

## I. INTRODUCTION

The practice of law has undergone a fundamental change in the last two decades. The rise of increasingly powerful and affordable personal computers, along with the ever expanding capabilities of the internet, have changed the way the world does business and the way attorneys practice law. Increased use of e-mail, as well as advances in scanning and other electronic document technology, have led to strides toward a reduction in paper documents.<sup>1</sup> These advancements have also led to an exponential increase in electronically stored information (ESI). The increase in ESI creates two problems in the practice of law: (1) ease of document creation can result in billions of documents in a given matter, which makes meaningful review of all relevant documents impossible; and (2) the newly created documents are not always produced in hard copy format, creating preservation and production issues.<sup>2</sup> Unfortunately, the substantive and procedural rules of the legal profession have yet to fully catch up to these changes.

Idaho amended its rules of civil procedure to address the discovery of ESI (e-discovery). Unfortunately, these amendments fail to set forth workable e-discovery standards. The amendments to the Idaho Rules of Civil Procedure (IRCP) specifically recognize ESI as discoverable, but fail to provide any definition of ESI or set limits for its production. As a result, the scope of discovery for ESI is entirely within the discretion of the trial judge, requiring discovery disputes that arise from this lack of clarity to be settled in court. As long as the scope of discovery of ESI is a matter of judicial discretion, attorneys will be unable to effectively advise their clients concerning their duties of preservation and production of ESI. This lack of clarity regarding how much data has to be preserved and produced creates practical and financial burdens for both client and counsel. The lack of a clear scope will also tax the limited resources of the trial court because it will be called upon to decide numerous discovery disputes that are likely to arise in the face of an unclear scope of discovery.

The federal judiciary and several states, including Idaho, have made strides toward addressing e-discovery issues in their procedural rules, recognizing the growing importance of e-discovery issues.<sup>3</sup> However, despite these efforts, there is still no clearly articulated standard for e-discovery.

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1. See Michelle Washington, *Norfolk Court Clerk Bytes Off Ambitious Goal: Paperless Files*, *Virginian-Pilot*, Mar. 19, 2007, <http://hamptonroads.com/node/238631> (chronicling progress already made toward a completely paperless court clerk's office where all records are stored electronically and filing can be done remotely). Even if law firms never go completely paperless, they may eventually have to deal with a completely electronic court record system, other paperless law firms, and paperless clients.

2. See George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, para. 1–2 (2007), <http://law.richmond.edu/jolt/v13i3/article10.pdf> (noting that the volume of information has increased as much as ten-thousand-fold in recent years requiring new levels of collaboration among lawyers for effective document review); see also James Gibson, *A Topic Both Timely and Timeless*, 10 RICH. J.L. & TECH. 49, para. 2 (2004), <http://law.richmond.edu/jolt/v10i5/article49.pdf> (“In 2002 alone, the world produced and stored an estimated five exabytes of new information. That’s the equivalent of the entire print collection of the Library of Congress—multiplied half a million times. Ninety-two percent of this information was stored not on paper, but on magnetic media.”); THE RADICATI GROUP, INC., TAMING THE GROWTH OF EMAIL: AN ROI ANALYSIS 2 (2005), available at <http://costkiller.net/tribune/Tribu-PDF/email-roi.pdf> (estimating that by 2009 541 million workers will be sending and receiving 160 emails per day, amounting to the generation of approximately 86.56 billion emails per day).

3. See THOMAS Y. ALLMAN, STATE BY STATE SUMMARY REPORT OF E-DISCOVERY EFFORTS 1 (2007), <http://discoveryresources.dreamhosters.com/wp-content/uploads/2007/10/staterulesoctober.pdf>. Arizona, Idaho, Indiana, Louisiana, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, Texas, and Utah, along with the federal judiciary, have amended their rules of civil procedure to specifically address e-discovery. *Id.* Additionally, Alaska, Florida, Illinois, Iowa, Kansas, Maryland, Nebraska, New Mexico, Ohio,

This comment focuses on the IRCP, specifically comparing the IRCP amendments to the Federal Rules of Civil Procedure (FRCP) amendments, as well as federal precedent that has developed concerning discovery of ESI. This comparison demonstrates areas where the FRCP could clarify the IRCP, along with areas where neither set of rules go far enough. Federal precedent is particularly instructive in showing the problems that arose with the increased use of ESI, leading to the FRCP amendments; the same problems will arise under the current IRCP. This comment also suggests a solution to the scope problems created by the IRCP amendments.

The IRCP amendments were formulated and presented to the Idaho Supreme Court for adoption by the Discovery Rules Advisory Subcommittee, a subdivision of the Civil Rules Committee, which was created in November 2004.<sup>4</sup> The committee met to discuss proposed changes to the rules in March 2005.<sup>5</sup> The agreed-upon changes were then submitted to the Idaho Supreme Court for approval.<sup>6</sup> The supreme court adopted the changes on March 17, 2006, and the new rules became effective on July 1, 2006.<sup>7</sup>

The unique nature of electronic data requires rules specifically tailored to e-discovery. Several reasons for separate treatment of e-discovery were proffered in the development of federal e-discovery precedent:

*First*, the volume of ESI is exponentially greater than the volume of stored paper records. . . . *Second*, electronic information is dynamic, which means that computer systems automatically create and discard data, often without the direction or knowledge of the operator. *Third*, unlike paper records, ESI is difficult, although not impossible, to delete. An operator may think information is deleted when in reality it is just transferred from an accessible location to one that is inaccessible—meaning that although it is expensive and burdensome to access, it continues to exist. *Finally*, ESI may need to be retrieved, restored or translated before it can even be reviewed for relevance or privilege.<sup>8</sup>

Essentially, e-discovery is a different animal from traditional discovery. As a result, e-discovery calls for a fundamental change in the discovery process because of the increased cost of production and the increased risk of spoliation and sanctions. For reasons that will be discussed below, the IRCP

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Tennessee, Virginia, Washington, and the District of Columbia are in the process of seeking similar amendments to their procedural rules. *Id.* The sheer volume of states which have chosen to make these amendments demonstrates the recognized importance of e-discovery issues.

4. Minutes of Meeting, Discovery Rules Advisory Subcommittee, Idaho State Judiciary 1 (March 11, 2005) (on file with author).

5. *Id.*

6. *Id.*

7. *In re* Amendment of Idaho Rules of Civil Procedure 16(b), 26(b)(4), 33(a)(2), 33(c), 34(a), 34(b), 35(a), 36(a), 37(a), and Repealing of Rule 45(a)(b)(c)(d)(e) and (f), and Adoption of New Rules 26(b)(5)(A), 26(b)(5)(b) and 45(a)(b)(c)(d)(e)(f)(g) and (h), (Idaho 2006) [hereinafter Amendment Order], available at [http://www.isc.idaho.gov/rules/Discovery\\_Rule306.htm](http://www.isc.idaho.gov/rules/Discovery_Rule306.htm).

8. Shira A. Scheindlin, Fed. Dist. Judge, S.D.N.Y., Keynote Address at the ARMA International Conference and Expo (Oct. 22, 2006), <http://www.arma.org/podcast/Speech.pdf>. Judge Scheindlin presided over the extensive discovery dispute in the *Zubulake* cases and has written an article on the subject of e-discovery sanctions. See Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 MICH. TELECOMM. & TECH. L. REV. 71 (2004).

amendments failed to address these concerns, leaving Idaho practitioners and their clients vulnerable to a host of potential pitfalls.

The scope of e-discovery should have been more clearly defined in the IRCP amendments. The IRCP amendments fail to include several of the protections provided in the FRCP. This failure will make operation under the newly promulgated rules problematic. The dearth of decisions in Idaho concerning both e-discovery and discovery in general, along with ambiguities in the currently promulgated rules, create confusion about what ESI must be retained and produced. Because there is no guidance in the IRCP or Idaho precedent to deal with this confusion, all parties who deal with ESI (essentially any party that receives email or has a word processor) is faced with potential loss of discoverable ESI. Accordingly, Part II of this comment examines the current scope of discovery through comparison of the IRCP to the FRCP, Part III shows the potential impact of unclear scope provisions through an examination of federal precedent, and Part IV suggests solutions to the problems created by the current rules governing e-discovery in an attempt to create more workable standards.