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

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I. INTRODUCTION: TECHNOLOGY AND ESI DISCOVERY IN CIVIL CASES

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

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

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1. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, COMPUTER USE IN THE

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

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

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

http://www.thesedonaconference.org/content/m0.0reniles/TSCGlossary_12_07.pdf. It should be noted that ESI will also play an important role in criminal cases and in government regulation.

9. Cameron G. Shilling, *Electronic Discovery: Litigation Crashes into the Digital Age*, 22 LAB. LAW. 207, 207 (2006) (*quoting*

accommodate the varying state procedures and are presented in a form that permits their adoption as a discrete set of rules applicable to discovery of electronically stored information."[14] Some state courts have looked to such guidelines when trying to decide how to approach e-discovery.[15]

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

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

14. UNIFORM RULES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED

as what steps have been taken to change the civil procedure rules. Next, this article examines the different approaches taken by the

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

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

III. OREGON'S CIVIL PROCEDURE RULES

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

> For all forms of discovery, parties may inquire regarding any matter, not privileged, which is relevant to the claim or defense of

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

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

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

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

29. OR. REV. STAT. § 1.725 (2007).

30. OR. REV. STAT.§ 1.730(1) (2007).

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

Id.

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

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

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

34. § 1.730(1).

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

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

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

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

The advent of ESI raises the following issues considered by the

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

37. *Id.*

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

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

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

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

42. *Id.*

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

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

FRCP amendments:

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

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

IV. DIFFERENT APPROACHES TO PRE-TRIAL CONFERENCES

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

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

A. The Federal Rules of Civil Procedure

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

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

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

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

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

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

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

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

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

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

71. *See* ALA. R. CIV. P. 1, cv.02 0c fo.3 (ple TDadop)4.5(7.5 0 0 7.02 255.3 2180 Tm0 Tc(.)T( )TjET1 0 0 8.52 257.36 316 Tr

entry into a party's computer system to attempt to access information no longer in the party's possession may not have been fully envisioned by the drafters of the rules."[76]

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

V. ANALYZING THE VARIOUS APPROACHES

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

A. Federal Rules of Civil Procedure

Although several concerns were raised about including ESI in the list of topics discussed in pre-trial discovery conferences prior to the 2006 FRCP amendments,[103] the amendments were met with general approval, and even enthusiasm, at the notion of mandatory

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

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

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

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

107. *Id.*

108. *See id.*

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

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

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

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

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

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

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

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

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

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

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

136. *Id.*

137. *Id.*

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

E. Other State Approaches

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

The case law approach followed by some states that lack civil procedure rules addressing ESI allows courts in those states to decide e-discovery issues within the construct of already-existing rules without taking excessive liberties. However, it can also lead to fact-specific and limited holdings that could prove detrimental to Oregon. Such cases would likely leave Oregon courts ill-equipped to cope with a large number of possible e-discovery issues that could come before them. Compounding this potential detriment is the fact that, normally, the highest courts hear few cases and those that they do hear tend to be extreme examples of issues that lower courts face. The result is a patchwork of rules and interpretations—something the FRCP amendments and other approaches enumerated above sought to avoid, and something Oregon should avoid as well. This approach might be the best for courts to take if their state has not amended or

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

Merriam-Webster's Online Dictionary defines "document" as "2a: a writing conveying information . . . ; 3: a computer file containing information input by a computer user and usually created with an application (as a word processor)"[160]160

2. Iowa and Texas

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

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

Of the above sections enumerating state approaches, the section on Texas is the only section with rules for e-discovery, in place for more than a year, that did not refer to any cases—in fact, it appears that no case law interpreting Texas's e-discovery civil rule presently exists.[173] In recent years, two states have amended their civil

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

VI. RECOMMENDATION

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

The authors recommend Iowa's approach because it presents a workable compromise based on the current state of the ORCP. The Council has decided that the current meaning of "document" in the ORCP is broad enough to encompass ESI,[177] but as illustrated above, it is unlikely Oregon's courts would come to the same conclusion.[178] This compromise—amending the ORCP discovery rules to expressly encompass ESI, but not adopting the 2006 amendments verbatim—gives those on either side of the debate of whether to amend the ORCP something they wanted. Adding a provision to ORCP 36 stating that, unless otherwise provided, the term "documents"/1dIu Tw[W(m)6.8(e.7(rs oth

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

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

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

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

184. *Id.*

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

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

Following Iowa's approach is recommended over the other approaches listed above—specifically the Guidelines, Principles, and Uniform Rules—because those approaches would require too many modifications to the current ORCP. One of the principal appeals of Iowa's approach is that it requires few changes to the ORCP and strikes a compromise between not amending the ORCP and adopting the 2006 FRCP amendments. Although some might argue that giving such weight to the ability to compromise is misguided, it is a realistic consideration 0 0.2088 Tw[(Iowa)5.8(’)5.8(’)5.8(’)5.8(’)5.8(’)5.8(’)5.8(’)5.8(’)5.8(’)5.8(’)5.8(’)5.8

VII. BENEFITS OF AMENDING THE

> tapes. The difference is not academic—the estimated cost of *restoring and searching* the remaining backup tapes is $165,954.67, while the estimated cost of *producing* them

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

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

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

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

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

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

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

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

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

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

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

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

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

VIII. CONCLUSION

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

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

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

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

226. It is also questionable whether it is within the court's province to answer such questions since the Oregon legislature expressly created the Council to amend and modify the ORCP. *See* O

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

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

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

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

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

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

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

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

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

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