A LAST VESTIGE OF OREGON'S WILD WEST: OREGON'S LAWLESS APPROACH TO ELECTRONICALLY STORED INFORMATION

LEROY J. TORNQUIST* & CHRISTINE R. OLSON**

I. INTRODUCTION: TECHNOLOGY AND ESI DISCOVERY IN CIVIL CASES

Technology is changing the way modern Americans live. In 1984, the first year the United States Census Bureau began surveying computer use in America, only 8.2% of American households reported owning a computer.[1] As of 2003, the number of households with a home computer increased to 62%.[2] What is perhaps more telling is that homes *without* an Internet connection are now in the minority; an estimated 82% of American households have an Internet connection.[3] That figure is probably growing.

Given the impact of technology on American society at large, it is not surprising that technology is affecting how attorneys practice law. In an environment where "e-mail, instant messaging, voicemail, blogs, laptops, .pdfs, PDAs, zip or flash drives, databases, and network servers"[4] are commonplace, it is not surprising that a 2006 American Bar Association Legal Technology Resource Center survey

* Professor of Law, Willamette University Legal Counsel and former Dean of Willamette University College of Law. Northwestern University B.S (1962) and Northwestern University School of Law (1965). Member of the Illinois and Oregon Bar.

** J.D., Anticipated 2009, Willamette University College of Law; B.A., 2006, Central Washington University, summa cum laude.

1. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, COMPUTER USE IN THE UNITED STATES: 1984, at 1 (1988), *available at* http://www.census.gov/population/socdemo/computer/p23-155/p23-155.pdf.

2. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, COMPUTER AND INTERNET USE IN THE UNITED STATES: 2003, at 1 (2005), *available at* http://www.census.gov/prod/2005pubs/p23-208.pdf.

3. Steven Musil, *Survey: One-Fifth of Americans Have Never Used E-Mail*, CNET NEWS, http://news.cnet.com/8301-10784_3-9946706-7.html (last visited Oct. 22, 2008).

4. Mia Mazza et al., *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 11, para. 2 (2007), http://law.richmond.edu/jolt/v13i3/article11.pdf.

found that 87% of surveyed attorneys have either a desktop computer or laptop in their office, ninety-three percent reported that they conduct their legal research online, and seventy-nine percent of attorneys reported that they conduct their legal research from their desks.[5] Moreover, the surge in the use of electronics is also leading to a change in the way attorneys interact with clients; a recent study shows that recent law school graduates are more likely—and actually prefer—to communicate with their clients through e-mail, which is leading to decreased use of traditional legal memoranda.[6]

This increasing prevalence of electronics in business, government, and individual settings has led to a significant increase in electronically stored information (ESI). ESI, as the term suggests, is information that is stored electronically, and

> includes email, web pages, word processing files, audio and video files, images, computer databases, and virtually anything that is stored on a computing device—including but not limited to servers, desktops, laptops, cell phones, hard drives, flash drives, PDAs and MP3 players. Technically, information is "electronic" if it exists in a medium that can only be read through the use of computers. Such media include cache memory, magnetic disks (such as computer hard drives or floppy disks), optical disks (such as DVDs or CDs), and magnetic tapes.[7]

The aspect of law that perhaps is most impacted by ESI is discovery, which is often referred to as "e-discovery" when ESI is involved.[8] "In the words of U.S. District Court Judge Shira

5. Melody Finnemore, *Beyond Paperless: Trends in Legal Technology*, OR. ST. B. BULL., JAN. 2007, at 17, 18, 22 (2007) (*citing* American Bar Association, *Online Research Trend Report*, 2006 A.B.A. LEGAL TECH. SURV. REP.).

6. Kristen Konrad Robbins-Tiscione, *From Snail Mail to E-Mail: The Traditional Legal Memorandum in the Twenty-First Century*, 58 J. LEGAL EDUC. 32, 32–33 (2008).

7. THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 1 (Jonathan M. Redgrave et al. eds., 2d ed. 2007), *available at* http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf [hereinafter THE SEDONA PRINCIPLES].

8. The Sedona Conference defines "discovery" as:

> the process of identifying, locating, securing and producing information and materials for the purpose of obtaining evidence for utilization in the legal process. The term is also used to describe the process of reviewing all materials that may be potentially relevant to the issues at hand and/or that may need to be disclosed to other parties, and of evaluating evidence to prove or disprove facts, theories or allegations.

THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT 15, 18 (Conor R. Crowley et. al eds., 2d ed. 2007), *available at*

Scheindlin[:] . . . '[a]s individuals and corporations increasingly do business electronically . . . the universe of discoverable materials has expanded exponentially.'"[9]

Until recently, there was little to no guidance on ESI—what exactly was discoverable (all relevant ESI or only the easiest to produce?), how did preservation duties apply (should parties preserve all relevant information or only what is saved in the ordinary course of business?), and who should bear the costs of e-discovery (responding party, requesting party, both?). These are just a subset of the questions for which attorneys had no answers.

The first answers to such questions came when the Sedona Conference[10] approved the first edition of the Sedona Principles, a set of guidelines that resulted from "concern[] about whether rules and concepts developed largely for paper discovery would be adequate to handle issues of electronic discovery."[11] The Conference of Chief Justices[12] published the next set of guidelines ("the Guidelines") aimed at "assist[ing] state courts in considering issues related to electronic discovery."[13] Another organization, the National Conference of Commissioners on Uniform State Laws (NCCUSL), approved a set of guidelines in 2007, that are modeled after (and at times directly quoting) the 2006 amendments to the Federal Rules of Civil Procedure (FRCP), but are "modified, where necessary, to

http://www.thesedonaconference.org/content/miscFiles/TSCGlossary_12_07.pdf. It should be noted that ESI will also play an important role in criminal cases and in government regulation.

9. Cameron G. Shilling, *Electronic Discovery: Litigation Crashes into the Digital Age*, 22 LAB. LAW. 207, 207 (2006) (*quoting* Zubulake v. UBS Warburg LLC *(Zubulake I)*, 217 F.R.D. 309, 311 (S.D.N.Y. 2003)).

10. "The Sedona Conference® . . .is a nonprofit, 501(c)(3) research and education institute dedicated to the advancement of law and policy in the areas of antitrust, complex litigation and intellectual property rights." The Sedona Conference, Frequently Asked Questions, http://www.thesedonaconference.org/content/faq (last visited Dec. 4, 2008). The Sedona Principles are discussed in more detail in later portions of this article.

11. THE SEDONA PRINCIPLES, *supra* note 7, at iii.

12. As stated on their website, the Conference of Chief Justices

> was founded in 1949 to provide an opportunity for the highest judicial officers of the states to meet and discuss matters of importance in improving the administration of justice, rules and methods of procedure, and the organization and operation of state courts and judicial systems, and to make recommendations and bring about improvements on such matters.

Conference of Chief Justices, About CCJ, http://ccj.ncsc.dni.us/about.html (last visited Nov. 23, 2008).

13. GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION vii (Richard Van Duizend, ed., 2006), *available at* http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf [hereinafter GUIDELINES].

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 electronically stored information."[14] Some state courts have looked to such guidelines when trying to decide how to approach e-discovery.[15]

However, the most important guidance for courts and attorneys came with the 2006 amendments to the FRCP; these amendments are discussed in more detail below. Yet, despite the FRCP amendments and multiple sets of guidelines produced by several organizations, the Oregon Rules of Civil Procedure (ORCP) remain unchanged. While some states have modified their rules either by amendments or through case law, Oregon has remained on the sidelines, taking no steps to amend its civil procedure rules despite recognizing that a difference exists between paper documents and electronic information.[16] This article argues that Oregon should amend its civil procedure rules to reflect the difference between paper documents and ESI as well as the complexities that are unique to ESI. More specifically, this article argues that Oregon should amend its civil procedure rules to provide parties with the option to request a pre-trial discovery conference when the use of ESI is reasonably foreseeable in litigation since the ORCP do not currently call for pre-trial conferences of any kind.[17] To explain why Oregon should specifically require a pre-trial discovery conference if a party requests it in litigation where ESI is likely involved, this article illustrates situations where such interaction between parties can prove beneficial and efficient. Discovery conferences can save the parties and the court system money, reduce unnecessary time in discovery, and, most importantly, lead to a more just result.

First, this article examines the reasons for the 2006 FRCP amendments. Then, this article looks at Oregon's current civil procedure rules and the process for amending/modifying them as well

14. UNIFORM RULES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION 2 (2007), *available at* http://www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.pdf [hereinafter UNIFORM RULES].

15. *See, e.g.*, Analog Devices, Inc. v. Michalski, No. 01 CVS 10614, 2006 WL 3287382 (N.C. Super. Ct. Nov. 1, 2006).

16. 2003 Or. Laws 2226 ("'Record' means information that is inscribed on a tangible medium or that is *stored in an electronic or other medium and is retrievable in perceivable form*.") (emphasis added).

17. Because the ORCP do not have provisions requiring a pre-trial conference, this article only suggests that Oregon allow parties to request a pre-trial discovery conference when ESI is involved to respect the current spirit and aims of the ORCP.

as what steps have been taken to change the civil procedure rules. Next, this article examines the different approaches taken by the FRCP, the Sedona Principles, the Guidelines, the NCCUSL Uniform Rules, and other states, in order to determine the best approach for Oregon to pursue when amending/modifying its own rules for ESI and pre-trial discovery conferences. Finally, this article examines two separate areas—costs and privilege/work product—where ORCP amendments allowing ESI discovery conferences would benefit litigants and courts.

II. THE 2006 FEDERAL RULE OF CIVIL PROCEDURE AMENDMENTS

The Advisory Committee on the Federal Rules of Civil Procedure ("Advisory Committee") began the process of amending the FRCP in 2000 after the issue was initially raised in 1996 at a Judicial Discovery Conference.[18] The amendments, some of which are described in more detail below, went into effect on December 1, 2006.[19] Although the 1970 amendments of the FRCP acknowledged technological advances by adding "document" to the rules,[20] advances in recent years outgrew the confines of even a liberal construction of "document."[21]

To explain why it recommended the FRCP amendments, the Judicial Conference Committee pointed to several differences between traditional paper documents and electronic documents:

> [ESI] is characterized by exponentially greater volume than hard-copy documents. Commonly cited examples of such volume include the capacity of large organizations' computer networks to store information in terabytes, each of which represents the equivalent of 500 million typewritten pages of plain text, and to receive 250 to 300 million e-mail messages monthly. Computer

18. REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 22 (2005), *available at* http://www.uscourts.gov/rules/Reports/ST09-2005.pdf [hereinafter COMMITTEE REPORT].

19. *See, e.g.*, FED. R. CIV. P. 16.

20. FED. R. CIV. P. 34(a), advisory comm. note (1970).

21. FED. R. CIV. P. 34(a), advisory comm. note (2006).

> Lawyers and judges interpreted the term "documents" to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology. But it has become increasingly difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of a "document."

Id.

> information, unlike paper, is also dynamic; merely turning a computer on or off can change the information it stores. Computers operate by overwriting and deleting information, often without the operator's specific direction or knowledge. A third important difference is that [ESI], unlike words on paper, may be incomprehensible when separated from the system that created it.[22]

However, a lack of uniformity and "patchwork of rules" were the more pressing reasons for the 2006 amendments because of the impact such inconsistencies have on not only large organizations, but on individual litigants as well.[23] Providing parties with a mechanism to combat the increased costs and burdens associated with ESI also factored into the amendments.[24]

III. OREGON'S CIVIL PROCEDURE RULES

The Oregon Rules of Civil Procedure became effective on January 1, 1980.[25] The Oregon Council on Civil Procedures ("the Council") originally drafted the ORCP and submitted them to the Oregon Legislature in 1979 for approval and/or modification.[26] Currently, ORCP 36(B)(1)—the section pertaining to the scope of discovery—states:

> For all forms of discovery, parties may inquire regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter.[27]

Prior to the 2006 amendments, FRCP 26—the equivalent to ORCP 36—contained nearly identical language.[28]

The Oregon Legislature created the Council in 1977 after finding:

22. COMMITTEE REPORT, *supra* note 18, at 22–23.

23. *Id.* at 23.

24. *See, e.g.*, FED. R. CIV. P. 26(b)(2); FED. R. CIV. P. 26(b)(2) advisory comm. notes (2006).

25. Oregon Council on Court Procedures, http://www.lclark.edu/~ccp/LegislativeHistory.htm (last visited June 9, 2008) [hereinafter Council on Court Procedures].

26. *Id.*

27. OR. R. CIV. P. 36(B)(1).

28. *See* FED. R. CIV. P. 26(b)(1).

> (1) Oregon laws relating to civil procedure designed for the benefit of litigants which meet the needs of the court system and the bar are necessary to assure prompt and efficient administration of justice in the courts of the state.
>
> (2) No coordinated system of continuing review of the Oregon laws relating to civil procedure now exists.
>
> (3) Development of a system of continuing review of the Oregon laws relating to civil procedure requires the creation of a Council on Court Procedures.[29]

The duties of the Council are outlined in title 1, section 730, of the Oregon Revised Statutes,[30] but the Council states that its "primary function [is] to amend the ORCP from time to time whenever the need for, or utility of, amendment is demonstrated."[31] Although amending the ORCP is primarily within the Council's purview, the state legislature has—of its own accord—occasionally amended the ORCP, as it retained authority to amend, modify, and rescind the rules as it saw fit.[32]

The Council considers amendments to the ORCP in two-year cycles,[33] and has to submit any proposed changes to the legislature "at the beginning of each regular session[.]"[34] The Council decides which rules to amend/modify from "developments in case law, changes in technology, new Oregon statutes or federal legislation, . . . changes in legal practice," and proposals from those who contact them.[35]

With regard to e-discovery, the Council first considered the idea in May 2006, after the Senate and House Judiciary Committee counsel contacted a Council member and "suggest[ed] that the Council needs to look at e-discovery in light of the new federal

29. OR. REV. STAT. § 1.725 (2007).

30. OR. REV. STAT.§ 1.730(1) (2007).

> The Council on Court Procedures shall promulgate rules governing pleading, practice and procedure, including rules governing form and service of summons and process and personal and in rem jurisdiction, in all civil proceedings in all courts of the state which shall not abridge, enlarge or modify the substantive rights of any litigant.

Id.

31. Council on Court Procedures, *supra* note 25.

32. *Id.*; *see also* OR. R. CIV. P. 1 (amended by the state legislature in 1981, 1995, and 2003).

33. Council on Court Procedures, *supra* note 25.

34. § 1.730(1).

35. Council on Court Procedures, *supra* note 25.

rules."[36] At the suggestion of another Council member that e-discovery "would take substantial time to review," the Council decided to address the issue "in the next Council cycle."[37] Additionally, when one member noted that a group contacted her wanting to submit proposed amendments to the Council later on in the same cycle, an invitation was extended to the group to submit a proposal in the next cycle.[38]

However, during the first meeting of the 2007–2009 Council cycle, the Council decided not to amend the ORCP[39] to reflect the reality that an estimated "more than 90% of all information today is created and retained in an electronic format."[40] The issue was presented to the Council with the idea of modeling the ORCP after the FRCP 2006 amendments, but no formal action was taken after one Council member stated that "there is not much difference between requesting electronic documents and requesting paper documents."[41] The Council's decision not to amend the ORCP came despite one member noting "that there can be substantial additional expense to retrieve electronic information versus paper information."[42]

The Council's reasons for not amending the ORCP with regards to ESI seem weak and directly contradict the Advisory Committee and Judicial Conference Committee's reasons for the FRCP amendments.[43] Unlike the Advisory Committee, the Council, as far as the authors can tell, has not investigated the important difference between paper documents and ESI, the resulting implications, and ramifications.[44] As a result, the Council's refusal to amend the ORCP is—at the very least—questionable.

The advent of ESI raises the following issues considered by the

36. MARK A. PETERSON, COUNCIL ON COURT PROCEDURES, MINUTES OF MEETING 6 (May 13, 2006), *available at* http://www.lclark.edu/~ccp/Content/2005-2007_Biennium/2006-05-13_Minutes.pdf.

37. *Id.*

38. COUNCIL ON COURT PROCEDURES, MINUTES OF MEETING 8 (Sept. 9, 2006), http://www.lclark.edu/~ccp/Content/2005-2007_Biennium/2006-09-09_Minutes.pdf.

39. COUNCIL ON COURT PROCEDURES, MINUTES OF MEETING 4 (Sept. 15, 2007), http://www.lclark.edu/~ccp/Content/2007-2009_Biennium/2007-09-15_final_minutes_w_appendices.pdf [hereinafter Sept. 15, 2007 Meeting Minutes].

40. *See* Mazza, *supra* note 4, at 2 (citing THE SEDONA PRINCIPLES,**Error! Hyperlink reference not valid.** *supra* note 7, at 4).

41. Sept. 15, 2007 Meeting Minutes, *supra* note 39.

42. *Id.*

43. *See supra* note 22 and accompanying text.

44. *See supra* note 18 and accompanying text.

FRCP amendments:

1. The desirability of initial discussions of electronically stored information. See FRCP 16(b), 26(f), and Form 35.
2. The extent of required production. See FRCP 26(b)(2)(B), 45(d)(1)(D).
3. Scope and form of production. See FRCP 33(d), 34(a-b), 45a, c, and d.
4. Inadvertent production of privileged information or trial-preparation materials. See FRCP 16(b)(6), 26(f)(4), 45(d)(2), and Form 35.
5. Sanctions. FRCP 37.

At a bare minimum, the ORCP should acknowledge a difference between paper documents and ESI. One such way this acknowledgment should occur is to provide for different treatment of discovery for paper documents and ESI; more specifically, the difference should be acknowledged in how to treat discovery of such information from the very beginning of litigation (i.e., discovery conferences). As noted above, Oregon currently does not require pre-trial conferences with regard to discovery. However, given the differences between paper documents and ESI, parties should have the option of a pre-trial discovery conference in order to facilitate discussions of various issues—such as costs, form of production, scope of preservation, privilege considerations, and work product—that will result in less confrontation and time-consuming debate later in the course of litigation.[45]

IV. DIFFERENT APPROACHES TO PRE-TRIAL CONFERENCES

Before recommending how Oregon should amend its civil procedure rules, this article discusses the various approaches Oregon could take or after which it could model its own rules. This section simply states how each example approaches ESI and pre-trial conferences. An analysis of each example and how they do and do not suit Oregon appears later in the article.

45. The pretrial conference should also result in better and more just decisions by Oregon courts and juries.

A. The Federal Rules of Civil Procedure

Rule 26 already required initial disclosure and a pre-trial conference prior to the December 2006 amendments.[46] However, the amendments added ESI to the list of topics such conferences covered: "In conferring, the parties must . . . make or arrange for the disclosures required by Rule 26(a)(1) [and] discuss any issues about preserving discoverable information . . . ."[47] Rule 26(a)(1) states:

> Except as exempted . . . or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:
>
> . . . .
>
> (ii) a copy—or a description by category and location—of all documents, *electronically stored information*, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment[.][48]

Additionally, Rule 26(f) requires that parties develop a "discovery plan" that

> must state the parties' views and proposals on:
>
> . . . .
>
> (C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;
>
> (D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order[.][49]

In summary, "[t]he approach of the Federal Rules is to work general disclosures and discussions of electronic discovery into the existing Rule 26 structure of an early meeting of counsel and early 'voluntary' disclosure of information . . . ."[50]

46. *See* FED. R. CIV. P. 26.

47. *See* FED. R. CIV. P. 26(f)(2).

48. FED. R. CIV. P. 26(a)(1) (emphasis added).

49. FED. R. CIV. P. 26(f)(1)-(2).

50. 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. CONTINUING LEGAL EDUC. 295, 301.

B. The Guidelines for State Trial Courts Regarding the Discovery of Electronically-Stored Information

As the title suggests, the Guidelines are premised on the notion that ESI is discoverable under state civil procedure rules. The Guidelines take a flexible approach to pre-trial discovery conferences—judges should encourage parties to meet so that they may come to an agreement regarding discovery of ESI, and if the parties are unable to come to an agreement the judge should order the parties to exchange information with the goal of expediting the discovery process.[51] This approach emphasizes cooperation and a voluntary agreement between the parties.[52] The Guidelines also add a step beyond the parties' voluntary or court-ordered agreement:

> Following the exchange of the information . . . , a judge should inquire whether counsel have reached agreement on any of the following matters and address any disputes regarding these or other electronic discovery issues:
>
> A. The electronically-stored information to be exchanged including information that is not readily accessible;
>
> B. The form of production;
>
> C. The steps the parties will take to segregate and preserve relevant electronically stored information;
>
> D. The procedures to be used if privileged electronically-stored information is inadvertently disclosed; and
>
> E. The allocation of costs.[53]

This extra step is aimed at promptly identifying potentially conflict-laden issues that the parties may not have thought to include in their

---

51. GUIDELINES, *supra* note 13, at 2.

> In any case in which an issue regarding the discovery of electronically-stored information is raised or is likely to be raised, a judge should encourage counsel to meet and confer in order to voluntarily come to agreement on the electronically stored information to be disclosed, the manner of its disclosure, and a schedule that will enable discovery to be completed within the time period specified by [the Rules of Procedure or the scheduling order].
>
> In any case in which an issue regarding the discovery of electronically-stored information is raised or is likely to be raised, and in which counsel have not reached agreement regarding the following matters, a judge should direct counsel to exchange information that will enable the discovery process to move forward expeditiously. The list of information subject to discovery should be tailored to the case at issue.

Id.

52. *Id.* at 3.

53. *Id.* at 4.

original agreement and are not specifically outlined in the list enumerated in Guideline 3(B).[54]

C. The Sedona Principles

The first of the Sedona Principles ("the Principles") adds ESI to a state's list of discoverable materials: "Electronically stored information is potentially discoverable under [FRCP] 34 or its state equivalents."[55] As with the FRCP amendments, the Principles aimed at settling the debate over whether "documents" included all types of ESI.[56] This principle, like FRCP 34, insures "that discovery extends to all stored information, including information that it is [sic] only readable by machine."[57]

Principle 3 states: "Parties should confer early in discovery regarding the preservation and production of electronically stored information when these matters are at issue in the litigation and seek to agree on the scope of each party's rights and responsibilities."[58] Early meetings between the parties to discuss ESI are encouraged by the Principles because they "may help reduce misunderstandings, disputes and unnecessary motions, including post-production sanction motions involving the failure to preserve relevant information."[59] As with the Guidelines, the Principles suggest a list of topics and issues parties can discuss and resolve during this conference with the aim of reducing unnecessary delay and expense on issues that may not even pertain to the litigation.[60] Moreover, the Principles suggest that parties prepare to discuss "records management policies and practices, including the litigation hold process"[61] and "counsel should consult with their clients' information technology departments and vendors regarding the technical issues"[62] in connection with

54. *Id.*; *see also id.* at 2–3 (Guideline 3B's list of information the court order can mandate parties disclose).

55. THE SEDONA PRINCIPLES, *supra* note 7, at ii; *see also* Fed. R. Civ. P. 34 (Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes).

56. THE SEDONA PRINCIPLES, *supra* note 7, at 11 cmt. 1.a.

57. *Id.*

58. *Id.* at ii.

59. *Id.* at 21 cmt. 3.a.

60. *Id.* (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 40.25(2) (Fed. Jud. Ctr. 2004) (Preservation of Documents, Data, and Tangible Things)).

61. *Id.* at 16 cmt. 1.d.

62. *Id.* at 20 cmt 2.e.

preservation issues. The Principles recognize that "[t]he efficacy of 'meet and confers,' or other types of communications, depends upon the parties' candor, diligence and reasonableness."[63]

D. The Uniform Rules Relating to the Discovery of Electronically-Stored Information

The Uniform Rules appear to be drafted based on the assumption that ESI is discoverable under state civil procedure rules—aside from the Uniform Rules' definition of ESI, there is not a provision similar to the Sedona Principles' first principle clearly establishing ESI as discoverable material.[64] Uniform Rule 3 states: "Unless the parties otherwise agree or the court otherwise orders . . . all parties that have appeared in the proceeding shall confer concerning whether discovery of electronically stored information is reasonably likely to be sought in the proceeding."[65] The Rule goes on to list several issues and factors parties should discuss if discovery of ESI is "reasonably likely to be sought."[66] It also requires parties to develop a discovery plan, and then to "submit to the court a written report that summarizes the plan and states the position of each party as to any issue about which they are unable to agree."[67]

E. Examples of Different State Approaches

While Oregon has not dealt with e-discovery issues, other states have.[68] Some states have determined their approach by proactively amending their civil procedure rules, while other states have encountered e-discovery issues in their courts. Some of the following states have opted for approaches that differ from the FRCP. The states that have addressed e-discovery in their courts have taken one of several different approaches to e-discovery issues: using their existing civil procedure rules for guidance and amending them as necessary; looking to and following the FRCP amendments; looking to the FRCP amendments for guidance as to how to follow state civil procedure rules; interpreting existing rules as broad enough to

63. *Id.*

64. *See generally* UNIFORM RULES, *supra* note 14.

65. *Id.* at 4.

66. *Id.*

67. *Id.*

68. *See, e.g.*, Bank of America Corp. v. SR Int'l Bus. Ins. Co., No. 05-CVS-5564, 2006 WL 3093174 (N.C. Super. Ct. Nov. 1, 2006).

encompass ESI; and using already ESI-amended state civil procedure rules.

1. Alabama—The Federal Rules of Civil Procedure as a Guide

One approach some state courts have taken is to simply consider e-discovery issues by using the FRCP amendments as guidance. Alabama is one state that has used this approach.[69] Alabama's civil procedure rules do not address ESI.[70] However, since the Alabama civil procedure rules are modeled after the FRCP, looking to FRCP amendments and federal case law is not a new approach for Alabama courts.[71] So when an issue concerning e-discovery came before the Alabama Supreme Court in 2007, pursuant to a writ of mandamus, the court directed that "the trial court should consider the recent changes to the Federal Rules of Civil Procedure."[72] After considering the trial court's original decision, the Supreme Court noted that

> the trial court's exercise of its discretion over the discovery process requires some reference to standards designed to address the technology of information that is available, or that can be made available, on electronic media. Although neither the courts of this state nor the legislature has developed standards for information available on electronic media, such standards have been addressed in the federal court system.[73]

The court even went so far as to cite a federal case from the Northern District of Illinois as a specific example and as guidance of the factors the trial court should consider in making its decision.[74]

2. Florida—Case-by-Case Basis Under Common Law

Florida first tackled the issue of e-discovery in 1996.[75] One party requested to inspect the other's computer system, and the court, after noting that "[t]he discovery dispute in this case is clearly one for the nineties," found that "[t]he scope of our discovery rules is broad enough to encompass this request, but the circumstance of allowing

69. *See Ex parte* Cooper Tire & Rubber Co., 987 So. 2d 1090, 1104–06 (Ala. 2007).

70. *See* ALA. R. CIV. P. 26.

71. *See* ALA. R. CIV. P. 1, cmt. on 1973 adoption ("It has long been settled in this state that when the legislature adopts a federal statute or the statute of another state, it adopts also the construction which the courts of such jurisdiction have placed on the statute.").

72. *Ex parte Cooper Tire & Rubber Co.*, 987 So. 2d at 1105.

73. *Id.* at 1104.

74. *Id.* at 1105.

75. *See* Strasser v. Yalamanchi, 669 So. 2d 1142 (Fla. Dist. Ct. App. 1996).

entry into a party's computer system to attempt to access information no longer in the party's possession may not have been fully envisioned by the drafters of the rules."[76] The court's solution was to order the requesting party to show the likelihood of recovering the desired information and for the trial court to find that no lesser intrusive manners of discovery existed; if both requirements were fulfilled, "then the computer search might be appropriate" but "the order must define parameters of time and scope, and must place sufficient access restrictions to prevent compromising patient confidentiality and to prevent harm to defendant's computer and data bases."[77] Since this decision, Florida courts have decided e-discovery issues on a case-by-case basis applying common law and common sense.[78]

However, with regard to case law involving e-discovery, Florida is most known for its "2005 decision by the 15th Judicial Circuit in Palm Beach County, *Coleman Holdings, Inc. v. Morgan Stanley & Co.* . . . , which resulted in a $ 604.3 million verdict."[79] The facts were these:

> Morgan Stanley was accused of defrauding billionaire investor Ron Pearlman in a 1998 cash/stock deal. Pearlman made repeated document requests to obtain Morgan Stanley's internal e-mails relating to the deal. Despite the onset of litigation, Morgan Stanley had failed to preserve these e-mails, and Pearlman requested a jury instruction that the e-mails unveiled a scheme to defraud him. The court agreed and instructed the jury accordingly. The result: A combined jury verdict and attorneys' fees award amounting to over $1 billion.[80]

76. *Id.* at 1143–44.

77. *Id.* at 1145.

78. *See, e.g.*, Topp Telecom, Inc. v. Atkins, 763 So.2d 1197, 1199–1201 (Fla. Dist. Ct. App. 2000) (dismissing appeal of lower court's grant of plaintiff's discovery request over defendants' objection that they were overly broad and overreaching because defendants did not support their claims with an affidavit stating difficulty and cost of compliance with the requests; there was no evidence to support defendant's claim of unwarranted discovery); Menke v. Broward County Sch. Bd., 916 So. 2d 8, 10–12 (Fla. Dist. Ct. App. 2005) (analogizing a computer hard drive to a filing cabinet: "[W]e have never heard of a discovery request which would simply ask a party litigant to produce its business or personal filing cabinets for inspection . . . to see if they contain [useful] information . . . . Requests for production ask the party to produce copies of the relevant information in those filing cabinets . . . .") (emphasis omitted).

79. Robert H. Thornburg, *Electronic Discovery in Florida*, 80 FLA. B. J. 34, 34 (2006).

80. *Id.*

The Florida Court of Appeals later reversed the judgment on other grounds.[81]

3. Iowa—Amendment of Civil Procedure Rules

One unique approach to dealing with e-discovery is found in Iowa's civil procedure rules. On February 14, 2008, Iowa approved an amendment to its civil procedure rules that broadened the term "document" to include ESI: "Unless otherwise provided in a request for discovery, a request for the production of a 'document' or 'documents' shall encompass electronically stored information. Any reference in the rules in this division to a 'document' or 'documents' shall encompass electronically stored information."[82] As this rule change went into effect on May 1, 2008, there is no case law interpreting or applying this recent amendment as of yet. Iowa civil procedure rules also previously contained rules pertaining to discovery conferences; the amendment added provisions regarding ESI.[83] Discovery conferences under Iowa civil procedure rules occur only after one of the parties files a motion with the court containing various pieces of information, including "[a] statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion."[84]

4. North Carolina—Use of the North Carolina Rules of Civil Procedure with Amendments as Needed to Deal with E-Discovery Issues

In an often-cited, yet unpublished, opinion, one North Carolina court decided in 2006 to use its existing civil procedure rules for guidance and amend them when necessary.[85] The court decided, after examining the many different approaches state courts could take when deciding e-discovery issues, to look to the North Carolina Rules of Civil Procedure and amend them as needed to deal with e-

81. Morgan Stanley & Co. v. Coleman (Parent) Holdings, Inc., 955 So. 2d 1124,1126, 1132–33 (Fla. Dist. Ct. App. 2007).

82. IOWA R. CIV. P. 1.503(1).

83. IOWA R. CIV. P. 1.507(1).

84. IOWA R. CIV. P. 1.507(1)(g).

85. Analog Devices, Inc. v. Michalski, No. 01 CVS 10614, 2006 WL 3287382, at *11 (N.C. Super. Ct. Nov. 1, 2006).

discovery issues.[86] This approach was inspired by Maryland District Court Judge Paul W. Grimm's pre-FRCP amendment explanation of why simply looking to civil procedure rules already in place is a sound approach: "'[I]t . . . can be argued with some force that the Rule 26(b)(2) balancing factors are all that is needed to allow a court to reach a fair result when considering the scope of discovery of electronic records.'"[87] Judge Grimm reasoned that the pre-amendment FRCP provided enough guidance to answer and settle e-discovery issues, stating: "'Rule 26(b)(2) requires a court, *sua sponte*, or upon receipt of a Rule 26(c) motion, to evaluate the costs and benefits associated with a potentially burdensome discovery request. The rule identifies [several] factors to be considered . . . .'"[88] Following this reasoning, the North Carolina court rationalized that "[t]his approach is attractive because it allows the Court to integrate a broad range of relevant factors while staying within the general analytical framework already in place."[89] The court also acknowledged that North Carolina courts would likely use the Guidelines when applying the state's civil procedure rules.[90]

5. New York—The FRCP and Federal Case Law Are Instructive in Interpreting New York Rules of Civil Procedure (CPLR)

Arguably, the most important case in e-discovery case law came from New York's federal district courts.[91] New York's state courts, like many other state and federal courts, have looked to the trio of *Zubulake* cases when deciding e-discovery issues.[92] After acknowledging that "[e]lectronic discovery raises a series of issues that were never envisioned by the drafters of the [Civil Practice Rules and Laws, and that n]either the parties nor the Court have been able to find any cases decided by New York State Courts dealing with the issue of electronic discovery," the court in *Lipco Electric Corp. v. ASG Consulting Corp.* simply stated that "[r]aw computer data or

86. *Id.*

87. *Id.* at *7 (quoting Thompson v. U.S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 98 (D.Md.2003)).

88. *Id.* (quoting *Thompson*, 219 F.R.D. at 98).

89. *Id.*

90. *Id.* at *11.

91. *See* Zubulake v. UBS Warburg LLC (*Zubulake III*), 217 F.R.D. 309 (S.D.N.Y. 2003).

92. *See, e.g.*, Lipco Elec. Corp. v. ASG Consulting Corp., No. 8775/01, 2004 WL 1949062, at **7–8 (N.Y. Sup. Ct. Aug. 18, 2004).

electronic documents are discoverable."[93] In coming to that conclusion, the court cited three federal court cases, including *Zubulake III*.[94] Also, New York courts have read the state's civil procedure rules to require production of ESI despite no rule strictly requiring disclosure of ESI.[95] Additionally, a recent and significant case involving e-discovery stated: "While this court is not controlled by the [FRCP], it finds them and the caselaw interpreting them instructive and quite useful, especially in light of the absence of CPLR guidance."[96]

6. Texas—Amendment to the Texas Rules of Civil Procedure

Texas was the first state to amend its civil procedure rules to address ESI; in fact, Texas amended its civil procedure rules seven years before the FRCP amendments went into effect.[97] The Texas approach encompasses topics in one rule that the FRCP covered over several:

> To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot—through reasonable efforts—retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.[98]

"The purposes of the provision are to require requesting parties to be more specific when seeking electronic data and to clarify the form in which the producing party must provide responsive material."[99] And

93. *Id.* at **6–7.

94. *Id.* at *7.

95. N.Y. Civ. Prac. L. & R. § 3101 (McKinney 2006) (comm. notes).

96. Delta Financial Corp. v. Morrison, 819 N.Y.S.2d 908, 911 (N.Y. Sup. Ct. 2006).

97. *See* TEX. R. CIV. P. 196.4.

98. *Id.*

99. ALEX W. ALBRIGHT ET AL, 47 TEXAS PRACTICE SERIES, HANDBOOK ON DISCOVERY PRACTICE § 10.9 (2007).

while the Texas rule does not include the phrase "electronically stored information," it appears that "electronic data" could encompass all that is generally considered as ESI.[100] However, this is debatable because the Texas rules do not define "electronic data."[101] This issue remains unresolved as there is no case law interpreting this rule, which some suggest proves how successful this rule has been.[102]

V. ANALYZING THE VARIOUS APPROACHES

As discussed above, there are numerous routes Oregon could take in addressing the issues raised by ESI. However, not all of the above approaches appear suitable for Oregon, and this portion of the article analyzes each approach and how it does or does not fit within Oregon's existing civil procedure rules and their framework. From this analysis, the most appropriate approach for Oregon can be determined.

A. Federal Rules of Civil Procedure

Although several concerns were raised about including ESI in the list of topics discussed in pre-trial discovery conferences prior to the 2006 FRCP amendments,[103] the amendments were met with general approval, and even enthusiasm, at the notion of mandatory early discussion of ESI issues.[104] Moreover, the importance of early discussions about ESI outweighed any concerns.[105]

The Committee Notes from the 2006 amendments observe that "[w]hen the parties do anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution."[106] The Committee Notes reflect a flexibility of what could and/or should be discussed during pre-trial discovery conferences:

100. *See supra* note 7 and accompanying text.

101. *See generally* TEX. R. CIV. P.

102. Richard L. Marcus, *E-Discovery Beyond the Federal Rules*, 37 U. BALT. L. REV. 321, 334 (2008) ("Justice Nathan Hecht of the Texas Supreme Court, who played a role in the drafting of the Texas provision, was a member of the Advisory Committee . . . . And the report then from Texas was that there were no cases interpreting the Texas provision, perhaps proof of its success."). The authors' own research also failed to find Texas case law interpreting Rule 196.4.

103. *See* COMMITTEE REPORT, *supra* note 18, at C-23, C-24.

104. THE SEDONA PRINCIPLES, *supra* note 7, at 8 n.22.

105. *See* COMMITTEE REPORT, *supra* note 18, at C-23, C-24.

106. FED. R. CIV. P. 26(f) advisory comm. notes (2006).

> When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference.
> . . .
>
> The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case.[107]

Also underlying the 2006 amendments is the desire to help lower the cost of e-discovery, reduce delay in litigation, and reduce the burdens on both the producing and requesting parties.[108]

Another feature of the FRCP amendments is that the pre-trial discovery conference is not optional—only if discoverable materials are exempted under Rule 26(a)(1)(B) or the court orders otherwise are parties excused from having a pre-trial conference.[109] Although the amendments, as noted above, are flexible in some respects, the actual occurrence of the conference is not one of them.

With regard to the FRCP's suitability for Oregon, amending the ORCP to resemble the 2006 amendments would allow Oregon courts to look to federal law when interpreting and applying the ESI discovery rules. The Oregon Rules of Evidence are based on the Federal Rules of Evidence and Oregon courts often find Federal Court interpretations of the FRE persuasive.[110] This benefit is not novel; Oregon courts have looked to federal law when deciding issues of discovery because ORCP 36—prior to the 2006 FRCP amendments—closely resembled FRCP 26.[111] The ability to look to federal courts for guidance about how to decide ESI issues seems particularly beneficial to Oregon since, currently, there is no case law in Oregon

107. *Id.*

108. *See id.*

109. *See* FED. R. CIV. P. 26(f)(1).

110. *See, e.g.*, OR. R. EVID. 101 note (2003); State v. Stevens, 970 P.2d 215 (Or. 1998).

111. *See supra* note 28 and accompanying text; Wilson v. Piper Aircraft Corp., 613 P.2d 104, 106 (Or. App. 1980) (looking to federal court decisions when deciding issue regarding protective order); *see also* State *ex rel.* Thesman v. Dooley, 526 P.2d 563, 566 (Or. 1974) (quoting Richardson-Merrell, Inc. v. Main, 402 P.2d 746, 748 (Or. 1965)) (When adopting "the discovery statute it was 'the intention of the legislature . . . to bring Oregon procedural law into line with the modern and, in the opinion of many, including this Court, better view of the value of discovery in litigation, as exemplified in particular by the Federal Rules of Civil Procedure.'").

directly addressing ESI. However, adopting the entirety of the 2006 Amendments is not the route Oregon should take. While the goals and reasons behind the 2006 amendments are ones Oregon should strive for, adopting all of the 2006 changes arguably would create more problems than they would solve. The ORCP do not currently call for a pre-trial discovery conference of any kind, nor do they call for initial disclosure as do the FRCP.[112] In this respect, Oregon would need more drafting and guidance to amend the ORCP to encompass ESI if the 2006 amendments are simply "cut and pasted" into the ORCP. Additionally, the Council has proven reluctant when others have requested that it amend the ORCP to reflect the 2006 amendments.[113] This reluctance argues against adopting the 2006 amendments and also could indicate a deep-rooted desire not to follow the FRCP example in this area. But the strong ties between the ORCP and FRCP cut against simply dismissing the 2006 amendments in their entirety when deciding which sources to consult when amending the ORCP.

B. The Guidelines for State Trial Courts

Although the Guidelines specifically state that their intent is to reduce "uncertainty about how to address the differences between electronic and traditional discovery under current discovery rules,"[114]

> [t]he Guidelines should not be treated as model rules that can simply be plugged into a state's procedural scheme. They have been crafted only to offer guidance to those faced with addressing the practical problems that the digital age has created and should be considered along with the other resources.[115]

Currently, a handful of cases have used the Guidelines as they were intended,[116] and some states are looking to the Guidelines for assistance in amending current civil procedure rules or adopting new ones to address e-discovery.[117]

---

112. *See generally* OR. R. CIV. P. 36 (general provisions governing discovery).

113. *See supra* Part III.

114. GUIDELINES, *supra* note 13, at vii.

115. *Id.*

116. *See, e.g.*, Bank of America Corp. v. SR Int'l Bus. Ins. Co., No. 05-CVS-5564, 2006 WL 3093174 (N.C. Super. Ct. Nov. 1, 2006).

117. *See* Thomas Y. Allman & Ashish S. Prasad, *The Forgotten Cousin: State Rulemaking and Electronic Discovery*, *in* 766 ELECTRONIC DISCOVERY AND RETENTION GUIDANCE FOR CORPORATE COUNSEL 2007 317 (PLI Litig. & Admin. Practice, Course Handbook Series No. 766, 2007).

In one respect, the Guidelines offer a different approach from the FRCP, in part, because the Conference of Chief Justices recognized that not all states have mandatory pre-trial conferences as exist in federal courts.[118] Oregon, of course, does not have mandatory pre-trial discovery conferences.[119] As the Guidelines are intended to assist states in adapting to e-discovery, recognizing variations in the several states' discovery processes allows states to adopt pre-trial discovery conferences or agreements that are best suited to their already existing civil procedure rules.

However, the Guidelines and FRCP are not completely different. One similarity between the Guidelines and the FRCP is flexibility; Guideline 3(B)'s list of information a court could order parties to share regarding ESI provides several elements for a state court judge to select from, since "not all of these items may be needed in every case."[120] This flexibility acknowledges a very basic, yet very important reality: not all litigation is the same, and thus, will require different treatment.

The Guidelines appear more appropriate for Oregon to adopt—at least facially. As they were drafted for the purpose of aiding *state* courts, the Guidelines obviously lend themselves for state consideration more easily than does the FRCP. As this article has and is considering more than just the Guidelines, any suggestion that Oregon adopt e-discovery rules in tune with the Guidelines does not run counter to their stated purpose.[121] The Guidelines' recognition that not all states require pre-trial discovery conferences[122] also makes them attractive to states looking to amend their civil procedure rules, especially to Oregon, as the state has a relatively small bar membership[123] that has helped create a "collegial bar and bench."[124] Given the general atmosphere of the Oregon bar and bench, encouraging counsel to discuss e-discovery issues early on in litigation and ordering parties to exchange information only if they

118. GUIDELINES, *supra* note 13, at 3.

119. *See* Or. R. Civ. P. 36.

120. GUIDELINES, *supra* note 13, at 3.

121. *See supra* note 115 and accompanying text.

122. GUIDELINES, *supra* note 13, at 3 (emphasis added).

123. Oregon State Bar, About the Oregon State Bar, http://www.osbar.org/osbinfo.htm (last visited Nov. 22, 2008) (the Oregon bar has approximately 12,500 active members, 1,900 of whom reside out of state).

124. Richard J. Vangelisti, *Professional Strategies for Dealing with Others' Conduct*, 68 OR. ST. B. BULL. 30, 30 (May 2008).

cannot reach an agreement better reflects this reality. This approach also is more suited to Oregon's current civil procedure rules from a drafting point of view; little modification to the Guidelines is required for them to fit into Oregon's existing rules. However, the Guidelines do not come with a body of case law for Oregon courts to consult when interpreting and answering e-discovery questions. Arizona's civil procedure rules reference the Guidelines in committee notes,[125] but appear more heavily influenced by the FRCP.[126] While this drawback alone should not deter Oregon from adopting the Guidelines' suggested language, it is an important factor in deciding on an approach.

C. The Sedona Principles

Originally published in 2004, the second edition released in 2007 "includes updates throughout the Principles and Comments reflecting the new language found in the amended Federal Rules and advances in both jurisprudence and technology."[127] While the 2006 amendments to the FRCP arguably called the importance of the Principles into question, "the amended rules and the accompanying Committee Notes . . . do not govern procedure in state court or in alternative dispute resolution forums . . . [and they] have highlighted the many areas of electronic discovery in which there is continued and growing need for guidance."[128]

Similar to the Guidelines, the Principles appear more adaptable to existing state civil procedure rules than the FRCP. The pre-trial discovery conference is not required by the Principles; rather, it is strongly suggested.[129] In this regard, the Principles appear to take on an advisory role similar to the Guidelines and fill one of the areas where the FRCP amendments left room for such guidance. Also comparable to the Guidelines, the Principles incorporate a list of potential topics for parties to discuss during discovery conferences.[130] Additionally, all three approaches aim at expediting litigation and avoiding unnecessary disputes and motions from the outset.

125. ARIZ. REV. STAT. ANN. § 16-16(b) comm. notes (2008).

126. *Id.*; ARIZ. REV. STAT. ANN. § 16-26(b) (2008).

127. THE SEDONA PRINCIPLES, *supra* note 7, at i.

128. *Id.* at iv.

129. *See id.* at ii (Principle 3 says "parties should confer" rather than something akin to "parties are required to confer.").

130. *Id.* at 21 cmt. 3.a.

One way the Principles differ from both the FRCP and Guidelines is that the Principles admit that the pre-trial discovery conferences will be only as successful as the parties want or allow them to be.[131] Although the FRCP and Guidelines arguably address this reality indirectly through sanctions,[132] the Principles acknowledge that if parties are dishonest, ill-prepared, and/or exaggerate their positions, the usefulness of a pre-trial conference is diminished or even undermined.[133] While this recognition of potential failure could send a pessimistic and negative message to litigating parties, more likely it was intended as a reminder that litigation is at its heart an adversarial process, and despite the intentions of the FRCP amendments, the Guidelines, and the Principles, this antagonistic nature may not always be overcome with a pre-trial discovery conference.

Like the Guidelines, the Principles appear facially more suitable to Oregon than the FRCP. The Principles also were created specifically for the states, for guidance in handling e-discovery issues. Also like the Guidelines, the Principles allow for flexibility when it comes to pre-trial discovery conferences, as they direct that parties "*should* confer" rather than "*shall* confer."[134] This flexibility appears suitable to Oregon given its current civil procedure rules and the number of active attorneys in its "collegial bar and bench."[135] Additionally, the Principles are flexible with respect to the topics of discussion in the pre-trial discovery conference, which could be useful for Oregon attorneys. With Oregon's smaller and generally friendly bar,[136] attorneys who are familiar with each other may not need to repeat discussion of issues resolved in previous litigation.

The Principles' acknowledgement that the efficacy of a pre-trial discovery conference depends on the parties is also fitting for Oregon because it serves as a reminder that, even though Oregon's bar is smaller and collegial,[137] litigation is adversarial; therefore, depending on litigants' desires and motives, complete cooperation during pre-trial conferences is not mandatory beyond an obligation to discuss

131. *See supra* note 63 and accompanying text.

132. *See* FED. R. CIV. P. 37; GUIDELINES, *supra* note 13, at 10–11.

133. *See* THE SEDONA PRINCIPLES, *supra* note 7, at 20 cmt. 2.e.

134. *Id.* at ii (emphasis added).

135. Oregon State Bar, *supra* note 123; Vangelisti, *supra* note 124, at 30.

136. *Id.*

137. *Id.*

issues in good faith.[138] However, as with the Guidelines, there is little to no case law to turn to for guidance should Oregon adopt the Principles' approach. While Maryland's civil procedure rules look to the Principles for guidance,[139] this will not provide Oregon with a body of case law comparable to the FRCP, and therefore, the Principles will likely not be as useful in this respect. Another aspect of the Principles that is not very appealing to Oregon is that the Sedona Conference has already released a second edition of the Principles. While the second edition is intended to and does reflect the 2006 FRCP amendments, this fact could argue against following the Principles' suggested approach given that the Council is already reluctant to modify Oregon's civil procedure rules; basing the ORCP amendments on a source that has seen two editions in three years[140] may warrant—in the very least—caution.

D. The Uniform Rules

The NCCUSL, as noted above, promulgated a set of uniform rules that "mirrors the spirit and direction of the recently adopted amendments to the [FRCP]" because, in its "Drafting Committee's judgment[,] the significant issues relating to the discovery of information in electronic form had been vetted during the Federal Rules amendment process."[141] The NCCUSL adopted Uniform Rule 3 based on the "nearly universal agreement that early attention to issues relating to the discovery of [ESI] . . . facilitates orderly discovery."[142] The Rule does not specifically require counsel's familiarity with his/her client's electronic information storage system and its characteristics, but "counsel's meaningful participation in the conference and compliance with discovery obligations require that counsel promptly and diligently familiarize themselves with their clients' information systems to the extent they may be relevant to the issues in dispute."[143]

138. THE SEDONA PRINCIPLES, *supra* note 7, at 21. Therefore, if parties genuinely do not agree about e-discovery issues, there is not a requirement that they continue discussions (at least at a pre-trial conference) to resolve those issues at all costs.

139. *See, e.g.*, MD. CODE ANN., RULES § 2-402 comm. notes (West 2008).

140. *See* THE SEDONA PRINCIPLES, *supra* note 7, at i.

141. UNIFORM RULES, *supra* note 14, at 2; *see supra* text accompanying note 14.

142. UNIFORM RULES, *supra* note 14, at 4.

143. *Id.* at 5.

As with the Guidelines and Principles, the Uniform Rules have a built-in flexibility that appears more adaptable to existing state civil procedure rules. Parties are allowed to agree not to have a pre-trial discovery conference and are also allowed to draft a discovery plan as they see fit; there is no strict requirement that parties meet.[144] The Uniform Rules, however, do require a pre-trial discovery conference only if it is "reasonably likely" that ESI will be involved in litigation.[145] This allows states to fit the pre-trial discovery conference requirement into already-existing civil procedure rules; if a pre-trial conference is already required, parties can simply add ESI to the list of discussion topics. Conversely, if a conference is not already required, states can choose to require a pre-trial discovery conference only when ESI is likely involved. Based on these differences, this is one area where the NCCUSL saw fit to modify the FRCP amendments to better suit existing state civil procedure rules, despite the fact that the Uniform Rules admittedly closely mirror the FRCP amendments.

One unique feature of Uniform Rule 3 is that it recognizes that not all the parties involved in litigation will actually be involved from the beginning of the lawsuit.[146] Thus, this rule may require more than one pre-trial discovery conference.[147] However, even this aspect of the Uniform Rules has a cost-reducing and time-efficient prong:

> To avoid unnecessary expense associated with additional conferences, plans and reports, to the extent that the joinder of additional parties does not affect plans or reports relating to previously joined parties, this rule should be applied by the parties and the court in a "common sense" manner that permits the parties to incorporate by reference into later plans and reports those elements of earlier plans and reports that are not affected by the joinder of additional parties.[148]

While this acknowledgement may not seem like a largely important issue to address in the realm of e-discovery, it provides yet another example of how the Uniform Rules and the other approaches examined thus far were drafted with time and cost efficiency in mind.

144. *Id.* at 4.
145. *Id.*
146. *Id.* at 5.
147. *Id.*
148. *Id.*

Since the Uniform Rules are essentially a "state friendly" version of the FRCP 2006 amendments,[149] this approach appears to offer a compromise to states that, like Oregon, drafted FRCP-influenced civil procedure rules but did not incorporate every aspect of the FRCP. The Uniform Rules are heavily influenced by, and in some parts mirror, the FRCP; consequently, it stands to reason that if Oregon chose to amend its civil procedure rules and use the Uniform Rules for guidance, its courts would still have the entire body of federal case law to consult for guidance. While it is questionable how many answers federal case law would provide in a situation where a state adopted rules that varied from the FRCP, the influence of the FRCP on both the Uniform Rules and a state like Oregon's civil procedure rules still allows federal case law to guide state courts on e-discovery issues. And as with the Guidelines and Principles, the Uniform Rules' flexibility with regard to pre-trial discovery conferences aligns with the Oregon bar and bench's collegial attitude, as the Rules allow parties to agree not to meet and confer.[150]

While the Uniform Rules require that parties meet and confer again when additional parties join litigation, this aspect of the Uniform Rules also allows parties to elect not to attend the additional meetings if their presence is not needed.[151] One quality of the Uniform Rules that is questionable for Oregon is the required discovery plan when it is reasonably likely that ESI will be involved in litigation. Oregon's current civil procedure rules do not call for anything resembling a discovery plan; however, given the complexity of ESI and e-discovery, it is perhaps desirable to require parties to create a discovery plan. Notwithstanding this, it is also likely that such a requirement is unnecessary since it is probable—and, frankly, smart lawyering—that counsel will confirm any agreements they reach regarding e-discovery in a writing and that such a writing will contain information similar to a discovery plan. The discovery plan requirement also reflects the FRCP's influence on the Uniform Rules, in that it requires parties to draft discovery plans whether ESI is likely involved in litigation or not.[152]

149. *See supra* note 14 and accompanying text.

150. *See supra* notes 64, 123–124 and accompanying text.

151. *See supra* note 148 and accompanying text.

152. *See* FED. R. CIV. P. 26(f)(2).

E. Other State Approaches

1. Alabama, North Carolina, New York, and Florida

The case law approach followed by some states that lack civil procedure rules addressing ESI allows courts in those states to decide e-discovery issues within the construct of already-existing rules without taking excessive liberties. However, it can also lead to fact-specific and limited holdings that could prove detrimental to Oregon. Such cases would likely leave Oregon courts ill-equipped to cope with a large number of possible e-discovery issues that could come before them. Compounding this potential detriment is the fact that, normally, the highest courts hear few cases and those that they do hear tend to be extreme examples of issues that lower courts face. The result is a patchwork of rules and interpretations—something the FRCP amendments and other approaches enumerated above sought to avoid, and something Oregon should avoid as well. This approach might be the best for courts to take if their state has not amended or otherwise offered guidance for how to approach e-discovery issues, but the vast potential for mixed and disastrous results should spur Oregon to take action before its courts are left to their own devices. Even if a court decides to follow the FRCP amendments and look to the already existing body of case law that has developed in the federal courts, there is no guarantee that the court will closely follow the federal example and could, instead, prevent future courts from referring to federal precedent. Also, although state courts can look to federal case law for guidance, not many have done so, contrary to what scholars and commentators expected.[153]

Using case law to decide e-discovery issues is especially problematic for Oregon given the state's Supreme Court decision in *Portland General Electric Co. v. Bureau of Labor and Industries*.[154] Commonly known as *PGE v. BOLI*, this case established how Oregon courts should interpret statutes.[155] The Oregon Supreme Court has applied this interpretation method to the ORCP, characterizing the

153. Renee T. Lawson, *I Know the Federal eDiscovery Rules, Now What About the States?*, *in* 766 ELECTRONIC DISCOVERY AND RETENTION GUIDANCE FOR CORPORATE COUNSEL 2007 357, 364 (PLI Litig. & Admin. Practice, Course Handbook Series No. 766, 2007).

154. 859 P.2d 1143 (Or. 1993).

155. *Portland Gen. Elec. Co.*, 859 P.2d at 1145–47.

rules as statutes.[156] The goal of statutory interpretation under *PGE v. BOLI* is to discern the intent of the legislature.[157] Because the Council promulgates the civil procedure rules, the Oregon Supreme Court stated that with the ORCP, "unless the legislature amended the rule at issue in a particular case in a manner that affects the issues in that case, the Council's intent governs the interpretation of the rule."[158] To determine "legislative" intent, Oregon courts first look at the statutory provision itself and use "rules of construction of the statutory text that bear directly on how to read the text" including "the rule that words of common usage typically should be given their plain, natural, and ordinary meaning."[159] It is at this first level of interpretation that Oregon courts would have problems construing the term "documents," as it is used in ORCP 36, to include various forms of ESI.

Merriam-Webster's Online Dictionary defines "document" as "2a: a writing conveying information . . . ; 3: a computer file containing information input by a computer user and usually created with an application (as a word processor)"[160] While this definition includes computer files such as Microsoft Word documents, it is questionable whether this was the common understanding of "document" in 1980, when the Council last amended ORCP 36.[161] However, even assuming "document" included computer files when the Council last amended ORCP 36, this understanding of the term still does not include several forms of ESI. One excluded form of data is information contained on cell phones; today's cell phones are capable of taking pictures, and text messaging is so common some states have banned "texting" while driving.[162] Such files are not

156. State v. Arnold, 879 P.2d 1272, 1277 (Or. 1994).

157. *Portland Gen. Elec. Co.*, 859 P.2d at 1145.

158. Waddill v. Anchor Hocking, Inc., 8 P.3d 200, 203 n.2 (Or. 2000).

159. *Portland Gen. Elec. Co.*, 859 P.2d at 1146. "If, but only if, the intent of the legislature is not clear from the text and context inquiry, the court will then move to the second level, which is to consider legislative history to inform the court's inquiry into legislative intent." *Id.* "When the court reaches legislative history, it considers it along with text and context to determine whether all of those together make the legislative intent clear." *Id.* "If, after consideration of text, context, and legislative history, the intent of the legislature remains unclear, then the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Id.*

160. MERRIAM-WEBSTER'S ONLINE DICTIONARY "document," *available at* http://www.merriam-webster.com/dictionary/document (last visited Nov. 22, 2008).

161. *See* OR. R. CIV. P. 36.

162. WASH. REV. CODE § 46.61.668 (2007) ("[A] person operating a moving motor vehicle who, by means of an electronic wireless communications device, other than a voice-

contained on a computer, and therefore, according to Merriam-Webster's, are not included in the term "document." If an Oregon court held that text messages and cell phone pictures are included in the term, such a holding would run counter to *PGE v. BOLI*. Another form of ESI that would not be discoverable as a "document" is metadata, which "is information about other data, like when and who generated the data, whether and how the data was copied or transmitted, and when and what was changed."[163] While metadata is associated with a computer file, it is not technically a word file since the information metadata contains is not "input by a computer user" but is attached to a document, sometimes by the word processor itself.[164] It would stretch the "plain, natural, and ordinary meaning" of "document" to encompass metadata. Therefore, despite what the Council believes,[165] "document" as it is currently used in ORCP 36 does not encompass all of what is commonly understood as ESI, and Oregon courts would rebuff precedent to hold that it does.

Obviously, those states that look to the FRCP for guidance on how to deal with e-discovery issues will find the approach more effective and efficient when the state's civil procedure rules are modeled after or similar to the FRCP from the start. While Oregon does fall into this category,[166] the same risks identified above apply and appear to outweigh any benefits associated with molding existing civil procedure rules to mirror the FRCP on a case-by-case basis.

While not all states that find that their existing civil procedure rules are broad enough to encompass e-discovery will come to find *Coleman*-esque cases on their books, Florida does serve as a cautionary tale of how existing rules and court re-interpretations and modifications of those rules may lead to unintended consequences and results.[167] And for some states, such court re-interpretations and modifications could be actions more appropriate for the legislature.

activated global positioning or navigation system that is permanently affixed to the vehicle, sends, reads, or writes a text message, is guilty of a traffic infraction.").

163. Shilling, *supra* note 9, at 209–10.

164. *See id.* at 210 ("Metadata exists at various levels, often being invisible or inaccessible to most users, and there may be many hundreds of pieces of metadata associated with one electronic document.").

165. Sept. 15, 2007 Meeting Minutes, *supra* note 39.

166. *See supra* note 111 and accompanying text.

167. *See supra* text accompanying notes 79–81.

2. Iowa and Texas

Iowa's 2008 civil rule amendments avoid the problem of stretching the term "document" by expressly stating that it includes ESI.[168] This approach answers the question of whether ESI is discoverable under Iowa's civil procedure rules and allows Iowa courts to apply pre-amendment discovery case law without—in theory—altering it to more readily apply to ESI. This latter quality provides Iowa courts with a body of law to look to for guidance: its own precedent. Because "document" was broadened, but not otherwise altered in terms of its previous understanding and application, the principles and reasoning of prior cases remain good law and a source of guidance. Additionally, Iowa's scope of discovery rule is nearly identical to FRCP 26(b)(1),[169] and Iowa courts have looked to the FRCP when deciding discovery issues.[170] This, therefore, allows Iowa to look to federal case law when deciding discovery issues. Although Iowa's amendments differ from the 2006 FRCP amendments, the same material (ESI) is discoverable under both sets of civil procedure rules and thus sets the stage for federal guidance by analogy, at the very least.

Iowa's approach appears well-suited for Oregon. As the Council is reluctant to amend Oregon's civil procedure rules and, contrary to its belief, "document" does not encompass all forms of ESI, adopting a provision that expressly expands the meaning of "document" to include ESI strikes a compromise between those seeking amendments in line with the FRCP and those who believe no change is necessary. If Oregon did follow in Iowa's footsteps, the most substantial modification to the civil procedure rules would involve adding a provision about pre-trial discovery conferences. Oregon could even follow Iowa's approach for pre-trial discovery conferences since Iowa does not require such conferences, but allows parties to file a motion to request that the "court . . . direct the attorneys for the parties to appear before it for a conference on the subject of discovery."[171] Such a provision would be similar to Oregon's rule pertaining to protective orders to limit the extent of disclosure, because in both instances, a party motions the court and the court decides whether to

168. *See* IOWA R. CIV. P. 1.503(1).

169. *Compare id. with* FED. R. CIV. P. 26(b)(1).

170. *See, e.g.*, Gordon v. Noel, 356 N.W.2d 559, 564 (Iowa 1984).

171. IOWA R. CIV. P. 1.507(1).

issue an order.[172] Additionally, because Iowa's and the FRCP's scope of discovery language is nearly identical, Oregon would not be modeling its e-discovery civil procedure rules after an example that has an entirely different basis than its own. Thus, Oregon would not place itself in the potential dilemma of losing the ability to look to its own and/or federal precedent for guidance.

Of the above sections enumerating state approaches, the section on Texas is the only section with rules for e-discovery, in place for more than a year, that did not refer to any cases—in fact, it appears that no case law interpreting Texas's e-discovery civil rule presently exists.[173] In recent years, two states have amended their civil procedure rules to contain nearly identical language as Texas's with regard to e-discovery.[174] Surprisingly, neither Mississippi nor Idaho appears to have any case law interpreting their amended civil procedure rules either.[175] Accordingly, one could argue that states with e-discovery rules similar to Texas's hear fewer court cases—at least at the appellate level—with e-discovery issues. And while the Mississippi and Idaho amendments are fairly recent, the Texas amendments went into effect in January 1999—more than nine years ago.

However, the success of Texas's drafting calls into question its suitability for Oregon. While Texas's discovery rules are similar to the FRCP,[176] the use of "electronic data" rather than "ESI" or simply broadening the scope of "document" could be reason alone to keep Oregon from using this approach. While "electronic data" and "ESI" are similar terms, there is no indication that they encompass the same information since, as mentioned above, there is no Texas case law interpreting "electronic data." Therefore, it is questionable whether, if Oregon did follow the Texas approach, its courts would have any

172. *See* OR. R. CIV. P. 36(C) ("Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . .").

173. *See supra* note 102 and accompanying text.

174. *See* MISS. R. CIV. P. 26(5); IDAHO R. CIV. P. 34.

175. The authors must acknowledge that Idaho's amendments only went into effect on January 1, 2008 and it is therefore too early for any interpretive case law to exist. IDAHO R. CIV. P. 34. However, Mississippi's amendments became effective on May 29, 2003. MISS. R. CIV. P. 26 comm. notes.

176. *See, e.g.*, *In re* Dana Corp., 138 S.W.3d 298, 303 n.1 (Tex. 2004) ("Like our Rule 192.3(a), the federal rules define the general scope of discovery as 'any matter, not privileged, that is relevant to the claim or defense of any party . . . .'").

guidance in interpreting and applying this discovery rule. Oregon could look to federal case law for guidance, but its courts would have to decide whether such a step is even appropriate given Texas's divergence from the FRCPs in this area. While Texas had no way of knowing what the federal rules' approach to e-discovery would be when it amended its rules in 1999—and the state should be applauded for amending its rules seven years before the federal amendments went into effect—this departure is enough to raise serious doubt about whether looking to federal case law for e-discovery guidance is appropriate.

VI. RECOMMENDATION

After examining the above examples of how Oregon could approach ESI when amending its civil procedure rules—it appears that many of the approaches could suit Oregon. While the goals of each approach appear the same or at least very similar, there are subtle differences between each example. It is these differences and the current status of the ORCP that lead to the recommendation that Oregon should follow Iowa's approach with regard to both unquestionably adding ESI to the list of discoverable materials and its approach to pre-trial discovery conferences.

The authors recommend Iowa's approach because it presents a workable compromise based on the current state of the ORCP. The Council has decided that the current meaning of "document" in the ORCP is broad enough to encompass ESI,[177] but as illustrated above, it is unlikely Oregon's courts would come to the same conclusion.[178] This compromise—amending the ORCP discovery rules to expressly encompass ESI, but not adopting the 2006 amendments verbatim—gives those on either side of the debate of whether to amend the ORCP something they wanted. Adding a provision to ORCP 36 stating that, unless otherwise provided, the term "documents" encompasses ESI leaves courts and attorneys with no question as to whether some forms of ESI are discoverable, yet the added provision still leaves the ORCP largely unchanged. As mentioned above with regard to Iowa case law,[179] this suggested amendment leaves current Oregon discovery case law mostly undisturbed and available for

177. *See supra* notes 36–42 and accompanying text.

178. *See supra* notes 154–165 and accompanying text.

179. *See supra* Part V.E.2.

guidance when making e-discovery decisions; this recommendation does not propose new terminology, but merely expands the scope of pre-existing language. Because this is the case, there is little reason to think that pre-existing discovery rules and case law are altered by this expansion. Also, federal case law is another source of guidance still available given the similarity between Iowa, the ORCP, and the FRCP's discovery language. Thus, Oregon would not be modeling its civil rule amendments on a set of rules that do not share a common foundation or influence that would arguably limit or completely prevent looking to federal case law for guidance. Additionally, following Iowa's example suits Oregon because, while the ORCP are similar to the FRCP, they are not completely identical.[180] Therefore, adopting the 2006 amendments verbatim would not fit as nicely as Iowa's ESI language, especially since the 2006 FRCP amendments are prefaced on the pre-existing structure of the FRCP. Further, since some provisions of Oregon's constitution are "substantially copied from" other states' constitutions,[181] using another state's approach and language when modifying the ORCP is not unprecedented or a far-reaching suggestion.

The authors also recommend modeling a pre-trial discovery conference rule after Iowa's because it would fit within the existing ORCP and is suited for Oregon's small and collegial state bar.[182] Iowa's pre-trial discovery conference allows a court to order the parties to appear before it after one party has filed a motion requesting such a conference.[183] A party's motion must include specific information:

180. *Compare* FED. R. CIV. P. 24(a) (A court must allow a party to intervene when, upon filing a motion, the party has the unconditional right to intervene pursuant to federal law or "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."), *with* OR. R. CIV. P. 33(b) ("At any time before trial, any person shall be permitted to intervene in an action when a statute of this state, these rules, or the common law, confers an unconditional right to intervene.").

181. Tuel v. Gladden, 379 P.2d 553, 554–55 (Or. 1963).

182. *See* Vangelisti, *supra* note 124, at 30; Oregon State Bar, *supra* note 123. Iowa's civil procedure rules also states that "[e]ach party and that party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party." IOWA R. CIV. P. 1.507(2).

183. IOWA R. CIV. P. 1.507(1) ("At any time after commencement of an action, the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party . . . .").

> The court shall [direct the parties to appear before it] upon motion by the attorney for any party if the motion includes:
>
> a. A statement of the issues as they then appear.
>
> b. A proposed plan and schedule of discovery.
>
> c. Any limitations proposed to be placed on discovery.
>
> d. Any issues relating to the discovery and preservation of electronically stored information, including the form in which it should be produced.
>
> e. Any issues relating to claims of privilege or protection as trial-preparation material, including (if the parties agree on a procedure to assert such claims after production) whether to ask the court to include their agreement in an order.
>
> f. Any other proposed orders with respect to discovery.
>
> g. A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.[184]

The last required piece of information—a statement of reasonable efforts to reach an agreement with the opposing party—is especially suited to Oregon, because it limits a party's ability to motion a court for a pre-trial discovery conference as a last resort if parties do not reach an agreement on their own. Meet-and-confer negotiations are a good idea under any circumstance, but meet and confer may be essential when electronic discovery is involved. This allows parties to approach litigation and conferring with opposing counsel in essentially the same manner as they do now, but with a constant reminder that one party can motion for the court's involvement if e-discovery requests and talks break down. Iowa statutes provide that, once the conference occurs, "the court shall enter an order tentatively identifying the issues for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action."[185]

The only needed modification to Iowa's pre-trial discovery conference approach, before Oregon should adopt it, is to add language limiting these pre-trial discovery conferences to litigation where ESI is involved or where it is reasonably foreseeable that ESI will be involved. This alteration to Iowa's method is necessary to fit the pre-trial discovery conference into Oregon's civil procedure rules

184. *Id.*

185. IOWA R. CIV. P. 1.507(3).

because the ORCP currently do not require a pre-trial conference of any kind; while such a requirement might be beneficial to have in all litigation, such an argument is beyond the scope of this article. Keeping in mind the Council's reluctance to modify the ORCP at all, recommending the availability of pre-trial discovery conferences to parties litigating a case involving ESI reflects a compromise. Although some might argue that pre-trial conferences in any litigation are unnecessary and burdensome, the benefits associated with parties meeting and conferring early when litigation involves ESI are too large to ignore.[186]

Following Iowa's approach is recommended over the other approaches listed above—specifically the Guidelines, Principles, and Uniform Rules—because those approaches would require too many modifications to the current ORCP. One of the principal appeals of Iowa's approach is that it requires few changes to the ORCP and strikes a compromise between not amending the ORCP and adopting the 2006 FRCP amendments. Although some might argue that giving such weight to the ability to compromise is misguided, it is a realistic consideration given the Council's current stance on this issue. Because the Council has considered and dismissed amending the ORCP for the last two biennia, recommending an approach that strikes a balance between no amendments and adding entirely new provisions and language to the ORCP appears most appropriate. Additionally, the majority of states that have amended their civil procedure rules are incorporating the 2006 FRCP amendments.[187] While some states have looked to approaches other than the FRCP, their amendments are still most strongly influenced by the FRCP.[188] Therefore, Oregon would not have the benefit of persuasive case law to look to for guidance in applying their amended rules if the state chose to follow the Guidelines, Principles, or Uniform Rules.

186. *See infra* Part VII.A-B.

187. Thomas Y. Allman, *State by State Summary Report of E-Discovery Efforts*, DISCOVERY RESOURCES, http://www.discoveryresources.org/case-law-and-rules/state-rules/annotated-list-of-state-rules-of-civil-procedure/ (last visited Nov. 23, 2008).

188. *See, e.g.*, SANDRA F. HAINES, STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, NOTES OF PROPOSED RULES CHANGES 3–4, 17–18 (2007), *available at* http://www.courts.state.md.us/rules/reports/158thReport.pdf (Maryland looked to the Guidelines, Principles, and Uniform Rules as well as the 2006 amendments but still based their e-discovery amendments on the FRCP); ARIZ. REV. STAT. ANN. § 16-16(b) comm. notes (2008) (citing the Guidelines in committee notes but referring only to the Guidelines' suggested list of factors a court should consider when limiting disclosure requested information).

VII. BENEFITS OF AMENDING THE ORCP

To illustrate why Oregon should amend its civil procedure rules, this article now addresses the benefits associated with early meet-and-confer conferences between council in litigation involving ESI. Potential hazards and pitfalls exist when parties do not meet early in litigation; some of them are described below.

A. Costs

Litigation can be very expensive. While such a statement is not surprising, it is nonetheless true. ESI can exponentially increase the expense. As is commonly cited,

> the sheer volume of such data, when compared with conventional paper documentation, can be staggering. A floppy disk, with 1.44 megabytes, is the equivalent of 720 typewritten pages of plain text. A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes; each terabyte represents the equivalent of 500 billion typewritten pages of plain text.[189]

Given the electronic equivalents of paper documents, it is not surprising how quickly the costs of e-discovery can accumulate.

The sources of such costs vary. One source is the cost of computer experts to recover "lost" or deleted information; "[w]hile companies retain vast amounts of ESI, much of it is stored for disaster-recovery purposes" so "'[r]etrieving computer based records or data is not the equivalent of getting the file from a file cabinet or archives.'"[190] These costs include not only paying such individuals for their services, but also the time and effort spent retrieving the information. In many cases, these costs can be substantial. New York's landmark *Zubulake* cases illustrate such costs:

> [Defendant] spent $11,524.63, or $2,304.93 per tape, to restore the five back-up tapes. Thus, the total cost of restoring the remaining seventy-two tapes extrapolates to $165,954.67.
>
> . . . .
>
> The final question is whether this result should apply to the entire cost of the production, or only to the cost of restoring the backup

189. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446 (2004).

190. Mazza, *supra* note 4, at para. 6 (quoting Lipco Elec. Corp. v. ASG Consulting Corp., No. 8775/01, 2004 WL 1949062, at *8 (N.Y. Sup. Ct. 2004)).

> tapes. The difference is not academic—the estimated cost of *restoring and searching* the remaining backup tapes is $165,954.67, while the estimated cost of *producing* them (restoration and searching costs plus attorney and paralegal costs) is $273,649.39 ($19,003.43 for the five sample tapes, or $3,800.69 per tape, times seventy-two unrestored tapes), a difference of $107,694.72.[191]

However, as large as they may be, "[c]osts cannot be calculated solely in terms of the expense of computer technicians to retrieve the data but must factor in other litigation costs, including the interruption and disruption of routine business processes and the costs of reviewing the information."[192]

Another source of costs are attorneys themselves: "[a]ssuming it takes a skilled attorney using available technology an average rate of one hour to review 100 documents, it would take him or her 5 years to review 1 million documents working 2,000 hours per year."[193] An additional cost associated with attorneys is that of understanding the nature of e-discovery. In order to effectively and intelligently discuss e-discovery issues—at a pre-trial discovery conference or elsewhere—an attorney should understand the nature of his/her client's technology systems.[194] This includes more than knowing whether a client uses a Dell or HP laptop. An attorney should understand how potentially discoverable ESI is stored and the accessibility of such information. Such knowledge most likely means additional education and/or personnel—an attorney or an information technology engineer, for example—to the practice's payroll who understands technology and its intricacies enough to efficiently litigate e-discovery matters. Parties must review documents to determine if they are relevant, if they contain privileged information or work product information, or if they contain duplicate information.[195] The time and cost for an attorney or group of attorneys to accomplish this task can be enormous. It is conceivable

191. Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280, 287, 289–90 (S.D.N.Y. 2003).

192. THE SEDONA PRINCIPLES, *supra* note 7, at 30 cmt. 2.b.

193. Mazza, *supra* note 4, at para. 6.

194. Shilling, *supra* note 9, at 215.

195. *See* COMMITTEE REPORT, *supra* note 18, at C-24, C-25 ("During the study of electronic discovery, the Committee learned that reviewing [ESI] for privilege and work product protection adds to the expense and delay, and the risk of waiver, because of the added volume, the dynamic nature of the information, and the complexities of locating potentially privileged information.").

that the costs could be greater than the amount in controversy. Part of the reason it would take the experienced attorney mentioned above five years to review one-million documents is that the documents, in addition to preparing them for delivery to the opposing party, are scanned for material that is not discoverable.[196]

Parties can help limit some of the costs of ESI discovery if they meet and confer early in litigation; in fact, this is one of the principle goals of the FRCP amendments and other approaches enumerated above.[197] Parties can discuss what information is sought in a discovery request and whether such information can be found in other sources that would be less time-consuming or laborious to search and produce.[198] Parties can also discuss the nature of potentially-discoverable ESI so that they can decide whether the costs of production outweigh the value of the information.[199] The form of production is another topic parties can discuss;[200] this can avoid costly time delays. For example, not all law offices use the same operating system (such as Windows, Linux, Mac OS X) or word processors (such as Word, Word Perfect); therefore, communication about what format and storage device (e.g., CD-ROM, flash drive) to produce e-discovery requests in could prove to be a simple but effective cost saver. In addition, should the production be in hard copy or electronic form or both? Yet another topic parties could discuss is whether the costs of e-discovery should shift from one party to another. The FRCP amendments included a provision that allows for cost-shifting.[201] Cost-shifting is an important consideration that allows parties to consider a number of factors, such as the *Zubulake III* court did:

> 1. The extent to which the request is specifically tailored to discover relevant information;
>
> 2. The availability of such information from other sources;

196. *See* Mazza, *supra* note 4, at para. 6.

197. *See, e.g.*, FED. R. CIV. P. 26(b) advisory comm. notes (2006).

198. *Id.*

199. *Id.*

200. *See, e.g.*, FED. R. CIV. P. 34.

201. FED. R. CIV. P. 26(b)(2)(C)(iii).

> [T]he court must limit the frequency or extent of discovery . . . if it determines that: . . . the burden or 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 issues.

Id.

> 3. The total cost of production, compared to the amount in controversy;
>
> 4. The total cost of production, compared to the resources available to each party;
>
> 5. The relative ability of each party to control costs and its incentive to do so;
>
> 6. The importance of the issues at stake in the litigation; and
>
> 7. The relative benefits to the parties of obtaining the information.[202]

Although *Zubulake III* also stated that courts should not consider cost-shifting unless the ESI is relatively inaccessible,[203] parties can still consider these factors—and others that are appropriate in a specific case—when deciding e-discovery issues in light of their costs. Parties can also discuss ways to reduce costs associated with reviewing information for relevancy, privilege, and work product. This topic is discussed in more detail below; but with regard to costs, parties can discuss how to approach examining large volumes of documents for privilege/work product to either avoid spending large quantities of time examining each document or to allow the opposing party a "quick peek" at a sample of documents to determine the value of their information in terms of the case.[204]

Whatever topics parties choose to discuss during a pre-trial discovery conference, one of the principal goals of the conference is to reduce costs. Requiring (or strongly encouraging) parties to discuss any and all of the topics listed above aims to "emphasize[] the importance of discussing these topics early in the case, to identify disputes before costly and time-consuming searches and production occur."[205] Since e-discovery costs can reach surprisingly high numbers, parties should utilize steps as simple as pre-trial discovery conferences as a method of reducing such costs. While some may view a step such as a pre-trial discovery conference as a burden, parties should not forget that both the FRCP and ORCP call for the most efficient and least costly determination of litigation.[206] Given

202. Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280, 284 (S.D.N.Y. 2003).

203. *Id.* at 284 n.31.

204. *See infra* Part VII.B for further discussion.

205. *See* COMMITTEE REPORT, *supra* note 18, at C-24.

206. *See* FED. R. CIV. P. 1 ("The[se rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding"); OR.

these underlying principles of both the federal and Oregon civil procedure rules, parties should utilize any actions they can to reduce the potentially high costs of e-discovery.

Of course, one should not assume that the parties will reach agreement on all of these issues at a meet-and-confer encounter. At most, the parties will probably isolate the discovery issues on which they cannot agree. The next logical step would be for the trial court to decide upon the contested ESI discovery issues.

B. Privilege, Work Product, Trade Secrets, and Relevance

While the advances in and the pervasiveness of technology in the legal field helped streamline processes that used to take longer, there are potential hazards that come with that efficiency. One such area is privilege and work product in the realm of discovery requests. As mentioned above, the number of electronic documents created each day and their equivalent paper volume is staggering.[207] Thus, it is not surprising that there is more risk of inadvertent disclosure of privileged or work product information when e-discovery is involved.[208] Some even argue that inadvertent disclosure is not a matter of "if" but "when."[209] However, pre-trial discovery conferences can minimize or—at the very least—create contingency plans dealing with these risks.

Inadvertent disclosure can lead to waiver of privilege or work product protection: "[a] privilege or protection from discovery . . . can be waived if its holder voluntarily discloses the confidential matter to a third person, either explicitly or implicitly through actions inconsistent with the reasonable maintenance of confidentiality."[210] The ramifications of inadvertent disclosure can be devastating: even if privilege or work product protection is not waived, it is difficult to "unring" such a bell;[211] the information can be used throughout

R. CIV. P. 1(B) ("These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.").

207. *See supra* text accompanying notes 40 and 18.

208. *See* Jonathan M. Redgrave & Kristin M. Nimsger, *Electronic Discovery and Inadvertent Disclosure*, 49 FED. LAW. 37, 37 (2002).

209. Shilling, *supra* note 9, at 225.

210. Redgrave, *supra* note 208, at 37.

211. This consequence refers to the aphorism "Once a bell has been rung it is impossible to have the sound made by the bell silenced." Even if privilege or work product are not waived, inadvertent disclosure of privileged or work product information can be devastating to the client and the attorney representing the client. How the information will be used is difficult

litigation and other, future proceedings as well; in some jurisdictions, waiver extends to all documents regarding the subject matter contained in the formerly privileged information, and a client may not be able to retrieve documents produced as a result of the attorney's negligence.[212] Moreover, the attorney who inadvertently disclosed the information could face ethical implications.[213] Fortunately for Oregon lawyers, Oregon follows

> the American Bar Association's Formal Opinion 94-368, which states that an attorney who inadvertently receives privileged or confidential materials has the professional obligation to 'notify the adverse party's lawyer that she possesses such materials and follow the instructions of the adverse party's lawyer with respect to the disposition of the materials or to seek guidance from the court.[214]

There are several ways attorneys can address inadvertent disclosures during pre-trial discovery conferences to avoid additional litigation about whether privilege is waived. Parties can enter into a "clawback agreement," which states that "the parties agree that the production of privileged or work product material will not operate as a waiver, and the producing party has a right to recover the material when it discovers the inadvertent disclosure."[215] Essentially, such an agreement would allow parties to reach the same result a court might, without having to actually litigate the issue depending on a state's waiver law.

Another agreement parties can reach is called a "quick peek." In a "quick peek" production, documents and electronically stored information are produced to the opposing party before being reviewed for privilege, confidentiality, or privacy. Such production requires stringent guidelines and restrictions to prevent the waiver of confidentiality and privilege. Under a "quick peek" agreement, if the requesting party selects a document that appears to be privileged, the

to police. Can the information be used in future litigation? Can the information be used in future discovery?

212. Redgrave, *supra* note 208, at 37.

213. *Id.* at 38 ("[T]here are also ethical implications as to whether the failure to properly and fully protect client confidences and property constitutes an ethical violation of Rule 1.1 [due diligence and care] or Rule 1.6 (protection of client secrets and confidences) of the Model Rules of Professional Conduct.").

214. *Id.* (quoting ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368).

215. Shilling, *supra* note 9, at 225.

producing party can identify the document as privileged and withdraw it from production without having waived any privilege.[216]

However, the "quick peek" method has several disadvantages: such production of privileged documents to the opposing party is counter to the tenets of privilege law; "there is currently no effective way to extend the scope of the order to restrict persons who are non-parties to the agreement from seeking the production of privileged materials that have been produced under such an order"; such production of documents is counter to attorneys' duty to zealously guard their clients' secrets; it is hard to "unring" any bells; and privacy issues can arise.[217]

Parties can agree on numerous ways to deal with inadvertent disclosure, most of which center around the notion that "a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material."[218] Under the federal rules, which expressly allow scheduling orders to include "any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced,"[219] courts can enter an order adopting the parties' agreements, but they cannot enter such an order *without* a pre-existing agreement between the parties.[220]

While Oregon approaches waiver of privilege with a balancing test,[221] parties who can reach an agreement regarding inadvertent disclosure during a pre-trial discovery conference will have the advantage of avoiding costly litigation about the waiver issue. And as mentioned above with regard to the costs of e-discovery,[222] if parties have a pre-trial agreement addressing inadvertent disclosure, it is very likely that the number of hours an attorney would spend examining and sorting through discoverable documents would decrease, since

216. THE SEDONA PRINCIPLES, *supra* note 7, at 54.

217. *Id.*

218. FED. R. CIV. P. 26(f) advisory comm. notes (2006).

219. FED. R. CIV. P. 16(b)(3)(B)(iv).

220. COMMITTEE REPORT, *supra* note 18, at C-28.

221. Goldsborough v. Eagle Crest Partners, Ltd., 838 P.2d 1069, 1073 (Or. 1992). "A court need not necessarily conclude that the lawyer-client privilege has been waived when a document has been produced during discovery." *Id.* "Factors to be considered by the court may be *whether the disclosure was inadvertent*, whether any attempt was made to remedy any error promptly, and whether preservation of the privilege will occasion unfairness to the opponent." *Id.* (emphasis added).

222. *See supra* Part VII.A.

not every single page of every document would need examination with a proverbial fine-toothed comb. Such pre-trial agreements can also help attorneys avoid potential ethical conundrums and professional embarrassment. Although not going through documents with a fine-toothed comb arguably is not representing a client with due diligence, attorneys also have a duty not to charge unreasonable fees.[223]

There is obvious tension between these two obligations. While the 2006 FRCP amendments included a provision detailing how parties can claim privilege and protection for already-produced documents,[224] as long as Oregon courts recognize privilege and work product agreements between parties, such an amendment to the ORCP is not warranted.[225] Pre-trial agreements pertaining to privilege and work product protection also benefit courts because, not only do they help prevent additional and lengthy hearings, they also provide courts with potential guidelines for deciding waiver; the agreements provide the court with a glimpse of litigation as seen by the parties and the parties' expectations at the outset of the case.

VIII. CONCLUSION

Oregon should amend its civil procedure rules to expressly cover ESI, as was done by Iowa. The current language of Oregon's discovery rules arguably does not include all forms of ESI. In order to avoid a patchwork set of e-discovery decisions that are fact-specific, Oregon should not leave its courts to decide e-discovery issues on an ad hoc basis without any direct guidance to answer such questions.[226] ESI is, without question, going to become more prevalent in litigation and Oregon should amend its rules to reflect this reality.

223. MODEL RULES OF PROF'L CONDUCT R. 1.5 (2008).

224. FED. R. CIV. P. 26(b)(5)(B). The producing party notifies the requesting party of the inadvertent disclosure. The requesting party then has to return, sequester or destroy the information, cannot use the information until the privilege claim is resolved, and must take reasonable steps to retrieve any information disclosed before the privilege notification, and may present the court the information under seal to determine the privilege claim. *Id.*

225. Oregon's collegial bar and bench also makes such an amendment unnecessary. *See supra* note 124 and accompanying text.

226. It is also questionable whether it is within the court's province to answer such questions since the Oregon legislature expressly created the Council to amend and modify the ORCP. *See* OR. REV. STAT. § 1.730(1) (2007).

Oregon should also amend its civil procedure rules to provide parties with the recourse of motioning the court to issue a discovery order when the parties cannot reach such an agreement by themselves. This proposal does not require a pre-trial discovery conference in every case. Even if the case involves ESI, it is possible for the attorneys to reach an agreement without the help of the court; a required conference between parties who have already come to an agreement is unnecessary and a waste of both the parties' and the court's time. However, providing parties with a remedy when they cannot reach an agreement on very difficult issues allows courts to decide the contested issues.[227] The remedy of a pre-trial discovery conference is helpful in allowing the court to resolve difficult ESI issues at an early and less expensive stage of the litigation.

Discovery practice in federal and state courts has often resulted in gamesmanship, but courts likely will not allow gamesmanship in ESI discovery. The complexity and volume of information involved in electronic discovery may cause courts to urge litigators to collaborate on a whole range of issues.

These proposals, in turn, help avoid additional and unnecessary costs to parties and can provide a contingency plan—and arguably some peace of mind—with regard to privilege, work product, and waiver. Lowering the cost of litigation when possible and coming to an agreement about how to efficiently produce e-discovery while still zealously protecting a client's interest are two goals these proposals achieve. All parties and the bench should seek to uphold and conform with the goals and expectations enumerated at the outset of Oregon's civil procedure rules,[228] and this article's suggested amendments to the ORCP provide avenues to do just that.

Oregon attorneys may be more collaborative than attorneys in other states, but the confluence of discovery rules with ESI raises complex issues. Many attorneys are not well-versed in the complexities of the ever-changing technology involved in ESI. Furthermore, many trial judges are not trained in this area either.

Although the mere cutting and pasting of the recent amendments to the FRCP may not be appropriate, the Council could perform a valuable contribution to the Oregon Bar by giving careful

227. *See* IOWA R. CIV. P. 1.507(4).

228. *See supra* note 206 and accompanying text.

consideration to the proposal made by this article and the many other issues raised by discovery and ESI.

Finally, while this article proposes simple and necessary steps Oregon should take to amend its civil procedure rules, these proposed amendments do not cover every area where Oregon could—and arguably should—add to its civil procedure rules in terms of ESI. This article touches on, but does not fully discuss, ESI that is reasonably accessible; deleted files may be discoverable, but the cost of retrieving and restoring such files may significantly outweigh their discovery value. Therefore, additional amendments that add specific language addressing reasonably accessible ESI could be necessary. This article also cursorily discusses cost-shifting, but amendments adding cost-shifting language could prove necessary in litigation involving *Zubulake*-sized discovery costs. ORCP 36 does not discuss when the burden and cost of discovery outweighs its value,[229] and this could detrimentally affect parties litigating cases involving ESI. Additionally, Oregon should consider amendments involving sanctions relating to e-discovery. Issues regarding ESI that is lost due to good faith and routine operation of an electronic system are likely to arise, and Oregon's civil procedure rules are currently unequipped to address the issue. Each of these areas that this article either barely or does not address is a topic that the Council and Oregon legislature should be prepared to discuss in the near future. So, while this article suggests significant yet elementary ESI amendments to the ORCP, important modifications addressing additional aspects of e-discovery warrant serious future discussion and consideration.

229. *See* OR. R. CIV. P. 36.