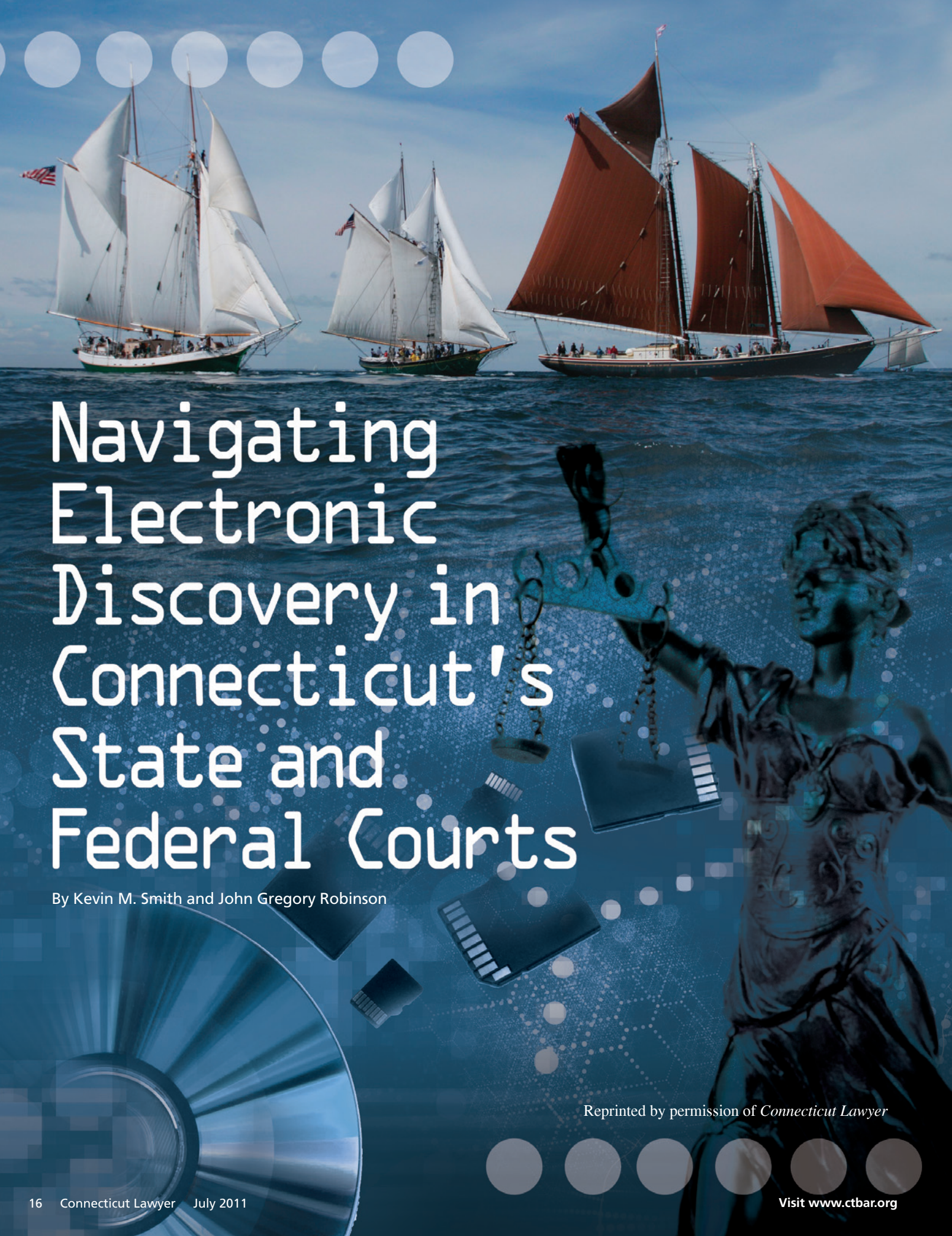

Navigating Electronic Discovery in Connecticut's State and Federal Courts

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Lawyers seeking guidance on electronic discovery will find a significant current disparity between Connecticut's state and federal courts. The Federal Rules of Civil Procedure were amended in 2006 specifically to address e-discovery, and the federal reporters are replete with opinions on nearly every facet of the topic. By contrast, the Connecticut Practice Book does not yet specifically address e-discovery, and the case law is relatively anemic. But not for long. The Rules Committee of the Superior Court has proposed a series of important amendments to the Practice Book that should bring it in closer alignment with federal practice,[1] and the number of state court opinions is likely to increase with the need to construe these rules in an ever-expanding universe of electronically stored information (ESI). This article discusses several key questions about the discovery of ESI in Connecticut, and highlights some key differences and similarities between applicable federal and state court rules and decisions.[2]

What is ESI?

The Federal Rules define ESI as "including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained whether directly or, if necessary, after translation by the responding party into a reasonably usable form."[3]

By contrast, the Practice Book does not currently define ESI. However, a proposed amendment to § 13-1 would define ESI as "information that is stored in an electronic medium and is retrievable in perceivable form."[4] In turn, "electronic" would be defined as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities."[5] The commentary explains that these proposed definitions are based in part on the 2006 amendments to the Federal Rules of Civil Procedure, but also were "intended to encompass future developments in computer technology" and to be "sufficiently broad to cover all types of computer-based information" and "sufficiently flexible to encompass future technological changes and development."[6]

When must ESI be preserved?

There is no existing or proposed Federal Rule or Practice Book section addressing when the duty to preserve ESI arises. However, the Second Circuit has held that it attaches when parties have "notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."[7] The Connecticut Supreme Court similarly has held that "parties to a pending or impending civil action…have a legal duty to retain evidence relevant to that action."[8] Under these similar standards, state and federal cases tend to agree, for example, that actual notice of litigation, demand letters for preservation, and even knowledge of an incident probable to result in litigation trigger the obligation to preserve relevant ESI.[9]

How must ESI be preserved?

Similar to the timing of the obligation to preserve ESI, the Federal Rules do not address the steps that must be taken to satisfy the obligation. Over the past decade, however, numerous federal courts have written on the issue. Principal among them is *Zubulake V*,[10] which opined that "it is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched."[11] Examples of affirmative steps that counsel is expected to take include becoming fully familiar with the client's document retention policies and data retention architecture, speaking with information technology personnel, communicating with the "key players" in the litigation, and/or running system-wide keyword searches.[12] Failures to take such steps, leading to the loss of ESI, can result in sanctions, such as an adverse inference and paying the costs of further discovery, including a second round of depositions.[13]

Neither the Practice Book nor Connecticut common law provide similarly specific guidance for preserving ESI in state court—

a significant gap in practice between the Connecticut state and federal courts.

Are there consequences for a "good faith" loss of ESI?

The Federal Rules allow parties to avoid sanctions for a failure to preserve ESI, if the failure results from the "routine, good-faith operation of an electronic information system."[14] However, it should come as no surprise that this "safe harbor" applies generally to only those losses of ESI that occur before the obligation to preserve the ESI arises.[15] The commentary explains that this protection reflects the fact that "many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation," and, therefore, losses of ESI can result without culpability.[16] By the same token, the "good faith" limitation "means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve."[17]

The Practice Book does not presently contain a similar safe harbor, but the proposed amendments seek to add one to § 13-14.[18] The proposed provision is substantially identical to its federal counterpart, and its "good faith" limitation similarly "may require that a party intervene to modify or suspend features of the routine operation of a computer system to prevent loss of information if that information is subject to a preservation obligation."[19]

What are the consequences of losing ESI after the obligation to preserve has arisen?

As with any failure to comply with one's discovery obligations, Federal Rule 37 provides a generally applicable set of procedures and remedies that can be used, in addition to a court's inherent authority, to address the specific failure to preserve ESI.[20] Similarly, Practice Book § 13-14 authorizes a range of orders to remedy discovery abuses generally, and can be relied on to address a specific failure to preserve ESI.

More specifically, federal courts often address the loss of ESI through the lens of "spoliation." The Second Circuit has defined spoliation as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."[21] Federal courts have explained that spoliation of ESI can be negligent, grossly negligent, or willful. Negligent spoliation occurs when relevant material is lost despite the producing party's good faith efforts. Grossly negligent spoliation occurs when the offending party fails to take basic necessary actions to preserve ESI (e.g., failing to send out a litigation hold notice). Willful spoliation requires bad faith.[22] These levels of culpability are important not only to a court's analysis of an appropriate remedy, but also to the relative burdens of proof in demonstrating that the lost ESI is sufficiently relevant and prejudicial to warrant a given remedy. When there is a finding of negligent spoliation, for example, federal courts do not typically presume the relevance and prejudicial nature of the lost evidence, but, rather, require the requesting party to prove both through other evidence. By contrast, where ESI has been lost through gross negligence, courts have used their discretion in deciding whether to presume or otherwise require a showing by the requesting party of relevance and prejudice. If there is willful spoliation, courts typically presume relevance and prejudice, although the presumption is rebuttable.[23]

Federal courts have exercised wide discretion in remedying a loss of ESI, regardless of the degree of culpability. For example, the Second Circuit has agreed that an adverse inference may be appropriate "even for the negligent destruction of documents if that is necessary to further the remedial purpose of the inference," because it makes "little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently."[24] In its view, the adverse inference is the means for restoring the evidentiary balance, and is used "not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss."[25] Other sanctions that have been used to remedy the loss of ESI have included fines, cost-shifting, preclusion of evidence as well as individual claims and defenses, and defaults and dismissals.[26]

Similar guidance for analyzing and remedying the loss of ESI does not exist in the state court case law. As a general matter, the Connecticut Supreme Court has held that "intentional spoliation" can result in an adverse inference if it is shown that a party (1) intentionally, and not merely inadvertently, destroyed the evidence; (2) the destroyed evidence is relevant; and (3) the party seeking production acted with due diligence, e.g., by putting the producing party on notice that the evidence should be preserved.[27] The Court limited the remedy to an adverse inference based on its view that the remedy should place the discovering party in the same position as if the spoliation did not occur, rather than punish the producing party. However, it did "leave to another day the determination of the appropriate remedy when the spoliator's intent had been to perpetrate a fraud."[28] The Court also made clear that the trier of fact must be instructed that it "may," but is "not required" to, apply the inference after the requisite showing has been made.[29] This general framework for intentional spoliation has been applied in the specific context of lost ESI,[30] but there is little analysis in the case law addressing a negligent or grossly negligent loss of ESI.

The Connecticut Supreme Court also has recognized an independent cause of action for intentional spoliation, available where: (1) a defendant has knowledge of a pending or impending civil action, (2) destroys evidence, (3) in bad faith, that is, with intent to deprive the plaintiff of his or her cause of action, (4) the plaintiff is unable to establish a prima facie case without the lost evidence, and (5) there are damages.[31]

Must parties confer about ESI?

Federal Rule 26(f) was amended in 2006 to require parties to discuss, at the beginning of an action, "any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced." The commentary explains that this requirement was based on the idea that, when parties "anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution."[32] To that end, the Local Rules provide a model form for the Rule 26(f) report, which requires parties, among other things, to address their agreement or failure to agree on issues "including, but not limited to, the form in which such data shall be

produced, search terms to be applied in connection with the retrieval and production of such information, the location and format of ESI, appropriate steps to preserve ESI, and the allocation of costs of assembling and producing such information."[33]

By contrast, neither the current nor proposed state court rules contain any such requirement that the parties meet and confer at the outset of litigation to discuss ESI issues—another significant gap in practice between the state and federal courts in Connecticut.

Who bears the costs of e-discovery?

ESI is not immune from the general presumption under Federal Rule 26 that the responding party must bear the expense of complying with discovery requests.[34] Typically, that presumption holds for ESI that is maintained in an "accessible" format (i.e., "stored in a readily usable format"), and courts consider cost-shifting only in connection with "inaccessible" ESI, such as data stored on backup tapes.[35] Indeed, the Federal Rules state that 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."[36] If a motion to compel or for protective order is filed, "the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost."[37] 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)," which balance the costs and potential benefits of discovery (i.e., the "proportionality test").[38]

The commentary further explains that the "considerations may 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 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."[39] After weighing these factors, the court "may specify conditions for the discovery,"[40] which, among other things, can include the payment of "part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible."[41]

The Practice Book currently does not have an equivalent cost-shifting structure. However, the proposed amendments would implement standards that are substantially identical to the Federal Rules. Under the proposed rule, for "good cause shown," the court is expressly authorized to enter orders regarding "the allocation of expense of the discovery of electronically stored information, taking into account 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."[42] The commentary elaborates that, like the Federal Rules, the amendment would require production of "reasonably accessible" ESI, and that the decision "whether to require the responding party to search for and produce information that is from sources that are not reasonably accessible depends not only on the burden and expense of doing so, but also on whether the burden and expense can be justified in the circumstances of one case."[43] The commentary also provides factors similar to those in federal court, and states that, "if the court orders discovery after these considerations, the court may allocate, in its discretion, the expense, in whole or in part, of discovery."[44]

In what form must ESI be produced?

The Federal Rules do not dictate a form for the production of ESI. However, they allow a requesting party to "specify the form or forms in which electronically stored information is to be produced."[45] In turn, the producing party may object to the specified form, but must "state the form or forms it intends to use."[46] If a particular form of ESI is not requested, a party "must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms."[47] In addition, a party "need not produce the same electronically stored information in more than one form."[48]

Federal case law has provided additional guidance. For example, in one recent case, a plaintiff sought records from four government agencies under the Freedom of Information Act. There was no agreement between the parties as to the form of the production, and, among other things, electronic records were produced in a form that was not text searchable and did not contain metadata. The plaintiff challenged the form of the production, and the court held that productions of ESI under Rule 34 require searchability and metadata, which the court considered to be "an integral part of an electronic document."[49]

Although the Practice Book also does not specify a form for production of ESI, it does currently provide that, for good cause, a court may order and shift the costs of the disclosure of ESI in "an alternative format," after considering the cost of the requested format.[50] However, a proposed amendment to § 13-9 would substitute language more closely tracking the Federal Rules: "If information has been electronically stored, and if a request for production does not specify a form for producing a type of electronically stored information, the responding party shall produce the information in a form in which it is ordinarily maintained or in a form that is reasonably usable. A party need not produce the same electronically stored information in more than one form."[51] According to the commentary, this new language is "designed to more clearly address the form of production of electronically stored information," and "allows the requesting party to specify the form and allows the responding party to object, and creates a default rule for production if no form is specified."[52]

Can ESI be clawed back?

Given that the production of ESI is often voluminous, there is an increased risk of an inadvertent disclosure of privileged information. As the commentary to the Federal Rules explains, "the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed."[53] In recognition of this fact, the Federal Rules codify the right to seek the return of mistakenly produced ESI. They specifically pro-

vide that, after being notified that privileged information was inadvertently disclosed, the receiving party "must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim."[54]

The Practice Book is currently silent on the issue, but the amendments would add a new provision, § 13-33, which is substantially identical to the Federal Rules.[55]

Conclusion

The current rules and case law in state and federal court addressing e-discovery leave Connecticut practitioners with disparate levels of guidance on several key issues. If adopted, the proposed amendments to the Practice Book should bridge the gap to a large extent, and yield some consistency for lawyers who practice in both courts. Given the relative lack of current guidance in state court, and that the proposed amendments to the Practice Book seek largely to federalize e-discovery practice in state court, Connecticut practitioners should understand the similarities and differences that currently exist, and may find it prudent to follow federal practice where the guidance is not as refined in the state rules and case law. **CL**

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Notes

1. On January 24, 2011, the Rules Committee unanimously voted to submit to public hearing proposed revisions to Practice Book §§ 13-1, 13-2, 13-5, 13-9, and 13-14, and a new § 13-33. *See* Minutes ¶ 3 (Jan. 14, 2011). The public hearing was held on May 31, 2011. *See* Conn. L.J. (Apr. 26, 2011). As of the date that this article was submitted for publication, the proposed amendments were awaiting final review and approval by the Rules Committee.
2. For further guidance on e-discovery, practitioners can consult materials published by The Sedona Conference (available at http://www.thesedonaconference.org), a forum dedicated to developing principles and best practice recommendations that have been influential on this topic. *See, e.g.*, *Trusz v. UBS Realty Investors LLC*, 09CV268, 2010 U.S. Dist. LEXIS 92603, at **14-17 (D. Conn. Sept. 7, 2010) (citing Sedona Conference).
3. Fed. R. Civ. P. 34(a)(1)(A).
4. Conn. L.J. at 84PB (Apr. 26, 2011).
5. *Id.* at 83PB-84PB.
6. *Id.* at 84PB.
7. *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001).
8. *Rizzuto v. Davidson Ladders, Inc.*, 280 Conn. 225, 250-51 (2006).
9. *See, e.g.*, *Doe v. Norwalk Cmty. College*, 248 F.R.D. 372, 377 (D. Conn. 2007); *Rizzuto,* 280 Conn. at 234, 250-51.
10. The *Zubulake* employment discrimination litigation yielded four influential discovery opinions addressing ESI issues. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I*); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake III*); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*). The fifth opinion, *Zubulake v. UBS Warburg LLC*, 230 F.R.D. 290 (S.D.N.Y. 2003) (*Zubulake II*), did not address issues specifically related to ESI. The *Zubulake* opinions have been citied positively in the District of Connecticut. *See, e.g.*, *Doe*, 248 F.R.D. at 377, 381.
11. *Zubulake V*, *supra*, at 432.
12. *Id.*
13. *Id.* at 439-40; *see also Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 496-97 (S.D.N.Y. 2010) (concluding that plaintiffs' failure to issue a litigation hold notice to custodians with relevant documents warranted monetary sanctions and an adverse inference).
14. Fed. R. Civ. P. 37(e).
15. *See Doe*, 248 F.R.D. at 378.
16. Fed. R. Civ. P. 37(e) advisory committee's note (2006).
17. *Id.*
18. *See* Conn. L.J. at 99PB (Apr. 26, 2011).
19. *Id.* at 100PB.
20. *See, e.g.*, *Genworth Fin. Wealth Mgmt. v. McMullan*, 267 F.R.D. 443, 449 (D. Conn. 2010) (ordering party to pay computer forensic expert to image and extract archived data that otherwise would have been lost after hard drive was thrown away).
21. *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999).
22. *See Pension Comm.*, 685 F. Supp. 2d at 464-65; *Doe*, 248 F.R.D. at 379-80 (following *Pension Committee*).
23. *See, e.g.*, *Pension Comm.*, 685 F. Supp. 2d at 467-68.
24. *Residential Funding Corp. v. DeGeorge Fin. Corp*., 306 F.3d 99, 108 (2d Cir. 2002).
25. *Id.*
26. *See Pension Comm.*, 685 F. Supp. 2d at 469.
27. *Beers v. Bayliner Marine Corp*., 236 Conn. 769, 775, 777-79 (1996).
28. *Id.* at 777 n.11.
29. *Id.* at 779.
30. *See, e.g.*, *Paylan v. St. Mary's Hosp.*, 118 Conn. App. 258 (2009) (concluding that plaintiff's failure to prove intentional loss of computer hard drive prevented application of *Beers* adverse inference).
31. *Rizzuto*, 280 Conn. at 244. The Supreme Court has not yet addressed whether it will recognize a similar cause of action for negligent or grossly negligent spoliation.
32. Fed. R. Civ. P. 26(f) advisory committee's note (2006).
33. D. Conn. L. Civ. R. Form 26(f) part V(E)(j) (2011).
34. *See Zubulake I*, *supra*, at 316 & n.32 (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978)).
35. *Id.* at 318-19, 324 (providing five categories of data, ranging from most to least accessible, and opining that a court "should consider cost-shifting *only* when electronic data is relatively inaccessible, such as in backup tapes.") (emphasis in original).
36. Fed. R. Civ. P. 26(b)(2).
37. *Id.*
38. *Id.*
39. *Id.* advisory committee's note (2006).
40. Fed. R. Civ. P. 26(b)(2)(B).
41. *Id.* advisory committee's note (2006).
42. *See* Conn. L.J. at 86PB (Apr. 26, 2011) (proposed amendment to § 13-5).
43. *Id.* at 86PB-87PB.
44. *Id*. at 87PB.
45. Fed. R. Civ. P. 34(b)(1)(C).
46. Fed. R. Civ. P. 34(b)(2)(D).
47. Fed. R. Civ. P. 34(b)(2)(E)(ii).
48. Fed. R. Civ. P. 34(b)(2)(E)(iii).
49. *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, 10CV3488, 2011 U.S. Dist. LEXIS 11655, at *11 (S.D.N.Y. Feb. 7, 2011).
50. Practice Book § 13-9(d). Metadata is frequently referred to as "data about data," and is "electronically-stored evidence that describes the history, tracking, or management of an electronic document." *Aguilar v. Immigration & Customs Enforcement Div.*, 255 F.R.D. 350, 354 (S.D.N.Y. 2008).
51. Conn. L.J. at 93PB (Apr. 26, 2011).
52. *Id.* at 93PB-94PB. Connecticut state case law also recently began to address this issue. For example, similar to *National Day*, one case has held that, absent agreement, productions of ESI converted to images that are not searchable, may be inappropriate. *Artie's Auto Body, Inc. v. The Hartford Fire Ins. Co.*, X08CV030196141S, 2009 Conn. Super. LEXIS 1286 (Conn. Super. Ct. May 7, 2009).
53. Fed. R. Civ. P. 26(b)(5) advisory committee's note (2006).
54. Fed. R. Civ. P. 26(b)(5)(B).
55. Conn. L.J. at 108PB-109PB (Apr. 26, 2011).