

# Memorandum

To: Clerk of the Supreme Court, Georgia

Date: August 8, 2016

Re: State E-Discovery Rulemaking (2016)

From: Tom Allman

This memorandum tracks state e-discovery rulemaking contemporaneous with the 2015 Amendments to the FRCP.<sup>1</sup> Where relevant, e-discovery rulemaking by the state after the 2006 Amendments is also summarized.

1. **Arizona.** E-discovery amendments (“AZ St. RCP R \_\_\_\_” or “Ariz. R. Civ. P. \_\_\_\_”) based on the 2006 Amendments became effective on January 1, 2008, including limitations on inaccessible production (Rule 26(b)(1)(B) and sanctions for loss of ESI due to routine, good-faith operations (Rule 37(g)). Currently, a Petition is pending to amend the rules to reflect the 2015 Federal Amendments. It would require courts to “ensure” that “discovery is appropriate to the needs of action,” considering a list of unique factors. Rule 37(g), if amended as proposed, would include the measures authorized by amended FRCP Rule 37(e) but would also define factors for determining if “reasonable steps” were undertaken.
2. **Colorado.** Colorado amended its civil rules (“Colorado Rule \_\_\_\_”) effective July 1, 2015 so that Rule 1(a) requires that the rules be “administered, and employed by the court and the parties” to achieve the goals of the Rules, reflecting the (then) proposal of the 2015 Federal Amendments. Rule 26(b)(1) makes the scope of discovery “proportional to the needs of the case” and related factors, and deletes references to subject matter discovery and the role of “reasonably calculated.” and examples. The applicable Comment regarding proportionality factors is extensive. Colorado did not adopt either the initial 2006 nor the amended version of FRCP Rule 37(e) nor placed limitations on production from inaccessible sources of ESI as found in FRCP 26(b)(2)(B).
3. **Georgia.** The discovery rules in the Civil Practice Act of the Georgia Code do not contain specific references to e-discovery. *See, e.g.*, Ga. Code Ann. § 9-11-26 (General Provisions Governing Discovery)(providing no limits on production unique to ESI). Various attempts to pass e-discovery legislation in the Georgia General Assembly have failed, although elements of amended Rule 37(e) were in the most recent proposal. The Uniform Georgia Civil Rules incorporate permission for parties to agree on preservation and production of ESI, including formats, at an Early Planning Conference. *See* Rule 5.4 (effective 2015).

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<sup>1</sup> *See* Rule text and Committee Notes, at 305 F.R.D. 457 (2015)(as transmitted to Congress by the Supreme Court).

4. **Illinois.** Illinois updated its Civil Rules (“Ill. Sup. Ct. R. \_\_\_\_”) in 2014 to add proportionality considerations to Rule 201(c)(3)(“Proportionality”). The Committee Comments note that various categories of ESI (drawn from the 7<sup>th</sup> Cir. Electronic Discovery Program) should not be discoverable. Rule 219 (“Consequences of Refusal to Comply with Rules or Order”) was not amended to incorporate former or current Rule 37(e) since *Shimanovsky v. General Motors*<sup>2</sup> and *Adams v. Bath and Body Works*<sup>3</sup> were viewed as adequately covering sanctions for discovery violations and the separate and distinct claim for the tort of negligent spoliation. See Committee Comment to Rule 219.
5. **Iowa.** E-Discovery Amendments were adopted in Iowa (“I.C.A. Rule \_\_\_\_”) or (“Iowa R. Civ. P. \_\_\_\_”) in 2008 based on the 2006 Amendments. This included equivalents of both Rule 26(b)(2)(B)(1.504(2)) and former Rule 37(e)(1.517). Subsequently, a Supreme Court Task Force for Civil Justice Reform recommended further revisions, which became effective January 1, 2015. These included adoption of the 2015 FRCP changes to the equivalent to Rule 1 (1.501(2)), new disclosure requirements (1.500(1)(including ESI) and relocated proportionality requirements, now articulated separately (1.503(8)). See, e.g., Comment to I.C.A. Rule 1.504(1)(stressing “independent obligation” to “ensure the proportionality of discovery”).
6. **Massachusetts.** The Supreme Judicial Court initially adopted, effective January 1, 2014, a number of amendments to its Civil Rules (Mass. R. Civ. P. \_\_\_\_”) to apply to e-discovery. Rule 37(f) is identical to former FRCP 37(e), except that it limits all sanctions, not just rule-based sanctions. After the 2015 Federal Amendments, by Order of the Supreme Judicial Court effective July 1, 2016 (MA Order 16-0037), Rule 26(c) has been amended to add factors to determine if discovery is unduly burdensome. The Reporters Notes reflect a conscious decision to refuse to amend the scope of discovery to add “proportional to the needs of the case,” in favor of a “wait and see” attitude.
7. **Minnesota.** The Minnesota Supreme Court initially adopted e-discovery rules which mirror the 2006 Amendments effective on July 1, 2007 (“MN ST RCP Rule \_\_\_\_”), including limits on production of ESI from inaccessible sources and former Rule 37(e) [Rule 37.05]. On July 1, 2013, Rules 1 and 26.02(b) were amended to emphasize the role of “proportionality.” Rule 1 places the responsibility on the courts and parties to assure that “the process and costs are proportionate to the amount in controversy and the complexity and importance of the issues,” listing factors. Rule 26.02(b)(2) provides that discovery must be limited to “comport with the factors of proportionality.” The scope of discovery is limited to matters relevant to claims or defense but a court may order discovery as to subject matter after a showing of “good cause and proportionality.” The Minnesota Supreme Court has famously distinguished the tort “duty” to preserve in pending and third party actions in *Miller v. Lankow*, 801 N.W. 2d 120 (Sup. Ct. Aug. 3, 2011).
8. **New Hampshire.** E-discovery amendments were incorporated into a single rule (“N.H. Super. Ct. R 25”) which became effective October 1, 2013. This unique rule identifies

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

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

a duty to preserve on the part of parties; requires counsel to notify clients to place a “litigation hold;” requires that requests for ESI be “proportional” to the significance of the issue (and allows shifting costs if not). It makes no provision for sanctions for losses of ESI.

9. **Texas.** The Texas Civil Procedure code was initially amended in 1999 to deal with electronic or magnetic data (“Tx. Rules of Civil Procedure, Rule 196.4”). It authorized objections to production of electronic data which is not “reasonably available” to the responding party in “its ordinary course of business.” If ordered to produce, the rule shifts the costs of any extraordinary steps required in producing the information. The Texas Supreme Court analogized the rule with FRCP Rule 26(b)(2)(B) in the case of *In re Weekley Homes, LP*.<sup>4</sup> Rule 196.6 allocates the costs of producing “items” to the “requesting party” unless otherwise ordered for “good cause.” In April, 2016, the Chief Justice asked the Supreme Court Advisory Committee to review a proposal to add a “spoliation rule” (Proposed Tex. R. Civ. P. 215.7). That proposal deals, among other issues, with the impact of *Brookshire Bros. v. Aldridge*,<sup>5</sup> under which Texas courts are barred from submitting evidence of spoliation to juries under certain circumstances.
  
10. **Utah.** The Utah Supreme Court approved a set of e-discovery rules (“Ut R. CRP Rule \_\_\_”) based on the 2006 Amendments, effective on November 1, 2007. Rule 37(i) (“Failure to preserve evidence”) provides that nothing in the rule limits the inherent power to issue sanction if a party fails to preserve documents or ESI, followed by a verbatim copy of former FRCP 37(e). See *Veazie v. RCB Ranch*.<sup>6</sup> In 2011, Rule 26(b) was amended to permit discovery only “if the party satisfies the standard of proportionality” with the burden of establishing proportionality and relevance “always” placed on the party “seeking discovery.” Rule 26(b)(2) defines “proportionality” in terms of its ability to further the just, speedy and inexpensive resolution of the case. The amount of discovery available is tied to the amount in controversy although a party can seek extraordinary discovery if “necessary and proportional.”

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<sup>4</sup> 295 S.W.3d 309 (2009).

<sup>5</sup> 438 S.W.3d 9 (Tex. 2014).

<sup>6</sup> 2016 UT App. 78, 2016 WL 1618416 (CA. April 21, 2016)(civil contempt finding enabled use of remedies under Rule 37 as a result of equivalent of slightly revised former FRCP Rule 37(e)).