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E-Discovery under the Minnesota Rules: Where We've Been, Where We Might Be Headed

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E-DISCOVERY UNDER THE MINNESOTA RULES: WHERE WE'VE BEEN, WHERE WE MIGHT BE HEADED

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I. INTRODUCTION

This article reviews the history of discovery in Minnesota practice under the Minnesota Rules of Civil Procedure, analyzes

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the place of electronic discovery in Minnesota today, and attempts to predict how the courts may deal with electronic discovery issues in the future. At one point it was reasonable to analogize Minnesota e-discovery to Minnesota's infamous weather—everyone was talking about it but no one was doing anything about it. With amendments to the rules in recent years, that is not really a fair criticism, as the Minnesota courts have attempted to prevent e-discovery from subverting the strong policy goal of resolving disputes promptly, fairly, and inexpensively.

Minnesota has historically followed the lead of the federal courts in establishing court rules.¹ This article discusses how that has occurred with respect to discovery in particular, and reviews how e-discovery problems have emerged as major challenges to the “just, speedy, and inexpensive” determination of civil cases promised by Rule 1 of the Minnesota Rules of Civil Procedure.² This article explores the history of the Minnesota Supreme Court's efforts to deal with the challenges of e-discovery, both in following federal rule changes where they are deemed wise and in forging its own solutions where the federal solutions are either ill-suited to Minnesota or too limited to address the issues sufficiently.³ In 2013, the court adopted recommendations of its Civil Justice Reform Task Force to deal with some of these issues, many without federal court counterparts.⁴

This article attempts to predict what the future may hold for e-discovery in Minnesota.⁵ Those predictions will be informed by the following articles in this issue, but if history is any guide, the Minnesota solution to e-discovery problems will involve considered, measured review of any federal court rule reforms, together with careful consideration of changes originating in Minnesota or tailored to Minnesota's needs.

II. BACKGROUND ON COURT RULES AND ELECTRONIC DISCOVERY

In the early days of litigation under the Rules of Civil Procedure (since 1938 in federal courts and since 1953 in

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1. See *infra* Part IV.
 2. See *infra* Part IX.
 3. See *infra* Part IV, VIII.
 4. See *infra* Part IX.
 5. See *infra* Part XI.

Minnesota state courts), electronic discovery really didn't exist.⁶ Commerce was not conducted in cyberspace and records were not created or stored in electronic form. The rules reflected the greater world—discovery involved witnesses, paper documents, and occasionally tangible things other than documents. Entire files on transactions existed in a single file folder, and a thin one at that. If copies of documents existed, they were necessarily “carbon copies,”⁷ unless a scrivener had been employed to create a duplicate. If there were copies, they would generally number one or two (more than that would be illegible).

How the world has changed! The photocopy machine probably brought the most dramatic change in the world of commerce that impacted the litigation process. Suddenly numerous copies might be created of documents that might be relevant to a civil dispute. Additionally, the litigation process itself could create multiple additional copies of the documents. But the photocopier's impact pales in comparison to the changes wrought by the high-speed digital computer. These machines have brought changes the rule makers never contemplated. The rules committees have been playing catch-up ever since.⁸

While the changes in the use of computers in virtually every corner of our lives are clear and undisputable, questions about how these changes should be reflected in the judicial process never have been easy to answer. It is tempting just to say that electronic

6. Current versions of the Minnesota and Federal Rules are most frequently accessed by consulting 1 MINNESOTA RULES OF COURT (2013) (state rules) and FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES (Westlaw rev. ed. 2013). Local rules for the federal courts in Minnesota are found in 2 MINNESOTA RULES OF COURT (2013) (federal rules). Those volumes contain compilations of the various amendments to the state and federal civil rules. Similar compilations of the Minnesota state civil rules are also available in volume 15 of the MINNESOTA STATUTES (2012), and of the federal civil rules in 28 U.S.C. (2006).

7. “[A] thin paper faced with a waxy pigmented coating so that when placed between two sheets of paper the pressure of writing or typing on the top sheet causes transfer of pigment to the bottom sheet.” MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 185 (11th ed. 2003) (defining “carbon paper”). Carbon paper allowed the creation of a single copy; multiple copies could be made by using very thin paper, familiarly known as “tissue” paper, and multiple sets of carbon paper and the tissue paper. Each layer in the sandwich was a little less clear than the last.

8. The “crisis” of e-discovery is not universally viewed as dire. For an article suggesting that the e-discovery crisis might be a little overblown, see James M. Rosenbaum, *The Death of E-Discovery*, FED. LAW., July 2007, at 26, 26.

records are the equivalent of documents and should simply be treated as documents in discovery and proof at trial. This is a simple approach, and it has served to answer many simple questions. However, it ignores that as computer systems evolved, electronic records acquired features that distinguished them from their paper forebears—multiple versions were created, often with no notice to or action by the user. Probably the most important form of data in the world of electronic documents with no real counterpart in paper documents is metadata.⁹

Discovery has been a substantial part of Minnesota civil procedure since Minnesota adopted the Minnesota Rules of Civil Procedure in 1952.¹⁰ The Minnesota rules closely followed the

9. See generally BARBARA J. ROTHSTEIN ET AL., *MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES 3* (2007). The Manual for Complex Litigation identifies (and defines) several categories of data, most of which really don't typically exist in paper-based systems:

- *Metadata.* These include information about a particular file, attached to it and part of it electronically, but usually not part of what might be printed, and often not even readily accessible by the user. A good example is information about each document in most word processing documents that shows when it was created, by whom, when it was last edited, by whom, etc.
- *System Data.* These are data created and maintained by the computer itself, and include a wide array of settings, logs of activity, records on file location, access to other devices, changes in settings, etc.
- *Backup Data.* These are data created or maintained for the purpose of short-term disaster recovery, and can include backup files on the host computer, though most often these data are on separate disks or tapes stored away from the host computer system.
- *Files Purposely Deleted by a User.*
- *Residual Data.* These data may arise for several reasons, but essentially are underlying data that are not removed when part of a block of memory is used for another purpose. These may not comprise an entire file, but rather just pieces of it.

FED. JUDICIAL CTR., *MANUAL FOR COMPLEX LITIGATION*, FOURTH § 11.446, at 77–79 (2004). Each of these categories may involve information that may be relevant to litigation and may properly be discoverable. *Id.* at 79. Many of them would be, or would be in some situations, “not reasonably accessible because of undue burden or cost,” and would therefore not be routinely discoverable under FED. R. CIV. P. 26(b)(2)(B) or MINN. R. CIV. P. 26.02(b)(2).

¹⁰ See MINNESOTA RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURT 26–37 (1951). For discussion of the rules' consideration and adoption in Minnesota, see CHARLES ALAN WRIGHT, *WRIGHT'S MINNESOTA RULES* (1954). See also David Louisell, *Discovery and Pre-Trial Under the Minnesota Rules*, 36 MINN. L. REV. 633 (1952)

provisions of the Federal Rules of Civil Procedure, which had been adopted in 1938. Since that original adoption, Minnesota has generally followed the lead of the United States Supreme Court and has considered and adopted federal rules changes. The problems of discovery reform have, in many states, led state rule makers to impose limitations on wide-open discovery.¹¹ Minnesota has been part of that trend, imposing a numerical limit on the use of interrogatories. In 1968 the number of permitted interrogatories was limited to fifty.¹² Not until 1993 would the Federal Rules of Civil Procedure impose any such limit, when a twenty-five interrogatory limit was imposed.¹³ In 1996 Minnesota considered, but declined to adopt, that lower twenty-five interrogatory limit.¹⁴

E-discovery issues have confronted the Federal Rules Committee, and that Committee recommended important rule changes in 2006 that the Supreme Court adopted.¹⁵ Those changes took effect on December 1, 2006.¹⁶ Minnesota followed with the 2007 amendments to the Minnesota Rules, adopting the federal changes in substantial part.¹⁷

The Federal Advisory Committee continues to wrestle with e-discovery and is currently considering rule amendments that would address some of the pending issues.¹⁸ We can expect that

(comparing the Minnesota discovery rules with the newly adopted federal discovery rules); Note, *Discovery Practice in States Adopting the Federal Rules of Civil Procedure*, 68 HARV. L. REV. 673 (1955) (comparing several states' discovery rules with the newly adopted federal discovery rules).

11. See, e.g., Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1216 (2005) ("Most jurisdictions . . . impose some form of rule-based limits on discovery volume.").

12. MINN. R. CIV. P. 33.01(a) advisory committee's comment (1968 amendment).

13. See FED. R. CIV. P. 33(a) advisory committee's note (1993 amendment).

14. MINN. R. CIV. P. 33.01(a) advisory committee's comment (1996 amendment).

15. See *infra* Part VII.

16. By statute, the Supreme Court adopts rules that take effect on December 1st of the year of adoption, provided that they are submitted to Congress by May 1st and Congress does not act to prevent their effectiveness. 28 U.S.C. § 2074(a) (2012).

17. Compare FED. R. CIV. P. (2007), with MINN. R. CIV. P. (2007).

18. See Memorandum from David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Jeffrey S. Sutton, Chair, Standing Comm.

those changes, if eventually adopted in the federal courts, will in time be taken up by the Minnesota Supreme Court and its Advisory Committee. But Minnesota has not slavishly followed federal rule amendments, nor has it confined itself to rule changes adopted in federal courts. E-discovery issues are a likely candidate for further rulemaking unrelated to any limitation federal-rule amendments, especially if a consensus were to develop as to the nature and seriousness of the problems faced in Minnesota.

In 2013, the Minnesota Supreme Court adopted significant rule changes that originated not with its Advisory Committee on Rules of Civil Procedure, but with the Minnesota Supreme Court Task Force on Civil Justice Reform.¹⁹ The Task Force recommendations were not focused particularly on e-discovery, but

on Rules of Practice & Procedure (May 8, 2013), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf>; *see also infra* Part X.

19. *See* Order Nos. ADM10-8051, 09-8009, 04-8001, Order Adopting Amendments to the Rules of Civil Procedure (Minn. Feb. 4, 2013), *available at* <http://www.mncourts.gov/?page=511>; Order Nos. ADM10-8051, 09-8009, 04-8001, Order Promulgating Corrective Amendments to the Rules of Civil Procedure (Minn. Feb. 12, 2013), *available at* <http://www.mncourts.gov/?page=511>; Order Nos. ADM10-8051, 09-8009, 04-8001, Order Authorizing Expedited Civil Litigation Track Pilot Project and Adopting Amendments to the Rules of Civil Procedure (Minn. May 7, 2013), *available at* <http://www.mncourts.gov/?page=511>. These orders amended or adopted the following rules:

MINN. R. CIV. P. 1	<ul style="list-style-type: none"> Added new proportionality provision.
MINN. R. CIV. P. 3	<ul style="list-style-type: none"> Added cross-reference to new filing requirement in MINN. R. CIV. P. 5.04.
MINN. R. CIV. P. 5.04	<ul style="list-style-type: none"> Added new requirement that actions be filed within one year of commencement.
MINN. R. CIV. P. 26	<ul style="list-style-type: none"> Added automatic disclosure requirements. Recast proportionality requirement in MINN. R. CIV. P. 26.02(b). Created mandatory discovery conference and discovery plan.
MINN. R. CIV. P. 37	<ul style="list-style-type: none"> Provided for sanctions for failure to make required disclosures or failure to participate in framing a discovery plan.
MINN. GEN. R. PRAC. 8.13, 104, 111, 114, 146	<ul style="list-style-type: none"> Modified scheduling process and adopted new Civil Cover Sheet.
MINN. GEN. R. PRAC. 115.04(d)	<ul style="list-style-type: none"> Adopted new expedited motion procedure for nondispositive motions.
MINN. GEN. R. PRAC. 146	<ul style="list-style-type: none"> Adopted procedure for Complex Case Project.

necessarily addressed it. Probably the most significant provision recommended by the Task Force and adopted by the court is the inclusion of an express requirement for consideration of proportionality.²⁰ This important amendment to Rule 1 is not modeled after any existing provision in the Federal Rules.²¹ Proportionality is one of the most important issues on the e-discovery front.

Because Minnesota has not marched in lockstep with the federal courts on matters of procedure, it is not possible to predict that it will simply sit back and wait for the Federal Rules process to end. The recent activities of both the Minnesota and Federal Rules Advisory Committees, as well as the Minnesota Supreme Court's concern about the issues, as reflected in its appointment of a Civil Justice Reform Task Force and adoption of several recommendations of that task force, suggest that these issues are important. It is reasonable to predict that if the Federal Rules are amended to deal with e-discovery issues, the Minnesota Supreme Court will take a serious look at the amendments and ask its Advisory Committee to consider their merits for adoption in Minnesota. In addition, Minnesota may well look at other solutions, as it has in the past, either out of greater concern about the problems or the presence of issues in state court litigation that are not really present in federal court litigation.²²

It seems implicit that the civil dispute resolution process should not consume more in litigation costs than is involved in the dispute. This notion has not been embraced in any court rule or policy, but seems fundamental.²³ That recognition should drive

20. See MINN. R. CIV. P. 1 (effective July 1, 2013).

21. See *infra* Part X.A. Compare MINN. R. CIV. P. 1 ("It is the responsibility of the court . . . to examine each civil action to assure that the process and the costs are proportionate to the amount in controversy"), with FED. R. CIV. P. 1 (containing no such clause).

22. See *infra* text accompanying notes 37–46.

23. This disputed notion of balancing cost versus amount was expressly considered by the Minnesota Supreme Court Civil Justice Reform Task Force in its December 23, 2011, Final Report. The task force observed: "High litigation costs cause parties to forgo claims that do not exceed the litigation expenses The surveys and studies also present evidence of agreement that litigation costs also drive cases to settle for reasons unrelated to the substantive merit of the claims or defenses." RECOMMENDATIONS OF THE MINNESOTA SUPREME COURT CIVIL JUSTICE REFORM TASK FORCE: FINAL REPORT 11 (Dec. 23, 2011), available at <http://www>

innovative approaches to provide e-discovery that is needed to present the merits of the parties' cases for resolution, without consuming the parties' resources and exhausting the courts through obtaining and reviewing electronic records that do not help with that resolution in a meaningful way.

III. THE "ELECTRONIC DARK AGES" (1938–1952)

The Federal Rules of Civil Procedure were adopted in 1938.²⁴ They came about after extensive study and discussion with the bench and bar, and with input from the academic community. The rules brought many changes but didn't address electronic discovery in any meaningful way. Quite simply, they didn't need to. High-speed digital computing didn't exist, at least not outside the laboratory, and records were created and maintained on paper and in file cabinets (if retained at all).

Pursuant to the Rules Enabling Act of 1934,²⁵ the Federal Rules have repeatedly been amended since their adoption. The adoption process requires promulgation of rules by the Supreme Court with the effective date deferred to December 1st of the year of adoption, giving Congress the ability to intercede to prevent any rule from taking effect.²⁶ The amendments have kept the rules current and have helped them adapt to developments in the types of cases filed and their case management needs. An important amendment was made in 1946, adding a provision to Rule 26 that provided that, at a deposition, "[i]t is not ground for objection that the testimony sought . . . appears reasonably calculated to . . . the discovery of admissible evidence."²⁷ This broadening language was extended to

[.mncourts.gov/Documents/0/Public/Court_Information_Office/Civil_Justice_Ref_Task_Force_Dec_2011_Rpt.pdf](http://mncourts.gov/Documents/0/Public/Court_Information_Office/Civil_Justice_Ref_Task_Force_Dec_2011_Rpt.pdf).

24. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1004 (3d ed. 2002) (discussing the formulation of the Federal Rules).

25. Act of June 19, 1934, ch. 651, §§ 1, 2, 48 Stat. 1064, 1064 (codified as amended 28 U.S.C. § 2072 (2012)). For discussion of the Act, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

26. The history of adoption and early amendments to the Federal Rules is set forth in 4 WRIGHT & MILLER, *supra* note 24, §§ 1001–08.

27. FED. R. CIV. P. 26(b) (1946).

all discovery by the 1970 reorganizing amendments to the discovery rules.²⁸

Discovery itself was one of the major innovations of the Federal Rules. The merger of law and equity probably is more earthshaking and fundamentally important to the structure of civil litigation, but the creation of routine use of discovery in any type of case undoubtedly was important and one of the enduring impacts on most civil cases. The establishment of discovery by the rules was fairly viewed as revolutionary.²⁹

IV. THE REUNION OF FEDERAL AND MINNESOTA CIVIL PROCEDURE IN 1953

The years 1938 and 1953 are the bookends of the period when the federal courts were using their new rules of civil procedure and the Minnesota courts were continuing to follow statute-based rules of procedure.³⁰

Minnesota did not immediately embrace the changes made in the federal courts in 1938; not until 1953 did Minnesota adopt the Minnesota Rules of Civil Procedure, modeled closely on the Federal Rules as they then existed.³¹ Since 1953, Minnesota has generally followed—not quite in lockstep and usually with some time lag—the developments in the Federal Rules.³² There have been relatively few federal procedural changes that did not see eventual adoption in Minnesota.³³

28. The 1970 amendments to the Federal Rules were adopted in Minnesota in 1975. See *infra* notes 34–35 and accompanying text.

29. See Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery “Reform,”* 64 LAW & CONTEMP. PROBS. 197, 202 (2001); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 734 (1998).

30. Compare FED. R. CIV. P. (1938), and FED. R. CIV. P. (1953) (exemplifying the federal courts’ use of new rules), with MINN. R. CIV. P. (1938), and MINN. R. CIV. P. (1953) (demonstrating Minnesota courts’ use of statute-based rules).

31. MINN. R. CIV. P. (1952). The adoption of the rules in Minnesota is also discussed in note 10. See *supra* note 10 and accompanying text.

32. See generally David F. Herr, *A Parting of Ways? Amendments to the Civil Rules—State and Federal*, BENCH & B. MINN., July 2000, at 29, available at <http://www.mnbar.org/benchandbar/2000/jul00/civil-rules.htm> (discussing the history of the relationship between the Minnesota and Federal Rules).

33. The most sweeping of the federal amendments, although arguably the most insignificant from a substantive standpoint, were the 2007 so-called

A good example of Minnesota's approach to the Federal Rules, especially relevant to the issues here, occurred in 1975. In 1970, the Federal Rules were extensively amended, with the changes focusing on discovery.³⁴ Not until five years later, in 1975, did Minnesota amend its rules to adopt the vast majority of those changes.³⁵ This lag is typical of the approach the Minnesota Supreme Court and its Advisory Committees have taken to federal rule amendments. The 1970 federal amendments were significant and changed many aspects of discovery practice.³⁶ The 1975 amendments to the Minnesota rules were similarly impactful because they made several important changes to how discovery is conducted, and the Advisory Committee carefully considered the desirability of each change.³⁷

More recently, the Minnesota Supreme Court has not been as slavish in its consideration of federal rule changes. A good example of this came with the 1991 federal rule amendments, which made important and far-reaching changes, including the revamping and relabeling of post-trial motions.³⁸ These amendments were not adopted in Minnesota until 2006.³⁹ This lag initially is attributable to reluctance to make changes that were both far reaching in impact and nominally trivial—the mere relabeling of the motions

“restyling” amendments. Those amendments to the federal rules restyled the federal rules but were intended not to change the meaning or interpretation of the rules. *See, e.g.*, Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761 (2004). These changes have not been given substantive attention by the Minnesota Supreme Court for adoption in Minnesota. For a discussion of the elusiveness of changing wording without changing meaning, see Steven S. Gensler, *Must, Should, Shall*, 43 AKRON L. REV. 1139 (2010).

34. *See* FED. R. CIV. P. (1970).

35. *See* MINN. R. CIV. P. (1975).

36. *See, e.g.*, 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2003 (3d ed. 2010).

37. The 1975 changes in Minnesota practice were just as extensive as the 1970 amendments were to federal discovery practice, and their importance was as well. The 1975 Minnesota amendments are analyzed in detail in William B. Danforth, *The 1975 Amendments to the Minnesota Discovery Rules*, 3 WM. MITCHELL L. REV. 39 (1977).

38. *See* FED. R. CIV. P. 50(a)–(b) advisory committee's note (1991 amendment). Under these changes, the motion for directed verdict under FED. R. CIV. P. 50(a) and for judgment notwithstanding the verdict under Rule 50(b) were redefined and relabeled, both becoming motions for “judgment as a matter of law.”

39. *See* MINN. R. CIV. P. (2006).

would not seem to justify the substantial risk that parties would fail to file the motions properly and the risks that would flow from that failure.⁴⁰

Since 1953, Minnesota has had a history of following the lead of the federal courts in amending the rules of procedure. A cogent statement on the guiding philosophy of the Advisory Committee on state conformity to the Federal Rules of Civil Procedure was provided to the Minnesota Supreme Court in the Committee's report in 1996, recommending adoption of several, but not all, of the federal amendments that had followed the Committee's most recent report to the court. The Committee stated:

The committee continues to believe that, as a general principle, it is desirable to have the rules governing practice in the state courts parallel as closely as practicable the rules in federal court. This general principle guides some of the recommendations made above. The committee has always recognized, however, that litigation in the state courts is different from that in the federal courts, and that Minnesota concerns may dictate different rules.⁴¹

In many ways, this statement articulates a very consistently applied guiding principle. The 1996 report containing it recommended against the adoption of automatic disclosures, which

40. The bringing of post-trial motions has a substantial impact on appellate review in Minnesota appellate practice. *See generally* 3 ERIC J. MAGNUSON, DAVID F. HERR & SAM HANSON, MINNESOTA PRACTICE: APPELLATE RULES ANNOTATED §§ 103.16–19 (2013 ed.) (discussing scope of review and limitations caused by failure to raise issues in post-trial motions, especially motions for a new trial under MINN. R. CIV. P. 59).

41. RECOMMENDATIONS OF MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, FINAL REPORT 2 (July 22, 1996) [hereinafter RECOMMENDATIONS 1996], *available at* <http://www.mncourts.gov/Documents/0/Public/administration/AdministrationFiles/Civil%20Procedure%20Rules%20ADM04-8001%20formerly%20C6-84-2134/1996-07-29%20SC%20Advisory%20Cmte%20Report.pdf>; *see also* RECOMMENDATIONS OF MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, FINAL REPORT 2 (Sept. 26, 2005) [hereinafter RECOMMENDATIONS 2005], *available at* <http://www.mncourts.gov/Documents/0/Public/administration/AdministrationFiles/Civil%20Procedure%20Rules%20ADM04-8001%20formerly%20C6-84-2134/2005-09-26%20Civ%20Proc%20Final%20Rpt.pdf> (reiterating preference for having state rules conform to federal counterparts).

had been adopted in federal court only three years earlier.⁴² Automatic disclosures were not adopted in Minnesota until 2013.⁴³

In 1988, the Minnesota Advisory Committee proposed and recommended to the court extensive amendments to delete gender-specific language from the rules.⁴⁴ These amendments also included an amendment to Minnesota Rule 30.02 to provide for taking depositions by telephone, adopting language identical to the 1980 amendment to the federal counterpart to that rule.⁴⁵

In 1999, the Advisory Committee recommended that the court adopt changes to Minnesota Rule 11 to conform the rule to Federal Rule 11 as it had been amended in 1993.⁴⁶ The Advisory Committee also recommended that the court defer any action on adoption of the automatic disclosure provisions that the Federal Rules adopted in 1996.⁴⁷ It was not until 2013 that those rules would become part of Minnesota practice.⁴⁸

In 2006, the Committee recommended several changes to the Minnesota Rules, including four that involved virtually wholesale adoption in Minnesota of recently adopted federal rule amendments.⁴⁹ These included adoption of Federal Rule 23 on class actions,⁵⁰ Rule 53 on special masters,⁵¹ Rule 50 on the

42. See RECOMMENDATIONS 1996, *supra* note 41, at 3. Minnesota's reluctance to embrace automatic disclosures was undoubtedly at least partly a product of the controversial reception disclosure had received in the federal courts. As originally adopted in 1993, districts were allowed to opt out of its provisions, and more than one-fourth of the districts had done so, including many of the larger metropolitan districts with larger caseloads. See Stempel, *supra* note 29, at 199 n.14. The option to opt out by local rule adopted in 1993 was removed by the 2000 amendments to the rules. See FED. R. CIV. P. 26(a)(1) advisory committee's note (2000 amendment).

43. See MINN. R. CIV. P. 26.01 (effective July 1, 2013).

44. See RECOMMENDATIONS OF MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE: FINAL REPORT 2 (Mar. 25, 1988).

45. See MINN. R. CIV. P. 30.02 advisory committee's comment (1988 amendment). This rule provision is currently numbered MINN. R. CIV. P. 30.02(g).

46. *Id.* R. 11 advisory committee's comment (1999 amendment).

47. RECOMMENDATIONS OF MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, FINAL REPORT 2 (July 13, 1999) available at <http://www.mncourts.gov/Documents/0/Public/administration/AdministrationFiles/Civil%20Procedure%20Rules%20ADM04-8001%20formerly%20C6-84-2134/1999-07-16%20SC%20Advisory%20Cmte%20Report.pdf>.

48. See *infra* note 116 and accompanying text.

49. See RECOMMENDATIONS 2005, *supra* note 41.

50. MINN. R. CIV. P. 23 advisory committee's comment (2006 amendment).

nomenclature for post-trial motions,⁵² and—importantly, for the subject of this article—amendments to Rules 26 and 30 to modify the scope of discovery and limit the duration of depositions.⁵³

V. THE CIVIL RULES AND THE EARLY DAYS OF THE COMPUTER AGE

Because neither the Federal nor Minnesota Rules provided explicit rules for dealing with computers and data in electronic formats, the courts were initially left to resolve issues relating to data created or residing on computer systems under rules that contemplated documents as paper things. The courts had rules that were intended to diminish the role of formalism, and electronic documents could be treated as “documents.”⁵⁴ In the early days, applying the existing rules worked just fine to answer discovery issues that occasionally arose. The simple question of “what would the answer be for paper records?” worked to answer questions about computer records. If a party maintained records on a computer system, most courts had little difficulty concluding that they were “documents” and thus discoverable to the extent their paper counterparts would have been.⁵⁵ As volume increased, however, and as computer systems didn’t really emulate the paper world, the answers provided by the rules proved more elusive and less satisfactory. File cabinets didn’t generally contain every draft of paper documents or detailed records of every change to every document. Letters occasionally would be copied to a few additional recipients or might attach a single earlier piece of correspondence. In the e-mail world, letters might be directed to a long list of recipients or even to a group list. Dozens of earlier rounds of messages might be appended, and any of those forwarded to others. The result is a collection of issues that the rules just didn’t address well, and the “analogy to paper” wasn’t obvious—there wasn’t necessarily a clear analogy to paper.

The courts’ recognition of electronic data and information as “documents” gained significant traction in the early 1970s. In 1970,

51. *Id.* R. 53 advisory committee’s comment (2006 amendment).

52. *Id.* R. 50 advisory committee’s comment (2006 amendment).

53. *Id.* R. 26.02, 30.04 advisory committee’s comments (2006 amendment).

54. *See* FED. R. CIV. P. 34 (applying the same procedure for producing “documents or electronically stored information”).

55. *See infra* notes 56, 67.

Rule 34 of the Federal Rules of Civil Procedure was amended to provide for the production of “data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.”⁵⁶ Professors Wright and Miller characterized this language as “bringing the rules ‘into the computer age.’”⁵⁷ In *Adams v. Dan River Mills, Inc.*,⁵⁸ the United States District Court for the Western District of Virginia applied these rule changes to require production of computer cards and tapes, stating:

Examination of the notes of the Advisory Committee on Rules pertaining to Rule 34 of the Federal Rules of Civil Procedure reveals that the Committee was aware of the effect which technology in the field of electronic data processing might have in discovery. The notes of the Committee state in part:

The inclusive description of ‘documents’ is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when data can as a practical matter be made usable by the discovering party only through respondent’s devices, respondent may be required to use his devices to translate the data to usable form. In many instances, this means that respondent will have to supply a print-out of computer data. The burden thus placed on respondent will vary from case to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs

While it appears to this court that the above language only directly covers the situation where the respondent can be required to prepare the information in a usable form, such as a print-out, it does not appear to preclude the production of computer in-put information such as computer cards or tapes. Likewise, this court is aware of

56. FED. R. CIV. P. 34(a)(1) advisory committee’s notes (1970 amendment). See also *Pearl Brewing Co. v. Joseph Schiltz Brewing Co.*, 415 F. Supp. 1122, 1136 (S.D. Tex. 1976).

57. *Pearl Brewing Co.*, 415 F. Supp. at 1136 (citing 8 WRIGHT ET AL., *supra* note 36, § 2218).

58. 54 F.R.D. 220 (W.D. Va. 1972).

no reason why documents of this nature should not be subject to discovery.⁵⁹

Based on the 1970 amendments to Rule 34, courts frequently ordered parties to produce computer printouts,⁶⁰ computer cards or tapes,⁶¹ and even allowed an opposing party to use the producing party's computer machinery for duplication or replication of regularly compiled information.⁶² Courts also showed a willingness to impose sanctions for a party's failure to produce such information in response to legitimate discovery requests.⁶³ Similarly, courts regularly entertained requests to shift the costs of preparing and producing electronic information to the requesting party.⁶⁴

The courts' focus on broad functionality continues to provide the answers to numerous e-discovery questions, even as technology evolves. A digital record of an x-ray examination under the rules

59. *Id.* at 222 (quoting FED. R. CIV. P. 34 advisory committee's note (1970 amendment)) (requiring the production of electronic records even after paper versions had been previously requested and produced). This would not be the presumptive ruling under the Federal Rules following the 2006 amendments, as FED. R. CIV. P. 34(b)(2)(iii) explicitly provides that a party need not produce electronically stored information in more than one form.

60. *See, e.g.,* *Macrovision Corp. v. VSA, Ltd.*, No. 88-315-FR, 1989 U.S. Dist. LEXIS 11246, at *8 (D. Or. Sept. 20, 1989); *Colorado v. Schmidt-Tiago Constr. Co.*, 108 F.R.D. 731, 735 (D. Colo. 1986); *Adams*, 54 F.R.D. at 222.

61. *See, e.g.,* *Kuenz v. Goodyear Tire & Rubber Co.*, Nos. 83-1469C(3), 84-0475C(3), 1985 U.S. Dist. LEXIS 21858, at *2-3 (E.D. Mo. Mar. 12, 1985); *Ottaviani v. State Univ. of N.Y.*, No. 77 Civ. 6259 (SWK), 1985 U.S. Dist. LEXIS 23346, *6 (S.D.N.Y. Jan. 17, 1985); *Allen v. Isaac*, 100 F.R.D. 373, 377 (N.D. Ill. 1983); *EEOC v. Sears, Roebuck & Co.*, No. 79-1957A, 1980 U.S. Dist. LEXIS 16068, *15 (N.D. Ga. Sept. 9, 1980); *Adams*, 54 F.R.D. at 222. *But see* *Williams v. Owens-Ill., Inc.*, 665 F.2d 918, 933 (9th Cir. 1982) (affirming denial of motion to compel production of computer tapes where all information contained on the tapes was included in wage cards, which were produced).

62. *See, e.g.,* *Macrovision Corp.*, 1989 U.S. Dist. LEXIS 11246, at *8 (requiring defendant to use its computer devices to translate data into usable form for plaintiff).

63. *See, e.g.,* *Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 555-56 (N.D. Cal. 1987).

64. *See, e.g.,* *Williams v. E.I. Du Pont de Nemours & Co.*, 119 F.R.D. 648, 651 (W.D. Ky. 1987); *Kuenz*, 1985 U.S. Dist. LEXIS 21858, at *2-3; *Adams*, 54 F.R.D. at 222. *But see* *Sanders v. Levy*, 558 F.2d 636, 648-51 (2d Cir. 1976) (affirming district court's decision not to shift the cost of computer discovery to the requesting party).

should be expected to be just as discoverable as a silver-emulsion film would be. These functional equivalencies have also served to analyze evidentiary issues, although questions under the rules of evidence may be more complicated, or at least different. A digital photograph is not identical to a Kodachrome print, and even less so to a Kodachrome negative. (Digital photos may be more readily altered, at least at the clumsy level.⁶⁵) Digital x-rays may reveal clear evidence of an injury or no suggestion of it, depending on contrast and other settings of the playback device, but this does not prevent the discovery of the images.⁶⁶

VI. THE ADVENT OF “E-DISCOVERY” AS A NEW SET OF ISSUES

At some point courts, litigators, and commentators recognized that some of the differences between the world of paper and the world of electronics didn't map to each other perfectly.⁶⁷ Some things that worked just fine for paper didn't really work so well for electronics. As electronic discovery advanced, the traditional approach became only the starting point. The question transformed to become, first, what would the answer be for paper records, but would then be modified to consider the additional issues such as volume, number of locations, and data volatility.⁶⁸ These issues can be addressed by courts on a case-by-case basis, but

65. For discussion of the evidentiary issues relating to evidence that is created or exists in electronic form, see Keiko L. Sugisaka & David F. Herr, *Admissibility of E-Evidence in Minnesota: New Problems or Evidence as Usual?*, 35 WM. MITCHELL L. REV. 1453 (2009). For particular focus on digital photographs, see Christine A. Guilshan, Note, *A Picture Is Worth a Thousand Lies: Electronic Imaging and the Future of the Admissibility of Photographs into Evidence*, 18 RUTGERS COMPUTER & TECH. L.J. 365 (1992).

66. See, e.g., Suzanne Collins, *Medical Malpractice Litigation: What Are the Foundational Requirements for High-Tech Exhibits?*, 212 N.J. L.J., May 6, 2013, at 301.

67. Electronic data, unlike paper data, may be incomprehensible when separated from its environment. . . . If the raw data (without the underlying structure) in a database is produced, it will appear as merely a long list of undefined numbers. To make sense of the data, a viewer needs the context that includes labels, columns, report formats, and other information.

THE SEDONA CONFERENCE, *THE SEDONA PRINCIPLES ADDRESSING ELECTRONIC DOCUMENT PRODUCTION* 4 (Jonathan M. Redgrave et al. eds., 2d ed. 2007).

68. See *In re John Doe Proceeding*, 680 N.W.2d 792, 809 (Wis. 2004) (Abrahamson, J., concurring).

a strong case can be made to facilitate rules or standards to facilitate decisions. It is hard to pinpoint a specific advent of “e-discovery” as a separate field of inquiry.⁶⁹ There was no landmark event that marks the beginning of the era; it is marked more by the increasing use of digital computers in business and throughout society.⁷⁰ We have all been struggling to keep up ever since.

Probably the three most important differences of the electronic world are persistence, volume, and volatility.⁷¹ These are somewhat mirror-image features that create different problems in very similar ways. Persistence refers to the well-known fact that electronic documents, once created or saved on a system, may very well persist in some readable form even if they are “deleted.”⁷² Some computer systems are designed to ensure some level of persistence, by operation of backup and archive systems whose only purpose is to preserve copies of records created on the system. The persistence problem is amplified by the continued application of Moore’s Law and the ever-decreasing cost of mass computer storage.⁷³ Flash drives with 64- or 128-gigabyte capacity are now readily available.⁷⁴ Where storing a thousand pages of documents

69. An early reference to electronic discovery is found in *United States v. Hearst*, 412 F. Supp. 863, 869 (N.D. Cal. 1975) (referring to discovery of electronic surveillance records). References in the 1970s and early 1980s are relatively sparse, however, and especially sparse in civil cases.

70. See Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, 64 LAW & CONTEMP. PROBS. 253, 258–60 (2001); *A History of Windows*, WINDOWS, <http://windows.microsoft.com/en-us/windows/history> (last visited Oct. 19, 2013) (stating that the Microsoft Disk Operating System (MS-DOS) was introduced in 1980, and IBM introduced the personal computer (PC) in 1981).

71. These differences are discussed by The Sedona Conference Working Group on Electronic Document Retention and Production, in THE SEDONA CONFERENCE, *supra* note 67, at 2–5.

72. *Id.* at 3.

73. Moore’s Law was articulated in 1980 by Gordon E. Moore, founder of semiconductor industry pioneer Intel Corp. It is “an axiom of microprocessor development usually holding that processing power doubles about every 18 months especially relative to cost or size.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 7, at 806. For a biography on Moore see *IEEE Computer Society Awards*, IEEE COMPUTER SOC’Y, <http://www.computer.org/portal/web/awards/moore-goode> (last visited Oct. 19, 2013).

74. The capacity of a 64-gigabyte (GB) flash drive depends on the types of data stored, but a rule of thumb for Word documents is that a 64-GB drive can hold 58,100 documents. *SanDisk Support*, SANDISK, <http://kb.sandisk.com/app>

was once expensive, the inexorable lowering of the cost makes the cost relatively trivial today. Persistence also contributes directly to the problem of volume. There are now exponentially more records involved in litigation than would once have been possible.

Volume is a significant difference even aside from the persistent accumulation of electronic records.⁷⁵ The vast size of data collections stored on a computer system really converts a quantitative difference into a fundamental, qualitative difference. Volume relates directly to cost, but not always in an obvious way. It is easy to draft a plausible-sounding document request that might call for production of a million documents. The same request forty years ago might have reached one or two hundred documents. The difference is accounted for by the proliferation of record creation as well as reproduction and dissemination of records across broad networks. Phone messages that would have been regularly destroyed when the call was returned now may go into nearly permanent computer storage. Computer storage itself might create scores of copies in various archive files.

Volatility refers to the ease with which an electronic document can be altered or erased even if no one directly asks that to happen.⁷⁶ The simplest example of this occurs when a document is edited and then saved—on some systems the earlier version may be overwritten and lost forever. In other systems, it may persist in the form of an earlier version of the saved document. Even booting up a computer can change data contained on it.

To address these differences between paper and electronic documents, the Federal Rules of Civil Procedure were extensively amended in 2006.

VII. THE FEDERAL RULES AMENDMENTS IN 2006

Amendments to the Federal Rules of Civil Procedure that took effect on December 1, 2006, were widely referred to as “e-discovery” amendments. They constituted a fairly comprehensive attempt to address new and anticipated issues involving e-discovery and

/answers/detail/a_id/3651/~~/number-of-photos,-songs,-documents,-and-video-hours-a-sandisk-ultra-backup-usb (last visited Oct. 19, 2013).

75. See THE SEDONA CONFERENCE, *supra* note 67, at 2.

76. *The Sedona Principles* refer to volatility as “dynamic, changeable content.” *Id.* at 3.

included few other topics. These amendments are now an established part of the federal litigation system and are generally viewed to have worked well.⁷⁷

The amendments in 2006 defined “electronically stored information” (ESI) and incorporated the phrase into numerous rules to make it clear that disclosure and discovery obligations applied equally to “paper” and electronic documents.⁷⁸ Specifically, these amendments included revisions and additions to Rules 16, 26, 33, 34, 37, and 45, as well as to Form 35.

The amendments to Rule 16(b) were “designed to alert . . . court[s] to the possible need to address the handling of discovery of [ESI] early in . . . litigation.”⁷⁹ Rule 16 now explicitly states that the court’s scheduling order may “provide for disclosure or discovery of electronically stored information.”⁸⁰

The amendments to Rule 26(a), Rule 26(f), and Form 35 require parties to include ESI in their initial disclosures and to “meet and confer” early on regarding ESI data preservation, form

77. See generally Bennett B. Borden et al., *Four Years Later: How the 2006 Amendments to the Federal Rules Have Reshaped the E-Discovery Landscape and Are Revitalizing the Civil Justice System*, 17 RICH. J.L. & TECH., no. 3, 2011, ¶¶ 11, 13 (“This newfound proficiency [following adoption of the amendments] is finally helping achieve the primary goal of civil litigation: ‘the just, speedy, and inexpensive determination of every action and proceeding.’”).

78. Rule 34 defines “electronically stored information” to include “writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form” FED. R. CIV. P. 34(a)(1)(A). The 2006 Advisory Committee Notes make clear that the drafters purposefully did not limit the definition of electronically stored information:

The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically. . . . The rule covers—either as documents or as electronically stored information—information “stored in any medium,” to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

Id. R. 34 advisory committee’s note (2006 amendment).

79. *Id.* R. 16 advisory committee’s note (2006 amendment).

80. *Id.* R. 16(b)(3)(B)(iii).

of production, and privilege waiver.⁸¹ Specifically, Rule 26(a)(1)(A)(ii) requires each party to disclose, without receiving a discovery request, “electronically stored information” in its possession, custody, or control that it may use to support its claims or defenses.⁸² Rule 26(f) directs parties to discuss discovery of ESI if discovery of ESI is likely to be sought in the action and to incorporate any issues related to ESI into their discovery plan.⁸³ Form 35 was amended to include a report to the court about the results of the parties’ discussion about how they intend to handle ESI.⁸⁴

The amendments to Rule 26(b)(2)(B) created a proportionality provision in Rule 26, placing specific limits on the discovery of ESI based on an “accessibility” test:

(b) *Discovery Scope and Limits.*

....

(2) *Limitations on Frequency and Extent.*

....

(B) *Specific Limitations on Electronically Stored Information.* 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.⁸⁵

Inclusion of these limitations was “designed to address issues raised by difficulties in locating, retrieving, and providing discovery of” certain ESI.⁸⁶ Rule 26(b) now creates a “two-tiered” system for

81. See *id.* R. 26(f)(1); see also *id.* R. 26(a), Form 35.

82. *Id.* R. 26(a)(1)(A)(ii).

83. *Id.* R. 26(f)(3)(C).

84. *Id.* R. 16 advisory committee’s note (2006 amendment); see also *id.* Form 52.

85. *Id.* R. 26(b).

86. *Id.* R. 26 advisory committee’s note (2006 amendment).

the discovery of ESI: “accessible” vs. “not reasonably accessible.”⁸⁷ The first “tier” consists of accessible ESI, which a responding party must produce at its own cost.⁸⁸ The second “tier” pertains to ESI that is “not reasonably accessible.”⁸⁹ Because some sources of ESI can only be accessed “with substantial burden and cost,” Rule 26 treats those sources of ESI as “not reasonably accessible” and requires good cause to obtain discovery of them.⁹⁰

The Advisory Committee Notes to Rule 26 clarify that in addition to producing “reasonably accessible” ESI, a responding party “must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing.”⁹¹ In addition, “[t]he identification should, to the extent possible, provide enough detail to 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.”⁹² Rule 26(b)(2) does not define the different types of technological features that may affect the burdens and costs of accessing ESI.⁹³

As further set forth in the Advisory Committee Notes, courts may consider various factors in determining whether to require a responding party to search for and produce information that is “not reasonably accessible.” Those factors include:

- (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

87. See MICHAEL R. ARKFELD, ARKFELD ON ELECTRONIC DISCOVERY AND EVIDENCE § 7.4(G)(1)(a) (3d ed. 2013); see also Thomas Y. Allman, *Conducting E-Discovery After the Amendments: The Second Wave*, 10 SEDONA CONF. J. 215, 222 (2009).

88. Allman, *supra* note 87, at 224 (citing *Zubulake v. UBS Warburg L.L.C.*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003)); see also FED. R. CIV. P. 26 advisory committee’s note (2006 amendment) (“[A] responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery.”).

89. ARKFELD, *supra* note 87, § 7.4(G)(1)(a).

90. FED. R. CIV. P. 26 advisory committee’s note (2006 amendment).

91. *Id.*

92. *Id.*

93. See *id.*

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.⁹⁴

Even if discovery of ESI that is not reasonably accessible is permitted, courts may impose conditions on that discovery, including that the requesting party bear some or all of the costs.⁹⁵

The amendment to Rule 33(d), which permits a party to produce business records in response to an interrogatory, specifies that the definition of "business records" includes ESI.⁹⁶

Rule 34(a) was amended to confirm that discovery of ESI stands on "equal footing" with discovery of paper documents.⁹⁷ Rule 34(a)(1)(A) now states that a party may serve a discovery request to produce and permit the requesting party to "inspect, copy, test, or sample . . . documents or electronically stored information—including . . . sound recordings, images, and other data . . . stored in any medium."⁹⁸ Rule 34(b)(1)(C) now states that a document request "may specify the form or forms in which electronically stored information is to be produced."⁹⁹ Finally, Rule 34(b)(2)(D) and (E)(ii)–(iii) state:

(D) *Responding to a Request for Production of Electronically Stored Information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.

(E) *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

....

(ii) If a request does not specify a form for producing electronically stored information, a party

94. *Id.*

95. *Id.*

96. *Id.* R. 33(d).

97. *Id.* R. 34 advisory committee's note (2006 amendment).

98. *Id.* R. 34(a)(1)(A) (emphasis added).

99. *Id.* R. 34(b)(1)(C).

must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.¹⁰⁰

Like Rule 34, Rule 45 was also amended to specifically state that a subpoena may command a nonparty to produce or to permit the inspection, copying, testing, or sampling of “electronically stored information” and “may specify the form or forms in which electronically stored information is to be produced.”¹⁰¹ The subpoenaed person may object in writing to inspecting, copying, testing, sampling, or producing ESI in the form or forms requested.¹⁰² Paralleling the amendments to Rules 26 and 34, the amendments to Rule 45 go on to state that a subpoenaed party “need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost.”¹⁰³

Finally, Rule 37, which grants courts authority to impose sanctions for noncompliance with discovery rules, was amended to specify that, absent exceptional circumstances, courts may not impose sanctions on a party for failing to provide ESI that was lost as a result of “the routine, good-faith operation of an electronic information system.”¹⁰⁴ The Advisory Committee Note to Rule 37 explains this rule in greater detail:

When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a “litigation hold.” Among the factors that bear on a party’s good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.¹⁰⁵

100. *Id.* R. 34(b)(2)(D), (E)(ii)–(iii).

101. *Id.* R. 45(a)(1)(A)(iii), (C)–(D).

102. *Id.* R. 45(c)(2)(B).

103. *Id.* R. 45(d)(1)(D).

104. *Id.* R. 37(e).

105. *Id.* R. 37 advisory committee’s note (2006 amendment).

A general consensus has developed that the 2006 federal amendments have worked reasonably well and have had a clear impact on the civil justice system in federal court.¹⁰⁶

VIII. ADOPTION OF AMENDMENTS IN MINNESOTA IN 2007

Minnesota adopted the essential provisions of the 2006 federal rule amendments in 2007. These amendments were known as “e-discovery amendments” because of their particular focus on e-discovery and related discovery reform issues. The most important changes brought by the 2007 amendments include: a provision for addressing e-discovery in scheduling orders;¹⁰⁷ adoption of “two-tier” discovery, making ESI that is not “reasonably accessible” not automatically discoverable;¹⁰⁸ an express proportionality provision;¹⁰⁹ a provision permitting a post-production assertion of a claim of privilege and requiring the return of information subject to such a claim;¹¹⁰ a requirement that a motion for a discovery conference include identification of electronic discovery information;¹¹¹ various provisions for the mechanical aspects of e-discovery, including the right to request a specific format for production and specifying the formats that are acceptable for production;¹¹² and a “safe-harbor” provision to limit the imposition of sanctions for loss of information by “routine, good-faith operation of an electronic information system.”¹¹³ The e-discovery amendments also revised several rules to make explicit that “electronically stored information” is subject to discovery, including discovery from nonparties by use of subpoena.¹¹⁴

In addition, Minnesota Rule 26.06, like Federal Rule 26(f), now directs parties to discuss discovery of ESI if ESI is likely to be

106. See generally Borden et al., *supra* note 77, ¶¶ 59–60 (concluding that rules have brought changes consistent with Rule 1’s aspiration that the rules operated to secure the “just, speedy, and inexpensive” resolution of cases).

107. MINN. R. CIV. P. 16.02(d).

108. *Id.* R. 26.02(b)(2). Rule 45.04(a)(4) of the Minnesota Rules of Civil Procedure extended this limitation to nonparty discovery by subpoena.

109. *Id.* R. 26.02(b)(3).

110. *Id.* R. 26.02(f)(2).

111. *Id.* R. 26.06(c).

112. *Id.* R. 34.02.

113. *Id.* R. 37.05.

114. See, e.g., *id.* R. 45 advisory committee’s comment (2007 amendment).

sought in the action, and to incorporate any issues related to ESI into their discovery plan.¹¹⁵ With these changes, the Minnesota Rules of Civil Procedure pertaining to e-discovery became virtually identical to the Federal Rules, although Minnesota's new Rule 1, adopted in 2013, creating an across-the-board proportionality requirement, is an important Minnesota innovation.¹¹⁶

An interesting footnote to the 2007 amendments in Minnesota is that the Minnesota Advisory Committee once again did not recommend adoption of the automatic disclosures that were adopted in the federal courts in 1993,¹¹⁷ and the Minnesota Supreme Court did not include any requirement for initial disclosures in the 2007 changes to Minnesota Rule 26.¹¹⁸ Automatic disclosures would not become part of Minnesota state court litigation until 2013, when Minnesota Rule 26 was amended to mirror Federal Rule 26.¹¹⁹ Like the Federal Rule, Minnesota Rule 26.01 now requires each party to disclose, without receiving a discovery request and within sixty days of the Answer's original due date,¹²⁰ "electronically stored information . . . in its possession, custody, or control [that it] may use to support its claims or defenses."¹²¹

IX. MINNESOTA ACTS ON CIVIL JUSTICE REFORM

The year 2013 was possibly a landmark year for the Minnesota civil justice system, as the Minnesota Supreme Court took unmistakable steps to improve the operation of the civil justice system. Following several years of study, in 2011 the Minnesota Supreme Court received a report from its Civil Justice Reform Task

115. *Id.* R. 26.06(c)(3).

116. *Id.* R. 1; *see infra* note 133 and accompanying text.

117. *Compare* FED. R. CIV. P. 26 advisory committee's note (1993 amendment) ("Through the addition of paragraphs (1)-(4), this subdivision imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement."), *with* MINN. R. CIV. P. 26.01 (2007).

118. MINN. R. CIV. P. 26.01 (2007).

119. *Compare* FED. R. CIV. P. 26(a), *with* MINN. R. CIV. P. 26.01 (effective July 1, 2013).

120. MINN. R. CIV. P. 26.01(a)(3).

121. *Id.* R. 26.01(a)(1)(B).

Force, chaired by the Honorable Louise Dovre Bjorkman, and the court responded by implementing several of the recommendations.

The Task Force was a broadly diverse group of lawyers, judges, and court personnel.¹²² The Task Force met essentially monthly and gathered information from various sources, including from a judge in Oregon who explained civil justice reform measures adopted there.¹²³ The Task Force's work culminated in a formal report to the Minnesota Supreme Court.¹²⁴ This task force report contained recommendations on a wide variety of issues, including some that intended to address e-discovery issues.¹²⁵ The recommendations fell in several categories:

1. Proportionality;
2. Requirement for filing actions within one year;
3. Adoption of automatic disclosures;
4. Requirement of a discovery conference of counsel and discovery plan in every case (except those excluded from the operation of the rule);
5. Modified case scheduling process;
6. New expedited motion process;
7. A new rule on managing complex cases; and
8. A pilot project for expedited case management in the First and Sixth Districts.¹²⁶

The task force recommendation that Minnesota adopt the automatic disclosure changes adopted in the Federal Rules in 1993 is important but hardly earthshaking. By 2013, these changes were firmly a part of federal court practice and were generally viewed as effective at least to some degree in moving important parts of the

122. See MINN. SUPREME COURT CIVIL JUSTICE REFORM TASK FORCE, FINAL REPORT 1 (Dec. 23, 2011) [hereinafter RECOMMENDATIONS 2011], available at <http://www2.mnbar.org/sections/outstate-practice/Final%20civil%20reform%20task%20force%20report.pdf>.

123. *Id.* at 4.

124. *Id.* at 1–85.

125. *Id.* at 17.

126. *Id.* at 17–35. The committee's recommendations and the court's action on them are discussed in Louise Dovre Bjorkman & David F. Herr, *Reducing Cost & Delay: Minnesota Courts Revise Civil Case Handling*, BENCH & B. MINN., June 2013, at 26, 27–29. For general analysis of the need for proportionality, see Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather Than the Exception*, 87 DENVER U. L. REV. 513, 513–32 (2010).

litigation process earlier in the life of a case.¹²⁷ This “front-loading” both accelerates the ultimate resolution of a case and reduces the cost spent on the litigation.¹²⁸ Importantly, Minnesota’s rules now require that the parties get together to confer on the discovery and other case management needs of the case.¹²⁹ This requirement applies to cases even where they are not yet filed.¹³⁰

Similarly, the new expedited motion practice for non-dispositive motions,¹³¹ adopted upon the recommendation of the Task Force, will have particular impact on discovery motions.¹³² Discovery motions are time consuming and result in delay of the litigation, and often present issues that can be decided fairly quickly once presented to the court. The expedited process is designed to deliver that efficiency in appropriate cases. The most important change is probably the proportionality rule. It is contained in Rule 1 of the Minnesota Rules of Civil Procedure, which now provides:

Rule 1. Scope of Rules

These rules govern the procedure in the district courts of the State of Minnesota in all suits of a civil nature, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

It is the responsibility of the court and the parties to examine each civil action to assure that the process and the costs are proportionate to the amount in controversy

127. See WRIGHT ET AL., *supra* note 36, § 2053 n.39 (citing Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 563 (1998)).

128. See Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really In Need of Amendment?*, 39 B.C. L. REV. 517, 523 (1998) (reporting that users of litigation systems view disclosures as reducing cost of litigation and that judges should be involved earlier). *But see* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 581 (2010) (noting that critics have viewed front-loading of costs as creating a barrier to settlement).

129. MINN. R. CIV. P. 26.06.

130. The parties are required to hold a discovery conference within thirty days from the initial due date of an answer. *Id.* R. 26.06. Because the Minnesota Rules do not require that the parties file the action until one year after it is commenced and commencement requires service but not filing, an action might not be filed for over ten months after the discovery conference is held.

131. MINN. GEN. R. PRAC. 115.04.

132. RECOMMENDATIONS 2011, *supra* note 122, at 19.

and the complexity and importance of the issues. The factors to be considered by the court in making a proportionality assessment include, without limitation: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation.¹³³

This provision has no counterpart in the Federal Rules. It is modeled on language proposed by the Institute for the Advancement of the American Legal System.¹³⁴

It is impossible to predict just what impact this provision will have on the litigation process, but it is intended to prompt a fundamental shift in how courts and litigants address a wide variety of issues. Its placement in Rule 1 is intended to make it clear that it applies potentially to any aspect of the process.¹³⁵ The goal behind the Task Force's recommendation to and the court's modification of Rule 26 was to modify the proportionality provision to make it clearer and more prominent.¹³⁶

The amendment requiring actions to be filed within one year of commencement is intended similarly to foster active judicial management.¹³⁷ Although the responsibility to consider proportionality applies to the parties and attorneys, it is also an important responsibility of judges, and having cases under the supervision of a judge can be expected to reinforce the consideration of proportionality.

X. ONGOING ISSUES REGARDING E-DISCOVERY AND THE RULES

There are two notable ongoing issues regarding the current iteration of Minnesota's procedural rules pertaining to e-discovery. First, although Minnesota has specifically adopted a "proportionality" rule, it is yet to be seen how this rule will impact e-

133. MINN. R. CIV. P. 1. The second paragraph was added to the rule by the 2013 amendment. *Compare* MINN. R. CIV. P. 1 (2012), *with* MINN. R. CIV. P. 1 (effective July 1, 2013).

134. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM PILOT PROJECT RULES 2 (2009), *available at* http://iaals.du.edu/images/wygam/documents/publications/Pilot_Project_Rules2009.pdf.

135. *See* MINN. R. CIV. P. 1.

136. *Compare* MINN. R. CIV. P. 26.02(b) (effective July 1, 2013), *with* MINN. R. CIV. P. 26.02(b)(3) (2012).

137. *See* MINN. R. CIV. P. 5.04.

discovery. Second, the rules leave open the extent of litigants' duties to preserve ESI, their culpability for failing to preserve ESI, and when the duty to preserve ESI arises.

A. *Proportionality*

E-discovery is not cheap. There are costs associated with identifying potentially relevant ESI; extracting and/or copying ESI; and then reviewing it, document by document, for responsiveness and privilege. Often, a vendor will have to be hired at the outset to copy the producing party's hard drive, which will then have to be processed and converted into files that can be uploaded into the reviewing attorney's document review database. These basic "first steps" can run into thousands of dollars, even before the producing party's attorney has set eyes on a single document. The cost of e-discovery, when not properly balanced against the value of the case and the requesting party's need for the requested ESI, results in the increased impetus for parties to settle their disputes prior to trial—regardless of the merits—rather than incur disproportionately large discovery fees.

Although Rule 1 of the Minnesota Rules of Civil Procedure now mandates that the court and the parties "examine each civil action to assure that the process and the costs are proportionate to the amount in controversy," considering the "needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation,"¹³⁸ it provides no real guidance as to how this rule should apply to e-discovery. Likewise, although Rule 26.02 now states that discovery must "comport with the factors of proportionality," it provides no greater clarification than Rule 1.¹³⁹ Minnesota courts are left with wide discretion in interpreting and applying these rules.

Although the Federal Rules do not specifically use the term proportionality, they likewise embrace that concept.¹⁴⁰ The Sedona Conference recently addressed the concept of proportionality as it relates to the Federal Rules in *The Sedona Conference Commentary on Proportionality in Electronic Discovery* ("*Sedona Conference Commentary*"),

138. *Id.* R. 1.

139. *Compare id.*, with *id.* R. 26.02(b).

140. *See* FED. R. CIV. P. 26(b)(2)(B), (C) (placing limits on the scope of discovery).

recognizing that although the Federal Rules contemplate proportionality, courts have not always insisted upon it.¹⁴¹ The Sedona Conference Commentary suggests six principles in applying proportionality, which are equally applicable in state courts:

1. The burdens and costs of preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.
2. Discovery should generally be obtained from the most convenient, least burdensome, and least expensive source.
3. Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.
4. Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of its production.
5. Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.
6. Technologies to reduce cost and burden should be considered in the proportionality analysis.¹⁴²

These principles "provide a framework for applying the doctrine of proportionality to all aspects of electronic discovery."¹⁴³ Given the untested nature of the proportionality amendments to Minnesota Rules 1 and 26, these principles may provide greater guidance to Minnesota courts in achieving the objectives of those rules.

The Federal Advisory Committee is also considering amendments to Rule 26(b)(1) of the Federal Rules to explicitly provide for proportionality. The proposed amendment would provide that:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case considering the

141. The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 14 SEDONA CONF. J. 155, 155 (2013).

142. *Id.* at 157.

143. *Id.* at 158.

amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.¹⁴⁴

Because the items to be considered in evaluating proportionality under the proposed federal rule are substantially identical to those already listed in Minnesota's current Rule 26.02(b), it is unlikely that adoption of this federal rule would have any significant impact on the current Minnesota rule.¹⁴⁵ In fact, the Minnesota rule is arguably more restrictive than the proposed federal rule, as it allows discovery only of "matters that would enable a party to prove or disprove a claim or defense or to impeach a witness," as opposed to "any nonprivileged matter that is relevant to any party's claim or defense."¹⁴⁶

Although it has yet to be seen how Minnesota courts will apply the concept of proportionality to e-discovery, it is clear that if courts do not give weight to Minnesota's proportionality rules, litigants may not be able to afford the cost of getting their cases ready for trial and may be forced to settle or voluntarily dismiss their claims, regardless of the merits. On the other hand, applied as intended, these rules have the potential to significantly decrease litigation discovery costs, which may afford litigants greater ability to see their cases through to judicial resolution.

B. ESI Preservation Duties and Culpability for Failure to Preserve

In addition to the issue of proportionality, the amendments to the Minnesota Rules also leave open the extent of litigants' duties to preserve ESI, their culpability for failing to preserve ESI, and when the duty to preserve ESI arises. At present, the rules do not contain any specific provisions relating to the scope of litigants' duties to preserve ESI, other than stating that sanctions for failing to provide ESI "lost as a result of the routine, good-faith operation of an electronic information system" may not be imposed "[a]bsent

144. Memorandum from David G. Campbell, *supra* note 18, at 20.

145. If adopted, however, the proposed federal rule will lead to case law interpreting and applying its proportionality provision, which may provide persuasive guidance to Minnesota courts in applying Minnesota's substantially identical proportionality provision.

146. Compare MINN. R. CIV. P. 26.02(b), with FED. R. CIV. P. 26.02(b)(1).

exceptional circumstances.”¹⁴⁷ The 2007 Advisory Committee Comment recognized that “[t]he good-faith part of this test is important and is not met if a party fails to take appropriate steps to preserve data *once a duty to preserve arises*.”¹⁴⁸ However, neither the rule nor the comment discusses when the duty to preserve arises. The 2007 Advisory Committee Comment to Minnesota Rule 37.05 (which rule is identical to Federal Rule 37(e)) states that a duty to preserve arises “because of pending or reasonably anticipated litigation.”¹⁴⁹ This is consistent with longstanding, and fairly uniform, Minnesota State¹⁵⁰ and federal¹⁵¹ common law. Accordingly, although the rules themselves do not answer the question of “when” the duty to preserve ESI arises, for the time being litigants may continue to rely on case law to answer this question.

147. MINN. R. CIV. P. 37.05.

148. *Id.* R. 37.05 advisory committee’s comment (2007 amendment) (emphasis added).

149. *Id.*

150. *See, e.g.*, Miller v. Lankow, 801 N.W.2d 120, 127–28 (Minn. 2011); Frontier Pipeline, L.L.C. v. Metro. Council, No. 62-CV-08-2263, 2011 Minn. App. Unpub. LEXIS 714, at *21–22 (Ct. App. July 25, 2011); Willis v. Ind. Harbor S.S. Co., 790 N.W.2d 177, 184 (Minn. Ct. App. 2010); Akre v. MetLife Auto & Home Ins. Co., No. A07-1683, 2008 Minn. App. Unpub. LEXIS 1002, at *13 (Ct. App. Aug. 19, 2008); Huhta v. Thermo King Corp., No. A03-1961, 2004 Minn. App. LEXIS 722, at *9–10 (Ct. App. June 29, 2004); Spaise v. Dodd, No. A03-1430, 2004 Minn. App. LEXIS 607, at *28 (Ct. App. June 1, 2004); Auto-Owners Ins. Co. v. Heggie’s Full House Pizza, Inc., No. A03-316, 2003 Minn. App. LEXIS 1241, at *12 (Ct. App. Oct. 7, 2003); State Farm Ins. Co. v. Chase, No. C6-01-969, 2002 Minn. App. LEXIS 68, at *5 (Ct. App. Jan. 15, 2002); Garrison v. Farmers Coop. Exch., No. C1-00-657, 2000 Minn. App. LEXIS 1145, at *13 (Ct. App. Nov. 8, 2000); Minn-Chem, Inc. v. Richway Indus., Ltd., No. C1-99-1963, 2000 Minn. App. LEXIS 810, at *4 (Ct. App. Aug. 1, 2000); Henry v. Joseph, No. C2-98-181, 1998 Minn. App. LEXIS 948, at *11 (Ct. App. Aug. 18, 1998); Wright v. Romfo, No. C4-95-1818, 1996 Minn. App. LEXIS 340, at *10 (Ct. App. Mar. 26, 1996).

151. *E.g.*, Waters v. Cafesjian Family Found, Inc., No. 12-648 (RHK/LIB), 2012 U.S. Dist. LEXIS 98378, at *6 (D. Minn. June 27, 2012); Cenveo Corp. v. S. Graphic Sys., Inc., No. 08-5521 (JRT/AJB), 2010 U.S. Dist. LEXIS 104211, at *9–10 (D. Minn. Sept. 30, 2010); Nicollet Cattle Co. v. United Food Grp., L.L.C., No. 08-5899 (JRT/FLN), 2010 U.S. Dist. LEXIS 92951, at *10–11 (D. Minn. Sept. 7, 2010); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, No. 08-1958 ADM/RLE, 2008 U.S. Dist. LEXIS 96356, at *4–5 (D. Minn. Nov. 26, 2008); Capellupo v. FMC Corp., 126 F.R.D. 545, 551 (D. Minn. 1989).

Neither the Federal or Minnesota Rules, nor the Federal or Minnesota Advisory Committees, have explained what types of ESI must be preserved. Although the Federal Advisory Committee noted that a party's identification of ESI as "not reasonably accessible" does not relieve the party of its duty to preserve such evidence,¹⁵² the Advisory Committee did not offer any concrete guidance about what types of "not reasonably accessible" ESI must be preserved. Instead, it stated that "[w]hether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case."¹⁵³

Likewise, the language of Federal Rule 37(e) and Minnesota Rule 37.05 is unclear as to whether a party may be sanctioned for "fail[ing] to suspend a deleting or overwriting program that routinely rids the company's information system of data that are not reasonably accessible."¹⁵⁴ Despite the fact that these rules specifically state that sanctions for failing to provide ESI "lost as a result of the routine, good-faith operation of an electronic information system"¹⁵⁵ may not be imposed "[a]bsent exceptional circumstances,"¹⁵⁶ courts have infrequently and inconsistently applied this provision¹⁵⁷ and have often imposed discovery sanctions for spoliation of ESI after finding it inapplicable¹⁵⁸ or

152. FED. R. CIV. P. 26 advisory committee's note (2006 amendment).

153. *Id.*

154. John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 591 (2010).

155. FED. R. CIV. P. 37(e); MINN. R. CIV. P. 37.05.

156. FED. R. CIV. P. 37(e); MINN. R. CIV. P. 37.05.

157. See Memorandum from David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Jeffrey S. Sutton, Chair, Standing Comm. on Rules of Practice & Procedure 11 (Dec. 5, 2012), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV12-2012.pdf> (citing Thomas Y. Allman, *Inadvertent Spoliation of ESI After the 2006 Amendments: The Impact of Rule 37(e)*, 3 FED. CTS. L. REV. 25, 26 (2009) [hereinafter Allman, *Inadvertent Spoliation*]; Thomas Y. Allman, *Preservation Rulemaking After the 2010 Litigation Conference*, 11 SEDONA CONF. J. 217, 227–28 (2010); Philip J. Favro, *Sea Change or Status Quo: Has the 37(e) Safe Harbor Advanced Best Practices for Records Management?*, 11 MINN. J. L. SCI. & TECH. 317, 333–39 (2010)). Only a handful of cases have been directly influenced by Rule 37(e) in precluding an award of sanctions. *Id.* (citing cases).

158. See Allman, *Inadvertent Spoliation*, *supra* note 157, at 26 nn.2–4 (listing cases).

without referencing it at all.¹⁵⁹ The unpredictability of litigants' duties to preserve ESI, and their culpability for failing to preserve ESI, remain very much open issues under the current rules.

The Federal Advisory Committee has proposed amendments to Rule 37(e) to address the current rule's shortcomings. The proposed new rule reads:

Rule 37(e). Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(e) *Failure to Preserve Discoverable Information.*

(1) *Curative measures; sanctions.* If a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may

(A) permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and

(B) impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the party's actions:

(i) caused substantial prejudice in the litigation and were willful or in bad faith; or

(ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.

(2) *Factors to be considered in assessing a party's conduct.* The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors include:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

159. *E.g.*, Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., L.L.C., 685 F. Supp. 2d 456, 496–97 (S.D.N.Y. 2010), *abrogated by* Chin v. Port Auth., 685 F.3d 135 (2d Cir. 2012).

(B) the reasonableness of the party's efforts to preserve the information;

(C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation;

(D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and

(E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.¹⁶⁰

The proposed amended rule would apply to all discoverable information, not just ESI.¹⁶¹ As clarified in the proposed Advisory Committee Note, "[t]he amended rule . . . forecloses reliance on inherent authority or state law to impose litigation sanctions in the absence of the findings required under Rule 37(e)(1)(B)."¹⁶² It is "designed to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts."¹⁶³

If the proposed amendments to Federal Rule 37(e) are adopted, it is likely that the Minnesota Advisory Committee will at some point evaluate whether to amend Rule 37.05 to parallel the new federal rule. Until then, the extent of litigants' duties to preserve ESI, their culpability for failing to preserve ESI, and when the duty to preserve ESI arises remain open issues in both Minnesota state and federal courts.

XI. THE FUTURE: THROUGH THE GLASS, DARKLY

Prediction is a risky business. In ancient words, "Those who have knowledge, don't predict. Those who predict, don't have knowledge."¹⁶⁴ It is hard to divine with certainty where we may be headed with e-discovery. It seems clear that we can generate

160. Memorandum from David G. Campbell, *supra* note 18, at 43–44.

161. *Id.* at 44.

162. *Id.* at 36.

163. *Id.* at 44.

164. Lao Tzu, Chinese Poet (6th Century BC).

mountains of electronic records that are not needed for the fair and inexpensive resolution of disputes and that cannot be handled in the litigation process. The litigation process cannot fairly be expected to function if it regularly consumes more dollars on litigation expenses than is in dispute in a particular case. E-discovery unquestionably contributes to the cost of litigating many—and an increasing number of—disputes. It is hard to foresee just what solutions will be put in place to minimize those costs, while still permitting the parties to obtain the information needed for the full and fair assessment of the merits of the parties' disputes.

A few changes in the system seem likely to take place. First, the proportionality provisions adopted in 2013 will change how litigants and courts approach discovery matters. Courts will have to consider the cost of discovery and balance it against the legitimate needs of the case. Whether the current provisions will accomplish this remains to be seen, but if they prove inadequate, the Advisory Committee and the Minnesota Supreme Court can be expected to come up with additional approaches to the proportionality challenge.

A fundamental principle of discovery from the inception of the rules of civil procedure in both federal and state court has been that the cost of responding to discovery is borne by the party producing information.¹⁶⁵ There have always been exceptions to this rule, and for discovery from nonparties the rule is typically reversed—the party requesting information from nonparties can be expected to bear the cost of responding.¹⁶⁶ Because electronic discovery can impose tremendous burdens on the party having to locate, review, and produce information stored electronically, it is reasonable to foresee greater willingness to impose cost-sharing and cost-shifting presumptions for e-discovery. This is particularly likely to be combined with proportionality analysis, resulting in an increased willingness to impose costs on the requesting party when the requests are burdensome and they appear less related to the

165. 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”). See generally ROGER S. HAYDOCK & DAVID F. HERR, *DISCOVERY PRACTICE* § 27.03[G] (5th ed. 2013).

166. See MINN. R. CIV. P. 45.02(d) (providing for compensation to certain subpoenaed nonparties).

issues being litigated or the importance of the requested information to resolving the issues.

It is unlikely that these changes will be solely the result of simple adoption or modification of federal rules. The Civil Justice Reform Task Force approach adopted by the Court in 2013 carefully avoided a single-faceted, rule-focused approach. The Task Force recommended rule changes but also implemented case management recommendations that are not simple rule changes. These non-rule changes may be important in future e-discovery reforms in Minnesota. The Task Force recommended that courts make greater use of judicial adjuncts to help resolve pretrial disputes.¹⁶⁷ Encouraging the courts and parties to make use of special masters to help resolve e-discovery disputes would not require rule changes—Rule 53 was completely revamped in 2005, effective on January 1, 2006, and provides ample basis for appointing masters for this purpose.¹⁶⁸

Similarly, the broad goal of encouraging cooperation can be addressed in a wide variety of ways. The Task Force recommended that the Minnesota courts adopt the Sedona Conference's Cooperation Proclamation.¹⁶⁹ This is just one change to help prompt the necessary changes in the approach to litigation issues. It may well be that other approaches will be implemented.

167. RECOMMENDATIONS 2011, *supra* note 122, at 31.

168. See MINN. R. CIV. P. 53. See generally 2 DAVID F. HERR & ROGER S. HAYDOCK, MINNESOTA PRACTICE: CIVIL RULES ANNOTATED §§ 53.01–.09 (5th ed. 2011) (discussing Rule 53 and the 2005 amendment); 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 (2008) (discussing the special role of special masters in e-discovery).

169. RECOMMENDATIONS 2011, *supra* note 122, at 35.