

# Electronic Discovery: A Call for a New Rules Regime for the Hawai‘i Courts

Brandon M. Kimura<sup>\*</sup> and Eric K. Yamamoto<sup>\*\*</sup>

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<sup>\*</sup> Class of 2010, William S. Richardson School of Law, University of Hawai‘i.

<sup>\*\*</sup> Professor of Law, William S. Richardson School of Law, University of Hawai‘i.

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"E[lectronic] discovery [is] profoundly changing lawyering."<sup>1</sup>

"What it means to be a lawyer will change rapidly in the years to come."<sup>2</sup>

"E-Discovery [is] a morass."<sup>3</sup>

"Massive sanction for e-discovery failures offers lessons for lawyers."<sup>4</sup>

## I. OVERVIEW: THE NEW AGE OF ELECTRONIC DISCOVERY

Electronic discovery has arrived. And with a profound impact on attorneys, judges, businesses and individual litigants.<sup>5</sup> Electronically-stored information (ESI) is now the form for more than ninety percent<sup>6</sup> of all information created

<sup>1</sup> Chris Mondics, *Ediscovery Profoundly Changing Lawyering*, PHILADELPHIA INQUIRER, June 8, 2008, at D1.

<sup>2</sup> George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, ¶ 6 (2007).

<sup>3</sup> Martha Neil, *Litigation Too Costly, E-Discovery a "Morass," Trial Lawyers Say*, A.B.A. J., Sept. 11, 2008, [http://www.abajournal.com/news/litigation\\_too\\_costly\\_e\\_discovery\\_a\\_morass\\_trial\\_lawyers\\_say/](http://www.abajournal.com/news/litigation_too_costly_e_discovery_a_morass_trial_lawyers_say/) (internal quotation marks omitted).

<sup>4</sup> Sylvia Hsieh, *Massive Sanction for E-Discovery Failures Offers Lessons for Lawyers*, LAWYERS USA, Feb. 25, 2008, news.

<sup>5</sup> See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008) (determining that defendants waived any privilege or work-product protection for 165 electronically stored documents); *In re* Sept. 11th Liab. Ins. Coverage Cases, 243 F.R.D. 114 (S.D.N.Y. 2007) (imposing severe sanctions on law firms and their insurer clients); *Doppes v. Bentley Motors, Inc.*, 94 Cal. Rptr. 3d 802 (Cal. Ct. App. 4th 2009) (holding that the trial court failed to impose a default judgment sanction for e-discovery abuse and remanding with orders to do so).

<sup>6</sup> See SHIRA SCHEINDLIN ET AL., *ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE: CASES AND MATERIALS* 42 (2009) ("Ninety-two percent of the new information was stored on magnetic media, mostly in hard disks." (emphasis added) (quoting Peter Lyman & Hal R. Varian, *How Much Information?* 2003 (Oct. 27, 2003), <http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/execsum.htm>)); Mia Mazza et al., *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 11, ¶ 14 (2007) (citing The Sedona Conference, *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* 1 (Jonathan M. Redgrave et al. eds., 2005), <http://www.thesedonaconference.org/content/miscFiles/RetGuide200409.pdf> [hereinafter Sedona Conference, *Best Practices*]).

and stored—whether business transactions, financial arrangements or social interactions.<sup>7</sup> This technology revolution is generating an evolution in the legal arena.<sup>8</sup> Specifically, new technology has transformed modern discovery—the litigation mechanism for unearthing and sharing relevant information.<sup>9</sup>

Lawyers who adroitly work through the complexities of e-discovery ably serve their clients and the courts—“secur[ing] . . . just, speedy, and inexpensive” litigation.<sup>10</sup> Those who miss its hidden issues and nuances may alter the outcomes of their cases, simple and complex, and at times face costly sanctions.<sup>11</sup> Indeed, e-discovery is changing the way businesses do, or should do, their business and the way lawyers lawyer.<sup>12</sup> Yet, for a time, in-house counsel, private firm attorneys and businesses nationwide walked largely in the

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<sup>7</sup> See, e.g., Sarah Merritt, Comment, *Sex, Lies, and Myspace*, 18 ALB. L.J. SCI. & TECH. 593, 595 (2008); Dennis Kennedy, *Get the (Instant) Message, Dude!: By Phone or PC, Messaging Offers Several Advantages*, A.B.A. J., Nov. 2008, at 40; Major R. Ken Pippin, *Consumer Privacy on the Internet: It's "Surfer Beware"*, 47 A.F. L. REV. 125, 125 (1999).

<sup>8</sup> See Monica A. Fennell, *Judge William Lee: Leading By Example*, RES GESTAE, Sept. 2008, at 46 (describing United States District Judge Lee's approach to embracing the societal technological revolution with a parallel technological revolution in the courts).

<sup>9</sup> See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (“Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes.”).

<sup>10</sup> FED. R. CIV. P. 1; see Chris Mondics, *Firm Tracks Evidence Generated by E-Devices; Clients are Considering Suits, or Fear Being Sued*, PHILADELPHIA INQUIRER, Feb. 1, 2009, at D1 (discussing how an e-discovery vendor can help businesses avoid legal disputes, narrow the issues, more accurately value cases, and ultimately seek the truth); see also *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007) (discussing methods of properly admitting various types of ESI into evidence).

<sup>11</sup> See *infra* Section II.B.; Charles S. Fax, *Inadvertent Disclosure of ESI and “Reasonable Care”: A Close Look at Victor Stanley*, LITIG. NEWS, Fall 2008, at 20 (“E-discovery can be dangerous for lawyers.”).

For important commentary on problems in traditional discovery, see Lawrence J. Fox et al., *Ethics: Beyond the Rules: Historical Preface*, 67 FORDHAM L. REV. 691 (1998); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635 (1989); Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787 (1980); Wayne D. Brazil, *Views From the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217 (1980); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978).

<sup>12</sup> See, e.g., *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005) (discussing the advent of records retention policies).

dark.<sup>13</sup> The news headlines in the epigraph reflect the heightened anxiety about this evolving litigation landscape.<sup>14</sup>

In 2005 the Judicial Conference Committee on Rules of Practice and Procedure affirmed the federal judiciary's commitment to "full disclosure" during civil discovery, declaring that "potential access to [relevant] information [should be] virtually unlimited."<sup>15</sup> To better achieve this goal, the Rules Committee addressed the increasing complexity of discovery of ESI.<sup>16</sup> In 2006, with Supreme Court approval, federal rule-making bodies amended the Federal Rules of Civil Procedure<sup>17</sup> to create a rules regime to guide e-discovery practice.<sup>18</sup> Described in depth in Section III.C., that new regime generally addresses early attention to e-discovery issues, the production format and procedure for location and disclosure of ESI, the handling of ESI that is not reasonably accessible because of undue burden or expense, a mechanism for dealing with inadvertently produced ESI and a limited safe harbor for e-discovery missteps.

Most important, the new federal e-discovery rules regime sends a clear signal to attorneys and businesses: *plan ahead, assess benefits and burdens and watch out for sanctions!*

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<sup>13</sup> See Deni Connor, *Study Proves E-Discovery Confusion*, NETWORK WORLD, June 12, 2008, available at 2008 WLNR 1131194; Deni Connor, *Half of Businesses Not Meeting Federal E-Mail Discovery, Retention Rules*, NETWORK WORLD, July 5, 2007, available at 2007 WLNR 12960966.

<sup>14</sup> See *supra* text accompanying notes 1, 3–4.

<sup>15</sup> See Summary of the September 2005 Report of the Judicial Conference Committee on Rules of Practice and Procedure [hereinafter Report of the Judicial Conference Committee] 22, <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf> (citing a 1999 Federal Rules Advisory Committee goal to develop "mechanisms for providing full disclosure in a context where potential access to information is virtually unlimited and in which full discovery could involve burdens far beyond anything justified by the interests of the parties"); see also *Wakabayashi v. Hertz Corp.*, 66 Haw. 265, 275, 660 P.2d 1309, 1315 (1983) ("The Hawaii Rules of Civil Procedure, like the federal procedural rules, reflect a basic philosophy that a party to a civil action should be entitled to the disclosure of all relevant information in the possession of another person prior to trial, unless the information is privileged." (citations omitted)).

<sup>16</sup> See *infra* Sections II.C. and III.C.

<sup>17</sup> "Federal Rules" or "Rules."

<sup>18</sup> DAHLSTROM LEGAL PUBLISHING, INC., *THE NEW E-DISCOVERY RULES* 5 (2006). The Advisory Committee of the Federal Rules of Civil Procedure submitted proposed amendments to the Standing Committee on the Rules of Practice and Procedure, who then submitted the proposed amendments, unchanged, to the Judicial Conference. *Id.* After unanimous approval by the Judicial Conference, approval by the Supreme Court and no Congressional action to the contrary, the rules became effective on December 1, 2006. *Id.*; Letter from Chief Justice John G. Roberts, Jr. to Rep. J. Dennis Hastert and Vice-President Dick Cheney (Apr. 12, 2006), <http://supremecourtus.gov/orders/courtorders/frcv06p.pdf>.

The federal amendments and the series of five opinions in *Zubulake v. UBS Warburg LLC*<sup>19</sup> (on which the amendments were in part based), however, have not resolved all e-discovery issues.<sup>20</sup> Ambiguities and gaps persist. For instance, the rules are largely silent on the duties of attorneys and clients to create and implement policies that govern preservation and destruction of potentially litigation-relevant ESI.<sup>21</sup> They also provide only limited guidance on the allocation of sometimes oppressive costs of e-discovery and the extent of cost-benefit proportionality considerations; and, they are silent on specific criteria for sanctions.<sup>22</sup>

Even with these limitations, twenty-three state courts have adopted the federal e-discovery rules regime in whole or in part, including California, Alaska, Arizona, Utah and Montana.<sup>23</sup> Six more states are currently considering e-discovery rules amendments, including Washington and New Mexico.<sup>24</sup>

The Hawai'i State Judiciary has yet to speak on e-discovery issues through new rules or appellate decisions. As a consequence, Hawai'i attorneys, judges and businesses lack tailored e-discovery guidance. Practitioners must necessarily look elsewhere for direction.<sup>25</sup> Yet, other courts' rulings form a

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<sup>19</sup> *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake III*); *Zubulake v. UBS Warburg LLC*, 230 F.R.D. 290 (S.D.N.Y. 2003) (*Zubulake II*); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I*). Although the *Zubulake* opinions added significantly to the e-discovery common law prior to amendment of the Federal Rules, this article discusses the *Zubulake* opinions only to the extent that they clarify or add to the discussion herein.

<sup>20</sup> See The Sedona Conference, The Sedona Principles Addressing Electronic Document Production, Second Edition iv (June 2007), [http://www.thesedonaconference.org/dltForm?did=TSC\\_PRINCP\\_2nd\\_ed\\_607.pdf](http://www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf) ("The [Federal] [R]ules do not answer many of the most vexing questions judges and litigants face. They do not govern a litigant's conduct before suit is filed, nor do they provide substantive rules of law in such important areas as the duty of preservation or the waiver of attorney-client privilege."); Jason Krause, *E-Discovery Gets Real: Revisions to the Federal Rules of Civil Procedure Still Leave Many Questions About Discovery of Electronic Evidence*, A.B.A. J., Feb. 2007, at 44.

<sup>21</sup> Cf. SCHEIDLIN ET AL., *supra* note 6, at 76–77 (discussing common law and Federal Rule 37(e)'s limited and implicit guidance); see also David K. Isom, *Electronic Discovery Primer for Judges*, 2005 FED. CTS. L. REV. 1, 15–16 (2005) (discussing various types and sources of data for possible preservation).

<sup>22</sup> See *infra* Sections IV.B. and C.

<sup>23</sup> Kroll Ontrack, State Rules & Statutes E-Discovery and Computer Forensics, [http://www.krollontrack.com/library/staterules\\_krollontrack\\_dec2009.pdf](http://www.krollontrack.com/library/staterules_krollontrack_dec2009.pdf) (last visited Jan. 21, 2010).

<sup>24</sup> *Id.*

<sup>25</sup> See Amy K. Thompson-Smith et al., *Coming to Terms with Electronic Discovery*, 9 HAW. B.J. 4 (Feb. 2005); Memorandum from Keith K. Hiraoka, Roeca, Louie & Hiraoka, LLP, to Eric

patchwork of decisions. And, as mentioned, the federal e-discovery rules regime is silent or incomplete on some key issues.

To better explore the significance of the absence of e-discovery rules guidance in litigation practice consider *Rambus, Inc. v. Infineon Technologies AG*.<sup>26</sup> Before federal e-discovery rule amendments the Eastern District Court of Virginia faced classic ESI destruction in *Rambus*—a patent dispute marked by e-discovery mistakes and misconduct, including misuse of the attorney–client privilege, cost-allocation disputes, spoliation of potential evidence, hidden incriminating emails, faulty document retention and destruction policies and sanctions.<sup>27</sup>

*Rambus* brought a patent infringement claim against Infineon.<sup>28</sup> Infineon responded with affirmative defenses and counterclaims.<sup>29</sup> To support its counterclaims Infineon sought to compel *Rambus*' production of information on the development and implementation of *Rambus*' program for retention and destruction of ESI.<sup>30</sup> *Rambus* maintained that its purging policy itself was attorney–client privileged.<sup>31</sup> In earlier motions—with evidence from internal emails—the court established that, over several “shred days,” *Rambus* intentionally destroyed relevant non-privileged material (including ESI) under its document purging policy.<sup>32</sup> As a result, the court granted in part Infineon's motion to compel by applying the crime/fraud exception to the attorney–client privilege and work-product immunity doctrine because of *Rambus*' spoliation of potential evidence.<sup>33</sup>

*Rambus* explained that “it instituted its document [destruction] policy out of discovery-related concerns . . . [about] the legitimate purpose of reducing search and review costs.”<sup>34</sup> The court rejected *Rambus*' “undue cost” explanation and announced that “destruction of documents of evidentiary value

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K. Yamamoto, Professor of Law, William S. Richardson School of Law (Dec. 1, 2008) (on file with authors); see also *Hawaii Firm Hosts Shakacon Conference*, PAC. BUS. NEWS, 2008 WLNR 10730163 (June 6, 2008) (stating that Hawai'i is a growing market for guidance regarding e-discovery, evidenced by a conference “to inform business owners, government and military officials and information technology executives about . . . compl[iance with] stricter laws regarding . . . electronic discovery”).

<sup>26</sup> 222 F.R.D. 280 (E.D. Va. 2004).

<sup>27</sup> See *id.*

<sup>28</sup> *Id.* at 282.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 284.

<sup>31</sup> *Id.* at 285–87.

<sup>32</sup> *Id.* at 286–87, 291, 297. Emails in parallel actions revealed that before *Rambus* filed suit in 2000, it held a 1998 “Shred Day”—deliberately destroying 20,000 pounds of documents (over two million pages), including many potentially relevant documents. *Id.* at 284, 286.

<sup>33</sup> *Id.* at 285–87.

<sup>34</sup> *Id.* at 295.

... is fundamentally at odds with the administration of justice.”<sup>35</sup> The court then granted Infineon’s motion to compel and further admonished Rambus for its deployment of its ESI management policy to destroy potentially relevant and incriminating information.<sup>36</sup> It then authorized Infineon to conduct discovery relevant to appropriate sanctions.<sup>37</sup> *Rambus* aptly illustrates the range of common problems of e-discovery that have prompted state judiciaries to adopt the 2006 federal amendments or similar rules.<sup>38</sup>

In Hawai‘i, the recent saga over reportedly adult-oriented emails and racial jokes by a former CEO of the Hawai‘i Tourism Authority (HTA) provides a glimpse into the potential complexity of e-discovery in even “simple” cases.<sup>39</sup> A state audit of the HTA CEO’s business email account publicly revealed the emails.<sup>40</sup> Outraged residents pressed for his firing while Hawai‘i leaders stood in his defense.<sup>41</sup> The CEO resigned, foreclosing sticky termination-related litigation.<sup>42</sup> If a civil suit had ensued, e-discovery might have encompassed discovery of thousands of emails over several years from backup tapes, cellular phone and text messages records, personnel records and intra-office e-memoranda—with attorneys and judges struggling each step of the way over the general scope of e-discovery, the relevance of specific requests, the timing and scope of parties’ duty to preserve, the validity of e-destruction procedures and the allocation of e-discovery costs. Not to mention the looming prospect of sanctions for missteps.

Indeed, e-discovery has arrived in Hawai‘i and is here to stay. The questions today, with an eye towards tomorrow, are: whether to adopt the federal e-discovery rules regime, and if so, how to tweak the rules to fit local needs. Circuit Court discovery rulings rarely reach appellate courts, so guidance from the rules themselves, their commentary and scholarly insights will be crucial.<sup>43</sup> The time is ripe for the Hawai‘i legal community to even-handedly assess the burdens and opportunities of handling e-discovery in light of “the needs of the

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<sup>35</sup> *Id.* at 298.

<sup>36</sup> *Id.* at 299.

<sup>37</sup> *Id.*

<sup>38</sup> See Sheri Qualters, *States Launching E-Discovery Rules: Costs, Confusion Spark the Trend*, 30 NAT’L L.J. 1, Oct. 8, 2007.

<sup>39</sup> See Rick Daysog, *Scandal at Tourism Authority*, HONOLULU ADVERTISER, Sept. 19, 2008, at C2.

<sup>40</sup> *Id.*

<sup>41</sup> Rick Daysog, *Key Support Evaporated for Former Tourism Chief*, HONOLULU ADVERTISER, Oct. 10, 2008, at A1.

<sup>42</sup> Robbie Dingeman, *Search to Begin for New Tourism Authority CEO*, HONOLULU ADVERTISER, Oct. 11, 2008, at B6.

<sup>43</sup> See Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information, vii (Richard Van Duizend ed., 2006), <http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf> (citation omitted).

case, the amount in controversy, limitations on the parties' resources, the importance of the issues at stake in the litigation, . . . the importance of the proposed discovery in resolving the issues," and potential sanctions.<sup>44</sup>

This article endeavors to assist the Hawai'i courts and the public and private bars in assessing the need for an e-discovery rules regime by suggesting incorporation of the federal e-discovery rules regime into the Hawai'i Rules of Civil Procedure.<sup>45</sup> With this prospect in mind, it also suggests ways to fill gaps in the rules and clarify ambiguities in the federal approach.<sup>46</sup> More specifically, in terms of clarification and gap-filling, the article addresses hidden dimensions to the mandate of *early attention* to e-discovery issues (including attorney, client and expert attention to technological intricacies in anticipating litigation and preparing discovery plans); *cost-benefit proportionality* (including infusing the proportionality principle throughout the litigation and at times shifting e-discovery costs); and *sanctions avoidance* (including assessing tricky aspects of the duty to preserve ESI, crafting retention and destruction policies, deploying litigation holds and anticipating an affirmative sanctions rule). Finally, the article aims to assist in-house counsel and businesses in planning pro-actively for e-discovery even before litigation arises.

We therefore proceed in Part II by broadly explaining the ways that e-discovery has changed the litigation landscape. In Part III we list other state judiciaries that have adopted the Federal Rule amendments. Most important, and drawing support from federal magistrate judges, we suggest that the Hawai'i state courts adopt the federal e-discovery rules regime, and we provide a detailed description of the 2006 Federal Rules amendments for adoption. In Part IV we draw upon commentary, other discovery rules and Hawai'i appellate discovery decisions to suggest ways that Hawai'i rulemakers (through

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<sup>44</sup> HAW. R. CIV. P. 26(b)(2)(iii).

<sup>45</sup> The Hawai'i Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure. *Gap v. Puna Geothermal Venture*, 106 Haw. 325, 341, 104 P.3d 912, 928 (2004) (quoting *Gold v. Harrison*, 88 Haw. 94, 105, 962 P.2d 353, 364 (1998)). Changes to the Federal Rules are often, after study, incorporated into the Hawai'i Rules of Civil Procedure.

<sup>46</sup> This article is not merely a practice guide for attorneys to adjust their form file to account for amended Federal Rules; there are already many of those. *See, e.g.*, Dean Gonsowski, *The Maturity of E-Discovery Reflects a Greater Need for Law Firms to Begin Building Successful, Repeatable Processes and Taking Risk Out of the Equation Whenever Possible*, 27 No. 4 LEGAL MGMT. 26 (2008); Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since December 1, 2006*, 14 RICH. J.L. & TECH. 8 (2008); Raymond J. Peroutka, Jr., *Beyond the Quill: Best Practices in the "E-Discovery Age"*, 26-7 AM. BANKR. INST. J. 32 (2007); Sedona Conference, *Best Practices*, *supra* note 6; Sergio D. Kopelev & Michael R. Bandemer, *You Want Me to Do What?: A Practical Look at the Question of Proper Preservation of Electronically Stored Information in Today's Business Litigation Environment*, 14 NEV. LAW. 24 (2006).



commentary) and Hawai'i courts (through published decisions) can productively clarify ambiguities and fill important gaps in the federal regime.

## II. THE PROBLEMS AND PROMISE OF ELECTRONIC DISCOVERY

Out of the ferment of the technology revolution, the e-lawyer and e-client have arisen. Emails, text messages, Google searches, online shopping, e-banking, Facebook, YouTube and Twitter, with more on the horizon and nary a piece of paper. Litigation's proverbial "smoking gun" now often inhabits the electronic ether.<sup>47</sup> Electronic communications are changing the way that disputes arise and are adjudicated as e-discovery dramatically alters litigation opportunities, burdens and responsibilities.<sup>48</sup>

### A. Electronically Stored Information and the Transformation of Discovery

E-discovery is different from ordinary discovery in four major ways. First, the sheer volume of ESI is exponentially greater.<sup>49</sup> Social and business interactions are now recorded electronically in multiple locations and often stored—even automatically—in more than one medium.<sup>50</sup> These multiple media invariably store duplicates or slightly different versions that can only be located or distinguished from each other with great difficulty and expense.<sup>51</sup> Previously much of this information was not recorded at all.<sup>52</sup>

As one scholar of law and technology recently observed, "[i]n a small business, whereas formerly there was usually one four-drawer file cabinet full of paper records, now there is the equivalent of two thousand four-drawer file cabinets full of such records [stored electronically]."<sup>53</sup> Every month large organizations send and receive up to three hundred million email messages.<sup>54</sup> Most organizations, including local governments, now have the capacity to

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<sup>47</sup> E.g., *Arthur Andersen LLP v. United States*, 544 U.S. 696, 702 n.6 (2005) (referring to destruction of ESI labeled "smoking gun"); see RALPH C. LOSEY, E-DISCOVERY: CURRENT TRENDS AND CASES 33 (2008) ("The smoking guns in courtrooms today are found in computers, not filing cabinets.").

<sup>48</sup> See, e.g., *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 317 (S.D.N.Y. 2003) (*Zubulake I*) (stating that cost-shifting, which is more likely to arise in the e-discovery era, "may effectively end discovery").

<sup>49</sup> See Report of the Judicial Conference Committee, *supra* note 15, at 22.

<sup>50</sup> See Kennedy, *supra* note 7, at 40.

<sup>51</sup> See Paul & Baron, *supra* note 2, at ¶ 10; Van Duizend, *supra* note 43, at v.

<sup>52</sup> See Lynn McLain, *The Impact of the First Year of the Federal Rules and the Adoption of the Maryland Rules: Foreword*, 37 U. BALT. L. REV. 315, 315 (2008).

<sup>53</sup> Paul & Baron, *supra* note 2, at ¶ 13.

<sup>54</sup> Report of the Judicial Conference Committee, *supra* note 15, at 22–23.

store several terabytes of information at five hundred million typewritten pages per terabyte.<sup>55</sup>

Of all electronic business records, eighty percent are never converted to paper.<sup>56</sup> Unearthing this buried ESI is complicated and costly. The problem is magnified because most companies do not have *effective* ESI retention and destruction policies (for automatic file management) or lack sufficient employee training and technical support.<sup>57</sup>

Second, a great deal of ESI is unintelligible.<sup>58</sup> Some databases and programs create and store data so that the content is only comprehensible with software that is not readily available.<sup>59</sup> As a result, litigants regularly face costly delays in negotiating production formats and incur expert consultant expenses in assisting judges to resolve sticky disputes.<sup>60</sup>

Third, ESI includes unrecorded metadata—"data about data."<sup>61</sup> Metadata are computers' automatic recordings of "the date [files] w[ere] created, its author, when and by whom it was edited, what edits were made, and, in the case of e-mail, the history of its transmission."<sup>62</sup> Prior to electronic storage, there was no other way to consistently and reliably know details of the creation, amendment and deletion of information.<sup>63</sup>

Fourth, ESI is both nearly indestructible and extremely fragile.<sup>64</sup> Deleting ESI with the click of a mouse does not destroy it.<sup>65</sup> The information remains on the computer hard-drive and is only permanently eliminated by physical

<sup>55</sup> *Id.*

<sup>56</sup> LOSEY, *supra* note 47, at 33.

<sup>57</sup> *Id.*; *Beyond Records Management: Leveraging Your Process to Reduce E-Discovery Costs*, INSIDE COUNSEL, Sept. 2009, at 28.

<sup>58</sup> See Report of the Judicial Conference Committee, *supra* note 15, at 23.

<sup>59</sup> Rachel Hytken, Note and Comment, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875, 880 (2008).

<sup>60</sup> See Jason Krause, *In Search of the Perfect Search*, 95 A.B.A. J. 38 (2009) (discussing the potential insufficiency of keyword searches and need for experts); Conrad J. Jacoby, E-Discovery Update: Producing Spreadsheets in Discovery—2008, Law and Technology Resources for Legal Professionals (Sept. 4, 2008), <http://www.llrx.com/columns/ediscovery/spreadsheets.htm> (discussing negotiations over the format of producing ESI); see, e.g., *United States v. O'Keefe*, 537 F. Supp. 2d 14 (D.D.C. 2008); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008).

<sup>61</sup> Philip J. Favro, *A New Frontier in Electronic Discovery: Preserving and Obtaining Metadata*, 13 B.U. J. SCI. & TECH. L. 1, 4 (2007); Hytken, *supra* note 59, at 879.

<sup>62</sup> Ronald Hedges et al., *Taking Shape: E-Discovery Practices Under the Federal Rules*, SN085 ALI-ABA 289, 391 (June 25–28, 2008).

<sup>63</sup> *Id.*

<sup>64</sup> See Mazza et al., *supra* note 6, at ¶ 4.

<sup>65</sup> Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. REV. 327, 337 (2000).

destruction of the hardware or overwriting by the computer system.<sup>66</sup> To the extent that data have been merely deleted by a computer user they are often recoverable, although usually only through costly computer forensics.<sup>67</sup>

Paradoxically, ESI is also extremely fragile.<sup>68</sup> “Deleting” information marks it for later elimination by computers’ automatic process for overwriting aging files. Therefore, while “deletion” is not necessarily permanent, electronic files and accompanying metadata may be altered or destroyed by computers’ routine pre-programmed operations.<sup>69</sup> This can result in the “deliberate” destruction of ESI—in the sense of ordinary overwriting—even though no person specifically intended to destroy the particular ESI.<sup>70</sup>

These four major dimensions of ESI are transforming the ways attorneys seek information and conduct discovery in a wide array of cases.

### *B. E-Discovery Trouble*

Without clear guidance, e-discovery is a walk in the dark. It also allows some attorneys and litigants to jigger the litigation process and, at times, exploit others.<sup>71</sup> E-discovery issues arise prior to and during all stages of litigation, including the moment a dispute morphs into a possible legal claim; at an early conference to form a discovery plan; during discovery requests and responses; in motions for preservation, to compel production and for protective orders; and upon contemplation of sanctions.

E-discovery is often more expensive than ordinary discovery because of the large volume, hidden features and frequent need for an army of support staff and specialists.<sup>72</sup> Costs of preservation can be exorbitant, even prior to litigation when it is unclear if a lawsuit will be filed.<sup>73</sup> Cautious in-house counsel tend to advise clients to absorb the high costs of preserving wide-ranging ESI to avoid steep sanctions for improper destruction, even though neither the rules nor court pronouncements clearly delineate when the

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<sup>66</sup> See Hytken, *supra* note 59, at 879–80.

<sup>67</sup> See, e.g., *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652 n.6 (2002).

<sup>68</sup> See Kenneth J. Withers, “Ephemeral Data” and the Duty to Preserve Discoverable Electronically Stored Information, 37 U. BALT. L. REV. 349, 378 (2008).

<sup>69</sup> See FED. R. CIV. P. 37(f) advisory committee’s note (2006).

<sup>70</sup> See *id.*

<sup>71</sup> See Qualters, *States Launching E-Discovery Rules*, *supra* note 38 (“Lawyers are figuring out how to turn electronic discovery into a sideshow.”). See generally Thomas C. Tew, *Electronic Discovery Misconduct in Litigation: Letting the Punishment Fit the Crime*, 61 U. MIAMI L. REV. 289 (2007).

<sup>72</sup> See generally Mazza et al., *supra* note 6.

<sup>73</sup> See Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-litigation Preservation Decisions*, 37 U. BALT. L. REV. 381, 386–87 (2008).

preservation duty begins and what preservation actually entails.<sup>74</sup> Indeed, “unrestricted and undefined [ESI] preservation obligations” at times function as an unseen force that drives litigation.<sup>75</sup>

The high volume and complexity of ESI also expands pre-production time for attorneys who must cull sensitive and discovery immune material from massive computer files.<sup>76</sup> The possibility of finding damaging “hidden” ESI—that would not have been recorded by non-electronic means—invites exceedingly aggressive production requests.<sup>77</sup> The availability of metadata, in particular, allows discovery of information that was previously unavailable; although often at great expense through computer forensics and at a possible invasion of privacy.<sup>78</sup> It is common for producing parties to become frustrated by the cost and tedium of pre-production review and for requesting parties to become frustrated by what appears to be unnecessary delay.<sup>79</sup>

Some attribute high e-discovery costs to the adversarial nature of litigation, businesses’ deficient ESI management policies or poor technology—or all three.<sup>80</sup> Others cite inevitable disagreements over the format of ESI production even among cooperative parties and attorneys.<sup>81</sup> Regardless of the causes, ordinary discovery problems are often magnified by e-discovery.<sup>82</sup>

<sup>74</sup> LOSEY, *supra* note 47, at 32; *see also* Grimm et al., *supra* note 73, at 385–88 (noting that Rule 26(b)(2)(C) cost-benefit factors technically do not apply before a complaint is filed, but suggesting that it should guide practices nonetheless); Paul & Baron, *supra* note 2, at ¶ 12.

<sup>75</sup> Hytken, *supra* note 59, at 886 (quoting Andrew M. Scherffius et al., *Conference on Electronic Discovery, Panel Four: Rules 37 and/or a New Rule 34.1: Safe Harbors for E-Document Preservation and Sanctions*, 73 FORDHAM L. REV. 71, 77 (2004)).

<sup>76</sup> *See id.* at 881.

<sup>77</sup> *See id.*

<sup>78</sup> *See* Favro, *supra* note 61, at 4 (stating that metadata is unique to ESI); Bradley H. Leiber, *Current Development 2007–2008: Applying Ethics Rules to Rapidly Changing Technology: The D.C. Bar’s Approach to Metadata*, 21 GEO. J. LEGAL ETHICS 893, 893 n.2 (2008) (“[T]he D.C. Bar analogizes mining for metadata to looking through a briefcase that was inadvertently left in opposing counsel’s office.”); Lucia Cucu, Note, *The Requirement for Metadata Production Under Williams v. Sprint/United Management Co.: An Unnecessary Burden for Litigants Engaged in Electronic Discovery*, 93 CORNELL L. REV. 221, 229–32 (2007) (discussing the high cost and difficulty of producing metadata).

<sup>79</sup> *See* Conrad J. Jacoby, E-Discovery Update: Recognizing Hidden Logistical Bottlenecks in E-Discovery, Law and Technology Resources for Legal Professionals (Apr. 24, 2007), <http://www.llrx.com/columns/fios16.htm>.

<sup>80</sup> *See* John Bace, Gartner RAS Core Research, Cost of E-Discovery Threatens to Skew Justice System (Apr. 20, 2007), <http://www.h5technologies.com/pdf/gartner0607.pdf>.

<sup>81</sup> *See* Shira A. Scheindlin & Jonathan M. Redgrave, *Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure*, 30 CARDOZO L. REV. 347, 356 (2008).

<sup>82</sup> *See* Qualters, *States Launching E-Discovery Rules*, *supra* note 38 (“[S]maller firms are wrestling with the issue of cost, such as searching the country for experts on long-obsolete programming languages.”).

E-discovery troubles also arise in the form of court imposed sanctions for e-discovery missteps. Those sanctions aim to compel compliance with e-discovery obligations, deter others from misconduct, restore prejudiced parties<sup>83</sup> and “plac[e] the risk of an erroneous judgment on the party who wrongfully created the risk.”<sup>84</sup> They are often imposed when there is a lesser degree of culpability than “bad faith,” including “cognizable prejudice to the injured party.”<sup>85</sup>

Sanctions against attorneys include significant fines, public pronouncements of wrongdoing and referrals to bar association ethics commissions.<sup>86</sup> Attorney and party e-discovery misconduct sometimes lead to default judgments or case dismissals,<sup>87</sup> adverse jury instructions;<sup>88</sup> bars to further discovery;<sup>89</sup> imposed waiver of confidentiality, attorney–client privilege and work-product immunity;<sup>90</sup> and payment of experts’ and attorneys’ fees and costs.<sup>91</sup>

Prior to and shortly after federal e-discovery rules were amended, courts imposed e-discovery sanctions in sixty-five percent of cases where sanctions were sought.<sup>92</sup> E-discovery sanctions are a hot topic—they are at play in one quarter of all ESI-related cases.<sup>93</sup>

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<sup>83</sup> Thomas Y. Allman, *Achieving an Appropriate Balance: The Use of Counsel Sanctions in Connection With the Resolution of E-Discovery Misconduct*, 15 RICH. J.L. & TECH. 9, ¶ 3 (2009).

<sup>84</sup> *Phoenix Four, Inc. v. Strategic Res. Corp.*, 2006 WL 1409413, at \*3 (S.D.N.Y. May 23, 2006).

<sup>85</sup> *Id.*

<sup>86</sup> See, e.g., *In re Sept. 11th Liab. Ins. Coverage Cases*, 243 F.R.D. 114 (S.D.N.Y. 2007); *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81 (D.N.J. 2006); *Metro. Opera Ass’n v. Local 100, Hotel Employees & Rest. Employees Int’l Union*, 212 F.R.D. 178 (S.D.N.Y. 2003).

<sup>87</sup> See, e.g., *Grange Mut. Cas. Co. v. Mack*, 270 Fed. Appx. 372 (6th Cir. Mar. 17, 2008); *S. New England Tel. Co. v. Global NAPs, Inc.*, 2008 U.S. Dist. LEXIS 47986 (D. Conn. June 23, 2008).

<sup>88</sup> See, e.g., *Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, 2007 U.S. Dist. LEXIS 48309 (N.D. Cal. June 27, 2007); *Anderson v. Crossroads Capital Partners, L.L.C.*, 2004 U.S. Dist. LEXIS 1867 (D. Minn. Feb. 10, 2004).

<sup>89</sup> See, e.g., *R & R Sails, Inc. v. Ins. Co. of the State of Pa.*, 251 F.R.D. 520 (S.D. Cal. 2008).

<sup>90</sup> See, e.g., *Casio v. Papst (In re Papst Licensing GMBH & Co. KG Litig.)*, 550 F. Supp. 2d 17 (D.D.C. 2008).

<sup>91</sup> See, e.g., *Keithley v. Homestore.com, Inc.*, 2009 U.S. Dist. LEXIS 2720 (N.D. Cal. Jan. 7, 2009).

<sup>92</sup> See Hytken, *supra* note 59, at 879 (describing events prior to 2006); Arthur F. Greenbaum, *Judicial Reporting of Lawyer Misconduct*, 77 U.M.K.C. L. REV. 537, 561 n.98 (2009) (referring to a study of cases from 1997–2007).

<sup>93</sup> Sheri Qualters, *25 Percent of Reported E-Discovery Opinions in 2008 Involved Sanctions Issues*, NAT’L L.J. (Dec. 17, 2008), <http://www.law.com/jsp/article.jsp?id=1202426805975&rss=newswire> (reporting that twenty-five percent of the opinions issued in the first 10 months of 2008 involved sanctions for mishandling electronic discovery).

*C. Overview of Federal E-Discovery Rules Amendments*

The Judicial Conference Committee on Rules of Practice and Procedure conceded in 2005 that then-extant federal discovery rules provided “inadequate guidance” on the e-discovery rights and obligations of parties and attorneys.<sup>94</sup> The Committee concluded that Federal Rules needed to be amended to avoid a vague “patchwork” of case law, local rules and varying practices—collectively inconsistent, confusing, burdensome and even debilitating.<sup>95</sup> The Committee further cautioned that, “[u]nless timely action is taken to make the federal discovery rules better able to accommodate the distinctive features of electronic discovery, those rules will become increasingly removed from practice, and similarly situated litigants will continue to be treated differently depending on the federal forum.”<sup>96</sup>

As a result, the Committee proposed rule amendments in 2005 with several main goals: to reduce costs and burdens for litigants, to increase uniformity, to instruct judges “to participate more actively in case management when appropriate” and to reduce unfair power differential among litigants of disparate resources.<sup>97</sup> In 2006, after careful vetting by the Judicial Conference Committee, the Supreme Court approved amendments to the e-discovery rules and Congress tacitly accepted them.<sup>98</sup>

A summary in thematic categories of the 2006 federal e-discovery rules amendments will be useful. The amended rules suggested for adoption by the Hawai'i state courts will be discussed in greater detail in section III.C.

Amended Federal Rules 16, 26(a) and 26(f) specifically account for “early attention” to e-discovery issues.<sup>99</sup> Automatic initial disclosure of documents useful to support a claim or defense, under amended Federal Rule 26(a)(1)(A),

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<sup>94</sup> Report of the Judicial Conference Committee, *supra* note 15, at 23.

<sup>95</sup> Report of the Judicial Conference Committee, *supra* note 15, at 23.

<sup>96</sup> Report of the Judicial Conference Committee, *supra* note 15, at 24.

<sup>97</sup> Report of the Judicial Conference Committee, *supra* note 15, at 24.

<sup>98</sup> Thomas Y. Allman, *The “Two-Tiered” Approach to E-Discovery: Has Rule 26(b)(2)(B) Fulfilled its Promise?*, 14 RICH. J.L. & TECH. 7, Appendix (2008).

Several organizations have created formal principles and rules that detail “proper” e-discovery conduct, anticipating or supplementing the federal rules. See Sedona Principles Addressing Electronic Document Production, Second Edition, *supra* note 20; National Conference of Commissioners on Uniform State Laws, *Uniform Rules Relating to the Discovery of Electronically Stored Information* (2007), [http://www.law.upenn.edu/bll/archives/ulc/udoera/2007\\_final.pdf](http://www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.pdf); American Bar Association, Section of Litigation, Civil Discovery Standards (Aug. 2004), <http://www.abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf>.

<sup>99</sup> FED. R. CIV. P. 16, 26(a) & 26(f); see also Sedona Principles Addressing Electronic Document Production, Second Edition, *supra* note 20.

specifically includes ESI.<sup>100</sup> Federal Rule 26(f), which covers party discovery conferences, requires parties to discuss ESI preservation, ESI production formats and issues and agreements relating to inadvertently produced attorney-client privileged and work-product immune ESI.<sup>101</sup> Federal Rule 16(b), which governs court scheduling orders pursuant to Rule 26(f) conferences, directs judges to include party agreements, in particular, those that relate to inadvertent disclosure of privileged and immune materials.<sup>102</sup>

Amended Federal Rule 26(b)(2), referring to the scope of discovery, explicitly allows a party to refuse to disclose ESI because of undue burden or cost.<sup>103</sup> However, if a refusing party seeks a protective order or a requesting party moves to compel the ESI, then the refusing party bears the burden of showing undue burden or cost.<sup>104</sup> Finally, regardless of a refusing party's showing, the amended rule appears to authorize courts to order discovery within general Rule 26(b)(2)(C) proportionality limitations.<sup>105</sup>

Amended Federal Rule 26(b)(5)(B) articulates what should happen when privileged or immune materials are inadvertently produced.<sup>106</sup> Initially, a producing party may notify all recipients and seek retrieval.<sup>107</sup> In these instances, recipients must immediately cease further disclosure and either return or destroy the material or produce it under seal to a court to challenge the claim of protection.<sup>108</sup>

Amended Federal Rule 33(d) permits a party to answer interrogatories by specifying responsive electronically stored business records.<sup>109</sup> Amended Federal Rule 34(a), relating to the scope and procedure of producing documents, permits general discovery of "any designated documents or electronically stored information."<sup>110</sup> Further, in the absence of a party agreement as to the format of production, amended Federal Rule 34(b) requires that a respondent produce ESI as it is normally maintained or in a reasonably usable form and it need not produce it in more than one form.<sup>111</sup>

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<sup>100</sup> FED. R. CIV. P. 26(a)(1)(A) (Rule 26(a)(1)(B) was renumbered as Rule 26(a)(1)(A) as part of the 2007 Amendments to the Federal Rules of Civil Procedure and is consistently referred to as Rule 26(a)(1)(A) herein).

<sup>101</sup> FED. R. CIV. P. 26(f).

<sup>102</sup> FED. R. CIV. P. 16(b).

<sup>103</sup> FED. R. CIV. P. 26(b)(2); *see* LOSEY, *supra* note 47, at 86.

<sup>104</sup> FED. R. CIV. P. 26(b)(2).

<sup>105</sup> *Id.*

<sup>106</sup> FED. R. CIV. P. 26(b)(5)(B).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> FED. R. CIV. P. 33(d).

<sup>110</sup> FED. R. CIV. P. 34(a)(1)(A).

<sup>111</sup> FED. R. CIV. P. 34(b)(2)(E)(ii)–(iii).

Finally, amended Federal Rule 37(e) provides a safe harbor from sanctions for the destruction of ESI where a party's "routine, good-faith" system of ESI management destroyed otherwise discoverable ESI.<sup>112</sup>

The next two parts of this article address the Hawai'i courts' adoption of the federal e-discovery rules regime and offer suggestions for clarification and to fill gaps in that regime.

### III. ADOPTING THE FEDERAL E-DISCOVERY RULES REGIME

#### A. Twenty-Three Other States' Adoption of the Federal Regime

To date, twenty-three states have adopted the federal e-discovery rules regime in whole or in part, including the western states of California, Alaska, Arizona, Utah and Montana.<sup>113</sup> In addition, several states that have not yet adopted new rules themselves are closely watching those states that have.<sup>114</sup>

Shortly after the federal amendments took effect in December 2006, the Montana Supreme Court adopted the federal e-discovery rules regime in 2007 "to provide more specific guidance [for discovery of ESI]."<sup>115</sup> After eighteen months of observation of the Federal Rules and adoption of rules by dozens of

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<sup>112</sup> FED. R. CIV. P. 37(e) (Rule 37(f) was renumbered as Rule 37(e) as part of the 2007 Amendments to the Federal Rules of Civil Procedure and is consistently referred to as Rule 37(e) herein).

<sup>113</sup> Kroll Ontrack, *supra* note 23 (containing a color-coded map of the United States and identifying twenty-three states that have adopted at least the basics of the federal e-discovery rules regime as of October 2009). In 2007 the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Rules Relating to the Discovery of Electronically Stored Information for state courts. See National Conference of Commissioners on Uniform State Laws, *supra* note 98. The "uniform rules" follow almost verbatim the Federal Rule amendments. Substantively, they are the same. Some of the relatively minor differences include a 21 day meet and confer requirement for counsel and an attempted definition, somewhat ambiguous, of "electronic discovery." See *id.*; LOSEY, *supra* note 47, at 108-09. The state courts that have adopted a new e-discovery regime generally appear to be following the Federal Rule amendments, with minor tweaking, rather than the uniform rules. See Kroll Ontrack, *supra* note 23. One apparent reason is that the Federal Rule amendments are now supported by a growing body of interpretive federal court decisions. Especially because Hawai'i state courts rely upon federal court decisions interpreting Hawai'i rules that are modeled after corresponding federal rules, see, e.g., *Moyle v. Y & Y Hyup Shin, Corp.*, 118 Haw. 385, 403 n.14, 191 P.3d 1062, 1080 n.14 (quoting *Harada v. Burns*, 50 Haw. 528, 532, 445 P.2d 376, 380 (1968)), we suggest adoption of the federal rules regime.

<sup>114</sup> Thomas Y. Allman, Annotated List of State Rules of Civil Procedure: State by State Summary of E-Discovery Efforts, <http://www.discoveryresources.org/library/case-law-and-rules/state-rules/annotated-list-of-state-rules-of-civil-procedure/> (last visited Oct. 11, 2009).

<sup>115</sup> *In re Proposed Revisions to the Montana Rules of Civil Procedure With Respect to Discovery of Electronic Information*, No. AF 07-0157 (Mont. Feb. 28, 2007) (adopting new civil rules for e-discovery).



other states, California adopted rules that closely track the federal regime, with minor tweaks to add greater detail (likely due to its codified procedural system).<sup>116</sup>

Some Arizona attorneys are calling for clarification and gap-filling by courts and their state rules committee after adopting the federal regime in 2008.<sup>117</sup> Other practitioners look both to the federal e-discovery rules regime and other sources for guidance in state courts.<sup>118</sup>

A sense of urgency is compelling states in every region to seriously consider amending their rules to address e-discovery.<sup>119</sup> They are doing so with the recognition that rule amendments are only the beginning. What remains is judicial clarification and pronouncements on key issues and cooperation among courts, attorneys and businesses in developing workable best practices tailored to local needs. It is now Hawaii's turn.

### *B. Hawai'i State Courts: Adopting the Federal Regime*

Hawai'i courts lack a rules regime and developed case law to enable litigants and attorneys to prophesize about e-discovery disputes and shape their practices to avoid or at least productively handle them.<sup>120</sup> Judges, too, need a system of rules to guide their otherwise piecemeal determinations. The initial question,

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<sup>116</sup> Assem. B. 5, 2009 Leg. (Ca. 2009); e.g., CAL. CODE CIV. P. § 1985.8(l)(1) ("Absent exceptional circumstances, the court shall not impose sanctions . . . for failure to provide [ESI] that has been *lost, damaged, altered, or overwritten* as a result of the routine, good-faith operation of an electronic information system." (emphasis added)); cf. FED. R. CIV. P. 37(e) ("Absent exceptional circumstances, a court may not impose sanctions . . . for failing to provide [ESI] *lost* as a result of the routine, good-faith operation of an electronic information system." (emphasis added)).

<sup>117</sup> See Robert G. Schaffer & Anthony Austin, *New Arizona E-Discovery Rules*, 44 AZ Attorney 24, 26 (Feb. 2008) (discussing the failure of rules to mandate particular practices for handling e-discovery early in litigation).

<sup>118</sup> E.g., Jeffrey S. Follett, *The Chief Justices' E-Discovery Guidelines: Worth A Look*, 51 B.B.J. 9 (May/June 2007) (citing Van Duizend, *supra* note 43).

<sup>119</sup> See Kroll Ontrack, *supra* note 23.

<sup>120</sup> Federal Magistrate Judges Kurren and Chang recently observed that while e-discovery is important, it has not yet been the basis of major disputes in the cases at the United States District Court for the District of Hawai'i. Interview with The Honorable Kevin S.C. Chang, Magistrate Judge of the District of Hawai'i, Haw. (Sept. 24, 2009) [hereinafter Magistrate Chang Interview]; Interview with The Honorable Barry Kurren, Magistrate Judge of the District of Hawai'i, Haw. (Sept. 24, 2009) [hereinafter Magistrate Kurren Interview]. One possible reason is the new federal e-discovery rules regime. See Magistrate Chang Interview; Magistrate Kurren Interview; cf. *In re Hawaiian Airlines, Inc. v. Mesa Air Group*, 2007 WL 3172642 (Bankr. D. Haw. Oct. 30, 2007) (involving destruction of ESI in breach of a duty to preserve).

therefore, is: should the Hawai'i courts adopt the federal e-discovery rules regime?<sup>121</sup>

Empirical assessment of the impacts of the federal e-discovery rules amendments is unfinished.<sup>122</sup> And federal and state court litigation differ in the types of cases processed and, on the federal side, in the significant usage of magistrate judges for discovery management.

Nevertheless, the amendments to the 2006 federal e-discovery rules provide a solid foundation for handling evolving e-discovery issues. There are three broad indicators that point to the overall importance of the federal e-discovery rules regime for state courts, including Hawaii's. First, as mentioned, many state courts are incorporating the federal regime into their rules of civil procedure with apparently salutary initial results. Second, the somewhat sparse terrain of published federal court opinions interpreting and applying the federal e-discovery rules do not reveal significant problems with the rules themselves—although they do reveal certain ambiguities and gaps that we address in the following section.<sup>123</sup>

Finally, informal interviews with federal magistrate judges in Hawai'i<sup>124</sup> and California<sup>125</sup> highlight the importance of the e-discovery rules on the front-lines of federal litigation. For United States Magistrate Judge Edward Chen, of the District Court of the Northern District of California,

E-discovery presents unique problems as well as opportunities in the context of pretrial discovery. Issues such as the need to balance the costs of disrupting normal business operations against the need to preserve evidence, the ability through search technology to run efficient searches of digital documents, and other issues warrant specific rules.<sup>126</sup>

Magistrate Judge Barry Kurren of the District Court of Hawai'i encourages Hawai'i and other states to adopt the federal e-discovery rules regime.<sup>127</sup> He anticipates that the lack of uniform state and federal court practices could

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<sup>121</sup> As of this writing, the Hawai'i Supreme Court has convened a special committee of judges, attorneys and law professors to consider adoption of new e-discovery rules.

<sup>122</sup> See, e.g., Richard L. Marcus, *E-Discovery Beyond the Federal Rules*, 37 U. BAL. L. REV. 321 (2008).

<sup>123</sup> See, e.g., *United States v. O'Keefe*, 537 F. Supp. 2d 14 (D.D.C. 2008) (interpreting Federal Rules 34(b) and 37(e) and commenting on the difficulty of production without parties' earlier discussion and agreements).

<sup>124</sup> Magistrate Chang Interview, *supra* note 120; Magistrate Kurren Interview, *supra* note 120.

<sup>125</sup> E-mail from The Honorable Edward M. Chen, Magistrate Judge of the Northern District of California (Sept. 14, 2009, 08:21:00 HST) (on file with authors); *id.* ("E-discovery is the new future of civil discovery. Carefully crafted rules, knowledgeable attorneys and parties, and hands-on judges are essential.").

<sup>126</sup> *Id.*

<sup>127</sup> Magistrate Kurren Interview, *supra* note 120.

become problematic, especially because the rules' disparity is large.<sup>128</sup> Magistrate Judge Kevin S.C. Chang, also of the District Court of Hawai'i, agrees about the importance of uniformity and adds that clear guidance is crucial for state courts because of those courts' heavy caseload.<sup>129</sup> Magistrates Kurren and Chang also note that the federal regime has made Hawai'i attorneys and businesses more cognizant of e-discovery issues and facilitated more cooperative ESI-related litigation.<sup>130</sup>

The impending e-discovery litigation challenges, the largely salutary impact of the Federal Rule amendments and the insights of federal magistrate judges collectively argue for Hawai'i courts' adoption of the federal e-discovery rules regime—with an important caveat. Adoption of the package of the federal e-discovery rules marks the beginning. The Hawai'i courts' clarification of ambiguities and filling of gaps in the new rules—potentially along the lines we suggest—is what will likely be needed to productively shape e-discovery practice in Hawai'i. We therefore suggest that Hawai'i courts adopt the 2006 amendments to the federal e-discovery rules summarized in detail below. And we also carefully consider ways that commentary and court rulings might clarify ambiguities and fill the important rules regime gaps delineated in Part IV.

### *C. The Federal E-Discovery Rules Regime*

#### *1. Early attention to e-discovery issues: Rules 16(b) and 26(a) and (f)*

In the federal e-discovery rules regime, early attention to e-discovery issues by all litigation players is required through the combination of Rule 26(f) (party and counsel discovery conferences) and Rule 16(b) (scheduling orders).<sup>131</sup> This early attention requirement encourages attorneys to facilitate agreements for cost-effective production and avoid inadvertent waiver of attorney-client privilege and work-product immunity.<sup>132</sup> After a Rule 26(f) conference and party-submitted discovery plans, courts' scheduling orders often incorporate

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<sup>128</sup> Magistrate Kurren Interview, *supra* note 120.

<sup>129</sup> Magistrate Chang Interview, *supra* note 120.

<sup>130</sup> Magistrate Chang Interview, *supra* note 120; Magistrate Kurren Interview, *supra* note 120.

<sup>131</sup> See FED. R. CIV. P. 16(b) and 26(f); see also FED. R. CIV. P. 26(a) advisory committee's note (2006) (stating that Rule 26 was amended to clarify that ESI must be included in initial disclosures).

<sup>132</sup> Report from Lee H. Rosenthal, Chair, Advisory Committee on the Federal Rules of Civil Procedure, to David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure [hereinafter Advisory Committee Report] 24–25, 36 (May 27, 2005), <http://www.uscourts.gov/rules/Reports/CV05-2005.pdf>; see also FED. R. CIV. P. 16 advisory committee's note (2006); FED. R. CIV. P. 26 advisory committee's note (2006).

agreements regarding ESI production issues and prevention of inadvertent waiver of privilege or immunity.<sup>133</sup>

For the purposes of developing a proposed discovery plan and increasing “possibilities for promptly settling or resolving the case,” Rule 26(f) meetings are now to encompass discussion of ESI preservation, ESI production (including file format), prospects of cost-shifting and maintaining privileges or immunities in the event of inadvertent ESI production.<sup>134</sup> Furthermore, amendments to Rule 16(b)(5) and Form 35 encourage parties to detail proposed e-discovery plans to the court.<sup>135</sup>

Federal Rule 16(b) was “[re-]designed to alert the court to the possible need to address the handling of discovery of [ESI] early in the litigation if such discovery is expected to occur.”<sup>136</sup> Paralleling Rule 26(f), federal e-discovery scheduling orders now may also “provide for disclosure or discovery of [ESI]” and any party agreements regarding claims of privilege or immunity that may arise after inadvertent production.<sup>137</sup> In its notes to Rule 26(f), the Advisory Committee directed that *ex parte* preservation orders should only be entered in exceptional circumstances because doing so might interrupt the balance of competing needs to preserve ESI and allow litigants to continue business operations.<sup>138</sup>

The current Hawai'i rules do not specify the timing of any discovery conference and the dates for generation of a discovery plan.<sup>139</sup> Assuming that the Hawai'i procedural rules will not be amended to match the precise scheduling conference and discovery conference and plan requirements of the Federal Rules, then the simpler proposal of the Uniform Law Commission makes sense: within 21 days after all parties' appearance, the parties' counsel are to confer and, if ESI is likely to be sought, to submit to the court an e-discovery plan within 14 days after conferring.<sup>140</sup>

<sup>133</sup> See FED. R. CIV. P. 16(b).

<sup>134</sup> FED. R. CIV. P. 26(f)(2).

<sup>135</sup> Advisory Committee Report, *supra* note 132, at 24.

<sup>136</sup> FED. R. CIV. P. 16(b) advisory committee's note (2006).

<sup>137</sup> FED. R. CIV. P. 16(b)(3)(B)(iii); *see also* FED. R. CIV. P. 16(b) advisory committee's note (2006) (suggesting that parties make various agreements regarding this issue); FED. R. CIV. P. 26 advisory committee's note (2006).

<sup>138</sup> FED. R. CIV. P. 26(f) advisory committee's note (2006).

<sup>139</sup> *See* HAW. R. CIV. P. 16 & 26 (no specification of discovery conference or plan deadlines); *see also* HAW. CIR. CT. R. (no specification of discovery conference or plan deadlines).

<sup>140</sup> Rule 3. Conference, Plan, and Report to the Court.

(a) Unless the parties otherwise agree or the court otherwise orders, not later than [21] days after each responding party first appears in a civil proceeding, 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, and if so the parties at the conference shall discuss:

## 2. Production format and procedure: Rules 33(d) and 34(a) and (b)

Prior to the 2006 amendments to the federal e-discovery rules, many courts encountered difficulty in stretching Rule 34 to encompass ESI as a “document,” especially ESI that is unintelligible when separated from the database that it is stored on.<sup>141</sup> All types of ESI now fall within the ambit of amended Rule 34(a).<sup>142</sup> Amended Federal Rule 34(a)(1) pertains to the production of documents and things, permitting discovery requests to “test[] or sample . . . [ESI] . . . stored in any medium” and be translated, if necessary, by the respondent.<sup>143</sup> Federal Rule 26(f) now directs attorneys to discuss the “forms in which [ESI] should be produced” prior to requesting court assistance.<sup>144</sup> Paragraph (b) of Rule 34 permits requesting parties to “specify the form” of production and authorizes responding parties to object to those specifications and describe the form it intends to employ.<sup>145</sup> If a party does not request a specific format for ESI and there is no controlling court order or party agreement, then the respondent “must produce [ESI] in . . . forms in which it is ordinarily maintained or [forms that are] . . . reasonably usable . . . .”<sup>146</sup>

Federal Rule 33(d) now authorizes parties to respond to interrogatories by producing business records in electronic form.<sup>147</sup> The responding party, however, “must ensure that the interrogating party can locate and identify it ‘as readily as can the party served,’ and that the responding party . . . give the interrogating party a ‘reasonable opportunity to examine, audit, or inspect’ the information.”<sup>148</sup>

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(b) If discovery of electronically stored information is reasonably likely to be sought in the proceeding, the parties shall:

- (1) develop a proposed plan relating to discovery of the information; and
- (2) not later than [14] days after the conference under the subsection (a), 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.

National Conference of Commissioners on Uniform State Laws, *supra* note 98.

<sup>141</sup> FED. R. CIV. P. 34(a) advisory committee’s note (2006).

<sup>142</sup> *Id.*

<sup>143</sup> FED. R. CIV. P. 34(a); *see also* FED. R. CIV. P. 34(b) advisory committee’s note (2006) (stating that, upon objection, “parties must meet and confer under Rule 37(a)(2)(B) in an effort to resolve the matter before . . . a motion to compel” is filed).

<sup>144</sup> FED. R. CIV. P. 26(f)(3).

<sup>145</sup> FED. R. CIV. P. 34(b).

<sup>146</sup> FED. R. CIV. P. 34(b)(2)(E)(ii).

<sup>147</sup> FED. R. CIV. P. 33(d); *see also* Conrad J. Jacoby, E-Discovery Update: Pushing Back Against Hardcopy ESI Productions, Law and Technology Resources for Legal Professionals (Oct. 29, 2008), <http://www.llrx.com/columns/hardcopyesi.htm> (suggesting that production of ESI in hard-copy format is becoming less appropriate and less desired among attorneys).

<sup>148</sup> FED. R. CIV. P. 33(d) advisory committee’s note (2006).

3. *Discovery of ESI that is not reasonably accessible because of undue burden or cost: Rule 26(b)(2)(B)*

The addition of subsection (b)(2)(B) to Federal Rule 26 responds to a major difference between e-discovery and ordinary discovery. While many computer systems make ESI more accessible and less costly, others do the exact opposite—user-friendly properties do not always carry over for easy preservation and production.<sup>149</sup> Simply put, “[a] party may have a large amount of information on sources or in forms that may be responsive to discovery requests, but would require [substantial burden or cost for] recovery, restoration, or translation before it could be located, retrieved, reviewed, or produced.”<sup>150</sup> These burdensome sources include:

back-up tapes . . . that are often not indexed, organized, or susceptible to electronic searching; legacy data that remains from obsolete systems and is unintelligible on the successor systems; data that was “deleted” but remains in fragmented form, requiring a modern version of forensics to restore and retrieve; and databases that were designed to create certain information in certain ways and that cannot readily create very different kinds or forms of information.<sup>151</sup>

Accordingly, amended Federal Rule 26(b)(2)(B) now allows a respondent to avoid the hardship of production if requested ESI is “not reasonably accessible because of undue burden or cost.”<sup>152</sup> The Advisory Committee Notes to Rule 26(b)(2) are instructive, although the rule itself is unclear about the process for designating material “not reasonably accessible.” The Advisory Committee Notes outline a two-tier process for ESI production<sup>153</sup>—first “reasonably accessible” ESI and second (only if necessary), “not reasonably accessible” ESI.<sup>154</sup>

As to the second tier, a respondent must “identify, by category or type, the sources” that it claims are “not reasonably accessible” with “enough detail to

<sup>149</sup> See Report of the Judicial Conference Committee, *supra* note 15, at 31.

<sup>150</sup> Advisory Committee Report, *supra* note 132, at 42. Producing parties are often able to locate sources that may contain responsive information but are unable to “produce” them “without incurring substantial burden or cost.” Advisory Committee Report, *supra* note 132, at 42.

<sup>151</sup> Advisory Committee Report, *supra* note 132, at 42.

<sup>152</sup> FED. R. CIV. P. 26(b)(2)(B).

<sup>153</sup> Advisory Committee Report, *supra* note 132, at 42–43. Some argue that the two-tier system deters proper production of ESI by allowing parties to “self-designate” what is not reasonably accessible. Advisory Committee Report, *supra* note 132, at 44. Others argue that the two-tier system encourages storage of ESI in a way that is not reasonably accessible to avoid production in the event of litigation. Advisory Committee Report, *supra* note 132, at 44.

<sup>154</sup> FED. R. CIV. P. 26(b)(2) advisory committee’s note (2006); see Hytken, *supra* note 59, at 890 (stating that first-tier materials are presumed to be discoverable).

enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.”<sup>155</sup> Designated “second-tier” materials are presumed “not reasonably accessible.”<sup>156</sup> Without more, this is the end of the process.

If a requesting party challenges the “second-tier” designation with a motion to compel (or a respondent moves for a protective order), then the respondent bears the burden of showing that the materials sought are indeed unduly burdensome or costly.<sup>157</sup> The requesting party may refute this showing by proving “good cause” for production.<sup>158</sup> A court may then order production in entirety or with conditions, considering Rule 26(b)(2)(C) cost-benefit factors.<sup>159</sup> As to the latter assessment, the Advisory Committee Notes to Federal Rule 26 instruct courts to independently evaluate whether burdens and costs can be “justified [by] the circumstances of the case.”<sup>160</sup> The Advisory Committee Notes list seven “appropriate considerations”:

(1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties’ resources.<sup>161</sup>

The two-tier system does not diminish any preservation obligation.<sup>162</sup> It only addresses the *production* of preserved information.

#### 4. *Maintaining attorney–client privilege and work-product immunity despite inadvertent production: Rules 26(b)(5)(B) and 26(f)(4)*

Federal rulemakers intended for Rule 26(f) conferences to encourage e-discovery agreements.<sup>163</sup> They also designed Rule 26(f) to encourage parties to avoid inadvertent waiver of attorney–client privilege and work-product

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<sup>155</sup> FED. R. CIV. P. 26(b)(2) advisory committee’s note (2006).

<sup>156</sup> Hytken, *supra* note 59, at 890.

<sup>157</sup> FED. R. CIV. P. 26(b)(2) advisory committee’s note (2006).

<sup>158</sup> Hytken, *supra* note 59, at 890; *see* FED. R. CIV. P. 26(b)(2).

<sup>159</sup> FED. R. CIV. P. 26(b)(2)(B); *see* LOSEY, *supra* note 47, at 110.

<sup>160</sup> FED. R. CIV. P. 26(b)(2) advisory committee’s note (2006).

<sup>161</sup> *Id.*

<sup>162</sup> Advisory Committee Report, *supra* note 132, at 44.

<sup>163</sup> FED. R. CIV. P. 26(f) advisory committee’s note (2006); *see* LOSEY, *supra* note 47, at 82 (citing ADAM COHEN & DAVID LENDER, ELECTRONIC DISCOVERY: LAW AND PRACTICE (Supp. 2007)).

immunity—particularly because the “volume and dynamic nature” of ESI may make it difficult to identify privileged and immune material before production.<sup>164</sup>

Under amended Federal Rule 26(f), party agreements to prevent waiver of privileged and immune material often include “quick peeks” or “clawbacks.”<sup>165</sup> “Quick-peek” agreements allow a requesting party a “quick peek” at a broad range of the opposing party’s ESI.<sup>166</sup> Requests are then tailored to relevant and desired ESI without a producing party’s waiver of privilege or immunity.<sup>167</sup> “Clawback” agreements involve a producing party’s liberal disclosure of ESI and authorization for the producing party to “claw” ESI back as it becomes noticeably attorney–client privileged or work-product immune.<sup>168</sup> The Committee encouraged party agreements in anticipation of this issue, acknowledged that federal courts cannot order quick peeks or clawbacks without a party agreement and declared that courts should only enter an *ex parte* order in exceptional circumstances.<sup>169</sup>

Federal Rule 26(b)(5)(B) provides a procedure for parties who claim privilege or immunity after inadvertent production.<sup>170</sup> A party that inadvertently produced privileged or immune materials may notify any party that received the information and the basis for its protection.<sup>171</sup> Then the notified party “must promptly return, sequester, or destroy the specified information and any copies it has [and] must not use or disclose the information until the claim [for protection] is resolved . . . .”<sup>172</sup> The Federal Rule does not address whether production waives protection, but only provides an avenue for claiming after-the-fact protection.<sup>173</sup> Rule 26(b)(5)(B) is intended to work with the new Rule 26(f), which encourages party agreements on these issues.<sup>174</sup>

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<sup>164</sup> FED. R. CIV. P. 26(f) advisory committee’s note (2006).

<sup>165</sup> *Id.*; see Colonel John Siemietkowski, *Note From the Field: E-Discovery Amendments to Federal Rules of Civil Procedure Celebrate First Anniversary*, 2007 ARMY LAW. 77, 80 (2007).

<sup>166</sup> Advisory Committee Report, *supra* note 132, at 36.

<sup>167</sup> Advisory Committee Report, *supra* note 132, at 36.

<sup>168</sup> Advisory Committee Report, *supra* note 132, at 36.

<sup>169</sup> FED. R. CIV. P. 16 advisory committee’s note (2006); FED. R. CIV. P. 26(f) advisory committee’s note (2006).

<sup>170</sup> FED. R. CIV. P. 26(b)(5)(B).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> FED. R. CIV. P. 26(b)(5) advisory committee’s note (2006).

<sup>174</sup> *Id.* (“Agreements reached under Rule 26(f)(4) and orders including such agreements entered under Rule 16(b)(6) *may be considered* when a court determines whether a waiver has occurred.” (emphasis added)).



### 5. Sanctions and a safe harbor for loss of ESI: Rule 37(e)

Federal Rule 37(e)<sup>175</sup> provides a safe harbor from sanctions for ESI “lost” as a “result of the *routine, good-faith* operation of an electronic information system.”<sup>176</sup> Responding parties who satisfy the safe harbor requirement of routine, good-faith loss cannot be sanctioned “[a]bsent exceptional circumstances.”<sup>177</sup> Rule 37(e) is highly unusual. It is the only federal rule that expressly prohibits imposition of sanctions.

## IV. CLARIFYING AND SUPPLEMENTING E-DISCOVERY RULES FOR HAWAII PRACTICE

Adoption of the federal e-discovery rules regime will provide helpful guidance to Hawaii’s attorneys, judges and businesses. As mentioned, however, the amended federal e-discovery rules are ambiguous on some issues and leave significant gaps in others. We now analyze three major potentially problematic areas of e-discovery and offer rulemakers, judges and attorneys suggestions for clarification and gap-filling. More specifically, we address hidden dimensions to the mandate of *early attention* to e-discovery issues (including attorney, client and expert attention to technological intricacies in anticipating litigation and preparing discovery plans); *cost-benefit proportionality* (including infusing the proportionality principle throughout the litigation and shifting e-discovery costs); and *sanctions avoidance* (including assessing tricky aspects of the duty to preserve ESI, crafting ESI retention and destruction policies, deploying litigation holds and anticipating an affirmative sanctions rule). Our suggestions by no means exhaust the field of possibilities, but do reflect our best assessment to date.

### A. Early Attention for Efficient ESI Exchanges

Federal courts,<sup>178</sup> state courts,<sup>179</sup> practitioners<sup>180</sup> and procedural scholars<sup>181</sup> widely agree that “front-loading” the handling of e-discovery issues prevents or

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<sup>175</sup> See *supra* note 112 (noting that Rule 37(f) was renumbered as Rule 37(e) as part of the 2007 Amendments to the Federal Rules of Civil Procedure and is consistently referred to as Rule 37(e) herein).

<sup>176</sup> FED. R. CIV. P. 37(e) (emphasis added).

<sup>177</sup> *Id.*; cf. FED. R. CIV. P. 37(f) advisory committee’s note (2006) (stating that the rule “does not affect other sources of authority to impose sanctions or rules of professional responsibility”).

<sup>178</sup> Report of the Judicial Conference Committee, *supra* note 15, at 26.

<sup>179</sup> See, e.g., ALASKA R. CIV. P. 26–37; see also Uniform State Laws, *supra* note 98, at 4–6.

<sup>180</sup> See, e.g., LOSEY, *supra* note 47, at 7–8.

<sup>181</sup> See, e.g., Withers, *supra* note 68, at 378 (stating that an early discovery conference is essential for e-discovery, especially concerning time-sensitive data).

diffuses later e-discovery disputes.<sup>182</sup> Litigation costs may decline and case valuation may become more predictable as attorneys organize and present their positions on e-discovery issues early to opposing parties and the court.<sup>183</sup> While there may be unnecessary anticipatory expenses, we agree generally with these views and emphasize the importance of early attention to e-discovery by Hawaii's judges, attorneys and businesses.

The early attention framework of amended Federal Rules 16 and 26(a) and (f) is designed to avoid wasteful e-discovery and concomitant disputes.<sup>184</sup> The federal regime, however, does not particularize what kind of "early attention" is required or even desirable *prior to* the Rule 26(f) discovery conference and Rule 16 scheduling conference. With an eye on long-term costs and benefits, we highlight three practices that Hawai'i attorneys and litigants would likely find productive at the outset of litigation.

First, based on recent federal court e-discovery experience, businesses' early creation of detailed ESI management policies is crucial. Generally, the greater the detail of parties' ESI preservation protocols (i.e. specifying the individuals and computer systems involved), the more productive the Rule 26(f) discovery conference (or in Hawai'i courts, the discretionary discovery conferences) and the fewer the e-discovery problems later.<sup>185</sup>

Second, federal court experience also indicates that productive discovery conferences require attorneys' familiarity with their clients' ESI systems. Computer specialists are essential. They help attorneys assess and represent whether their clients' ESI is accessible and calculate costs for review, formatting and production.<sup>186</sup> Attorneys' early preparation might also focus on knowledge of: (1) the physical location of duplicates and back-up ESI; (2) the difficulty and cost of accessing particular ESI (and in what formats); (3) the ESI's sensitivity to overwriting or deletion; (4) the method their client uses to employ a litigation hold on scheduled ESI destruction; and (5) the use of data sampling to prepare a discovery plan.<sup>187</sup> Early cooperation and understanding

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<sup>182</sup> LOSEY, *supra* note 47, at 82–84 (citations omitted).

<sup>183</sup> See Ralph C. Losey, *Lawyers Behaving Badly: Understanding Unprofessional Conduct in E-Discovery*, 60 MERCER L. REV. 983, 998–99 (2009) (encouraging early and cooperative e-discovery conferences).

<sup>184</sup> Report of the Judicial Conference Committee, *supra* note 15, at 26–27.

<sup>185</sup> See Michael D. Berman, *Avoiding Discovery into Discovery: ESI Lessons Learned*, LITIGATION NEWS, Fall 2008, at 22; Correy E. Stephenson, *Clients Take Reins in E-Discovery*, MO. LAW. WKLY., Oct. 13, 2008 ("Companies are trying to be as efficient as possible . . . . In a perfect world, the attorneys will be involved even before litigation occurs."); Isom, *supra* note 21, at 5.

<sup>186</sup> See Berman, *supra* note 185, at 22.

<sup>187</sup> See, e.g., *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432–36 (S.D.N.Y. 2004) (*Zubulake V*). See generally Sedona Conference, Best Practices, *supra* note 6 *passim* (discussing best practices).

is also likely to promote parties' willingness to follow their attorneys' sometimes seemingly burdensome advice and help avoid later sanctions—in the immediate case and, even better, in future cases as well.<sup>188</sup>

Finally, based on federal court e-discovery experience, attorneys and parties are encouraged to devote early attention to the risk of inadvertently producing attorney–client privileged or work-product immune ESI. Prior to the surge of e-discovery, courts variously and inconsistently interpreted the waiver-effect of “inadvertent production”—all disclosures were waivers, only some disclosures were waivers, and no disclosures were waivers.<sup>189</sup> Amended Federal Rule 26(b)(5)(B), addressing inadvertent production, does not determine the extent to which inadvertent production constitutes waiver. It only sets up a procedure for raising and responding to the issue.<sup>190</sup> The Hawai‘i circuit courts will likely need to fill this gap by resorting to the Hawai‘i Supreme Court’s waiver rulings or federal court practices on inadvertent production in ordinary discovery.<sup>191</sup>

### *B. Express Cost–Benefit Proportionality Analyses*

Early attention is helpful for evaluating benefits and burdens of e-discovery in a particular case. But early attention alone does not resolve how to allocate costs in a way that both is consistent with the purposes of discovery and accounts for e-discovery’s often heavy financial toll and business disruption. The established proportionality principle for ordinary discovery provides apt guidance on this question.

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<sup>188</sup> See Marcus, *E-Discovery Beyond the Federal Rules*, *supra* note 122, at 331.

<sup>189</sup> See *Elkton Care Ctr. Assocs. Ltd. P’shp v. Quality Care Mgmt.*, 805 A.2d 1177, 1183–85 (Md. Ct. Spec. App. 2002).

<sup>190</sup> FED. R. CIV. P. 26(b)(5) advisory committee’s note (2006).

<sup>191</sup> See *Save Sunset Beach Coal. v. City & County of Honolulu*, 102 Haw. 465, 486, 78 P.3d 1, 23 (2003) (quoting *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993)). In determining whether inadvertent production constitutes waiver, the Hawai‘i Supreme Court has held that “consideration is given to all of the circumstances surrounding the disclosure.” *Id.* at 486, 78 P.3d at 22 (quoting *Alldread*, 988 F.2d at 1434). The court identified five key factors: “(1) the reasonableness of precautions taken to prevent disclosure; (2) the amount of time taken to remedy the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness.” *Id.* (quoting *Alldread*, 988 F.2d at 1434). Federal courts employ the same approach to determine waiver of inadvertently produced e-discovery. See, e.g., *Victor Stanley, Inc., v. Creative Pipe, Inc.*, 250 F.R.D. 251, 259 (D. Md. 2008) (citing *McCafferty’s, Inc., v. Bank of Glen Burie*, 179 F.R.D. 163, 167 (D. Md. 1998)).

As discussed, early attention to waiver may take the form of “clawback” or “quick peek” agreements. Although, in federal courts, these agreements sometimes result in disputes themselves. Magistrate Chang Interview, *supra* note 120; see also *Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228, 235 (D. Md. 2005) (suggesting that non-waiver agreements may be ineffective for third-parties).

### 1. Cost-benefit proportionality generally

E-discovery's potential for distorting substantive outcomes because of exorbitant costs highlights the salience of the principle of proportionality for e-discovery—that is, assessing probable long-range costs and benefits as a guide to discovery conduct.<sup>192</sup> The shift toward electronic transmittal and storage of information exacerbates imbalances of litigation power among individual, business and government litigants and sometimes affects case outcomes.<sup>193</sup> The federal e-discovery rules regime, however, is ambiguous on the crucial issue of cost-benefit proportionality. Some attorneys and judges look elsewhere for general rules that “superimpose the concept of proportionality on all behavior in the discovery arena.”<sup>194</sup> Others tend to overlook proportionality considerations altogether. At best, federal courts inconsistently employ the general proportionality principle for e-discovery.<sup>195</sup> With this in mind, we suggest that the Hawai'i courts expressly embrace cost-benefit proportionality as a key guiding principle for Hawai'i e-discovery practice.

Hawai'i Rule 26(b)(2) and its federal counterpart instruct judges and attorneys in ordinary cases to make proportionality determinations when creating an overarching discovery plan.<sup>196</sup> The rule *requires* that courts limit discovery at the outset of litigation according to the following criteria:

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<sup>192</sup> See *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357–58 (D. Md. 2008) (“[C]ompliance with the ‘spirit and purposes’ of these discovery rules requires [attorneys to] cooperat[e] . . . [and] avoid seeking discovery the cost and burden of which is disproportionately large to what is at stake in the litigation.”).

<sup>193</sup> See Salvatore Joseph Bauccio, Comment, *E-Discovery: Why and How E-Mail is Changing the Way Trials are Won and Lost*, 45 DUQ. L. REV. 269, 270–71 (2007) (discussing the differences between e-discovery and traditional discovery, especially the amount of resources needed for proper e-discovery and the increase of settled cases due to high costs).

<sup>194</sup> Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, 64 LAW & CONTEMP. PROBS. 253, 256–57 (2001) (quoting *In re Convergent Tech. Sec. Litig.*, 108 F.R.D. 328, 331 (N.D. Cal. 1985)).

<sup>195</sup> See Withers, *supra* note 68, at 377 (“[C]ourts have not expressly applied proportionality considerations analogous to Rules 26(b)(2)(C) and 26(c) of the [FRCP] to the context of preservation . . .”).

<sup>196</sup> HAW. R. CIV. P. 26(b)(2):

The frequency or extent of use of the discovery methods otherwise permitted under these rules *shall be limited by the court* if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) *the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.*

(emphasis added); accord FED. R. CIV. P. 26(b)(2)(C).

“[whether] the burden or expense . . . outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.”<sup>197</sup> The rule contemplates active judicial management and a comprehensive cost–benefit proportional discovery plan to guide information location and production and to minimize later disputes over burdens and costs.<sup>198</sup>

In practice, judges, attorneys and scholars regularly overlook Rule 26(b)’s broad proportionality mandate—an important oversight. Instead, many apparently choose to consider proportionality narrowly under Rule 26(c), which authorizes protective orders to limit specific discovery for reason of “annoyance, embarrassment, oppression . . . undue burden or expense” or unfair competitive advantage.<sup>199</sup> Rule 26(c) provides some guidance because it is, in part, concerned with burden and expense.<sup>200</sup> But the protective order rule addresses the handling of individual discovery disputes (e.g., objections to a request for specific documents) and not overarching discovery plans.<sup>201</sup> Even an “umbrella protective order” in a complex case simply allows parties early on to designate materials “confidential” without engaging in proportionality analyses.<sup>202</sup>

As mentioned, Hawai‘i Rule 26(b)(2)(iii) and Federal Rule 26(b)(2)(C)(iii) command in ordinary discovery a separate and early proportionality analysis. While arguments for *active* deployment of proportionality analysis in *all* cases falls beyond the scope of this article,<sup>203</sup> what follows are suggestions for how the cost–benefit proportionality principle might productively be employed through tailoring Hawai‘i Rule 26(b)(2)(iii) to *e-discovery* in Hawai‘i courts.<sup>204</sup>

<sup>197</sup> HAW. R. CIV. P. 26(b)(2)(iii); FED. R. CIV. P. 26(b)(2)(C)(iii) (roughly equivalent); see Eric K. Yamamoto, *Case Management and the Hawaii Courts: The Evolving Role of the Managerial Judge in Civil Litigation*, 9 U. HAW. L. REV. 395, 443 (1987) (discussing use of Rule 26(b)(2)(iii) “at the outset” of litigation).

<sup>198</sup> See Yamamoto, *supra* note 197, at 443, 445, 448–51.

<sup>199</sup> HAW. R. CIV. P. 26(c); FED. R. CIV. P. 26(c); see, e.g., *Rivera v. NIBCO, Inc.*, 384 F.3d 822, 827–28 & n.6 (9th Cir. 2004) (discussing a protective order analysis under Rule 26(c) as requiring great specificity tailored to protect the specific information and source); *In re Adobe Sys., Inc. Sec. Litig.*, 141 F.R.D. 155, 158 (N.D. Cal. 1992) (discussing unfair competitive advantage in a motion for a protective order).

<sup>200</sup> FED. R. CIV. P. 26(c).

<sup>201</sup> See, e.g., *Rivera*, 384 F.3d. at 827–28.

<sup>202</sup> See, e.g., *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987).

<sup>203</sup> To the extent that Hawai‘i courts tend to underuse this rule in ordinary discovery, we suggest significantly ramped up usage for ordinary as well as e-discovery. Hawai‘i appellate courts’ general guidance regarding Rule 26(b)(2) cost–benefit analysis is that trial courts have discretion to “limit the amount of discovery on a case-by-case basis even in the absence of sanctionable abuse.” *Acoba v. Gen. Tire, Inc.*, 92 Haw. 1, 11, 986 P.2d 288, 298 (1999).

<sup>204</sup> See *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 219 F.R.D. 93, 98 (D. Md. 2003)

The one amended federal rule that expressly refers to proportionality in e-discovery does not clearly apply to *all* e-discovery. This rule, amended Federal Rule 26(b)(2)(B), incorporates a two-tiered system for ESI production.<sup>205</sup> The rule provides that, in the first tier, a responding party must produce relevant and reasonably accessible ESI but can withhold ESI deemed “not reasonably accessible.”<sup>206</sup> Then, if either a motion to compel or for a protective order is filed, a responding party—in the second tier—“must show that the [ESI] is not reasonably accessible because of undue burden or cost.”<sup>207</sup> Regardless of the success of this showing, the court may order discovery if the requesting party also shows “good cause,” considering the limitations of Rule 26(b)(2)(C)’s general cost–benefit proportionality principle.<sup>208</sup>

The language of Federal Rule 26(b)(2)(B) thus indicates that e-discovery proportionality considerations do not operate at the threshold of discovery but only come into play when: (1) the responding party contends that particular ESI is not reasonably accessible; (2) a “trigger motion” is filed (either by the responding party for a protective order or by the requesting party to compel production); (3) a showing of undue burden or cost is made by the responding party; *and* (4) a counter showing of good cause is made by the requesting party.<sup>209</sup> But, contrary to the language of the rule, the Federal Advisory

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(“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.”); *cf.* *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 284–91 (S.D.N.Y. 2003) (*Zubulake III*) (articulating a seven-factor test for cost-shifting).

<sup>205</sup> FED. R. CIV. P. 26(b)(2)(B):

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* The Proposed Uniform Rules specifically incorporate the last four factors of Federal Rule 26(b)(2)(C)—the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues—but implicitly limit any proportionality considerations to these four factors. *See* LOSEY, *supra* note 47, at 110–11, *cf.* FED. R. CIV. P. 26(b)(2)(B).

<sup>209</sup> *Id.* In critique of the impact of the rules, one commentator suggests that amended Federal Rule 26(b)(2)(B) rewards continued use of outdated computer systems by immunizing from discovery data that is difficult to access under existing ESI systems. *See* LOSEY, *supra* note 47, at 84–90. It seems unlikely, however, that companies would maintain outdated systems for this reason. Doing so would constrict business activity and would also inhibit their ability to abide by amended Federal Rules 16(b) and 26(f), which require parties to quickly identify and review large amounts of electronic data and respond to discovery requests. *See id.* at 84–87 (citing

Committee Notes to Rule 26(b)(2) maintain that proportionality criteria “apply to all discovery of [ESI], including that stored on reasonably accessible electronic sources.”<sup>210</sup>

This ambiguity is slight but significant. It is unclear whether the proportionality principle is also to guide parties in crafting e-discovery plans and organizing the full range of parties’ e-discovery practices or, similar to Rule 26(c), whether it is to be applied only to disputed requests for particular ESI that is deemed “not reasonably accessible.”

Moreover, even if they desire to apply Rule 26(b)(2) broadly, attorneys and judges might easily adopt a restricted approach to proportionality—i.e., for only specific disputes rather than when parties create e-discovery plans and determine e-discovery practices for the entire litigation. This approach would be “easy” and “restricted” because it would mimic the limited protective order approach to burdens and costs. But doing so would bypass the opportunity to invoke the proportionality principle in shaping e-discovery throughout the litigation.

To clarify these ambiguities, we recommend that the proportionality principle embodied in Hawai‘i Rule 26(b)(2) and Federal Rule 26(b)(2)(C) operate throughout the litigation for all e-discovery—that is, when parties, attorneys or judges are crafting overarching e-discovery plans as well as when specific e-discovery cost–benefit disputes arise. It should also operate as an integral part of the threshold determination whether ESI is “not reasonably accessible.”

The utility and elegance of embracing cost–benefit proportionality throughout the litigation for all e-discovery is underscored by a pre-existing enforcement rule for “disproportionate discovery.” Rule 26(g), the general discovery sanctions rule, requires that the attorney sign discovery requests, responses and objections, certifying among other things that the attorney’s conduct is consistent with the cost–benefit proportionality principle.<sup>211</sup> Under this general rule, Hawai‘i courts are required to impose “an appropriate sanction” against *an attorney or party or both* for violations without substantial justification of the proportionality principle.<sup>212</sup> While Rule 26(g) was not

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Garrie et al., *Hiding the Inaccessible Truth: Amending the Federal Rules to Accommodate Electronic Discovery*, 25 REV. LITIG. 115 (2006)). Many commentators observe that the “good cause” requirement would likely discourage fraudulent practice. See *id.*

<sup>210</sup> FED. R. CIV. P. 26(b)(2) advisory committee’s note (2006).

<sup>211</sup> HAW. R. CIV. P. 26(g)(1):

[T]hat to the best of the signer’s knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is . . . *not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.*

(emphasis added); accord FED. R. CIV. P. 26(g)(1).

<sup>212</sup> HAW. R. CIV. P. 26(g)(2) (emphasis added); accord FED. R. CIV. P. 26(g)(3).

crafted with e-discovery in mind, its purpose of deterring wasteful discovery filings applies to e-discovery as well.

## 2. Cost-shifting

Another gap in the federal e-discovery rules regime that is related to the proportionality principle, is whether and when to shift costs of preserving and producing ESI. Traditionally, discovery burdens and costs have fallen largely on responding parties.<sup>213</sup> They are now being shifted with increasing regularity to requesting parties.<sup>214</sup> Without carefully assessed cost-shifting, the high costs of e-discovery can exacerbate the distorting effect of unequal resources among parties and affect strategic litigation decisions independent of the merits.<sup>215</sup>

The most often-cited considerations for determining when courts are to order (or approve) e-discovery cost-shifting are articulated in *Zubulake III*.<sup>216</sup> *Zubulake III* first determined that cost-shifting should only be considered when "inaccessible data" is sought and then described seven cost-shifting factors.<sup>217</sup> The main factors are relatively straightforward: the extent that the request is specifically tailored; the availability of the requested information from other sources; the total cost of production compared to the amount in controversy; and the respondent's available resources.<sup>218</sup> The remaining factors involve more subjective valuing of "the relative ability of each party to control costs and its incentives to do so[,] . . . the importance of the issues at stake in the litigation . . . and the relative benefits to the parties of obtaining the information."<sup>219</sup>

*Zubulake III* designed its cost-shifting calculus "to simplify application of the Rule 26(b)(2) proportionality test in the context of electronic data and to reinforce the traditional presumptive allocation of costs," but only for "not reasonably accessible" ESI.<sup>220</sup> As discussed, Rule 26(b)(2) cost-benefit

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<sup>213</sup> See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) ("[T]he presumption is that the responding party must bear the expense of complying with discovery requests . . .").

<sup>214</sup> See generally Ross Chaffin, Comment, *The Growth of Cost-Shifting in Response to the Rising Cost and Importance of Computerized Data in Litigation*, 59 OKLA. L. REV. 115 (2006).

<sup>215</sup> See, e.g., Scheindlin & Rabkin, *supra* note 65, at 369 ("Judges are left to determine cost-shifting motions on a fact-intensive basis by drawing on the often-ignored 'proportionality' provisions of Rule 26(b)(2).").

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

<sup>217</sup> *Id.* (emphasis omitted).

<sup>218</sup> *Id.* (citing *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003) (*Zubulake I*)).

<sup>219</sup> *Id.* (citing *Zubulake I*, 217 F.R.D. at 324).

<sup>220</sup> *Id.*; see *id.* at 289 ("Factors one through four tip against cost-shifting (although factor two only slightly so). Factors five and six are neutral, and factor seven favors cost-shifting."); see also *id.* (stating that determining how much of costs should be shifted is "a matter of judgment



proportionality analysis encompasses “the needs of the case, the amount in controversy, limitations on the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.”<sup>221</sup> Similar to *Zubulake III*, the Advisory Committee Note to Rule 26(b)(2), in discussing a court’s authority to shift costs, only refers to ESI that is “not reasonably accessible.”<sup>222</sup>

Restricting cost-shifting to ESI deemed “not reasonably accessible,” however, overestimates the similarity between e-discovery and ordinary discovery.<sup>223</sup> E-discovery often costs far more than traditional discovery even if the ESI is reasonably accessible.<sup>224</sup>

This substantial gap in e-discovery rules—that is, the omission of “reasonably accessible ESI” cost-shifting—needs careful filling.<sup>225</sup> The ESI reality justifies Hawai‘i courts’ serious consideration of case-by-case cost-shifting—under the *Zubulake III* factors—for both “reasonably accessible” and “not reasonably accessible,” relevant and non-privileged ESI.

### C. Duty to Preserve ESI and Sanctions for Destruction

The Hawai‘i courts will likely face ESI preservation and destruction issues but with only limited guidance from the amended Federal Rules. In this section we address gaps in the e-discovery rules regime concerning two critical related issues: the duty to preserve ESI and possible sanctions for its destruction.

#### 1. Attorneys’ and clients’ duty to preserve ESI

E-discovery on Hawai‘i courts’ horizon will certainly encompass motions to sanction a party and her attorney for breach of a “duty to preserve” ESI before litigation commenced. But the amended Federal Rules are silent on this

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and fairness” informed by the seven-factor test); *id.* at 290 (stating that “where cost-shifting is appropriate, only the costs . . . of making inaccessible material accessible” should be shifted).

<sup>221</sup> HAW. R. CIV. P. 26(b)(2)(iii); *accord* FED. R. CIV. P. 26(b)(2)(C)(iii).

<sup>222</sup> FED. R. CIV. P. 26(b)(2) advisory committee’s note (2006).

<sup>223</sup> See Qualters, *States Launching E-Discovery Rules*, *supra* note 38 (stating that judges “wouldn’t order you to produce a million pages of documents from a warehouse [but] in the electronic era they do [from computer systems]”) (alterations in original).

<sup>224</sup> See, e.g., Mazza et al., *supra* note 6, at ¶ 38 n.93 (articulating the high cost of preserving data, even for a single case); Scott A. Moss, *Litigation Discovery Cannot Be Optimal But Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 894 (2009) (stating that the the cost of e-discovery is high because of both volume and inaccessibility).

<sup>225</sup> See Jessica Lynn Repa, Comment, *Adjudicating Beyond the Scope of Ordinary Business: Why the Inaccessibility Test in Zubulake Unduly Stifles Cost-Shifting During Electronic Discovery*, 54 AM. U. L. REV. 257 (2004).

threshold question of a party's and attorney's duty to preserve ESI. When and under what circumstances does the duty arise? Who is responsible for implementing ESI preservation policies in practice? What level of culpability is required to breach the duty to preserve—subjective bad faith, recklessness, negligence or mere inadvertence? And what range of sanctions is authorized and appropriate for breaches of the duty?

The Federal Rules regime provides little or no guidance on these key questions. In this subsection we address the first two questions concerning the duty to preserve; in the next we address the latter two questions about sanctions for breach of that duty.

The amended Federal Rules are silent on parties' and attorneys' affirmative duty to preserve ESI.<sup>226</sup> New Federal Rule 37(e), discussed in Section III.C.5, partially addresses preservation and destruction of ESI by providing a safe harbor from sanctions for "loss" of ESI due to "routine, good-faith operation."<sup>227</sup> By shielding parties and attorneys from sanctions for destruction of ESI under limited circumstances the rule implies that there exists an underlying duty to preserve ESI.<sup>228</sup> But the rule does not address when or how that duty arises.

As an integral part of its new rules regime for e-discovery, the Hawai'i courts will therefore need to shape the duty to preserve ESI and to provide clear notice of the foundation for potential sanctions for missteps. In particular, the courts will need to bring clarity to the ambiguous obligation recognized in the Advisory Committee Notes to Federal Rule 26(f)—that attorneys and parties "discuss" preservation and "balance" preservation with businesses' continued operation.<sup>229</sup>

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<sup>226</sup> Advisory Committee Report, *supra* note 132, at 85 (stating that "[t]he rule itself does not purport to create or affect . . . preservation obligations").

The federal e-discovery rules regime does not address preservation directly, although the Advisory Committee Notes to amended Federal Rule 26(f) suggest attorneys' early discussion about ESI preservation. See FED. R. CIV. P. 26(f) advisory committee's note (2006). When determining the scope of ESI preservation, the Notes to Federal Rule 26(f) direct attorneys and businesses to "pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities." FED. R. CIV. P. 26(f) advisory committee's note (2006) (recognizing that "[c]omplete or broad cessation of a party's routine computer operations could paralyze the party's activities." (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.422 (2004))).

<sup>227</sup> FED. R. CIV. P. 37(e) ("Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information *lost as a result of the routine, good-faith operation* of an electronic information system." (emphasis added)).

<sup>228</sup> *Id.*; FED. R. CIV. P. 37(f) advisory committee's note (2006) ("A preservation obligation may arise from many sources, including common law, statutes, and regulations.").

<sup>229</sup> FED. R. CIV. P. 26(f) advisory committee's note (2006).

Evolving federal procedural common law has loosely filled this gap by combining rules to create a preservation duty for attorneys and parties, called the *Zubulake* duty.<sup>230</sup> Briefly stated, *Zubulake* imposes a duty to institute a “litigation hold” on the destruction of ESI “[o]nce [the party] reasonably anticipates litigation.”<sup>231</sup> This rather simple formulation of the duty to preserve belies its complexity. The “reasonably anticipates litigation” language means that the duty to preserve ESI often arises well before litigation commences. More fully conceived, the duty also imposes upon a litigant a “duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.”<sup>232</sup>

No single rule imposes the *Zubulake* duty. It is an amalgam that draws upon existing general discovery rules, procedural common law and the unique realities of ESI storage, retrieval and destruction.<sup>233</sup> One public critic of the *Zubulake* duty nevertheless acknowledges the importance of rule guidance for the duty to preserve.<sup>234</sup>

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<sup>230</sup> See *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*).

<sup>231</sup> *Id.* at 431 (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (*Zubulake IV*)). This standard for timing makes sense because it is consistent with the Federal Rule 26(b)(3) (and Hawai‘i Rule 26(b)(4)) timing for immunity for attorney work-product that is prepared in anticipation of litigation. Courts may turn to this body of case law for interpretation of “reasonably anticipates litigation.”

<sup>232</sup> *Zubulake IV*, 220 F.R.D. at 217 (quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991)).

<sup>233</sup> See generally SCHEIDLIN ET AL., *supra* note 6, at 90–96 (discussing the breadth of and nuanced legal issues of the *Zubulake* duty, some of which are a direct result of the nature of ESI).

<sup>234</sup> One prominent public critic of the *Zubulake* duty argues that the *Zubulake* duty is “draconian,” expensive, without legal basis, bad public policy because it shifts responsibilities from parties to their attorneys and will lead to unnecessary satellite litigation. David Levitt, *Counsel’s Obligations for E-Discovery*, FOR THE DEFENSE, Aug. 2007, at 44. Levitt argues that the Federal Rules have traditionally emphasized parties’ near sole responsibility for discovery. *Id.* at 45. He also observes that the obligation to supplement responses under the *Zubulake* duty is broader than Rule 26(e) suggests because *Zubulake* imposes an affirmative duty to ensure that discovery responses are not erroneous—while the Rule, he argues, merely requires that attorneys or parties update or reveal errors if they learn that updates or errors exist. *Id.* at 45–46. Finally, Levitt argues that the *Zubulake* duty and the amended e-discovery rules will increase expenses and the satellite litigation of discovery disputes, rather than lessen expenses as designed. *Id.* at 46–47. Levitt acknowledges nevertheless that an attorney’s greater familiarity with a client’s computer systems early in cases “may be a wise idea” so that the attorney can explain to opposing counsel and the court what her client has, what steps the client has taken to preserve ESI and how the client will proceed. *Id.* at 46–47.

The *Zubulake* duty covers an attorney's duty to "coordinat[e] her client's discovery efforts,"<sup>235</sup> in part by "oversee[ing] compliance with the litigation hold."<sup>236</sup> Policed by sanctions, the duty particularly requires attorneys to oversee clients' ESI preservation.<sup>237</sup> As officers of the court and agents for their clients, attorneys are deemed at least partially responsible for their clients' e-discovery preservation and destruction mistakes.<sup>238</sup> *Zubulake* therefore observes that attorneys need to understand the significance of e-discovery disclosures and become "more conscious of the contours of the preservation obligation."<sup>239</sup> *Zubulake* also instructs attorneys to "become *fully* familiar with [their] client's document retention policies, as well as the client's data retention architecture . . . [which will] invariably involve speaking with information technology personnel . . . and communicating with the 'key players' in the litigation."<sup>240</sup>

The *Zubulake* duty also elongates the duty to preserve ESI through the obligation to supplement discovery responses.<sup>241</sup> In conjunction with Rule 26(e), which governs supplemental responses, the *Zubulake* preservation duty encompasses all relevant ESI "in existence at the time the duty to preserve attaches[] and any relevant documents created thereafter."<sup>242</sup> Attorneys

<sup>235</sup> *Zubulake V*, 229 F.R.D. at 435.

<sup>236</sup> *Id.* at 432. As this article was going to press Judge Scheindlin issued an opinion she titled "*Zubulake* Revisited: Six Years Later." Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010). Among other things, the opinion clarifies that the party's and attorney's duty to preserve encompasses clear instructions to preserve specified ESI, the actual preservation of that ESI and the collection of the preserved ESI. *Id.* at \_\_\_, 2010 WL 184312, at \*8 (citing SCHEINDLIN ET AL., *supra* note 6, at 147–49).

<sup>237</sup> *See id.*

<sup>238</sup> E.g., *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*, 259 F.R.D. 591, 616 (M.D. Fla. Aug. 3, 2009); *United States v. Krause (In re Krause)*, 367 B.R. 740 (Bankr. D. Kan. 2007); *Zubulake V*, 229 F.R.D. at 432–33; *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*); *Metro. Opera Ass'n v. Local 100, Hotel Employees and Rest. Employees Int'l Union*, 212 F.R.D. 178 (S.D.N.Y. 2003); see Marcus, *E-Discovery Beyond the Federal Rules*, *supra* note 122, at 324–26; see also Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since December 1, 2006*, 14 RICH. J.L. & TECH. 8, ¶ 6 n.14 (2008) (discussing federal court decisions regarding varying standards for imposing sanctions for spoliation of discoverable material).

<sup>239</sup> *Zubulake V*, 229 F.R.D. at 433 (citing *Telecom Int'l Am. Ltd. v. AT&T Corp.*, 189 F.R.D. 76, 81 (S.D.N.Y. 1999)).

<sup>240</sup> *Id.* at 432 (emphasis added) (citing *Zubulake IV*, 220 F.R.D. at 218). The *Zubulake* court encouraged attorneys to "be creative" if speaking with every key player is not feasible because of the scope of the case or size of the company client. *Id.*

<sup>241</sup> *Id.* at 432–33; see also FED. R. CIV. P. 26(e); HAW. R. CIV. P. 26(e).

<sup>242</sup> *Zubulake IV*, 220 F.R.D. at 218; *Zubulake V*, 229 F.R.D. at 432–33 ("Although the Rule 26 duty to supplement is nominally the party's, it really falls on counsel."); see FED. R. CIV. P. 26(e) advisory committee's note (1970) ("Although the party signs the answers, it is his

therefore must “oversee compliance . . . [and continue to] monitor[] the party’s efforts to retain and produce the relevant documents” even if the ESI is generated after initial disclosures or its existence and location only later become known.<sup>243</sup>

In *Zubulake* itself, Laura Zubulake filed an EEOC gender discrimination claim in August 2001.<sup>244</sup> UBS’ in-house counsel instructed employees to preserve relevant documents in that month.<sup>245</sup> Employees at UBS began deleting or not saving relevant ESI in September 2001.<sup>246</sup> In October of that year Zubulake was fired by her employer, UBS.<sup>247</sup> She brought a Title VII discrimination suit in February 2002.<sup>248</sup> UBS’s in-house counsel reiterated the preservation instruction in February 2002 and September 2002, and outside counsel gave similar instructions in August 2002.<sup>249</sup> The court determined that UBS’s duty to preserve the ESI began in *April 2001*—well before suit was filed, before Zubulake was fired, before she filed an EEOC discrimination complaint, and most important, before the key ESI was destroyed.<sup>250</sup>

Two facts undergirded the court’s determination. First, Zubulake’s supervisor conceded in a deposition that he feared litigation as early as April 2001.<sup>251</sup> Second, emails from several key colleagues dating back to April 2001 referred to Zubulake and were designated “UBS Attorney Client Privilege.”<sup>252</sup> Therefore, the court determined that the duty to preserve the ESI arose when UBS’ officials “reasonably anticipated” a legal claim and litigation—April 2001—almost one year before litigation commenced. At the latest, the duty to

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lawyer who understands their significance and bears the responsibility to bring answers up to date. . . . In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information.”).

<sup>243</sup> *Zubulake V*, 229 F.R.D. at 432.

<sup>244</sup> *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 312 (S.D.N.Y. 2003) (*Zubulake I*).

<sup>245</sup> *Zubulake IV*, 220 F.R.D. at 215–16; *Zubulake V*, 229 F.R.D. at 425.

<sup>246</sup> *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 287 (S.D.N.Y. 2003) (*Zubulake III*).

<sup>247</sup> *Zubulake I*, 217 F.R.D. at 312.

<sup>248</sup> *Id.*

<sup>249</sup> *Zubulake IV*, 220 F.R.D. at 215–16; *Zubulake V*, 229 F.R.D. at 425.

<sup>250</sup> *Zubulake IV*, 220 F.R.D. at 216–17.

<sup>251</sup> *Id.* at 217.

<sup>252</sup> *Id.* Interestingly, these emails were deleted from UBS’ system and recovered from UBS’ backup tapes. In an earlier motion, the court ordered that costs for UBS to restore backup tapes should be shared. Therefore, if Zubulake had not continued to pursue discovery of emails containing relevant information—even if it meant sharing the high costs for restoring UBS’ backup tapes—it is unlikely that these relevant non-privileged emails would have been discovered. Although UBS’ in-house and outside counsel repeatedly advised institution of a litigation hold, UBS’ implementation did not prevent the overwriting of stored emails prior to or after the date that the hold was “triggered.” If UBS’ litigation hold on the deletion of relevant emails had been effective, the expense of restoring back-up tapes likely could have been avoided.

preserve arose in August 2001, when UBS' in-house counsel first informally instructed that employees implement a litigation hold—still the month before UBS began to destroy or not save relevant ESI.

We suggest that Hawai'i courts carefully assess the many aspects of the *Zubulake* preservation duty and seriously consider incorporating that duty into Hawai'i e-discovery practice. Since the *Zubulake* duty is extensive and spans across all cases, however, it might sometimes impose onerous preservation obligations beyond what is proportional to the parties resources, the importance of the issues, and the significance of the ESI. It might also unduly burden the daily operations of small and big litigants and governments. To address these problems, the court should employ a proportionality analysis in assessing the extent of a party's preservation duty. Thus, where the costs of preserving relevant ESI threaten to overtake possible litigation benefits, the proportionality principle discussed earlier offers apt guidance. Fully shaping the contours of the duty to preserve to fit Hawai'i practice needs will likely entail thoughtful pronouncements through future cases.

## 2. Sanctions for destruction of ESI

Parties and attorneys breach their duty to preserve ESI through destruction of ESI subject to a litigation hold. In some instances, as in *Zubulake*, a litigation hold will be required well before the filing of a lawsuit and may be triggered by a key player's or a business' "reasonable anticipation" that a suit will arise. In other cases, a litigation hold may be triggered by the filing of a lawsuit itself. When parties and their attorneys breach the duty to preserve ESI the prospect of sanctions arises.

### a. Broader context: Hawai'i court sanctions for non-e-discovery abuse

Hawai'i courts are familiar with the destruction of discoverable information—from mistakes in smaller cases to gross abuses in complex ones.<sup>253</sup> To broaden the context for handling sanction motions for ESI destruction we first highlight the Hawai'i Supreme Court's treatment of the destruction of potential evidence across a spectrum of "ordinary" discovery disputes.

*Wong v. City & County of Honolulu* started as a simple car accident suit that morphed into a major dispute about the City's destruction of discoverable

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<sup>253</sup> E.g., *Cho v. State of Hawai'i*, 115 Haw. 373, 168 P.3d 17 (2007), *cert. denied*, 552 U.S. 1185 (2008); *Kawamata Farms, Inc., v. United Agric. Prods.*, 86 Haw. 214, 948 P.2d 1055 (1997); *Wong v. City & County of Honolulu*, 66 Haw. 389, 665 P.2d 157 (1983).

“tangible things.”<sup>254</sup> Following multiple informal and formal requests for production of a traffic signal box for testing, a private contractor removed and destroyed the box while under the supervision of City employees.<sup>255</sup> The box was essential to the plaintiff’s claim that the City failed to properly maintain it.<sup>256</sup> By affirming the court’s sanction against the City, the Hawai‘i Supreme Court confirmed that the City had a duty to place a “litigation hold” on the box at least upon receiving a formal request for production, if not sooner.<sup>257</sup>

The Circuit Court imposed sanctions against the City under Hawaii Rule 37(d) for its failure to respond to the discovery request.<sup>258</sup> The court estopped the City from claiming that the signal box was not defective or that any malfunction was caused by the manufacturer.<sup>259</sup> The court did not, however, employ the common law doctrine of sanctions for spoliation (destruction) of discoverable material. Instead it relied exclusively upon Rule 37(d) to preclude the City from supporting those defenses through a cross-reference to Rule 37(b)(2)(B)—Rule 37(d) for the authority to sanction and Rule 37(b)(2)(B) for the type of sanction.<sup>260</sup>

*Cho v. State* is a moderately complex toxic tort case marked by a deliberate destruction of discoverable building debris that it could have “restored,” but, understandably, did not.<sup>261</sup> The school custodian, Cho, sued the State for injuries caused by exposure to lead, mercury and arsenic through his ten-year occupancy of a government-leased cottage.<sup>262</sup> The State sent debris from the demolished cottage—crucial to the Chos’ claim—to a mainland refuse site.<sup>263</sup> The State violated a court production order because it would cost one million dollars to re-locate and produce the debris.<sup>264</sup> For violating its production

<sup>254</sup> See *Wong*, 66 Haw. at 391, 665 P.2d at 159.

<sup>255</sup> *Id.*

<sup>256</sup> See *id.*

<sup>257</sup> See *id.* at 394, 665 P.2d at 161.

<sup>258</sup> See *id.* at 391–93, 665 P.2d at 160–61.

<sup>259</sup> *Id.* at 391, 665 P.2d at 160 (quoting unpublished Circuit Court Order by Judge Arthur S.K. Fong, Oct. 3, 1978).

<sup>260</sup> *Wong*, 66 Haw. at 392–93, 665 P.2d at 160–61.

If a party . . . fails . . . to serve a written response to a request for inspection . . . the court on motion . . . may . . . make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B) and (C) of this subdivision (b)(2) of this rule.

(citing HAW. R. CIV. P. 37(d) (emphasis omitted)).

<sup>261</sup> 115 Haw. 373, 168 P.3d 17 (2007), *cert. denied*, 552 U.S. 1185 (2008).

<sup>262</sup> *Id.* at 375, 168 P.3d at 19.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 377–78, 168 P.3d at 21–22. The Circuit Court noted that the State decided not to produce the debris, at least in part, because the estimated cost to retrieve and produce it was somewhere between \$150,000 and \$1 million. *Id.* at 378, 384, 168 P.3d at 22, 28. Upon the Circuit Court’s reconsideration of the sanctions order, the State pointed out that in addition to

order, the court sanctioned the State under Hawai'i Rule 37(b)(2)(B), precluding it from contesting the presence of toxins in the soil.<sup>265</sup> As in *Wong*, the court did not employ the common law doctrine of spoliation as the basis for sanctions and instead relied on Hawai'i Rule 37(b). The Hawai'i Supreme Court affirmed.<sup>266</sup>

Complex cases in Hawai'i sometimes involve severe discovery abuse. The string of cases involving the DuPont chemical company is an iconic example of how discovery abuse in Hawai'i is often linked to cases elsewhere.<sup>267</sup> Kawamata Farms, a Hawai'i farm corporation, brought a products liability suit against DuPont.<sup>268</sup> DuPont intentionally withheld numerous crucial technical documents—some of which were later found to have been disclosed in a parallel suit against DuPont in Florida.<sup>269</sup>

Throughout thirty months of discovery the Hawai'i Circuit Court issued twenty-six orders compelling discovery and twenty-seven orders imposing sanctions against DuPont.<sup>270</sup> Judge Ronald Ibarra found that DuPont's concealment of documents containing relevant technical information was part of a "pattern of discovery abuse" and sanctioned DuPont under Hawai'i Rule 37(b)(2) and its inherent power for DuPont's failure to produce relevant information.<sup>271</sup> Judge Ibarra ordered admission of critically damaging evidence, use of adverse jury instructions, the lifting of protective orders and payment of attorneys' fees and costs.<sup>272</sup> Judge Ibarra also ordered \$1.5 million in a criminal contempt sanction against DuPont.<sup>273</sup>

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the \$1 million cost to produce—which the trial judge did not know of—the Attorney General was unable to comply because the entire State budget for litigation expenses for that fiscal year was approximately \$1.4 million, and the value of the Chos' case was less than \$1 million. *Id.*

<sup>265</sup> *Id.* at 379, 168 P.3d at 23 (applying HAW. R. CIV. P. 37(b)(2)(B)). Rule 37(b)(2)(B) permits a court, "as [is] just," to refuse a party to support or oppose claims or defenses as a sanction for that party's failure to obey a court order to provide or permit discovery. HAW. R. CIV. P. 37(b)(2)(B). Here, the court precluded the State's defense that toxins were not present because the State deliberately did not produce the debris in direct violation of a court order.

<sup>266</sup> *Cho*, 115 Haw. at 386, 168 P.3d at 30.

<sup>267</sup> *Kawamata Farms v. United Agric. Prods.*, 86 Haw. 214, 948 P.2d 1055 (1997). See *Matsuura v. E.I. DuPont de Nemours & Co.*, 102 Haw. 149, 150–52, 73 P.3d 687, 688–90 (2003), for a brief discussion of DuPont's Benlate litigation.

<sup>268</sup> *Kawamata Farms*, 86 Haw. at 222, 948 P.2d at 1063.

<sup>269</sup> *Id.* at 228, 948 P.2d at 1069 (without citation to *Smith v. E.I. DuPont de Nemours & Co.*, 727 So. 2d 928 (Fla. Dist. Ct. App. 1998)).

<sup>270</sup> *Id.* at 224, 948 P.2d at 1065.

<sup>271</sup> *Id.*; see also *Matsuura*, 102 Haw. at 150–52, 73 P.3d at 688–90 (discussing the procedural history of Benlate litigation in Hawai'i).

<sup>272</sup> *Kawamata Farms*, 86 Haw. at 224–27, 948 P.3d at 1065–68; see *Matsuura*, 102 Haw. at 150–52, 73 P.3d at 688–90.

<sup>273</sup> *Kawamata Farms*, 86 Haw. at 225, 948 P.3d at 1066. DuPont waived appellate review of sanctions for criminal contempt by not raising objections to the Circuit Court. *Kawamata*



*Wong, Cho* and *DuPont* reveal that destruction or concealment of litigation information—whether inadvertent or purposeful—poses a discovery challenge for Hawai‘i courts. With the continuing expansion of ESI, e-discovery sanction issues will also likely surface across the entire spectrum of cases—from small to large, the collegial to the conflicted.

*b. General discovery sanction rules applicable to ESI destruction*

For many e-discovery disputes, the general discovery sanctions rule, Rule 26(g), will govern.<sup>274</sup> When litigation commences and attorneys (or parties) sign discovery “requests, responses or objections,”<sup>275</sup> Rule 26(g) imposes a set of obligations as the foundation for potential sanctions.<sup>276</sup> First, the signer must conduct “reasonable inquiry” under the circumstances.<sup>277</sup> Second, sanctions are mandated if the discovery filing is for an “improper purpose” (including harassment, delay or increasing costs), not reasonably grounded in law and facts, or violates the proportionality principle (discussed in Section IV.B).<sup>278</sup> Patterned after Rule 11,<sup>279</sup> Rule 26(g) is intended “to deter those who might be tempted to [engage in discovery mis]conduct in the absence of such a deterrent.”<sup>280</sup>

Rule 26(g) seeks to eliminate “kneejerk discovery requests served without consideration of cost or burden to the responding party” and the “equally abusive practice of objecting to discovery requests reflexively—but not reflectively—and without a factual basis.”<sup>281</sup> Careless requests and boilerplate objections are even more disruptive in the realm of e-discovery where

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*Farms*, 86 Haw. at 248–49, 948 P.2d at 1089–90. While not explicitly stated in the Hawai‘i Supreme Court opinion, Judge Ibarra possessed authority to impose these sanctions under Hawai‘i Rules 26(g) (discovery sanctions rule analogous to Rule 11), 37(b)(2) and 60(b)(3).

<sup>274</sup> See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 265 (D. Md. 2008).

<sup>275</sup> Rule 26(g) authorizes “judges [to] impose appropriate sanctions [for groundless or unduly burdensome filings] and requires them to use it.” FED. R. CIV. P. 26 advisory committee’s note (1983) (emphasis added); *id.* (“[The amendment] . . . is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions.”; “Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision.”); see also HAW. R. CIV. P. 26(g).

<sup>276</sup> See FED. R. CIV. P. 26(g); accord HAW. R. CIV. P. 26(g).

<sup>277</sup> FED. R. CIV. P. 26(g); accord HAW. R. CIV. P. 26(g).

<sup>278</sup> FED. R. CIV. P. 26(g); accord HAW. R. CIV. P. 26(g).

<sup>279</sup> FED. R. CIV. P. 26(g) advisory committee’s note (1983).

<sup>280</sup> *Nat’l Hockey League (NHL) v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976) (per curiam). *NHL* has since stood for commitment to the goal of deterring discovery abuse by mandating judicial imposition of sanctions. See Barbara J. Gorham, Note and Comment, *Fissions: Will it Tame the Beast of Discovery Abuse?*, 69 WASH. L. REV. 765, 775 (1994).

<sup>281</sup> *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358 (D. Md. 2008).

disproportionately expansive requests can overwhelm attorneys and clients and reflexive objections can foreclose access to significant ESI.<sup>282</sup>

Rule 26(g), however, does not govern e-discovery duties to preserve ESI that are breached *before* litigation begins or that do not entail signed filings.<sup>283</sup> Similarly, other general discovery sanction rules are activated by conduct *during*, not *before*, the litigation. For instance, Rule 37(b)(2) provides sanctions generally for failure to comply with a court order compelling discovery.<sup>284</sup> Rule 37(c) permits sanctions for failure to provide mandatory disclosures under Rule 26(a) or supplement those mandatory disclosures and testifying expert opinions under Rule 26(e).<sup>285</sup> Rule 37(d) provides sanctions for complete failure to respond to a request for interrogatories or inspection or appear at a deposition, including a request for electronic materials.<sup>286</sup> The problem with attempting to apply these general rules to ESI preservation and destruction issues is that they are not tailored to the pre-litigation duty to preserve ESI.

Courts may invoke their inherent power to impose attorneys' fees or case dispositive sanctions if discovery misconduct amounts to bad faith.<sup>287</sup> Proof of bad faith, however, is difficult to muster, and thus courts rarely invoke their inherent power for those sanctions. A common law *tort* claim for intentional or negligent spoliation of evidence is recognized by several jurisdictions, but not by Hawai'i courts.<sup>288</sup>

Therefore the general Hawai'i sanctions rules and the Hawai'i courts' inherent power to control litigation<sup>289</sup> appear to be largely inadequate for e-

<sup>282</sup> See *id.*

<sup>283</sup> See Grimm et al., *supra* note 73, at 397–99 (discussing limitations that the Rules Enabling Act, 28 U.S.C. § 2072 (2006), places on civil rules).

<sup>284</sup> FED. R. CIV. P. 37(b)(2); HAW. R. CIV. P. 37(b)(2); see also Child Support Enforcement Agency v. Roe, 96 Haw. 1, 15, 25 P.3d 60, 74 (2001) (expanding the reach of Rule 37(b)(2) to authorize sanctions “when a court unequivocally and prospectively notifies a party of a discovery requirement that the court expects that party to obey”) (quoting Fujimoto v. Au, 95 Haw. 116, 166, 19 P.3d 699, 749 (2001)).

<sup>285</sup> FED. R. CIV. P. 37(c); HAW. R. CIV. P. 37(c).

<sup>286</sup> FED. R. CIV. P. 37(d); HAW. R. CIV. P. 37(d).

<sup>287</sup> Chambers v. NASCO, Inc., 501 U.S. 32, 45–50 (1991) (stating that a court's inherent power to render an attorneys' fees sanction depends upon a finding of bad faith).

<sup>288</sup> Matsuura v. E.I. DuPont de Nemours & Co., 102 Haw. 149, 166–68, 73 P.3d 687, 704–06 (2003). While a tort claim for spoliation of evidence is not yet recognized in Hawai'i, this is likely to be a fertile area for future litigation when parties realize that ESI was destroyed in an earlier case. Where it is recognized, courts require: “(1) the destruction of evidence; (2) the disruption or significant impairment of the lawsuit; and (3) a causal relationship between the destruction of evidence and the inability to prove the lawsuit.” *Id.* (citations omitted).

<sup>289</sup> The Hawai'i Supreme Court has recognized generally that “courts have the inherent equity, supervisory, and administrative powers as well as inherent power to control the litigation process before them. . . . [including] the powers to create a remedy for a wrong even in the

discovery. They provide only indirect guidance and do not establish a clear deterrent against improper ESI destruction or a strong incentive for proper ESI preservation. Even if the Hawai'i judiciary adopts the federal e-discovery rules regime, it will need to provide that guidance, particularly by defining, explaining and enforcing the "duty to preserve" ESI. As discussed, Hawai'i courts might look most productively to the *Zubulake* opinions for that guidance.

*c. A limited safe harbor for "loss" of ESI*

As mentioned,<sup>290</sup> the only rule that specifically addresses ESI "loss," Federal Rule 37(e), actually prohibits sanctions.<sup>291</sup>

More specifically, Federal Rule 37(e) partially addresses ESI destruction by providing a safe harbor from sanctions for "loss" of ESI due to "routine, good-faith operation" of an ESI "overwriting" or destruction policy.<sup>292</sup> By shielding parties and attorneys from sanctions for ESI destruction under limited circumstances the rule implies that there exists an underlying duty to preserve

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absence of specific statutory remedies, and to prevent unfair results." *Kawamata Farms v. United Agric. Prods.*, 86 Haw. at 242, 948 P.2d at 1083 (quoting *Richardson v. Sport Shinko (Waikiki Corp.)*, 76 Haw. 494, 507, 880 P.2d 169, 182 (1994)). In addition, the court has identified factors for determining whether discovery sanctions are generally appropriate:

(1) the offending party's culpability, if any, in destroying or withholding discoverable evidence that the opposing party had formally requested through discovery; (2) whether the opposing party suffered any resulting prejudice as a result of the offending party's destroying or withholding the discoverable evidence; and (3) the inequity that would occur in allowing the offending party to accrue a benefit from its conduct.

*Id.* at 244, 948 P.2d at 1084 (citing *Richardson*, 76 Haw. at 507, 880 P.2d at 182).

<sup>290</sup> See *supra* notes 176–77 and accompanying text.

<sup>291</sup> FED. R. CIV. P. 37(e).

<sup>292</sup> *Id.* ("Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information *lost as a result of the routine, good-faith operation* of an electronic information system." (emphasis added)).

Businesses lobbied hard for this new rule. See Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 MICH. TELECOMM. & TECH. L. REV. 71, 72 (2004). It provides a partial shield from sanctions for businesses for destroying ESI through routine processes before their duty to preserve ESI kicks in. *Id.* at 72–73; see also *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005) (citing Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 FORDHAM J. CORP. & FIN. L. 721 (2003)). Healthy disagreement remains over whether this shield is too large or too small and how it operates in practice. Scheindlin & Redgrave, *supra* note 81, at 368–69. Businesses want to "forbid sanctions in the absence of willful or reckless conduct." Scheindlin & Wangkeo, *supra* note 292, at 72. Others argue that a bad faith standard is unworkable and allows for wholesale destruction of ESI. Scheindlin & Wangkeo, *supra* note 292, at 72.

ESI.<sup>293</sup> But the rule does not affirmatively authorize sanctions for breach of that duty or guide the courts in imposing appropriate sanctions.

Under Rule 37(e) the meanings of "routine" and "good-faith" are critical. According to the Advisory Committee, "routine" operation refers to "ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs," including document retention policies and "alteration and overwriting" of ESI that often occurs without users' specific awareness.<sup>294</sup> If routine operation results in loss of ESI, courts must determine if destruction occurred in "good-faith."<sup>295</sup> Good-faith "depends on the circumstances of each case" and may turn upon "whether the party reasonably believes [at the time of destruction] that the information on such sources is likely to be discoverable."<sup>296</sup> The Advisory Committee observed that routine operations should not "thwart discovery obligations by allowing that operation to . . . destroy . . . [ESI] that it is required to preserve."<sup>297</sup>

The Committee, however, stopped short of declaring that a party fails the Rule 37(e) "good-faith" test if it allows routine destruction in breach of its duty to preserve specific ESI. Judge Shira Scheindlin, the author of the *Zubulake* opinions, and other scholars have noted Rule 37(e)'s ambiguities.<sup>298</sup> The "sparse language raises serious questions about its reach and scope," and it "affords *no certain protection* against sanctions."<sup>299</sup>

By piecing together its several statements, it appears that the Advisory Committee contemplated that even "routine" destruction of ESI subject to a tacitly recognized duty to preserve would constitute a breach of that duty and that this "loss" of the ESI would not be in "good-faith." The safe harbor protection from sanctions, therefore, would not apply.<sup>300</sup> Assuming that this is

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<sup>293</sup> *Id.*; FED. R. CIV. P. 37(f) advisory committee's note (2006) ("A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case.").

<sup>294</sup> FED. R. CIV. P. 37(f) advisory committee's note (2006).

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*; *see, e.g.*, *U & I Corp. v. Advanced Med. Design, Inc.*, 251 F.R.D. 667 (M.D. Fla. 2008) (imposing sanctions for improperly destroying ESI); *Doe v. Norwalk Cmty. College*, 248 F.R.D. 372, 379 (D. Conn. 2007) (holding that the failure to properly institute a litigation hold was "at least grossly negligent, if not reckless").

<sup>297</sup> FED. R. CIV. P. 37(f) advisory committee's note (2006).

<sup>298</sup> SCHEINDLIN ET AL., *supra* note 6, at 403 (emphasis added).

<sup>299</sup> *Id.* (emphasis added).

<sup>300</sup> Judge Shira Scheindlin, author of the landmark *Zubulake* opinions, and other well-known commentators of e-discovery law, observed, "[t]he one common thread is that . . . Rule [37(e)] does not excuse a party from rule-based sanctions for a failure to comply with a preservation obligation." *Id.*; *see also Oklahoma ex rel. Edmonson v. Tyson Foods, Inc.*, 2007 WL 1498973 (N.D. Okla. May 17, 2007).

The Court notes that although no formal preservation order has been entered herein, the obligation of the parties to preserve evidence, including ESI, arises as soon as a party is

what the rulemakers contemplated, it is not reflected in the language of the rule itself. Most important, this construction of the rule only removes the safe harbor from sanctions under these circumstances. It does not indicate which affirmative rules authorize the imposition of sanctions or appropriate standards for doing so.

This gap is illuminated by the analogous situation of a government's safe harbor from suit (sovereign immunity) and the plaintiff's underlying substantive legal claim. In a suit against the federal or state government a plaintiff must first overcome the government's immunity.<sup>301</sup> If sovereign immunity is overcome by a showing of consent or waiver, then the plaintiff must show that there are substantive law rules that establish the government's liability (for example, negligent breach of duty).<sup>302</sup> The removal of the safe harbor (immunity) itself does not establish liability.

Similarly, a party seeking to sanction an opposing party or counsel for ESI destruction must overcome two hurdles. First, the party must show that ESI was destroyed by other than a "good-faith, routine" operation of an ESI management policy.<sup>303</sup> This removes the safe harbor protection. But it does not automatically lead to sanctions. Second, the party must then proceed to the substantive "liability" determination of whether rules or common law affirmatively authorize sanctions under the specific circumstances.<sup>304</sup>

As an integral part of its new rules regime for e-discovery, the Hawai'i courts will therefore need to expressly determine at the threshold whether "routine"

aware the documentation may be relevant. The Court further advises the parties that they should be very cautious in relying upon any "safe harbor" doctrine as described in new Rule 37[e].

SCHEINDLIN ET AL., *supra* note 6, at 403 (quoting *Edmonson*, 2007 WL 1498973, at \*6 (alteration in original)).

Judge Scheindlin and commentators also note other limits: (1) the Rule "explicitly excludes [a safe harbor for] the non-party served with a *subpoena duces tecum* for ESI under Rule 45;" and (2) "A judge always has inherent authority or contempt powers [to sanction regardless of Rule authority]." SCHEINDLIN ET AL., *supra* note 6, at 403 (citing *Leon v. IDX Sys.*, 464 F.3d 951, 958 (9th Cir. 2006)).

<sup>301</sup> See *Pele Def. Fund v. Paty*, 73 Haw. 578, 607–08 (1992) (discussing Eleventh Amendment immunity) (quoting *W.H. Greenwell, Ltd. v. Dept. of Land & Nat'l Res.*, 50 Haw. 207, 208–09, 436 P.2d 527, 528 (1968)).

<sup>302</sup> See, e.g., *Sierra Club v. Dep't of Transp.*, 120 Haw. 181, 229, 202 P.3d 1226, 1274 (2009) ("When the [S]tate has consented to be sued, its liability is to be judged under the same principles as those governing the liability of private parties.") (quoting *Fought & Co. v. Steel Eng'g & Erection, Inc.*, 87 Haw. 37, 56, 951 P.2d 487, 506 (1998)).

<sup>303</sup> FED. R. CIV. P. 37(e).

<sup>304</sup> But see *Phillip M. Adams & Assocs., LLC v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1188 (D. Utah 2009) (determining whether ESI was destroyed and if it were destroyed in a breach of the duty to preserve; then determining what sanctions are appropriate in light of the Rule 37(e) safe harbor).

destruction of ESI subject to a litigation hold constitutes “loss” not in “good-faith”—thereby removing the Rule 37(e) protection from sanctions.<sup>305</sup> We suggest that it does and that this construction of Rule 37(e)’s safe harbor provision is what the federal rulemakers intended.

The federal district court decision in *Doe v. Norwalk Community College* is illustrative. There the court sanctioned an institutional defendant despite its attempted reliance on the Federal Rule 37(e) safe harbor.<sup>306</sup> The defendant, Norwalk Community College, failed to impose a litigation hold or to follow a formal ESI management policy.<sup>307</sup> The plaintiff moved for sanctions because Norwalk “completely wiped [out]” data on key witnesses’ computers and email metadata revealed ESI alteration and destruction.<sup>308</sup> Further, Norwalk destroyed data earlier than designated by its regular document retention policy.<sup>309</sup>

In its discussion of Rule 37(e),<sup>310</sup> the court quoted the Advisory Committee and determined that to take advantage of the safe harbor “a party needs to act affirmatively to prevent the system from destroying or altering the information, even if such conduct would occur in the regular course of business.”<sup>311</sup> The court then held that because Norwalk failed to impose a litigation hold on the ESI in light of “pending or reasonably anticipated litigation,” the destruction was not in good-faith and the safe harbor rule, thus, failed to shield Norwalk from sanctions.<sup>312</sup>

One clear lesson of *Norwalk* is that businesses’ creation and implementation of reasonable routine ESI retention and destruction policies—even before litigation—is a necessary *beginning* (but only beginning) of the early attention approach to e-discovery. Once a litigation hold is triggered, routine “overwriting” of relevant ESI likely will not allow for the safe harbor protections of Rule 37(e).

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<sup>305</sup> FED. R. CIV. P. 37(e); FED. R. CIV. P. 37(f) advisory committee’s note (2006) (“A preservation obligation may arise from many sources, including common law, statutes, and regulations.”).

<sup>306</sup> 248 F.R.D. 372 (D. Conn. 2007).

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 376.

<sup>309</sup> *Id.* (internal quotation marks omitted).

<sup>310</sup> See *supra* note 112 (stating that the pertinent rule was moved to Rule 37(e) as a result of stylistic amendments in 2007).

<sup>311</sup> *Doe*, 248 F.R.D. at 378.

<sup>312</sup> *Id.* Further, the court determined that Rule 37(e) requires “a routine system in order to take advantage of the good-faith exception” and that Norwalk’s lack of “one consistent, ‘routine’ system” nullified safe harbor protection. *Id.*

*d. Crafting an affirmative sanction rule for ESI destruction*

A final related gap in the federal e-discovery rules regime is the absence of an affirmative sanctions rule for destruction of relevant ESI—or put another way, a rule authorizing sanctions for an attorney’s or client’s breach of the duty to preserve ESI. As discussed, the safe harbor immunity of Rule 37(e) would not apply under those circumstances, and judges would then look for affirmative sanctioning authority. The *Zubulake* opinions, again, provide apt guidance for the Hawai‘i courts.

*i. When are sanctions authorized?*

Determining whether sanctions are authorized for destruction of ESI is a two-step inquiry. First, was there a failure to effectively implement (and continue) a litigation hold and therefore a breach of the duty to preserve? In *Zubulake*, the court acknowledged in-house and outside counsels’ multiple attempts to enforce UBS’ litigation hold, but still noted that both counsel and party were to blame for the destruction of ESI and that many emails “were lost or belatedly produced because of counsel’s failures.”<sup>313</sup>

Second, if the duty was breached, was the requested ESI “relevant”? In *Zubulake*, the court linked proof of relevance to the culpable state of mind that led to ESI destruction. Relevance is presumed if the destruction was willful.<sup>314</sup> If the destruction was negligent or inadvertent, however, the party seeking sanctions is required to show that missing information is relevant “to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.”<sup>315</sup> The “relevance” requirement thus entails a showing that the destroyed ESI would have been favorable to the movant.<sup>316</sup> If, as in *Zubulake*, a court determines that sanctions are authorized because it finds both a breach of a duty to preserve and the relevance of the destroyed ESI, then it determines *what* sanctions are authorized.

*ii. What sanctions are authorized?*

*Zubulake* recognized that the purpose of imposing discovery sanctions and “major consideration[s] in choosing an appropriate sanction” are deterrence of future misconduct, punishment for past misconduct and restoration of the

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<sup>313</sup> *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 436 (S.D.N.Y. 2004) (*Zubulake V*).

<sup>314</sup> *Id.* at 436. “Once the duty to preserve attaches, any destruction of [ESI or ordinary] documents is, at a minimum, negligent.” *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) (*Zubulake IV*) (citations omitted).

<sup>315</sup> *Zubulake V*, 229 F.R.D. at 430–31; *Zubulake IV*, 220 F.R.D. at 221.

<sup>316</sup> *Zubulake V*, 229 F.R.D. at 431.

injured party.<sup>317</sup> For the destruction of ESI, *Zubulake* cited Rule 37 and courts' inherent power as guides for fashioning appropriate sanctions.<sup>318</sup> In light of *Zubulake*'s particular facts, the court considered an "adverse inference" (that the destroyed ESI would have been unfavorable to UBS) jury instruction, payment for depositions or re-depositions and payment for costs of the sanctions motion itself.<sup>319</sup> The court ordered an adverse jury instruction because ESI was destroyed *willfully* and not merely negligently.<sup>320</sup> The court also ordered that UBS pay costs of the motion and depositions and re-depositions.<sup>321</sup>

We suggest that Hawai'i courts draw from *Zubulake*'s insights and also incorporate the Rule 26(g) range of sanctions for the destruction of ESI—even prior to litigation and in the absence of signed filings. There are two overarching rationales for the propriety of Rule 26(g) sanctions for destruction of ESI. The purpose of Rule 26(g)'s mandate of "an appropriate sanction" is deterrence of similar discovery misconduct of both attorneys and litigants.<sup>322</sup> The rationale for Rule 26(g) fits where, as in *Zubulake* and most other cases involving the destruction of ESI, the sanction is intended to deter, not compensate or punish.<sup>323</sup>

In addition, the policy and tone of Rule 26(g) is appropriate for sanctions determinations for the destruction of ESI. The counterpart Rule 11 places an emphasis on deterrence<sup>324</sup> and provides for "nonmonetary directives; an order to pay a penalty into court; . . . an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."<sup>325</sup> In addition, under Rule 11, a court may "strick[e] the

<sup>317</sup> *Id.* at 437.

<sup>318</sup> *Zubulake* did not cite Rule 37(e), the safe harbor provision, which was added after *Zubulake V.*

<sup>319</sup> *Zubulake V.*, 229 F.R.D. at 431, 436–37.

<sup>320</sup> *Id.* at 437.

<sup>321</sup> *Id.*

<sup>322</sup> FED. R. CIV. P. 26(g) advisory committee's note (1983); see FED. R. CIV. P. 11(c).

<sup>323</sup> *Zubulake V.*, 229 F.R.D. at 437; FED. R. CIV. P. 26(g) advisory committee's note (1983).

A creative judge could apply Rule 26(g) directly as authority to impose sanctions for pre-litigation ESI destruction. If the party seeking ESI submits a Rule 34 request and the opposing party's attorney responds in writing that the ESI has been "lost," the judge can impose sanctions under Rule 26(g) for the following reasons. Assuming the "safe harbor" is inapplicable, the judge could find that the signed "ESI-is-destroyed" response is not reasonably grounded in law because it reflects the violation of the known duty of preservation. See HAW. R. CIV. P. 26(g)(2). The range of Rule 26(g) sanctions would then be appropriate.

<sup>324</sup> *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 393 (1990) (stating that "[i]t is now clear that the central purpose of Rule 11 is to deter baseless filings" (citations omitted)); Eric K. Yamamoto & Danielle K. Hart, *Rule 11 and State Courts: Panacea or Pandora's Box?*, 13 U. HAW. L. REV. 57, 66–68 (1991).

<sup>325</sup> FED. R. CIV. P. 11(c)(4).



offending paper; issu[e] an admonition, reprimand, or censure; require[e] participation in seminars or other educational programs; order[] a fine payable to the court; [and] refer[] the matter to disciplinary authorities . . . .”<sup>326</sup> Further, sanctions imposed under Rule 11 “must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.”<sup>327</sup> Similarly, Rule 26(g) determinations of what is “appropriate under the circumstances” first looks to non-monetary sanctions in light of the deterrent purpose.<sup>328</sup>

Hawai‘i courts may also draw from *Wong v. City & County of Honolulu*, where the non-monetary sanctions imposed were deemed appropriate because they were “commensurate” with the harm.<sup>329</sup> The monetary sanctions in some instances may be warranted by the severity of the breach of the duty to preserve and the degree of harm. For this, courts may draw from *DuPont*, where the defendant faced significant monetary sanctions for ongoing discovery misconduct that caused severe prejudice to the plaintiffs.<sup>330</sup>

## V. CONCLUSION

An e-discovery rules regime is imperative for Hawai‘i courts. Based on a survey of case law, the experience of federal and other states’ courts and recommendations of federal magistrate judges, we suggest that Hawai‘i courts incorporate the new federal e-discovery rules regime into the Hawai‘i Rules of Civil Procedure—albeit with one caveat. This caveat is that Hawai‘i rulemakers (through commentary) and courts (through case pronouncements) fill in key gaps and clarify ambiguities in the federal approach. To illuminate our suggestion and the caveat, we first examined the promise and problems of e-discovery and the federal court and state court responses. We then analyzed the new rules in detail, identified the gaps and ambiguities and offered specific correctives.

E-discovery has arrived. The time is right for the Hawai‘i courts.

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<sup>326</sup> FED. R. CIV. P. 11(b) & (c) advisory committee’s note (1993).

<sup>327</sup> FED. R. CIV. P. 11(c)(4).

<sup>328</sup> FED. R. CIV. P. 26(g) advisory committee’s note (1983).

<sup>329</sup> *Wong v. City & County of Honolulu*, 66 Haw. 389, 394, 665 P.2d 157, 161 (1983).

<sup>330</sup> *See generally* *Kawamata Farms, Inc. v. United Agric. Prods.*, 86 Haw. 214, 948 P.2d 1055 (1997).

