

ELECTRONIC DISCOVERY ARRIVES IN STATE COURT

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Amendments to the Tennessee Rules of Civil Procedure directed to the discovery of electronically stored information (“ESI”) will be effective July 1, 2009. The amendments include changes to six different rules: 16, 26, 33, 34, 37 and 45. The changes to Rules 26 and 37 may most directly and immediately impact practice in Tennessee state court.

The obligation to produce ESI is, of course, not new. It is now (or at least should be) beyond dispute that a properly phrased discovery request imposes an obligation to produce ESI, including email.¹ In 2006, amendments to the Federal Rules of Civil Procedure implemented new procedures for parties, counsel and the courts in federal court with regard to production of ESI. The amendments to the Tennessee Rules are similar. As the analogous amendments to the Federal Rules of Civil Procedure did in federal court, the amendments to the Tennessee Rules will present challenges and opportunities for lawyers, litigants and the courts in Tennessee.

The most significant changes to Tennessee Rule of Civil Procedure 26 provide as follows:

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 and cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, e.g., where the party requesting discovery shows that the likely benefit of the proposed discovery outweighs the likely burden or expense, 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. The court shall specify conditions for the discovery.

Likewise, the amendment to Rule 37 provides as follows:

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith, operation of an electronic information system.

These amendments generate four primary questions that should become of great interest to Tennessee litigants, lawyers and courts: (1) when is ESI “reasonably accessible;” (2) when is good cause established for discovery of ESI that is not “reasonably accessible;” (3) who pays for production of ESI; and (4) when is an award of sanctions appropriate for failure to preserve ESI. While such issues have not been then subject of reported cases from the Tennessee appellate courts, the federal courts have had ample opportunity to consider these issues in interpreting the amendments to the analogous Federal Rules. These decisions should prove helpful to Tennessee lawyers as they litigate ESI discovery issues in state court under the amendments to the Tennessee Rules of Civil Procedure.²

A. When is ESI “readily accessible”? Under the amendments to Rule 26, the party responding to a discovery request need not produce ESI that the party “identifies as not reasonably accessible due to undue burden or cost.”³ Confronted with a motion to compel (or if the producing party elects to file a motion for protective order), the responding party bears the burden of proving that the ESI is not reasonably accessible due to undue burden or cost. As a result, the responding party and the requesting party (as well as the court) must initially focus on whether the ESI is “reasonably accessible.”

As noted, the responding party bears the burden of establishing that the ESI is not reasonably accessible due to undue burden and cost. What must the responding party show to meet this burden? Plainly, a bald assertion of undue burden and expense should not be sufficient to avoid production.⁴

In one of the earliest, and most influential ESI discovery cases, *Zubulake v. UBS Warburg, LLC*,⁵ the United States District Court for the Southern District of New York addressed the accessibility of ESI. Initially, the court properly rejected the notion that “undue burden or expense may arise simply because electronic evidence is involved.”⁶ As the court recognized in *Zubulake*, electronic evidence can offer many advantages over traditional paper documents.⁷ Electronic evidence may be searched more easily using key words and the actual production may occur in electronic format thus eliminating the need for production of huge numbers of copies.⁸

Accordingly, the mere maintenance of evidence in electronic format does not by itself render production unduly burdensome or expensive. Accordingly, the prudent lawyer cannot simply refuse to produce electronic evidence with the assertion of an objection. The lawyer must examine the burden and expense actually associated with making the production. To do so, the lawyer must understand whether the data is maintained in an accessible or inaccessible format.

The *Zubulake* court recognized that whether production is unduly burdensome or expensive initially depends on whether the producing party maintains the electronic evidence in accessible or inaccessible format. Generally, with regard to electronic evidence, any data “retained in a machine readable format is typically accessible.”⁹ In *Zubulake*, the court identified five categories of electronically stored data and discussed their respective accessibility. From most accessible to least accessible, the court identified the following categories of ESI: (1) active, online data; (2) near line data; (3) offline storage/archives; (4) backup tapes; and (5) erased, fragmented or damaged data.¹⁰ Typically, the first three categories of data are accessible while the last two categories are inaccessible.¹¹ With regard to the first three

categories, the producing party has stored the information in a “readily usable format.”¹² Without regard to the length of time it may take to gather the information, data stored in one of the first three categories does not need to be “restored or otherwise manipulated to be usable.”¹³ Conversely, inaccessible data cannot be readily used. Generally, use of back up tapes or fragmented/damaged data requires some sort of restoration or reconstruction process.¹⁴ Accordingly, these methods of storage are typically inaccessible.¹⁵ Other courts have followed *Zubulake*’s approach in characterizing data as accessible or inaccessible depending on the manner in which the electronic evidence is stored.¹⁶

Lawyers cannot, however, make simple assumptions about the accessibility of the data depending on the format in which the data is stored. For instance, a court may conclude that electronic evidence stored on back up tapes or in an erased, fragmented or damaged format is not per se inaccessible thus involving undue burden or expense to produce. In *Commerce Benefits Group, Inc. v. McKesson Corporation*,¹⁷ the United States District Court for the Northern District of Ohio rejected the defendant’s assertion that backup tapes were “presumptively not searchable” calling the argument “without merit.” Even though the requested ESI existed only on backup tapes, the court required the defendant to make a showing of undue burden and expense.¹⁸ Similarly, the maintenance of ESI in a typically accessible format may not be dispositive. In *W.E. Aubuchon Co., Inc., v. Benefirst*,¹⁹ the court found production would be unduly burdensome and expensive even where the ESI was maintained in a typically accessible format. In *Benefirst*, the requested documents were stored on a server, generally an accessible format.²⁰ The documents were, however, stored without an indexing system and in manner that rendered searching very difficult. Due to the complexity and cost involved in production, the court found the data inaccessible.²¹

Likewise, some courts have considered factors other than the manner in which electronic evidence is stored in determining whether the data is accessible. In *Guy Chemical Company, Inc. v. Romaco AG*,²² the court determined electronic data was inaccessible based on proof that identifying and producing the requested documents would cost \$7,000.00. Similarly, in *Ameriwood Industries, Inc. v. Liberman*,²³ the court found electronic data not reasonably accessible based on the sheer volume of documents where the responding party identified 52,124 responsive emails and 4,413 additional computer files. In *Dilley v. Metropolitan Life Insurance Company*,²⁴ the court found the producing party carried its burden of establishing ESI was not reasonably accessible where the producing party demonstrated it had no ability to search an electronic database. In none of these cases did the court consider the manner in which the data was stored in making the accessibility determination.

From these cases, the prudent Tennessee practitioner should draw some lessons in responding to discovery requests following implementation of the amendments to Tennessee Rule of Civil Procedure 26. Because the responding party bears the burden of creating a record of undue burden or cost, creating a record that ESI is not reasonably accessible should be the lawyer's foremost concern when resisting production of ESI. The lawyer must first understand the method and manner in which ESI is stored. The lawyer should ascertain and understand what will be necessary to produce the requested ESI and should obtain meaningful cost estimates of the costs associated with production. Tennessee courts should not accept bald assertions that ESI is not reasonably accessible without supporting evidence.²⁵ Failure to create an appropriate record may well result in the court finding that the requested documents must be produced.²⁶

B. How is "good cause" established for production of ESI that is not "reasonably accessible"? The court's inquiry is not concluded once the responding party

demonstrates that ESI is not reasonably accessible due to undue burden and cost. Once the responding party demonstrates ESI is not reasonably accessible, the burden shifts to the requesting party to demonstrate good cause for the production.²⁷ The language in Amended Rule 26 establishes that good cause exists “where the party requesting discovery shows that the likely benefit of the proposed discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the discovery in resolving the issues.”²⁸ The comments to Amended Rule 26 establish a non-exclusive list of additional factors the court may consider in evaluating good cause including: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessible sources; (3) the failure to provide relevant information that seems likely to have existed but is no longer available on more easily accessible sources; and (5) predictions as to the importance and usefulness of the further information.²⁹ Accordingly, once the responding party has demonstrated the ESI is not reasonably accessible due to undue burden or expense, the requesting party must turn its focus to convincing the court that good cause exists for the production.

In evaluating good cause, some federal courts have conducted an explicit factor by factor analysis and discussion.³⁰ In *Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority*,³¹ the court found an “overwhelming case” for good cause under the unique circumstances of that case. *Disability Rights Council* involved a lawsuit by disabled individuals against the Washington Metropolitan Area Transit Authority alleging violations of the Americans with Disabilities Act, 42 U.S.C. § 12131.³² In finding good cause for production of not reasonably accessible ESI, the court placed great weight on the issues at stake and the parties’ resources.³³ The court found the plaintiffs had no material resources, were

represented on a pro bono basis and that the rights of persons with physical disabilities to public transportation posed an important issue.³⁴

The court applied the factors and found good cause in a more typical commercial case in *W.E. Aubuchon Co., Inc., v. Benefirst*.³⁵ In *Benefirst*, the court found the parties' resources and the importance of the issues could not be weighted in either party's favor. The court found significant both the specificity of the discovery request and the requesting party's inability to obtain the information from any other source. Additionally, the court found the documents "an integral part of the litigation" and "highly relevant."³⁶ As a result, the court found good cause for production of ESI that was not reasonable accessible.³⁷

Other courts have conducted the good cause analysis without such explicit weighting and discussion of the enumerated factors.³⁸ For instance, in *Ameriwood Industries, Inc. v. Liberman*, the court found the requesting party had failed to establish good cause for production of ESI that was not reasonably accessible where the discovery requests were "not narrowly tailored to seek only information relevant to the affirmative defenses ..."³⁹ Conversely, in *Guy Chemical, Inc. v. Romaco*, the court found the requesting party had established good cause where the requested ESI was unavailable from any other source and was critical to the important issue of damages.⁴⁰

Again, the text of amended Rule 26, the comments to the Rule and the decisions of the federal courts applying analogous Federal Rule of Civil Procedure 26 have much to offer the Tennessee lawyer seeking to establish good cause for production of ESI determined to be not reasonably accessible. First, the importance of the specificity of the request becomes readily apparent. Lawyers should ask for what they need and need that for which they ask. Plainly, it will be much more difficult to establish good cause for a request for ESI seeking "all documents"

pertaining to some issue. Good cause should be found more readily, for example, where the request details the sender and recipient of emails, limits the time frame and specifically identifies the information likely contained in the ESI requested. Second, when presenting argument to the court, the lawyer must clearly articulate what he hopes to find in the ESI and why the ESI is important to the case. The lawyer unable to articulate these critical issues will be unable to establish the good cause required for production.

The comments to amended Rule 26 recognize, however, that the lawyers may not be able to create the record the court needs in one, simple proceeding.⁴¹ As the comments recognize, the good cause determination may be complicated where the parties, and by extension the court, know little about what information may reside on the inaccessible sources, its relevance and value to the litigation.⁴² Where such is the case, the comments recognize the requesting party's need to conduct "focused discovery" to establish the costs of retrieving the information, what information is contained in the source, and the potential value of the information to the litigation.⁴³

The prudent lawyer needing to establish good cause for production of ESI from inaccessible sources should not hesitate to take discovery to support the record. The comments to Amended Rule 26 recognize that such discovery may include production of a sample of the information from the source.⁴⁴ Focused discovery may also include a deposition of an appropriate person from the responding party with knowledge of the party's information systems. Whatever avenue of discovery is pursued, the lawyer seeking ESI should spend the time needed to build a record which will enable the court to make a reasoned determination of good cause.

C. Who pays for production of ESI? The law recognizes that “discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter.”⁴⁵ At least under the Federal Rules, the responding party typically bears the burden of responding to discovery.⁴⁶ Initially, the same presumption often applied with regard to electronic discovery.⁴⁷

The comments to Amended Rule 26, however, recognize the importance of cost-shifting to the ESI production framework. The Rule couples the good cause analysis with the court’s authority to set conditions on discovery.⁴⁸ The comments explicitly state that “the conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party’s willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause.”⁴⁹

Obviously, the requesting party always wants the producing party to bear the costs of production while the producing party wants the requester to pay. Amended Rule 26.06(6) establishes that the court should consider shifting costs between the requesting and responding party when (1) the ESI is not reasonably accessible; and (2) restoration and production of a small sample would not be sufficient.⁵⁰ Amended Rule 26.06(6) identifies several factors that closely mirror those involved in the good cause determination for the court’s consideration in deciding whether to shift costs for production of ESI: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of the information from other sources; (3) the total cost associated with the production compared with the amount in controversy; (4) the ability to control costs and incentive to do so; (5) the

resources of the parties; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits of obtaining the information.⁵¹

Decisions from the federal courts interpreting similar factors in analyzing the appropriateness of cost shifting demonstrate the significance of these factors. The more specific a request, the less need exists for costs to shift to the requesting party.⁵² The more likely it appears that production of ESI will generate important information, the more appropriate it is for the producing party to bear the costs.⁵³ Where the information cannot be gathered from another source, the more likely it is that the producing party should bear the cost.⁵⁴ Where the expenses are high, it becomes more appropriate to require the requesting party to bear the costs.⁵⁵ The court must weigh and examine these factors in deciding whether to shift the costs to the requesting party.

D. When are sanctions appropriate for failure to preserve ESI? Generally, a litigant has a duty to preserve evidence that may be “relevant to imminent or pending litigation.”⁵⁶ In a case involving only tangible, physical evidence this duty seems straightforward. With ESI in an environment that may change monthly, daily or even more frequently, the contours of this duty may become more complicated.

Amended Tennessee Rule of Civil Procedure 37 seeks to address the anxiety that lawyers and litigants may suffer in connection with their duty to preserve ESI. As noted above, Amended Rule 37 provides that “absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.” Accordingly, the Amended Rule explicitly contemplates that the loss of ESI in good faith as a

result of the day to day operations of a computer system should not ordinarily result in sanctions.⁵⁷

While helpful, Amended Rule 37.06(2) does not specifically address the duty of the lawyer and litigant to preserve ESI once on notice of a claim. While the rule protects the lawyer and litigant when destruction of ESI occurs in the ordinary course of business, the Amended Rule does not provide guidance to the lawyer concerning her obligations to preserve evidence once litigation appears imminent.

The comments provide some additional assistance. The comments to Amended Rule 37 recognize that good faith may require intervention by the party to suspend the routine destruction of documents once a preservation obligation arises.⁵⁸ Plainly, only by taking appropriate steps to secure ESI once on notice that litigation is imminent can the lawyer and litigant be confident that sanctions will be avoided.

Several decisions from the federal courts are instructive and should give lawyers guidance in how to protect their clients in preserving ESI. Once again, the United States District Court for the Southern District of New York provided significant guidance in the *Zubulake* case. As the Court recognized in *Zubulake*, once a party reasonably anticipates litigation, the party must suspend its ordinary document retention policies and implement a litigation hold to preserve relevant documents.⁵⁹

Once counsel implements the litigation hold, the litigant and counsel must take reasonable steps to identify the sources of relevant information and secure the documents.⁶⁰ In doing so, counsel should: (1) insure his familiarity with the client's document retention policies and computer systems; (2) communicate with the critical actors in the litigation to understand how they used ESI; (3) explicitly instruct key actors to retain relevant documents; and (4) make

sure relevant documents are preserved.⁶¹ In *Zubulake*, the court found it was not sufficient to simply direct all employees to retain relevant documents. Rather, counsel must “take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.”⁶² Further, counsel should re-issue the litigation hold so that it remains fresh and, where possible, communicate directly with the key actors in the litigation.⁶³ Finally, counsel should take affirmative steps to secure all relevant, active electronic files and insure that backup tapes are secured in a safe place.⁶⁴

In the absence of such reasonable action, both the lawyer and the litigant may find themselves faced with the possibility of sanctions.⁶⁵ In *Zubulake*, the court imposed sanctions where key actors in the litigation simply deleted emails.⁶⁶ The *Zubulake* court also found sanctions appropriate because counsel failed to communicate the litigation hold to a critical employee, failed to request documents from a different critical employee and failed to secure the backup tapes.⁶⁷ In *Keithley v. The Homestore.com, Inc.*,⁶⁸ the court found sanctions were appropriate where no litigation hold was implemented and where counsel and the party failed to make a diligent search for relevant documents and preserve other tangible evidence. Likewise, in *Cache La Poudre Feeds, Inc. v. Land O’Lakes, Inc.*,⁶⁹ the court imposed a limited monetary sanction where counsel failed to stop a company practice of deleting hard drives of former employees once a litigation hold was implemented.

Again, the Amended Rules, the comments, and cases from the federal courts provide meaningful guidance to lawyers and litigants in securing and preserving ESI. First, to protect the client and properly preserve ESI, the lawyer must gain an understanding of the client’s computer system as quickly as possible. The litigation hold must be implemented as soon as the company is on notice that litigation is imminent. Both inside and outside counsel

should be vigilant in identifying the key actors in the litigation and insuring that the litigation hold is communicated to the key actors. Counsel should insure that the routine destruction of documents pursuant to a document retention policy is terminated and take appropriate steps to identify and secure relevant backup tapes. Further, counsel should not rest easy once the litigation hold is communicated and implemented. Throughout the pendency of the litigation, counsel should continue to insure that relevant ESI is preserved.

Undoubtedly, as the amendments to the Tennessee Rules of Civil Procedure are implemented in state courts, Tennessee jurisprudence will evolve to provide additional direct guidance to lawyers, litigants and trial courts. Until Tennessee law develops, decisions from the federal courts can provide meaningful assistance in assisting lawyers and litigants in complying with their discovery obligations concerning ESI.

¹ See *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421, 428 (S.D.N.Y. 2002)(“Electronic documents are no less subject to disclosure than paper records”).

² See *Meighan v. U.S. Sprint Communications Co.*, 924 S.W.2d 632, 637 (Tenn. 1996); *Bayberry Assoc. v. Jones*, 783 S.W.3d 553, 557 (Tenn. 1990).

³ Amended Tennessee Rule of Civil Procedure 26.02(1).

⁴ *City of Seattle v. Professional Basketball Club, LLC*, 2008 WL 539809 (W.D. Wash. Feb. 25, 2008).

⁵ 217 F.R.D. 309, 318 (S.D.N.Y. 2003).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* 318-39.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Canon U.S.A., Inc. v. S.A.M., Inc.*, 2008 WL 2522087 (E.D. La. June 20, 2008)(finding ESI reasonably accessible where data was stored on servers in machine readable and active format); *W.E. Aubuchon Co., Inc. v. Benefirst, LLC*, 245 F.R.D. 38, 42-43 (D. Mass. 2007)(applying *Zubulake*’s “media based analytical approach”); *Best Buy Stores, LP v. Developers Diversified Realty Corp.*, 247 F.R.D. 567, 570 (D. Minn. 2007).

¹⁷ 2008 WL 440373 (N.D. Ohio Feb. 13, 2008).

¹⁸ *Id.*

¹⁹ 245 F.R.D. 38, 43 (D. Mass 2007).

²⁰ *Id.*

²¹ *Id.*

²² 243 F.R.D. 310, 312 (N.D. Ind. 2007).

²³ 2007 WL 496716 (E.D. Mo. Feb. 13, 2007).

²⁴ -- F.R.D. --, 2009 WL 756967 (N.D. Ca. March 13, 2007).

²⁵ *City of Seattle v. Professional Basketball Club, LLC*, 2008 WL 539809 (W.D. Wash. Feb. 25, 2008).

²⁶ See e.g. *Mikron Industries, Inc. v. Hurd Windows & Doors, Inc.*, 2008 WL 1805727 (W.D. Wash. April 21, 2008)(finding responding party failed to demonstrate lack of reasonable accessibility where defendant neglected to provide details concerning the methods in which ESI was stored, the number of backup tapes to be searched, the existence and content of the document retention policies; and the extent to which accessible ESI had been searched).

²⁷ Amended Tennessee Rule of Civil Procedure 26.01.

²⁸ *Id.*

²⁹ Comments to Amended Tennessee Rule of Civil Procedure 26.

³⁰ *Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority*, 242 F.R.D. 139, 147 (D.D.C. 2007); *W.E. Aubuchon Co., Inc., v. Benefirst*, 245 F.R.D. 38, 43 (D. Mass 2007).

³¹ 242 F.R.D. 139, 147 (D.D.C. 2007).

³² *Id.*

³³ *Id.* at 148.

³⁴ *Id.*

³⁵ 245 F.R.D. 38, 43 (D. Mass 2007).

³⁶ *Id.* at 44.

³⁷ *Id.*

³⁸ *Guy Chemical Co., Inc. v. Romaco AG*, 243 FRD 310, 313 (N.D. Ind. 2007); *Ameriwood Industries, Inc. v. Liberman*, 2007 WL 496716 (E.D. Mo. Feb 13, 2007); *PSEG Power New York, Inc. v. Alnerici Constructors, Inc.*, 2007 WL 2687670 (N.D.N.Y. Sept. 7, 2007); *Ameriwood Industries, Inc. v. Liberman*, 2006 WL 3825291 (E.D. Mo. Dec. 27, 2006);

³⁹ 2007 WL 496716 (E.D. Mo. Feb. 13, 2007).

⁴⁰ 243 F.R.D. 310, 313 (N.D. Ind. 2007).

⁴¹ Comments to Amended Tennessee Rule of Civil Procedure 26.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Rowe Entm't Inc. v. William Morris Agency, Inc.*, 205 F.R.d. 421, 423 (S.D.N.Y. 2002).

⁴⁶ *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978).

⁴⁷ See *Zubulake v. USB Warburg, LLC*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003).

⁴⁸ Amended Tennessee Rule of Civil Procedure 26.02(1).

⁴⁹ Comments to Amended Tennessee Rule of Civil Procedure 26.02.

⁵⁰ Amended Tennessee Rule of Civil Procedure 26.06(6).

⁵¹ Amended Tennessee Rule of Civil Procedure 26.06.

⁵² *Rowe Entertainment, Inc. v. The William Morris Agency*, 205 F.R.D. 421, 430 (S.D.N.Y. 2002).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 431.

⁵⁶ *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614 (D. Colo. 2007).

⁵⁷ Amended Tennessee Rule of Civil Procedure 37.06(2).

⁵⁸ Comments to Amended Tennessee Rule of Civil Procedure 37.

⁵⁹ *Zubulake*, 220 F.R.D. at 218.

⁶⁰ *Zubulake*, 229 F.R.D. at 432.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 433-434.

⁶⁴ *Id.*

⁶⁵ The particular sanctions ordered by courts in connection with spoliation of evidence, in general, or ESI, in particular, is beyond the scope of this article. Tennessee Rule of Civil Procedure 34A.02 provides that sanctions may be imposed on a party who “discards, destroys, mutilates, alters or conceals evidence. Tennessee courts have imposed sanctions for destruction of evidence outside the ESI context. See, e.g., *Cincinnati Ins. Co. v. Mid South Drillers*, 2008 WL 220287 (Tenn. Ct. App. Jan. 25, 2008).

⁶⁶ *Id.* at 435.

⁶⁷ *Id.*

⁶⁸ 2008 WL 3833384 (N.D. Ca. Aug. 12, 2008).

⁶⁹ 244 F.R.D. 614, 637 (D. Colo. 2007).