LOCAL RULES, STANDING ORDERS, AND MODEL PROTOCOLS: WHERE THE RUBBER MEETS THE (E-DISCOVERY) ROAD

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> [District Courts], impatient with the failure of the national system to solve pressing, indeed urgent, procedural problems, utilize local rules in an effort to shape pragmatic solutions . . . . [as] one route to procedural change.[1]

I. INTRODUCTION

[1] In late 2012, the U.S. District Courts for the Western District of Washington,[2] the Northern District of California,[3] and the District of

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[1] A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1579 (1991).

[2] W.D. WASH. LCR 26 (2012).

[3] The initiatives adopted in the Northern District of California blend general guidelines with Model orders designed to educate practitioners on court preferences. *See Court Adopts New E-Discovery Guidelines Effective November 27, 2012*, U.S. DISTRICT CT. N.D. CAL., http://cand.uscourts.gov/news/101 (last visited Jan. 13, 2013).

Oregon[4] all announced, in close proximity with one another, local initiatives that deal with e-Discovery issues that the 2006 E-Discovery Federal Rules Amendments (the "2006 Amendments" or the "Amendments") largely ignored. These proposals are part of a second wave of local rulemaking, which is more focused on pragmatic solutions than earlier efforts.

[2] A large number of federal districts have undertaken local initiatives to deal with e-Discovery.[5] Some merely make passing reference to e-Discovery in local rules while others explicitly describe topics deemed worthy of attention or mandate specific measures to resolve open e-discovery issues. However, many districts have yet to make such special accommodations.

[3] Less visible but equally important efforts have been made to accommodate e-Discovery by amendments to standard forms. For example, there are now many useful forms available for Rule 26(f) reports and discovery plans, as well as for joint or individualized proffers of scheduling orders or case management orders.

[4] Section II of this Article describes the legal context for local initiatives.[6] Section III explores the types of local responses to the 2006

[4] *See Notice of Proposed Local Rule Changes and Opportunity for Public Comment - November 2012*, U.S. DISTRICT CT. D. OR., http://ord.uscourts.gov/en/proposed-local-rules/notice-of-proposed-local-rule-changes-and-opportunity-for-public-comment-november-2012 (last updated Nov. 6, 2012).

[5] *See generally* K&L Gates, *Local Rules, Forms and Guidelines of United States District Courts Addressing E-Discovery Issues*, ELECTRONIC DISCOVERY LAW, http://www.ediscoverylaw.com/promo/current-listing-of-states-that/ (last visited Jan. 13, 2013) (noting that "many individual judges and magistrate judges have created their own forms or have crafted their own preferred protocols for e-discovery").

[6] The focus here is on civil litigation, as distinct from criminal, bankruptcy and admiralty cases.

Amendments.[7] In Section IV, the efficacy of key components emerging from the variety of approaches described is evaluated. The author concludes that concerns over a lack of procedural uniformity among the districts are largely overblown and that some initiatives serve as welcome harbingers of national rulemaking. The author also expresses concerns about over-reaching in some of the measures studied.

II. THE LEGAL CONTEXT

[5] This Article turns first to the general description of rulemaking at the local level, focusing first on the statutory and rule-based framework.

A. Local Rules

[6] The authority to enact local rules flows from 28 U.S.C. § 2071 and Rule 83 of the Federal Rules of Civil Procedure. A local rule "must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075."[8] Local rules typically "supplement the applicable Federal Rules"[9] and have the force of law.[10] The mere fact

[7] *See generally* Letter from Chief Justice John Roberts to J. Dennis Hastert, Speaker of the House of Representatives (Apr. 12, 2006), *available at* http://www.supremecourt.gov/orders/courtorders/frcv06p.pdf (setting forth the amendments to the Federal Rules of Civil Procedure).

[8] FED. R. CIV. P. 83(a)(1); *see also* 28 U.S.C. § 2071(a) (2006) ("[A]ll courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules and practice prescribed under section 2072 . . . .").

[9] N.D. CAL. CIVIL L.R. 1-2(b).

[10] Many Local Rules authorize sanctions for their violation. *See, e.g.*, C.D. CAL. L.R. 83-7 (relating to "violation of or failure to conform to any of these Local Rules").

that a federal rule is not fully comprehensive, such when the rule is "silent" on a topic, does not bar otherwise permissible local initiatives.[11]

[7] Unless a majority of the district judges approve the local rules after "giving appropriate public notice and an opportunity for comment," they are ineffective.[12] Districts must use Local Rules Advisory Committees to assist in developing suggestions for and reviewing potential changes in the rules.[13] The rules are available on district websites and in legal research databases.[14] Numbering must conform to a uniform national system based on the Federal Rules.[15] In *Hollingsworth v. Perry*, the Supreme Court

[11] *See* Whitehouse v. U.S. Dist. Court, 53 F.3d 1349, 1363 (1st Cir. 1995) ("[S]ilence in the federal rules should not be interpreted as a prohibition on local rule-making authority.").

[12] 28 U.S.C. § 2071(b) (2006); *see also* FED. R. CIV. P. 83 (a)(1) (stating that rules shall be prescribed "after giving appropriate public notice and an opportunity for comment").

[13] The 1988 Judicial Improvements Act ("JIA") added a requirement that the district courts use local advisory committees in enacting their rules. 28 U.S.C. § 2077(b); *see, e.g.*, U.S. DISTRICT CT. W.D. VA., STANDING ORDER NO. 2010-7, *available at* http://www.vawd.uscourts.gov/storders/Establishment_of_Local_Rules_Advisory_Committee.pdf.

[14] WESTLAW indexes Local Rules by state (e.g., insert "KS-ST-ANN" in "Search for database," then go to "Table of Contents" and select Local Rules for Civil or Bankruptcy; to retrieve individual Rules, insert "KS-RULES" in "Find this document," scroll to bottom and insert the desired LR number). *See also Court Websites*, U.S. COURTS, http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx (last visited Jan. 13, 2013) (linking to the district courts' websites).

[15] *See* FED. R. CIV. P. 83; *see also* Memorandum from Leonidas Mecham, Director, Administrative Office of the United States Courts, to the Chief Judges and Clerks of the United States District Courts and the United Sates Bankruptcy Courts (Apr. 29, 1996), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Local_Rules_Uniform_Numbering.pdf.

confirmed that local rules enacted without meeting these procedural requirements risk invalidity.[16]

[8] Not all districts rely on extensive local rules.[17] Some also use "Administrative," "Standing," or "General" orders, typically to provide administrative detail.[18] In most districts, they are also available on the district website.[19] When used to provide procedural mandates, however, they are subject to the same consistency requirements as local rules.[20] In 2009, the Standing Committee issued helpful guidelines on the topic.[21]

B. Individual Judicial Practices

[9] Rule 83(b) acknowledges that *individual* district judges may "regulate [their] practice in any manner consistent with" federal and local

[16] 130 S. Ct. 705, 710 (2010) (concluding that "the District Court likely violated a federal statute in revising its local rules" by failing to give public notice and an opportunity for comment under 28 US.C. § 2071(b) and Rule 83(a)).

[17] The Northern District of Texas has a pithy set of Local Rules, but the Western District of Wisconsin sets the record: it has only five Local Rules and eight Administrative Orders. *Compare* N.D. TEX. L.R., *available at* http://www.txnd.uscourts.gov/rules/localrules/lr_civil.html, *with* W.D. WIS. L.R., *available at* http://www.wiwd.uscourts.gov/local-rules-and-administrative-orders.

[18] *See* D. KAN. RULE 83.1.2 ("By vote of a majority of the judges, the court may from time to time issue standing orders dealing with administrative concerns or with matters of temporary or local significance.").

[19] *See, e.g.*, *Local Rules*, U.S. DISTRICT CT. D. KAN., http://www.ksd.uscourts.gov/flex/?fc=1 (last visited Jan. 13, 2013).

[20] *See In re* Dorner, 343 F.3d 910, 913 (7th Cir. 2003).

[21] *See* COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT AND RECOMMENDED GUIDELINES ON STANDING ORDERS IN DISTRICT AND BANKRUPTCY COURTS (2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/jc09-2009/2009-09-Appendix-F.pdf.

rules or statutes.[22] These preferences are often expressed in "practice guidelines" or in case management forms reflecting the preferences of individual judges.[23] Many districts provide easy access on websites,[24] but in some instances, they can be difficult to locate.

[10] District judges play an active role in tailoring e-Discovery to the needs of individual cases through case management. This is consistent with an inherent right to manage individual cases,[25] which trumps mandates of the national and local rules. It has been observed that individual judicial practices may introduce more disuniformity into the civil litigation process than do varying local rules.[26] Not surprisingly, commentators universally advocate paying close attention to such local practices.[27]

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[22] *See* FED. R. CIV. P. 83(b).

[23] *See, e.g.*, *Practice Guidelines for Judge Robert H. Cleland*, U.S. DISTRICT CT. E.D. MICH., http://www.mied.uscourts.gov/judges/guidelines/index.cfm?judgeID=12.

[24] The Eastern District of Pennsylvania does a particularly good job in making them available. *See Judges' Procedures*, U.S. DISTRICT CT. E.D. PA., http://www.paed.uscourts.gov/us08001.asp (last visited Jan. 13, 2012).

[25] *See In re* Atl. Pipe Corp., 304 F.3d 135, 145 (1st Cir. 2002) (finding it within the inherent power of the district court to order non-binding mediation, despite the lack of a local rule on the topic).

[26] *See* Glenn S. Koppel, *Toward A New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1180 (2005) (observing that "the proliferation of local rule-making as a result of the 'exercise of individualized discretion' by federal judges" significantly contributes to disuniformity among local discovery practices); *see also* Richard Marcus, *Confessions of a Federal "Bureaucrat": The Possibilities of Perfecting Procedural Reform,* 35 W. ST. U. L. REV. 103, 119 (2007) (suggesting that procedural outcomes are unlikely to be uniform because "local (and individual) variation is quite likely among American judges").

[27] *See* Anne Shea Gaza & Jason J. Rawnsley, *Local Practices for Electronic Discovery*, FED. LAW., Feb. 2011, at 32.

C. Standardized Forms

[11] Standardized forms are provided in many districts for reports under Rule 26(f), discovery plans, scheduling orders, and the like, to conform to national or local requirements. In some districts, the forms may be an integral part of the local rules. In others, their adoption, modification, and implementation constitute an *ad hoc* process. The ease of access varies with some districts doing better than others.[28]

[12] The Administrative Office of the Judicial Conference (the "AO") makes national forms relating to discovery available but none relate to case management.[29] The Federal Judicial Center (the "FJC") has collected some sample forms in connection with its Civil Litigation Management Manual.[30]

D. Consistency

[13] The consistency of a local rule with the Federal Rules can present subtle issues. If a local initiative is challenged, the test is "whether the two rules are textually inconsistent or whether the local rule subverts the

[28] In many Districts, it can be a real challenge to locate the forms; however, the Southern District of West Virginia's website serves as a good example of a jurisdiction providing easy online access to the forms referenced in its local rules. *See Forms Referenced in the Local Rules*, U.S. DISTRICT CT. S.D. W. VA., http://www.wvsd.uscourts.gov/rules/local/forms.html (last visited Jan. 13, 2012).

[29] *See Forms & Fees*, U.S. COURTS, http://www.uscourts.gov/FormsAndFees.aspx (last visited Jan. 13, 2012) (providing a general index of AO forms).

[30] *See, e.g.*, *Rule 16(b) Scheduling Order, Sample Form 21*, FED. JUD. CENTER, http://www.fjc.gov/public/pdf.nsf/lookup/CivLit2D_Form21.pdf/$file/CivLit2D_Form21.pdf (last visited Jan. 13, 2013); *see also Civil Litigation Management Manual, Second Edition*, FED. JUD. CENTER, http://www.fjc.gov/public/home.nsf/pages/1245 (last visited Jan. 21, 2013) (providing links to the CIVIL LITIGATION MANAGEMENT MANUAL and sample forms).

overall purpose of the federal rule."[31] When a specific amendment is at issue, reliance on the intent expressed in relevant Committee Reports is one of the factors used to assess the intended effect.[32] In *Colgrove v. Battin*, for example, the Court tolerated local rules that reduced the minimum jury size despite what appeared to be an inconsistent federal rule.[33]

[14] Congress has from time to time authorized the development of local initiatives without regard to consistency.[34] One can attribute the current diversity in case management regimes in many districts to measures adopted because of the 1990 Civil Justice Reform Act, under which districts were directed to address cost and delay in civil litigation from "the bottom up."[35]

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[31] Whitehouse v. U.S. Dist. Court, 53 F.3d 1349, 1363 (1st Cir. 1995).

[32] *See, e.g.*, Miss. Pub. Corp. v. Murphee, 326 U.S. 438, 444 (1946) (noting that construction by the Advisory Committee is of weight in assessing "rules formulated and recommended" by them). *But see, e.g.*, Krupski v. Costa Crociere S.p.A., 130 S. Ct. 2485, 2598-99 (2010) (Scalia, J., concurring) (asserting the primacy of textual comparisons).

[33] 413 U.S. 149, 163-64 (1973) (denying mandamus with regard to local rule permitting juries of six in civil cases where the rule was not in conflict with the applicable federal rule). At least one commentator criticizes this use of inherent power to "bypass" local rulemaking as "troublesome" because it "exacerbates procedural disuniformity in the federal system." *See* Samuel P. Jordan, *Situating Inherent Power Within a Rules Regime*, 87 DENV. U. L. REV. 311, 318 (2010).

[34] *See* CHARLES ALAN WRIGHT ET AL., 12 FEDERAL PRACTICE AND PROCEDURE § 3152 (2d ed. 1997) (stating that the Civil Justice Reform Act of 1990 "clouded the evaluation of local rules because this legislation arguably authorized district courts to disregard Civil Rules in their plans for reducing cost and delay").

[35] Differentiated case management involving "tracks" remains a part of the Local Rules of many courts. *See, e.g.*, ROBERT M. LANDIS ET AL., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 5-8 (1991), *available at* http://www.paed.uscourts.gov/documents/cjraplan/cjraplan.pdf; *see also* E.D. PA. L.R.C.P. 1.1.1(f) (citing an Order adopting the CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN).

[15] Local districts are expected to act consistently with the Federal Rules.[36] Copies of local rules must be furnished to the Administrative Office and to the relevant Circuit Judicial Council.[37] The Judicial Councils have the primary responsibility to ensure "consistency [of Local Rules] with [existing Federal Rules]," and the power to "modify or abrogate any such rule."[38] Historically, Circuit Councils have not taken an active role,[39] although there are current signs to the contrary.[40] As recently as 2004, an *ad hoc* committee of the Standing Committee studied a subset of the local rules for consistency and made recommendations to the district courts involved.[41]

E. "Pilot Programs"

[16] The Judicial Conference and Congress utilize formal pilot projects to test procedural innovations. For example, "[f]ourteen federal district

[36] *See, e.g.*, D. ARIZ. LRCIV 83.9(a)(2)(A) (assigning duty to assure "consistency" to Rules of Practice Advisory Committee).

[37] *See* 28 U.S.C. § 2071(d) (2006); *see also* FED. R. CIV. P. 83(a).

[38] 28 U.S.C. § 332(d)(4); *see also* 28 U.S.C. § 331.

[39] *See* Myron J. Bromberg & Jonathan M. Korn, *Individual Judges' Practices: An Inadvertent Subversion of the Federal Rules of Civil Procedure*, 68 ST. JOHN'S L. REV. 1, 9 (1994).

[40] The cover page of the Local Rules effective in March, 2012 in the Eastern and Southern Districts of New York bear the legend "[a]pproved by the Judicial Council of the Second Circuit." LOCAL RULES OF THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK, U.S. DISTRICT CT. E.D.N.Y. 1 (Mar. 2, 2012), *available at* http://www.nyed.uscourts.gov/sites/default/files/local_rules/localrules.pdf.

[41] STANDING COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT ON LOCAL RULES 1 (2004), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Final_Local_Rules_Report_March_%202004.pdf.

courts have been selected to participate in a 10-year pilot project . . . to enhance expertise in patent cases among U.S. district judges," which will involve the generation of sample local rules and forms.[42] In addition, a pilot project designed to standardize early disclosures in employment litigation has been undertaken[43] for use by individual judicial officers or as a model for a local rule.[44]

[17] The Federal Rules do not, however, explicitly authorize experimental or "pilot projects" to test innovative local rules or procedures. Indeed, the Rules Committee refused to proceed with such proposals in 1983[45] and 1991.[46] Nonetheless, the District of Colorado

[42] *See District Courts Selected for Patent Pilot Program*, U.S. COURTS (June 7, 2011), http://www.uscourts.gov/News/NewsView/11-06-07/District_Courts_Selected_for_Patent_Pilot_Program.aspx.

[43] *See* J. JOHN KOELTL ET AL., PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION 11 (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf (recommending adoption of District wide Standing Order whose requirements "supersedes" obligations to disclose under F.R.C.P. 26(a)(1)).

[44] *See* PROPOSED D. OR. LR 26-7 (proposed Nov. 2012), *available at* http://ord.uscourts.gov/index.php?option=com_phocadownload&view=category&download=298%3Anovember-2012-proposed-new-and-amended-rules&id=60%3A2013-proposed-local-rules&lang=en.

[45] J. Edward T. Gignoux et al., *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, and Rules Governing Section 2255 Proceedings in the United States District Courts*, 98 F.R.D. 337, 371 (1983) ("When authorized by the judicial council, a district court may adopt on an experimental basis for no longer than two years a local rule that may not be challenged for inconsistency with these rules, after giving appropriate public notice and an opportunity to comment.").

[46] J. Robert E. Keeton et al., *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 153. (1991) (recommending that an experimental rule be "limited in its period of effectiveness to five years or less").

recently amended its local rules to authorize pilot programs or special projects by general order.[47]

[18] There is a history of reliance on local experimentation before adopting a measure as a uniform federal procedural rule.[48] It is far less risky to experiment with potential solutions at the local level, which are "inspired by a belief that the [national] rulemakers got it wrong."[49] District courts "are willing to try [solutions] because others have confidence in them."[50] Consistency with the Federal Rules is rarely perceived as a barrier under those circumstances.[51]

III. LOCAL E-DISCOVERY INITIATIVES

[19] At their core, the 2006 Amendments responded to the need to enhance the discovery of electronically stored information.[52] They became effective in December 2006 when, after several years of study, it

[47] D.C. COLO. LCIVR 1.1(I), *available at* http://www.cod.uscourts.gov/Portals/0/Documents/LocalRules/2012-LR/2012-Approved-Local-Rules.pdf.

[48] *See* CHARLES ALAN WRIGHT ET AL., *supra* note 34, at § 3153 (collecting examples of discovery innovations adopted in Federal Rules 33 and 37(a) that surfaced first in local rules).

[49] Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1484 (1994) ("Local court tinkering with the Federal Rules is rarely inspired by the disutility of a Rule under local conditions. Rather, it is inspired by a belief that the rulemakers got it wrong.").

[50] Levin, *supra* note 1, at 1579 ("Local rules offer the most expeditious means of experimenting.").

[51] *See id.* at 1583 ("Consistency with the national rules was not to be required of rules that were avowedly experimental.").

[52] *See* Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 DEF. COUNS. J. 206, 208 (2001).

was apparent that the differences between electronic data and traditional documents justified rule amendments.[53]

[20] In their final version,[54] changes to Rules 16(b), 26(a), and 26(f) were coupled with broadly worded amendments authorizing the discovery of electronically stored information ("ESI"), dealing with its form or forms of production, and providing in Rule 26(b)(2), a vague presumption against the production of ESI from inaccessible sources.[55] No meaningful standards for preservation were included and cost shifting was ignored. The Amendments were largely silent as to the role, if any, of local rules and standardized forms.

[21] As noted, federal district courts have reacted in a wide variety of ways, ranging from total avoidance of the subject to an assortment of actions involving local rules, informal guidelines, and standardized forms.

A. Early Enactments

[22] Before the 2006 Amendments took effect, few districts addressed the unique issues that e-Discovery presents. The Eastern and Western Districts of Arkansas were the first to act when they adopted an "Outline For [FRCP] 26(f) Report" for use in their districts.[56] At the 2004 conference held at Fordham Law School, an involved judicial officer

[53] *See id.* (stating that "amendments to the Federal Rules are necessary").

[54] An initial version was issued in the summer of 2004 for Public Comment. *See* ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, REVISED REPORT OF THE CIVIL RULES ADVISORY COMMITTEE (2004), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/comment2005/CVAug04.pdf.

[55] *See* Adoption and Amendment to Civil Rules, 234 F.R.D. 219, 279, 312-13 (2006).

[56] E.D. ARK. & W.D. ARK . L.R. 26.1 (whether anticipated requests exceeded "reasonably available [information] in the ordinary course of business;" if so, the costs of going further; the format and media of production; whether reasonable preservation measures had been taken to preserve; any other problems).

reported that the experience under the rule to date had been that "most attorneys work out these issues at the onset of litigation and make a report."[57]

[23] District courts in Wyoming,[58] New Jersey,[59] and the Middle District of Pennsylvania[60] also adopted local rules that utilize a similar approach, with an added focus on counsel undertaking preparatory investigation of client systems.[61] In addition, the District of Delaware issued a "Default Standard," which required, *inter alia*, that parties appoint "retention coordinators" and consult with an eye towards reaching binding preservation agreements.[62]

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[57] *See* Panel Discussions, *Panel Five: E-Discovery Under State Court Rules and United States District Court Rules*, 73 FORDHAM L. REV. 85, 93-94 (2004) (apart from issue of whether or not the Arkansas Rule produces "balkanization of the Federal Rules through Local Rules").

[58] D. WYO. U.S.D.C.L.R. 26.1(d)(1) & APP. D (requiring discussion of listed aspects of "computer data discovery").

[59] D.N.J. L.CIV.R. 26.1(b)(2), (d) (listing required topics for Rule 26(f) discovery plan and imposing duty to "investigate and disclose" on counsel).

[60] M.D. PA. L.R. 26.1 (duty to investigate by attorneys; also emphasizing email issues such as search protocols and the need to restore deleted information from backups or archives; advocating allocation of costs for disclosures "beyond what is reasonable available in the ordinary course of business").

[61] The Middle District of Florida also issued a handbook that references electronic discovery issues. *See* U.S. DIST. COURT MIDDLE DIST. FLA., MIDDLE DISTRICT DISCOVERY 21-22 (2001), *available at* http://www.flmd.uscourts.gov/Forms/Civil/Discovery_Practice_Manual.pdf.

[62] The District of Delaware adopted major revisions in 2011, reacting to concerns that the Default Standards "[was] basic, a bit scattershot, and meant to be a punishment to parties who failed to cooperate." *Delaware District Court's Revised Default eDiscovery Standard is Horrible-Electronic Discovery*, ELECTRONICDISCOVERY (May 7, 2012), http://electronicdiscovery.info/delaware-district-courts-revised-default-ediscovery-standard-is-horrible-electronic-discovery/.

[24] The Northern District of Ohio[63] and the Middle[64] and Western[65] Districts of Tennessee quickly adopted Delaware's Default Standard. Those provisions remain in effect, although the Delaware standard has been significantly updated since then.

B. Post Amendment Activity

[25] After the Amendments came into effect in late 2006, additional districts acted to highlight e-Discovery issues.[66] The primary emphasis was on preservation, form of production, and presumptive limits on production from inaccessible sources of ESI. Some districts merely referenced ESI as a topic for discussion.[67] Others provided extensive checklists of the items identified in the Federal Rules.[68] Yet, other districts, such as those in Mississippi,[69] Pennsylvania,[70] and New York,[71] provided substantive guidance in mandatory terms.

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[63] N.D. OHIO LR 16.3 & APP. K.

[64] *See* Administrative Order No. 174 Regarding Default Standard for Discovery of Electronically Stored Information (M.D. Tenn., July 9, 2007), *available at* http://www.tnmd.uscourts.gov/files/AO_174_E-Discovery.pdf.

[65] W.D. TENN. LR 26.1.

[66] *See* Thomas Y. Allman, *Addressing State E-Discovery Issues Through Rulemaking: The Case for Adopting the 2006 Federal Amendments*, 74 DEF. COUNS. J. 233, 239 (2007).

[67] *See, e.g.*, D. VT. L.R. 26(a)(4)(B) ("deadlines for discovery of [ESI]").

[68] *See, e.g.*, E.D. WIS. L.R. 26(a)(1)-(5) ("reasonable accessibility" and burdens and expense; format and media for production; measures taken to preserve; procedures for asserting post-production claims of privilege or work product; other issues relating to e-discovery).

[69] *See* D. MISS. L.U.CIV.R. 26(e)(2)(B)(i)-(xi) (providing a comprehensive list of ESI related topics for discussion by parties for the Northern and Southern Districts of Mississippi). Alone among the studied local rules, D. MISS. L.U.CIV.R. 45(d) (Non-Party ESI) also extends the duty to meet and confer to non-parties (or their counsel, if represented) when a subpoena duces tecum is issued for ESI.

[26] The bulk of the changes were reflected in the standard forms in use for case management. Many districts simply incorporated references to the topics referenced in Rules 26(f) and 16(b).[72] Other districts went further [73] and used "speaking forms," which include substantive instructions on how to handle the issues.[74]

[27] A few districts, such as the District Court of Kansas, provided informal "guidelines."[75] The Central District of Illinois posted the Sedona Conference® Principles along with its local rules and orders.[76] Perhaps the

[70] *See* W.D. PA. LCvR 26.2 (requiring designation of a "resource" person, and speaking of allocation of "costs of preservation [and] production" of ESI).

[71] *See* W.D.N.Y. L.R. CIV. P. 26(f)(1)-(6) (requiring phased search for ESI not reasonably accessible with possible payment of costs of "search, retrieval, review, and production;" specifying that metadata need not be produced absent agreement or good cause; providing for production as imaged files (PDF or TIFF) absent particularized need for native production).

[72] *See, e.g.*, D. CONN. CIV. REPORT FORM 26(f), *available at* http://www.ctd.uscourts.gov/sites/default/files/local_rules/Revised%20Local%20Rules%20%2011-15-2012.pdf (included as Appendix to Local Rules).

[73] *See, e.g.*, D. NEB. RULE 26(f) REPORT ¶ IV(E)(3)(b)(i)-(xi), *available at* http://www.ned.uscourts.gov/internetDocs/forms/form35.pdf (listing 11 topics which parties have discussed and requiring parties to either agree that no "special" provisions are required or, if they are, to list the agreements to be followed).

[74] The Model Joint Electronic Discovery Submission and Order used in the S.D.N.Y. Pilot project discussed below is a classic example of this approach. *See infra* note 80.

[75] *See Guidelines for Discovery of Electronically Stored Information (ESI)*, U.S. DISTRICT CT. D. KAN., http://www.ksd.uscourts.gov/wp-content/uploads/2010/03/electronicdiscoveryguidelines.pdf (last visited Jan. 23, 2013).

[76] *The Sedona Principles Addressing Electronic Document Production*, U.S. DIST. CT. C.D. ILL., http://www.ilcd.uscourts.gov/sites/ilcd/files/local_rules/Sedona%20Principles.pdf (last visited Jan. 23, 2013); *Local Rules and Orders*, U.S. DISTRICT CT. C.D. ILL., http://www.ilcd.uscourts.gov/court-info/local-rules-and-orders/local-rules (last visited Jan. 12, 2013).

most ambitious effort was the twenty-eight-page "Suggested Protocol for Discovery of [ESI]"[77] adopted for use before courts in the District of Maryland that blends suggestions with mandatory elements.[78]

[28] There has also been a revival of case differentiation under which e-Discovery guidance is tied to the type of litigation.[79] The Southern District of New York is currently testing the impact of an enhanced model order applied on a case-by-case basis in cases deemed to be complex.[80]

[29] A similar differentiation process is occurring with respect to patent litigation. In the Districts of Maryland[81] and Massachusetts,[82] for example, the only mention of ESI in the district rules relates to patent litigation. Similarly, a subcommittee of the Federal Circuit advocates the use of targeted rules for e-mail production in patent cases.[83] As noted, the

[77] *Suggested Protocol for Discovery of Electronically Stored Information*, U.S. DISTRICT CT. D. MD., http://www.mdd.uscourts.gov/news/news/esiprotocol.pdf [hereinafter *D. Md. Suggested Protocol*] (last visited Jan. 23, 2013). The Protocol was applied by order in O'Bar v. Lowe's Home Ctrs., No. 5:04-cv-00019-W, 2007 WL 1299180, at *4 n.2 (W.D.N.C. May 2, 2007).

[78] *See* Mezu v. Morgan State Univ., 269 F.R.D. 565, 570-71 (D. Md. 2010) (implying that violations of e-Discovery Protocol will result in sanctions that may include case-dispositive sanctions including contempt of court).

[79] *See, e.g.*, Pretrial Order No. 1, *available at* http://www.paed.uscourts.gov/documents/procedures/shapole.pdf.

[80] *See* JUDICIAL IMPROVEMENTS COMM., REPORT ON PILOT PROJECT REGARDING CASE MANAGEMENT TECHNIQUES FOR COMPLEX CIVIL CASES 18-29 (Oct. 2011), *available at* http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf.

[81] *See* D. MD. LAR 802(h).

[82] *See* D. MASS. LR 16.6 (7)(a)-(d).

[83] FED. CIRCUIT ADVISORY COUNCIL, MODEL ORDER REGARDING E-DISCOVERY IN PATENT CASES (2011) [hereinafter MODEL PATENT ORDER], *available at* http://www.cafc.uscourts.gov/images/stories/the-court/Ediscovery_Model_Order.pdf.

District of Oregon has recently proposed to adopt the model order as a local rule.[84]

C. The Second Wave

[30] Since roughly 2009, local initiatives have increasingly focused on pragmatic solutions for issues emphasizing the role of proportionality and cooperation. A leading example is the Seventh Circuit E-Discovery Pilot Program, a comprehensive approach implemented by Standing Orders adopted in individual cases.[85] The pilot program is based on "principles" designed to encourage cooperative resolution of disputes while emphasizing guidance on the underlying issues.[86]

[31] Principle 2.04 (Scope of Preservation), for example, mandates the taking of "reasonable and proportionate steps to preserve relevant and discoverable ESI" within a party's possession, custody, or control.[87] This articulation, a first among rules, echoes the Sedona Conference® Proportionality Principles[88] and helps to fill the gap in the 2006 Amendments. Another innovative feature is the inclusion of a list of categories of ESI which are "generally not discoverable in most cases"

[84] *See* PROPOSED D. OR. LR 26-6 (proposed Nov. 2012), *available at* http://ord.uscourts.gov/index.php?option=com_phocadownload&view=category&download=298%3Anovember-2012-proposed-new-and-amended-rules&id=60%3A2013-proposed-local-rules&lang=en.

[85] *Statement of Purpose and Preparation of Principles*, SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM, http://www.discoverypilot.com/ (last visited Jan. 12, 2013).

[86] *Id.* (providing links to Principles and to Model Standing Order).

[87] *Principles Relating to the Discovery of Electronically Stored Information*, SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM, 3-4 (Aug. 1, 2010), http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf [hereinafter *Seventh Circuit Principles*].

[88] *See* The Sedona Conference®, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 292 (2010).

and whose possible preservation must be raised "at the meet and confer or as soon thereafter as practicable."[89] These proportionally based distinctions also correspond to the recommendations found in the Sedona Conference® Best Practice Principles.[90]

[32] The Northern District of Illinois has recently proposed a local patent rule oriented towards guidance along similar lines.[91] Presumptive limitations were also incorporated into the revised Delaware Default Standard,[92] whose categories of ESI in its appendix echo those of Principle 2.04.[93] Similarly, the model protocol proposed for use in the Western District of Washington also lists categories of ESI that do not need to be preserved.[94]

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[89] *Seventh Circuit Principles*, *supra* note 87, at 4; *see also* Thomas Y. Allman, *Preservation Rulemaking After the 2010 Litigation Conference*, 11 SEDONA CONF. J. 217, 218-19 (2010).

[90] *See* THE SEDONA CONFERENCE®, THE SEDONA PRINCIPLES: SECOND EDITION BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 28 (Jonathan M. Redgrave et al. eds., 2d ed. 2007), *available at* http://www.sos.mt.gov/Records/committees/erim_resources/A%20-%20Sedona%20Principles%20Second%20Edition.pdf ("[I]t is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant [ESI]"); *id.* at 45 (Noting that the primary source should be "active data" absent demonstrable "need and relevance that outweigh the costs and burdens" including the "disruption of business and [IT] activities"); *id.* at 49 (Stating that there is no need to preserve or produce "deleted, shadowed, fragmented, or residual" ESI).

[91] *See* PROPOSED N.D. ILL. LPR ESI 2.3(d) (proposed Sept. 27, 2012), *available at* http://www.ilnd.uscourts.gov/_assets/_documents/Rules/LPR12.pdf.

[92] D. DEL. DEFAULT STANDARD FOR DISCOVERY, INCLUDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION (revised Dec. 8, 2011), *available at* http://www.ded.uscourts.gov/sites/default/files/Chambers/SLR/Misc/EDiscov.pdf [hereinafter D. DEL. DEFAULT STANDARD].

[93] *Id*. at SCHEDULE A.

[94] W.D. WASH. MODEL PROTOCOL FOR DISCOVERY OF ELECTRONICALLY STORED INFORMATION IN CIVIL LITIGATION § II(C)(2), *available at*

[33] The Federal Circuit has also introduced a "Model Order" for patent cases that addresses the number of custodians from whom production of e-mail may be sought in patent litigation as well as the number of search terms that can be introduced without agreement or court order.[95] The model protocol was adapted for use in the Eastern District of Texas[96] and proposed for the Oregon District as a local rule.[97]

IV. EVALUATION

[34] In this Section, the local initiatives enacted to guide e-Discovery are assessed. The Section first deals with the pros and cons of the emphasis on early agreement before discussing specific elements of interest—and possible shortcomings—that have emerged.

[35] Promotion of early agreement by parties and active judicial involvement of the judiciary in the management of discovery has been encouraged since at least 1983, but the emphasis on the "meet and confer"

http://www.wawd.uscourts.gov/sites/wawd/files/61412ModeleDiscoveryProtocol.pdf [hereinafter W.D. WASH. MODEL PROTOCOL] (listing categories of ESI which "need not be preserved" absent a showing of good cause by the requesting party).

[95] *See* MODEL PATENT ORDER, *supra* note 83, at ¶¶ 10-11 (limiting email production requests "to a total of five custodians per producing party" and shifting costs for additional requests; also limiting "contested requests" for additional search terms under same conditions).

[96] *See* E.D. TEX. LOCAL CIVIL RULES APP. P. ¶¶ 8-9, *available at* http://www.txed.uscourts.gov/page1.shtml?location=rules (limiting discovery to eight custodians and ten search terms).

[97] *See* PROPOSED D. OR. LR 26-6 (proposed Nov. 2012), *available at* http://ord.uscourts.gov/en/proposed-local-rules/notice-of-proposed-local-rule-changes-and-opportunity-for-public-comment-november-2012 (adopting the Model Order "in all cases in which a claim of patent infringement is asserted").

process is of more recent vintage.[98] To some, the 2006 Amendments bring the process to its ultimate intended use.[99]

[36] The emphasis is on the preparation of a detailed "discovery plan" to be furnished to the court before the initial pretrial conference, coupled with encouragement to courts to include reference to ESI agreements in the scheduling order. Parties are expected to discuss any preservation issues and disclosure and discovery issues. Rule 16(b) makes it clear that any scheduling orders can "provide for the disclosure or discovery of [ESI]."

A. The Scorecard

[37] Many of the ninety-four federal district courts studied, including a number located in major urban districts, have ignored e-Discovery, at least on district-wide basis.[100] This even includes some districts that have only recently adopted other amendments to their local rules governing the Rule 26(f) process.[101]

[98] *See* Moze Cowper & John Rosenthal, *Not Your Mother's Rule 26(f) Conference Anymore*, 8 SEDONA CONF. J. 261, 262 (2007).

[99] *See* Steven S. Gensler, *Some Thoughts on the Lawyer's E-Volving Duties in Discovery*, 36 N. KY. L. REV. 521, 525-38 (2009) (describing the "front-loading" effect of the 2006 Amendments).

[100] *See also* K&L Gates, *supra* note 5 (listing e-discovery initiatives in effect as of late 2011). While there is evidence of activity in most major urban districts, it is not evident in those which include Cincinnati, Dallas, Detroit, the District of Columbia, Los Angeles, Miami, New Orleans, San Diego, or St. Louis.

[101] *See, e.g.*, C.D. CAL. L.R. 26-1 ("At the conference of parties held pursuant to F.R.Civ.P. 26(f), the parties shall discuss the following matters in addition to those noted in F.R.Civ.P. 26(f)" [without mention of ESI-related issues]).

[38] At least thirty-two districts, however, have acknowledged the discovery of electronically stored information in civil litigation.[102] Of these districts, seven merely make passing reference to e-Discovery in their local rules.[103] Another twelve districts[104] emphasize e-Discovery topics deemed most worthy of attention at Rule 26(f) conferences. Nine districts,[105] as well as others using model orders,[106] have adopted pragmatic solutions that address gaps in the Amendments more aggressively. At least five additional districts have released non-binding guidance for parties on the topic of e-Discovery.[107]

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[102] *See generally* K&L Gates, *supra* note 5.

[103] *See* S.D. FLA. L.R. 26.1; LR 16.2, NDGA; E.D.MO. L.R. 26-3.01; M.D.N.C. LR 16.1; W.D.N.C. LCVR 16.1; D.P.R. L.CV.R. 16; D. VT. L.R. 26.

[104] *See* E.D. & W.D. ARK. R. 26.1(4)(a)-(e); D. MASS LR 16.6(A)(7)(a)-(d).; D. MISS. L.U.CIV.R. 26(e)(2)(B); D.N.J. L.CIV.R. 26.1(d); W.D.N.Y. L.R. CIV. P. 26(f); M.D. PA. R. 26.1(c); W.D. PA. LCVR 26.2; LOCAL RULES W.D. WASH. CR 26(f)(1)(I)-(J); E.D. WIS. L.R. 26(a)(1)-(5); D. WYO. U.S.D.C.L.R. 26.1(e).

[105] N.D. CAL., [MODEL] STIPULATED ORDER RE: DISCOVERY OF ELECTRONICALLY STORED INFORMATION FOR STANDARD LITIGATION, *available at* http://www.cand.uscourts.gov/eDiscoveryGuidelines; N.D. ILL., GENERAL ORDER 09-0022, *available at* http://www.ilnd.uscourts.gov/home/_assets/_documents/Rules/09022%20Patent%20Rules.pdf; D. DEL. DEFAULT STANDARD, *supra* note 92; S.D.N.Y. STANDING ORDER M10-468, *available at* http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf; N.D. OHIO LR APP. K; D. OR., MODEL E-DISCOVERY ORDER, *available at* http://www.ord.uscourts.gov/en/proposed-local-rules/notice-of-proposed-local-rule-changes-and-opportunity-for-public-comment-november-2012; Administrative Order No. 174 Regarding Default Standard for Discovery of Electronically Stored Information (M.D. Tenn., July 9, 2007), *available at* http://www.tnmd.uscourts.gov/files/AO_174_E-Discovery.pdf; W.D. TENN. LR 26.1; E.D TEX. LOCAL CIVIL RULES APP. P.

[106] The Seventh Circuit Pilot Project and the Federal Circuit Model Order advocate use of this approach in individual cases, a topic beyond the scope of this analysis. *See Statement of Purpose and Preparation of Principles*, *supra* note 85; MODEL PATENT ORDER, *supra* note 83.

[107] N.D. CAL., GUIDELINES FOR THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION, *available at* http://www.cand.uscourts.gov/eDiscoveryGuidelines; S.D.

[39] Many of these efforts center on use of standardized forms for Rule 26(f) reports and discovery plans, as well as for scheduling orders or case management orders. This has implications for the future. With the possible consignment of Official Form 52 to oblivion, it will be important for the Administrative Office of the Judicial Conference to make more of an effort to collect the best extant forms and make them readily available to all districts on its national website.[108]

B. Early Attention

[40] It is not terribly surprising that many districts have not yet formally addressed e-Discovery. Busy courts and practitioners may feel that individualized accommodations can be made in cases where e-discovery plays an important role. In addition, some may have concluded that the 2006 Amendments and emerging case law suffice to place parties and their counsel on notice of the need to address e-Discovery.

[41] However, there is another possibility. It may be that the assumed efficacy of early attention to ESI discovery is overstated. Most Rule 26(f)

FLA. L.R. APP. A; D. KAN., GUIDELINES FOR DISCOVERY OF ELECTRONICALLY STORED INFORMATION, *available at* http://www.ksd.uscourts.gov/wp-content/uploads/2010/03/electronicdiscoveryguidelines.pdf (last visited Jan. 24, 2013); *D. Md. Suggested Protocol*, *supra* note 77; *Local Rules*, U.S. DISTRICT CT. C.D. ILL., http://www.ilcd.uscourts.gov/court-info/local-rules-and-orders/local-rules (last visited Jan. 24, 2013) (J. John A. Gorman adopting the Sedona Principles).

[108] A Rule 84 Subcommittee of the Civil Rules Committee is considering (as of November, 2012) recommending the abrogation of Rule 84 (and most Official forms) in deference to the forms issued by the Administrative Office. *See* ADVISORY COMMITTEE ON CIV. RULES, *Reporter's Memorandum Regarding Rule 84*, *in* MEETING ON NOVEMBER 1-2, 2012 OF THE ADVISORY COMMITTEE ON CIVIL RULES 407, 407-25 (2012), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-10.pdf. The forms available on the AO website do not relate to the Rule 26(f) and Rule 16(b) processes. *See Courts Forms by Number*, U.S. COURTS, http://www.uscourts.gov/FormsAndFees/Forms/CourtForms.aspx (last visited Jan. 24, 2012).

conferences last for short periods and rarely involve ESI issues.[109] The conferences may be poorly timed.[110] Preservation decisions, for example, must often be made before Rule 26(f) conferences.[111] Moreover, the idea that busy judges can resolve meaningful disputes about the scope of discovery before requests have even been served may be wishful thinking. There are also avoidable costs that may be wasted if expended too early on e-discovery.[112] After all, most cases settle.[113]

[42] Accordingly, it is not clear that front-loading the process by intense and expensive preparations is the most effective means of reducing costs and encouraging cooperation. Other solutions may be required, such as presumptive "hard limits" or cost shifting, which provide

[109] *See* EMERY G. LEE III, FED. JUDICIAL CTR., EARLY STAGES OF LITIGATION ATTORNEY SURVEY 5 (2012), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/leeearly.pdf/$file/leeearly.pdf ("[J]ust 25% of all respondents discussed electronic discovery issues at a Rule 26(f) meeting, and only 13% of all respondents discussed preservation obligations.").

[110] *See, e.g.*, Christopher Boehning & Daniel J. Toal, *Are Meet, Confer Efforts Doing More Harm Than Good?*, N.Y. L.J., July 31, 2012 ("Forcing lawyers to discuss in detail issues they would otherwise skip over at the outset of a litigation may not be the best way to reduce disagreement and foster cooperation.").

[111] *See generally* Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since December 1, 2006*, 14 RICH. J.L. & TECH. 8, at ¶ 5 (2008), http://jolt.richmond.edu/v14i3/article8.pdf (pointing out the common law obligations to preserve information, which push parties to make unilateral preservation decisions when litigation is "reasonably likely").

[112] *See* Gensler, *supra* note 99, at 536 ("[L]awyers will spend many hours engaging in the range of activities contemplated by the Advisory Committee Note to Rules 26(f) and recommended by the Sedona Conference. . . . [and] parties will also incur internal costs . . . to assist the lawyers . . . .").

[113] *See* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012) ("Thus, in American civil justice, we have gone from a world in which trials, typically jury trials, were routine, to a world in which trials have become 'vanishingly rare.'").

assurance of fairness. The advantage of experimentation with such measures at the local level is that adjustments can be made as experience mounts, with the best of them slated for national rulemaking.

C. Assessment: The Core Initiatives

[43] Local initiatives have been prompted by the gaps in the 2006 Amendments, especially as to the onset and scope of preservation obligations, variances in culpability for sanctions, the lack of cost-shifting, and the vagueness of the application of the "accessibility" doctrine to preservation.

i. Preservation

[44] The 2006 Amendments ducked preservation issues.[114] Instead, drafters added Rule 26(b)(2)(B), a presumptive limitation on *production* of ESI based on "accessibility" subject to overriding for "good cause."[115] No attempt was made to deal with its implications for preservation, despite an understanding of the issue.[116]

[45] The Seventh Circuit Pilot Principles and other local initiatives address this shortcoming directly. Principle 2.04 provides that "[e]very party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its

[114] *See* Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, 13 RICH. J. L. & TECH. 9, at ¶¶ 12-13 (2007), http://jolt.richmond.edu/v13i3/article9.pdf (the Committee was urged to "deal directly with the ambiguities of preservation obligations in the ESI context," but did not do so).

[115] *See* FED. R. CIV. P. 26(b)(2)(B).

[116] *See* Adoption and Amendment to Civil Rules, 234 F.R.D. 219, 331, 336-37 (2006)(listing "[e]xamples [of inaccessible sources] from current technology" whose preservation and production would not normally be warranted).

possession, custody or control."[117] In addition, the Seventh Circuit Principle limits the need to preserve specific forms of ESI[118] absent agreement, thus removing incentives to "sand-bag" an opponent by not mentioning the preservation issue earlier.

[46] The revised Delaware Default Standard[119] also notes that parties need not modify "on a going-forward basis" the backup or archive procedures in place provided that they preserve non-duplicable discoverable material. Proposals from the Western District of Washington[120] and the Northern District of Illinois[121] also incorporate adopted elements of this approach, as do examples from best practice agreements of parties.[122]

[47] Professor Stephen Subrin has noted that firm limits are often the best way of "providing constraint, focus, and predictability to the unruly

[117] *Seventh Circuit Principles*, *supra* note 87; *see also Final Report on Phase Two*, SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM, 9 (May 2012), http://www.discoverypilot.com/sites/default/files/Phase-Two-Final-Report-Appendix.pdf.

[118] *Seventh Circuit Principles*, *supra* note 87 ("deleted" or "unallocated" data on hard drives, RAM, temporary files, frequently updated metadata, duplicative backup data and other forms of ESI requiring "extraordinary affirmative measures").

[119] D. DEL. DEFAULT STANDARD, *supra* note 92, at ¶ 1(c).

[120] *See* W.D. WASH. MODEL PROTOCOL, *supra* note 94, at ¶ C(2)(a)-(h) (listing types of ESI similar to those in the Default Standard).

[121] *See* PROPOSED N.D. ILL. LPR ESI 2.3(d) (proposed Sept. 27, 2012), *available at* http://www.ilnd.uscourts.gov/_assets/_documents/Rules/LPR12.pdf.

[122] *See* Chad Everingham, *Practical E-Discovery Issues*, 51 THE ADVOC. 37, 37 (2010) (recommending stipulation under which parties provide a list of no more than 15 custodians, which can be modified by the other side and custodians added by title; the same with search terms).

aspects of the federal rule[s]."[123] They provide a useful "starting point to allow parties and district courts to tailor discovery plans as appropriate"[124] and help deal with "over-preservation," an abiding problem identified at the 2010 Duke Litigation Conference and the Dallas Conference of 2011.[125]

[48] Given that specific limitations already exist on the use of interrogatories[126] and depositions,[127] it seems unlikely that limits on preservation efforts exceed permissible consistency boundaries. The limits are subject to the discretion of the court, applied on a case-by-case basis, and are not textually inconsistent with any existing rule or statute.

[49] It would be preferable, however, to adopt these presumptive limitations as a national rule. The Civil Rules Advisory Committee (the "Rules Committee") is considering recommending the amendment of Rule 26(b)(1) to limit discovery to information "relevant to any party's claim or defense and proportional to the needs of the case considering [the factors

[123] Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 101 (1997).

[124] Steven R. Trybus & Sara Tonnies Horton, *A Model Order Regarding E-Discovery in Patent (and Other?) Cases,* 20 ABA SEC. OF LITIG., no. 2, Winter 2012, at 2, *available at* http://jenner.com/system/assets/publications/8846/original/AModelOrderRegardingEDiscoveryinPatent.pdf?1328818478.

[125] *See Notes from the Mini-Conference on Preservation and Sanctions*, JUD. CONF. SUBCOMMITTEE ON DISCOVERY 24 (Sept. 9, 2011), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Materials/Notes%20from%20the%20Mini-Conference%20on%20Preservation%20and%20Sanctions.pdf.

[126] FED. R. CIV. P. 33(a) (no more than 25 written interrogatories, "including all discrete subparts").

[127] FED. R. CIV. P. 30(d)(2) ("a deposition is limited to 1 day of 7 hours").

transferred from (b)(2)(C)(iii)]."[128] That approach could be combined with other pending proposals to provide "default limitations on discovery of [ESI]," which are "useful referents for preservation decisions," given that preservation is limited to "'discoverable' information."[129]

ii. Cooperation

[50] The Federal Rules do not currently mandate a "duty to cooperate," having explicitly rejected proposals to do so in former times.[130] Instead, the Rules require participation by counsel and parties in "good faith" in preparing discovery plans and attending case management conferences.[131]

[51] Many local rules, however, invoke cooperation as an aspirational standard.[132] Thus, the Delaware Standard[133] provides that the court expects parties to cooperate with each other in arranging and conducting

[128] *Initial Rules Sketches*, DUKE CONFERENCE SUBCOMMITTEE, 19-20 (Oct. 2012), http://law.duke.edu/sites/default/files/images/centers/judicialstudies/Panel_4-Background_Paper.pdf.

[129] ADVISORY COMMITTEE ON CIV. RULES, *Memo Regarding Sanctions/Preservation Issues*, *in* MEETING ON MARCH 22-23, 2012 OF THE ADVISORY COMMITTEE ON CIVIL RULES 249, 274-76 (2012), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03.pdf (proposing, *inter alia*, that discovery "need not be provided" from nine sources of ESI, nor from "key custodians" and that search terms may be used).

[130] *See* Gensler, *supra* note 99, at 547 (A 1978 proposal requiring cooperation was deleted "in light of objections that it was too broad," and the requirement to participate in "good faith" was substituted).

[131] *See, e.g.*, FED. R. CIV. P. 16(f); FED. R. CIV. P. 37(f).

[132] S.D. CAL. CIVLR 16.1(d) (encouraging development of a "cooperative discovery schedule").

[133] DEL. DEFAULT STANDARD, *supra* note 95, at ¶ 1(a) ("[p]arties are expected to reach agreements cooperatively on how to conduct discovery under [Rules] 26-36").

discovery.[134] Similar expectations are found in certain ESI Guidelines[135] as well as individualized judicial instructions.[136] The model order recommended for use in the Northern District of California recites that "[t]he parties are aware of the importance the Court places on cooperation and commit to cooperate in good in good faith throughout the [litigation covered by the Order]."[137]

[52] Some districts emphasize that this involves "voluntary" action of counsel through "informal, cooperative discovery practices."[138] Local Rule 26.4 for the Southern and Eastern Districts of New York also provides that cooperation of counsel must be "consistent with the interests of their clients."[139] An open-ended mandate for cooperation, however, is a slippery slope.[140] A court has no authority to force a party to

[134] N.D. OHIO LR 16.3, *available at* http://www.ohnd.uscourts.gov/assets/Rules_and_Orders/Local_Civil_Rules/CoverSheet.htm (applying Appendix K absent agreement, which provides that the court expects parties to "cooperatively reach agreement" on how to conduct discovery).

[135] *See, e.g.*, M.D. ALA. GUIDELINES TO CIVIL DISCOVERY PRACTICE § I(A), *available at* http://www.almd.uscourts.gov/docs/GUIDCVDS.pdf ("discovery in this district is normally practiced with a spirit of ordinary civil courtesy and honesty").

[136] *See, e.g.*, J. Robert H. Cleldan, *Discovery Practices and Expectations*, U.S. DISTRICT CT. E.D. MICH., 1 (Apr. 2003), http://www.mied.uscourts.gov/judges/practices/Cleland/PDF%20Files/DiscoveryPrac.pdf ("The court expects parties and counsel to conduct discovery in a cooperative way, consistent with Fed.R.Civ.P. 1.").

[137] N.D. CAL., [MODEL] STIPULATED ORDER RE: DISCOVERY OF ELECTRONICALLY STORED INFORMATION FOR STANDARD LITIGATION, *available at* http://www.cand.uscourts.gov/eDiscoveryGuidelines.

[138] *See, e.g.*, D. MASS. LR 26.l(a)(1).

[139] E.D.N.Y. & S.D.N.Y. L.R. 26.4.

[140] *See* Steven S. Gensler, *A Bull's Eye View of Cooperation in Discovery*, 10 SEDONA CONF. J. 363, 374 (2009) ("[T]o the extent local rules are construed as ordering parties to disclose information that would otherwise be the subject of formal discovery, or as

compromise a position that it does not wish to take.[141] Placing that burden on counsel can put counsel in an impossible position with her client.[142] There is also the problem of interference with the primary source of counsel responsibility, the state licensing activities.[143]

[53] It is clear, however, that the judicial enthusiasm for cooperation is widespread and growing. One can safely assume that this will continue given the enthusiasm for the call to change the "culture of discovery from adversarial conduct to [one of] cooperation."[144] There seems to be no fundamental inconsistency between the Federal Rules and a call for "cooperation" under local initiatives.[145]

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mandating that the parties reach discovery agreements when there is a genuine dispute, they likely go too far . . . .present[ing] serious questions of validity in terms of inconsistency with the Federal Rules.").

[141] *See* Goss Graphics Sys., Inc. v. DEV Indus., Inc., 267 F.3d 624, 627 (7th Cir. 2001).

[142] *See* Thomas Y. Allman, *Achieving an Appropriate Balance: The Use of Counsel Sanctions In Connection with the Resolution of E-Discovery Misconduct*, 15 RICH. J.L. & TECH. 9, at ¶ 2 (2009), http://jolt.richmond.edu/v15i3/article9.pdf (a client has the ethical right to direct its counsel as it desires, and overly demanding local rules may impose unnecessary burdens on counsel with unforeseen consequences).

[143] *See* Joan C. Rogers, *Ethics 20/20 Rule Changes Approved by ABA Delegates With Little Opposition*, BLOOMBERG BNA (Aug. 15, 2012), http://www.bna.com/ethics-2020-rule-n12884911245/.

[144] The Sedona Conference,® *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331, 331 (2009) ("an exercise in economy and logic" because "[i]t is not in anyone's interest to waste resources on unnecessary disputes, and the legal system is strained by 'gamesmanship' or 'hiding the ball' to no practical effect").

[145] *See* Bd. of Regents v. BASF Corp., No. 4:04CV3356, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007) ("Compliance with [the 2006 Amendments] has placed—on counsel—the affirmative duties to work with clients to . . . cooperatively plan discovery with opposing counsel, Rule 26(f) . . . .").

[54] The Rules Committee has been asked to consider adding cooperation to Rule 1. At the November 2012 meeting, the Duke Subcommittee appeared to step back from earlier support for requiring that "parties [should] cooperate to achieve" the ends of Rule 1 because of the open-ended nature of the commitment.[146] However, no vote was taken on the proposal, which remains open.[147]

iii. Cost Shifting

[55] The 2006 Amendments avoided dealing with allocation of excessive costs attributable to preservation or production of ESI. A number of local initiatives identify cost shifting as an option. New Jersey local rules, for example, require parties to discuss "[w]ho will bear the costs of preservation, production, and restoration (if necessary) of any digital discovery."[148] Wyoming does the same.[149] The Northern District of Ohio Default Standard provides that while "costs of discovery shall be [generally] borne by each party," the court "will apportion the costs of electronic discovery upon a showing of good cause."[150]

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[146] *See Initial Rules Sketches*, *supra* note 128, at 42 (noting that opposition was based on "concern that cooperation is an open-ended concept that, if embraced in rule text, could easily lead to less cooperation and an increase in disputes in which every party accuses every other party of failing to cooperate").

[147] The Sedona Conference® on behalf of its drafting teams and Steering Committee, suggested addition of the phrase "complied with" in Rule 1 to convey the value of cooperation, to which reference would be made in the Committee Note. *See* Letter from Steering Committee of WG1 to J. David G. Campbell et al., Unites States District Court Justices (Oct. 3, 2012) (on file with author).

[148] D.N.J. L.CIV.R. 26.1(d)(3)(b).

[149] D. WYO. U.S.D.C.L.R. 26.1(e)(2); *see also* D. WYO. U.S.D.C.L.R. 26.2 ("cost sharing" should be discussed at Rule 26(f) conference).

[150] N.D. OHIO LR APP. K.

[56] While some argue that rules "should require courts to consider cost shifting whenever a party seeks electronic discovery,"[151] a better approach would require cost-shifting for additional costs of preservation and production beyond a core of basic information.[152] The Model Order for the Federal Circuit, for example, requires that "[c]osts will be shifted for disproportionate ESI production requests pursuant to [FRCP] 26."[153] Thus, e-mail production requests are limited "to a total of five custodians per producing party" with costs shifted for additional requests.[154]

[57] The Duke Subcommittee of the Rules Committee, while stating that it "is not enthusiastic about cost-shifting," has endorsed an amendment to Rule 26(c) that makes the availability of cost shifting a more "prominent feature of Rule 26(c)."[155] Those provisions could be "fine-tuned" to differentiate between costs related to core information and those which exceed presumptive limitations.

[58] Congress is currently taking a "watch and see" attitude, but is clearly interested in the issue.[156]

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[151] John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 585 (2010).

[152] *See, e.g.*, Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331, 341 (E.D. Pa. 2012) (requiring additional discovery to be at the cost of the requesting party since "a very large set" of documents had already been amassed "mostly at [producing party's expense]").

[153] MODEL PATENT ORDER, *supra* note 85, at ¶ 3 ("Likewise, a party's nonresponsive or dilatory discovery tactics will be cost-shifting considerations").

[154] *Id.* at ¶ 10.

[155] *Initial Rules Sketches*, *supra* note 128, at 37 (providing alternative formulations to emphasize that Rule 26(c) authorizes cost allocation).

[156] *See Costs and Burdens of Civil Discovery: Hearing Before the H. Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 9 (2011) (statement of Tony West, Assistant Att'y Gen. of the United States).

iv. Production Formats

[59] Rules 34 and 45 provide that ESI is to be produced, absent agreement or court order, in the form in which it was maintained or in a "reasonably usable form."[157] The clear preference is for parties to reach agreements without involving the courts.[158] The Rules Committee apparently anticipated that local rules would "pick up the slack."[159] That appears to be exactly what has happened.

[60] By an overwhelming consensus, local rules and guidelines favor the use of text searchable "imaged" formats, such as PDF, TIFF, or JPEG files for production of e-mail and other document like images.[160] Parties are free, of course, to vary requirements and to specify the fields of metadata to be included in load files to accomplish these goals.[161] Native production is used only for files "not easily converted to image format, such as Excel, Access files, and drawing files."[162]

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[157] FED. R. CIV. P. 34(b)(2)(E)(ii); FED. R. CIV. P. 45(d)(1)(B).

[158] *See* Kentucky Speedway, LLC v. NASCAR, No. 05-138-WOB, 2006 WL 5097354, at *8 (E.D. Ky. Dec. 18, 2006) ("The issue of whether metadata is relevant or should be produced is one which ordinarily should be addressed by the parties in a Rule 26(f) conference.").

[159] *See* Dahl v. Bain Capital Partners, LLC, 655 F. Supp. 2d 146, 148 (D. Mass. 2009) (addressing format of production because "the Local Rules of this court have yet to provide any guidance on electronic discovery").

[160] *See D. Md. Suggested Protocol*, *supra* note 79, at 17 ("ESI should be produced to the Requesting Party as Static Images," with any subsequent production in Native File format requiring a showing of "particularized need for that production").

[161] *See* D. DEL. DEFAULT STANDARD, *supra* note 92, at ¶ 5(c)&(e) (listing metadata fields).

[162] W.D. WASH. MODEL PROTOCOL, *supra* note 94, at § II(E)(3)-(4). The Model Protocol also provides alternative instructions for more complex cases, including such details as appropriate software files for use with Concordance® or Summation® review platforms.

[61] As explained by a leading case, "even if native files are requested, it is sufficient to produce memoranda, emails, and electronic records in PDF or TIFF format accompanied by a load file containing searchable text and selected metadata."[163] Given the consistency of this approach with the intent of the 2006 Amendments, there is no need to further address this by amendments to the national rules.

v. Search Methodology

[62] A number of local rules require parties to discuss search methodology, including an exchange of information about any keywords employed,[164] and favor "dialogue to discuss the search terms, as required by Rules 26 and 34."[165] The Delaware Default Standard suggests that "a requesting party may request no more than 10 additional search terms to be used in connection with an electronic search."[166]

[63] More recently, "predictive coding" and other types of "latent semantic indexing"[167] began to raise similar issues. One challenge is that

See id., at § III(E)(2). Also discussed is the use of OCR technology for scanning of hard copy documents, with appropriate cross-reference files. *See id.*, at § III(2)-(4).

[163] Aguilar v. Immigration & Customs Enforcement Div., 255 F.R.D. 350, 353 n.2 (S.D.N.Y. 2008) (defining TIFF and PDF, load files and native formats); *id*. at 356 (citing to Sedona Conference Principle 12, Comment 12b Illus. i).

[164] *See, e.g.*, W.D.N.Y. L.R. CIV. P. 26(f) (describing need to agree on search methodology).

[165] *In re* Seroquel Prods. Liab. Litig., 244 F.R.D. 650, 664 (M.D. Fla. 2007).

[166] D. DEL. DEFAULT STANDARD, *supra* note 92, at ¶ 5.

[167] Jason R. Baron, *Law in the Age of Exabytes: Some Further Thoughts on 'Information Inflation' and Current Issues in E-Discovery Search*, 17 RICH. J.L. & TECH. 9, at ¶ 32 (2011), http://jolt.richmond.edu/v17i3/article9.pdf (describing variations of techniques based on "latent semantic indexing," such as "'predictive coding,' 'clustering' technologies, 'content analytics,' and 'auto-categorization,' among many others").

parties who seek to utilize these techniques may be required to make a copy of the set of responsive and non-responsive materials used to "train" the mathematical models employed available.[168]

[64] However, while measures supporting discussions are consistent with the Federal Rules, one cannot reasonably read Rule 16 or Rule 26(f) to support mandating the choice.[169] As emphasized in Sedona Conference® Principle Six, "[r]esponding parties are best situated to evaluate" and choose the "procedures, methodologies, and technologies" most appropriate to preserve and produce their own ESI.[170] Compelling a particular choice without regard to individualized proof that a party would not otherwise meet its discovery obligations[171] would improperly intrude

[168] *See* Ronni Solomon, *Are Corporations Ready to Be Transparent And Share Irrelevant Documents With Opposing Counsel to Obtain Substantial Cost Savings Through the Use of Predictive Coding?*, THE METROPOLITAN CORP. COUNS., Nov. 2012, at 26, *available at* http://www.metrocorpcounsel.com/pdf/2012/November/26.pdf (collecting relevant cases).

[169] *See* J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1323-25 (7th Cir. 1976) (neither Rule 16 nor the "circumscribed area of power" authorize a judge to compel compliance under facts of case); *see also* Identiseal Corp. of Wis. v. Positive Identification Sys., Inc., 560 F.2d 298, 302 (7th Cir. 1977) (parties, rather than the court, should determine litigation strategy).

[170] THE SEDONA CONFERENCE®, THE SEDONA CONFERENCE DATABASE PRINCIPLES: ADDRESSING & PRODUCTION OF DATABASES & DATABASE INFORMATION IN CIVIL LITIGATION 12 (Conrad J. Jacoby et al. eds., Mar. 2011 Public Comment ed.), *available at* https://thesedonaconference.org/system/files/sites/sedona.civicactions.net/files/private/drupal/filesys/publications/Database_Principles.pdf.

[171] *See, e.g.*, SEC v. Collins & Aikman Corp., 256 F.R.D. 403, 414 (S.D.N.Y. 2009) (compelling negotiations for a "workable search protocol" because party and its counsel acted unreasonably).

on "private primary activity"[172] because it affects "behavior at the planning as distinguished from the disputative stage of activity."[173]

[65] It is one thing to require, for example, designation of a contact person or "liaison" to coordinate with the court and parties on technical e-Discovery issues.[174] It is quite another to reach out beyond the litigation context and compel a party to use a particular methodology in carrying out its obligations.[175] Any such basic change requires national authorization.[176]

vi. Disclosures Without Discovery

[66] Some local rules impose affirmative obligations on counsel to become knowledgeable about client information management systems[177]

[172] Hanna v. Plumer, 380 U.S. 460, 477 (1965) (Harlan, J., concurring).

[173] Olin Guy Wellborn III, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV. 371, 403-04 (1977) (a rule which affects "primary—nonlitigation related—conduct" is prohibited by the Enabling Act).

[174] *See, e.g.*, W.D. PA. LCvR 26.2(B).

[175] A classic example of overreaching is the requirement in some early local initiatives that "retention coordinators" be appointed and charged with ensuring that relevant information was not deleted by individual custodians. *See, e.g.*, J. TIMOTHY J. SAVAGE, ORDER GOVERNING ELECTRONIC DISCOVERY, at ¶ 8, http://www.paed.uscourts.gov/documents/procedures/savpold.pdf (last visited Dec. 29, 2012); *see also* N.D. OHIO LR APP. K, at ¶ 7; Administrative Order No. 174 Regarding Default Standard for Discovery of Electronically Stored Information (M.D. Tenn., July 9, 2007), *available at* http://www.tnmd.uscourts.gov/files/AO_174_E-Discovery.pdf.

[176] *See* Miner v. Atlass, 363 U.S. 641, 650 (1960) (invalidating basic innovations which should have been addressed at the national level).

[177] D. KAN., GUIDELINES FOR DISCOVERY OF ELECTRONICALLY STORED INFORMATION (ESI) ¶ 1 (2007) ("counsel should [also] make a reasonable attempt to review their clients' ESI to ascertain the contents, including backup, archival and legacy data (outdated formats or media)"), *available at* http://www.ksd.uscourts.gov/wp-content/uploads/2010/03/electronicdiscoveryguidelines.pdf.

and requires counsel to share that information during the Rule 26(f) process. According to one local drafting committee, these types of rules are intended to "express the obligations of counsel as articulated in case law beginning with the *Zubulake* cases."[178]

[67] In a broad sense, this is consistent with the observation in the Committee Note to Rule 26(f) that "[i]t may be important for the parties to discuss [information systems] and accordingly important for counsel to become familiar with those systems before the conference."[179] However, these comments in the Committee Note are not sufficient to supersede the limitations on disclosures without discovery so carefully expressed in Rule 26(a).[180]

[68] Rule 26(a) limits early disclosures to information that a party "may use to support its claims or defenses."[181] The 2006 Amendments did not expand its scope. Parties are not required to undertake an open-ended, costly, and ultimately premature effort to locate and review information.[182]

[69] The issue arose at the 2004 Fordham Conference prior to the adoption of the amendments to Rule 26(a). While noting that the local rules in New Jersey and Wyoming mandated that counsel acquire

[178] Susan Ardisson & Joseph Decker, *Western District Adopts New Local Rule on Electronic Discovery*, 11 LAW. J. 4, 4 (2009).

[179] FED. R. CIV. P. 26(f) advisory committee's note 2006.

[180] To date, the Federal Rules have been quite precise in regard to compliance obligations of counsel, which are mainly found in Rule 11 and 26(g), apart from obligations of good faith in several specific instances. *See generally* FED. R. CIV. P 11; FED. R. CIV. P. 26(g).

[181] FED. R. CIV. P. 26(a)(1)(A)(ii).

[182] Adoption and Amendments to Civil Rules, 234 F.R.D. 219, 312 (2006).

information about client systems, one speaker noted that "it may be that, for national rules, such a directive would be viewed as too intrusive."[183]

[70] The former chair of the Standing Committee has also noted that a "local rule that require[s] parties to provide an information system 'map' at the Rule 26(f) conference" would go "beyond [the] national rules."[184] Absent further amendments to the Federal Rules, therefore, local rules and guidelines should seek to accomplish these goals by voluntary, not mandatory, compliance. Under the case law, the act of requiring a party through its counsel to "furnish more information than is required" is barred.[185]

vii. Rule 502 Orders

[71] The 2006 Amendments included a "clawback" mechanism in Rules 26 and 45 to deal with post-production claims of privilege or work-product production, but made no attempt to establish the conditions under which "waiver" by such production could occur.[186] In 2008, Congress enacted Federal Evidence Rule 502 ("FRE 502"),[187] limiting privilege

[183] Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1, 16-17 (2004) (citing D.N.J. L.Civ.R. 26.1(d)(1) and Wyo. U.S.D.C.L.R. 26(1)(d)(3)).

[184] Lee H. Rosenthal, *Electronic Discovery—Is the System Broken? Can It Be Fixed?*, 51 THE ADVOC. 8, 13 (2010).

[185] Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc., 271 F.3d 374, 386 (2d Cir. 2001) (invalidating use of standing order to require party to furnish information not required by law).

[186] The Comments to the ABA Model Rule 4.4(b) and the related ABA Opinions take the position that whether the return of privileged information is required is committed to the receiving lawyer's discretion, subject to procedural and evidentiary law. *See* MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2012); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-440 (2006); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 05-437 (2005).

[187] *See* Act of Sept. 19, 2008, Pub. L. No. 110-322, 122 Stat. 3537.

waiver for "inadvertent" disclosures when the holder "took reasonable steps to prevent disclosure" as well as prompt and reasonable steps to rectify the error. The Rule also authorized court-adopted agreements that bind parties and non-parties in federal and state cases, even over objection, to waiver-free production without proof of reasonable precautions.[188]

[72] Surprisingly few districts have emphasized Rule 502 in local rules, guidelines, or amended forms. Many forms simply ask whether a court order "will be requested, either on stipulation or otherwise" to address the manner in which ESI subject to claims or work product protection will be handled.[189] However, more recently adopted local rules and model protocols routinely deal with the issue.[190] It should also be addressed in any new standardized forms that the Administrative Office develops to supplement or replace Official Form 52.

[188] *See, e.g.*, Rajala v. McGuire Woods, LLP, No. 08-2638-CM-DJW, 2010 WL 2949582, at *7 (D. Kan. July 22, 2010).

[189] N.D.N.Y., CIVIL CASE MANAGEMENT PLAN ¶ 12(G) (2007), *available at* http://www.nynd.uscourts.gov/documents/CivilCaseMgmtPlanFILLABLE_000.pdf.

[190] *See, e.g.*, LOCAL RULES W.D. WASH. CR 26(f)(1)(H) (requiring discussion of "procedures" for handling inadvertent production "pursuant to Rule 502(d)or (e) of the Federal Rules of Evidence").

IV. CONCLUSION

[73] There has been a healthy proliferation of local e-Discovery initiatives for use in district courts in the federal judicial system. There is no obvious pattern emerging as the dominant approach.

[74] Unfortunately, there is very limited empirical evidence on which one can base a conclusion as to the most effective type of local initiative. The topic has received very little attention[191] and only the Seventh Circuit pilot program has attempted to survey its users.[192] Hopefully, other districts will put more effort into such surveys. As demonstrated by the evolution of the Delaware Default Standard, trial and error is useful.

[75] There is substantial anecdotal evidence, however, that early attention to ESI can play an important role in reducing unnecessary disputes.[193] Certainly, that effort is preferable to ignoring potential disputes that can be avoided. The trick seems to be to find the right balance, blending a "light touch" with avoidance of unnecessary costs that produce no gain. Ultimately, however, the choice between doing nothing and jumping in with both feet is a matter of style that reflects the culture of the district and the degree to which it can be seen as appropriate.[194]

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[191] *See, e.g.*, Gaza & Rawnsley, *supra* note 27, at 34 (district courts have adopted a "wide variety of methods" to see that "discovery proceeds in a fair and orderly manner").

[192] *See* JOHN M. BARKETT, THE 7TH CIRCUIT E-DISCOVERY PILOT PROJECT: WHAT WE MIGHT LEARN AND WHY IT MATTERS TO EVERY LITIGANT IN AMERICA 3-4 (2011), *available at* http://apps.americanbar.org/litigation/litigationnews/civil_procedure/docs/barkett.december11.pdf.

[193] *See generally* J. Joy Flowers Conti & Richard N. Lettieri, *In re ESI: Local Rules Enhance the Value of Rule 26(f) "Meet and Confer"*, 49 JUDGES' J. 29 (2010).

[194] To the author, it would appear that this can best be accomplished making appropriate use of standardized forms coupled with some form of minimal rulemaking, along with a judicious (limited) amount of ad hoc guidelines.

[76] In the main, the ninety-four districts present the reassuring conclusion that the local rules and forms in current use are largely consistent with the 2006 Amendments. Moreover, the local initiatives do not appear to be the problem that the Standing Committee originally feared.[195] There is no drumbeat of complaints, aside from one comment in an ABA journal,[196] that the diversity of local e-discovery procedure has had an adverse impact. There is no need for drastic action reining in local rulemaking, even if that were somehow possible.

[77] However, as noted, procedural uniformity could be enhanced by converting some of the local initiatives into national rules. After six years, the tentative approach of the 2006 Amendments, can safely give way to a more confident and aggressive attempt to improve predictability and address the exploding costs of e-Discovery.

[195] *See* Adoption and Amendment to Civil Rules, 234 F.R.D. 219, 273 (2006) (explaining that "inconsistencies [due to varying local rules] are particularly confusing and debilitating [to large entities], the uncertainty, expense, delays, and burdens of such discovery also affect small organizations and even individual litigants").

[196] *See* Charles S. Fax, *Does Federalism Work for the Federal Rules?*, ABA LITIG. NEWS, (Feb. 8, 2012), http://apps.americanbar.org/litigation/litigationnews/civil_procedure/012512-federalism-federal-rules.html (noting adverse impact on efficiency, costs and the "risk of sanctions due to unfamiliarity with, or negligent failure to adhere to, local norms that differ from a lawyer's home jurisdiction").