearly dictate the underlying reasons behind the outcome.

Indeed, Rule 37 does not provide “bright lines upon which a producing party can rely in planning its preservation compliance policies.”<sup>188</sup> At the moment, a party must look “outside the rules to other practitioner guides and local jurisdictions”—an undesirable outcome for anyone seeking a clear answer.<sup>189</sup> Although solving this problem may reach outside the scope of traditional discovery rules, clearly defining when a party’s preservation obligations attach is an invaluable consideration.

#### 4. Metadata and Form of Production

The Federal Rules do not explicitly mention metadata, but indirectly treat the issue as one to be dealt with on a case by case

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184. Hytken, *supra* note 77, at 892.

185. Thomas Y. Allman, *Defining Culpability: The Search for a Limited Safe Harbor*, 2 FED. CTS. L. REV. 65, 75 (2007). The author notes that the Committee chose a lesser standard of fault—good faith—rather than the “higher standard of culpability or fault, such as recklessness or gross negligence” that public comment advocated for. *Id.* at 76.

186. Thomas Y. Allman, *Addressing State E-Discovery Issues Through Rulemaking: The Case for Adopting the 2006 Federal Amendments*, 74 DEF. COUNS. J. 233, 236 (2007) (citing *Cache La Poudre Feeds, L.L.C. v. Land O’Lakes, Inc.*, No. 04-cv-003929-WYD-CBS, 2007 WL 684001 (D. Col. Mar. 2, 2007); *Consol. Aluminum Corp. v. ALCOA*, Civ. No. 03-1055-C-M2, 2006 WL 2583308 (M.D. La. July 19, 2006).

187. Allman, *supra* note 117, at 238 n.38 (2007). Federal Rule 37 only states that a court may not impose sanctions for documents lost as a result of routine, good-faith operation of an electronic information system unless exceptional circumstances exist. FED. R. CIV. P. 37(e).

188. Hytken, *supra* note 77, at 894 (citing Allman, *supra* note 187, at 79).

189. Hytken, *supra* note 77, at 894.



basis.<sup>190</sup> The rules require, with the exception of an agreement by the parties to the contrary, that documents be produced in the format “in which [they are] ordinarily maintained.”<sup>191</sup> Unfortunately for receiving parties, however, documents might be “ordinarily maintained” in a form other than their native format.<sup>192</sup> Stated another way, the format in which the documents are typically stored may not be the best format for viewing hidden metadata. Such an obstacle could cost both producing and requesting parties frustration and expense. This issue can be solved by adopting rules that instruct courts to “tak[e] into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party.”<sup>193</sup>

#### CONCLUSION: AND THE ROAD GOES EVER ONWARD

Electronic discovery, a complicated and time consuming endeavor, is the natural result of litigation’s advancement into the Digital Age. The technology that drives society brings with it many complications, but many possibilities as well. Electronic documents present previously unseen questions of preservation, privilege, and proportionality due to their unique volume, retrieval methods, and modes of translation.<sup>194</sup> The legal profession cannot remain outside the reach of this technological advancement—the rules must advance to keep pace with society.

Many organizations seek to keep that pace—the drafters of Federal Rules of Civil Procedure and the State Guidelines, the Sedona

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190. See SEDONA PRINCIPLES (SECOND EDITION), *supra* note 13, at 8 (“Rule 26(f) instead emphasizes the need to discuss this topic early to attempt to reach agreement, and Rule 34(b) provides a process for resolving disputes.”).

191. FED. R. CIV. P. 34(b).

192. SEDONA PRINCIPLES (SECOND EDITION), *supra* note 13, at 8 (“It is common for electronic information to be migrated to a number of different applications and formats in the ordinary course of business . . . [and] [r]outine migration will likely result in the loss or alteration of some elements of metadata associated with the native application.”).

193. SEDONA PRINCIPLES (SECOND EDITION), *supra* note 13, at 60, principle 12. For further discussion and commentary on dealing with metadata, see *id.* at 60–66.

194. See discussion *supra* Part I.

Conference, and state legislatures—and each has found unique solutions for the questions presented.<sup>195</sup> The Federal Rules present the best opportunity for Georgia, since Georgia’s current procedural system already closely resembles the federal one.<sup>196</sup> That said, however, there is no reason the state must stop there. Georgia should consider modifications and additions to address ambiguities in “Meet and Confer” rules, “Good Cause” production standards, “Safe Harbor” and preservation obligations, discovery of metadata, and proper form of production.<sup>197</sup> This list is certainly not exhaustive, though—technology will continue to change, and, as it does, modifications will undoubtedly be necessary to craft new rules and exceptions.

The cause of advancement is promoted by many, but the general difficulty in such scenarios typically comes from resistance from practitioners and judges, the very people who work within the state’s own legal system. They are used to a certain set of rules and norms, and will try to stick to the old rules in order to preserve that with which they are familiar. But what cost does that familiarity impose?

Litigants are becoming aware of the potential pitfalls of electronic discovery, but are unable to effectively navigate them. Juries are not deterred from imposing punitive damages by the fact that electronic discovery issues are new, and judges have a wide degree of discretion when considering sanctions. So which is the better case—defining the rules of the game now, when there is time to respond, or instead soaking up million dollar losses in preventable electronic discovery sanctions? Indecision is expensive. In order to meet the demands of electronic records storage, Georgia must take affirmative action.

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195. See discussion *supra* Part II.

196. See discussion *supra* Part III.B.

197. See discussion *supra* Part III.

