

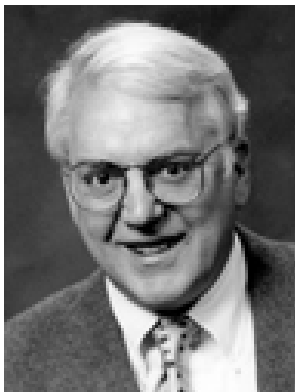
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## **The State of E-Discovery: An Overview of State & Uniform Rulemaking Efforts**



- Staff Attorney, Legal Technologies, Kroll Ontrack
  - Tracks evolving U.S. common and statutory law in the areas of electronic discovery and computer forensics.
  - Responsible for developing and bringing timely educational content to the e-discovery space through Thought Leadership Events and other legal education programs.
  - Frequently writes on issues relating to electronic evidence for national and international legal publications.
  
- Recent publications:
  - *Quick peeks & Clawbacks are Not Enough*, Minnesota Lawyer (September 17, 2007).
  - *On the Digital Paper Trail: Using E-mail Analysis & Other Best Practices for Preliminary Internal Investigations*, Electronic Discovery & Records Management Quarterly (Summer 2007).
  - *Discrimination Law & Litigation*, §§14:22-14:42, Electronic Evidence: Discovery and Production Employment (Thomson West, June 2007).
  - *Electronically Stored Information: Downgrade at Your Own Risk*, Minnesota Lawyer (March 12, 2007).
  - *U.S. Civil Procedure: Electronically Stored Information*, Fraud Intelligence (February/March 2007).
  - *Federal Rules of Civil Procedure E-Discovery Guide: Practical Analysis & Best Practices for Businesses & Legal Teams* (Kroll Ontrack, March 2007).

## Thomas Allman



- Co-chairs the E-Discovery Committee of the Lawyers for Civil Justice
  - Serves on the Steering Committee of the Sedona Conference®.
  - Serves on Georgetown Advisory Board, Advance E-Discovery Institute.
  - Previous career highlights:
    - Senior Counsel to Mayer Brown, Chicago from 2004 to 2007.
    - Senior Vice President, General Counsel and Chief Compliance Officer of BASF Corporation from 1993 to 2004.
    - J.D. from Yale Law School.
  - Writes and speaks widely on e-discovery, corporate compliance and information management.
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- Recent publications:
    - *“Managing Preservation Obligations after the 2006 Federal E-Discovery Amendments,”* 13 Rich. J.L. & Tech. 9 (2007)
    - *“Rule 37(f) Meets its Critics: The Justification for a Limited Safe Harbor for ESI,”* 5 Northwestern J. Tech. & Intell. Prop. 1 (2006)
    - *“Defining Culpability: The Search for A Limited Safe Harbor in Electronic Discovery,”* 2006 Fed. Cts. L. Rev. 7 (2006), and
    - *“The Impact of the Proposed Federal E-Discovery Rules,”* 12 Rich. J. L. & Tech. 13 (Spring, 2006).

## Discussion Overview

- State rulemaking efforts
  - Which states have acted?
  - Which states are following the Federal Rules' model?
  - What are the rest doing?
- Uniform Rules Relating to Discovery of Electronically Stored Information
  - What are they?
  - How do they compare to the Federal Rules?
- Guidelines for State Trial Courts issued by the Conference of Chief Judges
  - Purpose of the guidelines
  - Overview of key provisions



# State Rulemaking Efforts

## E-Discovery in States?

- Limited number of reported decisions, primarily:
  - Unfair competition
  - Divorce
  - Commercial cases
- Outcomes heavily influenced by Federal Decisions;
- Wide variety in rulemaking processes – some managed by courts and others by legislature/some hybrids.

## State Rulemaking

- The need is still questioned:

“Boston attorney Jerome P. Facher, who chairs [a Mass SJC Committee] said he believes that e-discovery is not a problem in Massachusetts trial courts at this time.”

*Facher, quoted in Mass. Lawyers Weekly, February 2007*

## State Rulemaking

- The need is still questioned:

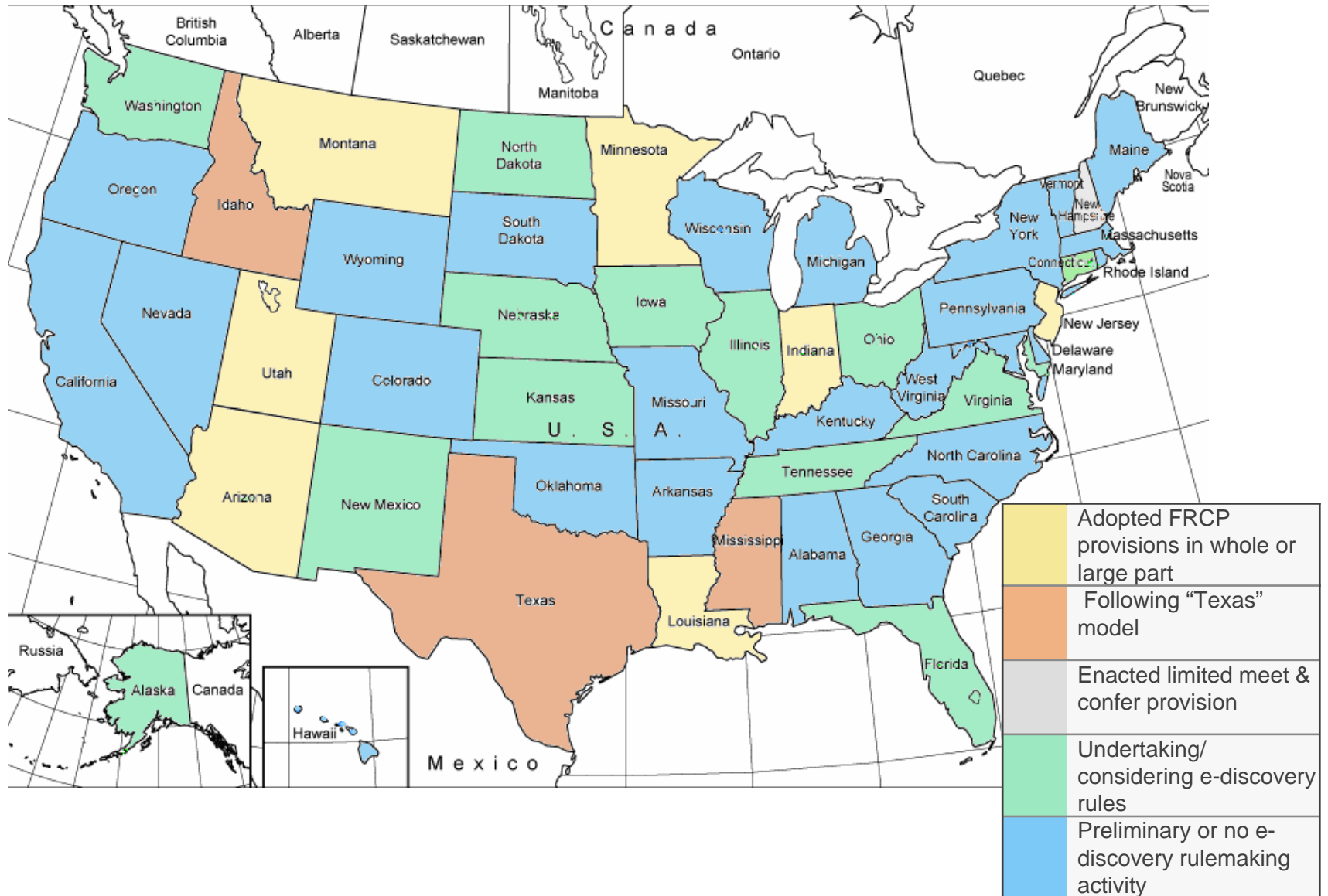
“[T]he [Advisory Committee] has considered the issue of e-discovery rules and has determined that, at this time, there is no need to add e-discovery rules to the CPLR for New York State.”

*Tel. Interview, H. Lutz, NY Advisory Committee, May, 2007*

## Options?

- Mirror the Federal Amendments as far as possible
- Make selective enhancements to existing rules
- Provide trial courts with guidelines
- Do nothing

# State E-Discovery Rulemaking Efforts



## States that have Adopted FRCP E-Discovery Provisions in Whole or Large Part

- Arizona\*\*
- Indiana\*\*
- Louisiana
- Minnesota
- Montana
- New Jersey
- Utah\*

\*Effective November 1, 2007

\*\*Effective January 1, 2008

## States with Limited E-Discovery Meet & Confer Provision

- New Hampshire
  - Superior Court Rule 62. (I) Initial Structuring Conference
    - Parties instructed to meet and confer no later than twenty days prior to structuring conference regarding variety of issues including:
      - Scope of discovery, particularly with respect to ESI
      - Data accessibility
      - Allocation of costs
      - Production format
      - Need for and extent of litigation holds and other preservation measures
      - Precautions to guard against waiver of privilege claims

## Another Model (Texas)

- Since 1999, Texas R. Civ. Pro. 196.4 Electronic or Magnetic Data:

To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request [it]....

...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...or produce it in the form requested, the responding party must state an objection...

If the court orders the responding party to comply..., the **court must also order that requesting party pay the reasonable expenses of any extraordinary steps** required to retrieve and produce the information.

## States Following “Texas” E-Discovery Rules Model

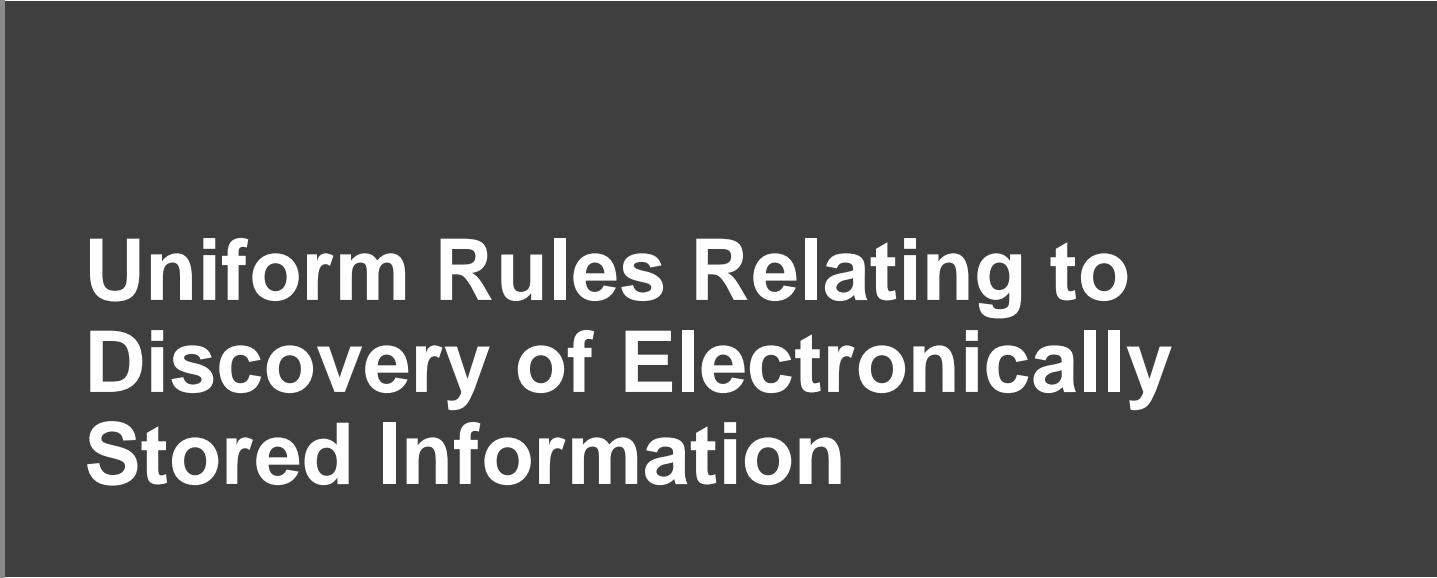

- Idaho
- Mississippi
- Texas

## States Undertaking/Considering E-Discovery Rules Changes

- Alaska
- Connecticut
- Florida
- Illinois
- Iowa
- Kansas
- Maryland
- Nebraska
- New Mexico
- No. Dakota
- Ohio
- Tennessee
- Virginia
- Washington

## States with Preliminary or No E-Discovery Rulemaking Activity

- Alabama
- Arkansas
- California
- Colorado
- Delaware
- Georgia
- Hawaii
- Kentucky
- Maine
- Massachusetts
- Michigan
- Missouri
- Nevada
- New York
- No. Carolina
- Oklahoma
- Oregon
- Pennsylvania
- Rhode Island
- So. Carolina
- So. Dakota
- Vermont
- West Virginia
- Wisconsin
- Wyoming



**Uniform Rules Relating to  
Discovery of Electronically  
Stored Information**

## Uniform Rules Relating to Discovery of Electronically Stored Information

- Developed by The National Conference of Commissioners on Uniform State Laws (“NCCUSL”)
- Serve as alternative formulation of state e-discovery rules, accommodating states that have opted not to adopt the 2006 Federal Amendments

## Uniform Rules Relating to Discovery of Electronically Stored Information

- Content based on Federal Amendments (simplified).
  - Key differences:
    - Intended to be enacted as standalone provisions by legislature or rules committee
    - Simplified committee notes



**Conference of Chief Judges  
Guidelines for State Trial  
Courts**

## Guidelines for State Trial Courts

- Approved by the Conference of Chief Justices ("CCJ") in August 2006.
- Intended to reduce state courts' uncertainty about how to address the differences between electronic and "traditional" discovery under current discovery rules and standards.
- However, the guidelines:
  - Are not intended to be model rules.
  - Should be considered along with other resources, such as the Federal Rules of Civil Procedure and the American Bar Association Standards Relating to Discovery.
  - Recognize that the final determination of what procedural or evidentiary rules should govern is a state decision.

## Guidelines for State Trial Courts

- Guidelines include provisions regarding:
  - Definition of terms “electronically stored information” and “accessible information”
    - Guideline 3
  - Counsel’s responsibility to be informed about their client’s ESI
    - Guideline 2
  - E-discovery topics for pre-trial conferences, pre-conference orders and hearings
    - Guidelines 3 & 4
  - Scope of discovery
    - Guideline 5
  - Production format
    - Guideline 6

## Guidelines for State Trial Courts (cont.)

- Guidelines include provisions regarding:
  - Allocation of discovery costs
    - Guideline 7
  - Determinations regarding whether attorney-client privilege has been waived because of inadvertent disclosure
    - Guideline 8
  - Threshold considerations for issuing preservation orders
    - Guideline 9
  - Appropriate use of sanctions for spoliation of ESI
    - Guideline 10



**Wrap-up**

## Recommendations?

- Adopt core elements of Federal Rules with selective improvements in two areas...

## Possible Improvement of Safe Harbor Provision

- Clarify direct relationship to litigation holds:

“A court should not impose sanctions on a party for failing to preserve or produce information lost as the result of a routine, good faith operation of an electronic information system **where reasonable efforts have been made to implement a litigation hold.**”

## Cost Shifting

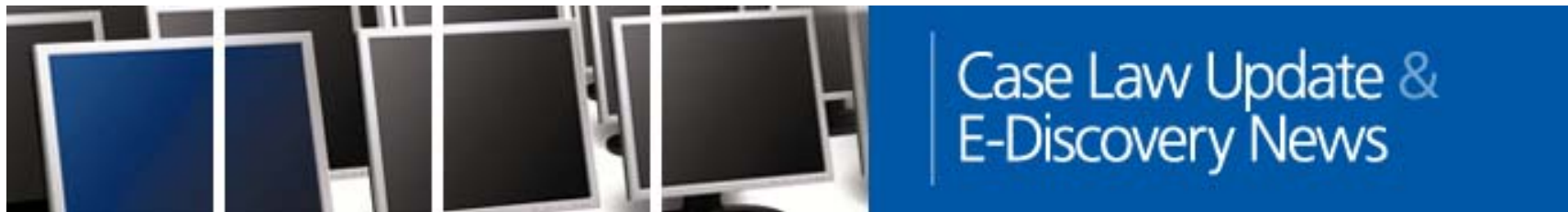
- Link production order to mandatory cost allocation:

“A party need not provide discovery of electronically stored information from sources the party identifies as not reasonably accessible because of undue burden or costs unless good cause is shown **and an order is entered requiring the requesting party to pay the reasonable expenses of an extraordinary steps required to make production.**”

## Bottom Line

- There is no one approach that is best.
- Success will be determined by degree that they reflect consensus best practices - and do not stifle emerging technology by requiring specific technological measures.

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