

E-Discovery: 9 points impacting discovery costs

Managing different rules among the 50 states means managing different risks

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There was a time when state court civil disputes did not involve the risk of astronomical e-discovery costs. That time has passed. Just as e-discovery in federal courts reaches some semblance of uniformity, the 50 (very independent) states have begun to realize that discovery in the Digital Age will necessarily involve "staggering" amounts of electronically stored information (ESI).

Since 2003, 30 states have adopted rules or enacted statutes that specifically address ESI management, preservation and production in civil disputes. New York and seven other states have developed their own methods for managing e-discovery, while California (and 21 states like it) generally follows the Federal Rules of Civil Procedure. The remaining 20 states (e.g. Illinois) have yet to adopt any e-discovery rules, but most recognize "the increasing reliance on computer technology," and some explicitly (by judicial interpretation of existing discovery rules) obligate civil litigants to produce ESI as part of their state's existing discovery obligations.

Although all 50 states have somewhat different approaches to managing e-discovery, there are a few trends in how states treat e-discovery that impact costs.

Some of the important trends include:

1. Discretionary Cost-Shifting. While the federal rules are silent on who should bear the cost of retrieving "inaccessible data," certain states (e.g. Texas) require that a judge order a party requesting inaccessible data to incur the cost of producing it. Other states (like California and Mississippi) give the judge the option to shift the cost of producing "inaccessible" ESI. Given that the retrieval and production of "inaccessible data" can easily run cost hundreds of thousands of dollars, the discretion (or obligation) to shift those costs can have a significant impact on the litigation budget.
2. The Meet and Confer. Some states (like New York and Delaware) have made the "meet and confer" the cornerstone of their methodology for managing e-discovery, while other states have abandoned the requirement altogether. Do not miss this opportunity to seize control of the e-discovery process. Skipping an early "meet and confer" may appear to save money and avoid the aggravation of dealing with the "unreasonable" opposition; however, more progressive literature on e-discovery suggests that the "meet and confer" actually saves costs in the long-run and helps insulate the parties against the risk of e-discovery "do-overs" and even more severe sanctions.
3. Safe Harbor. Federal Rule of Civil Procedure 37(e) forbids a court from ordering sanctions against a party who has destroyed potentially relevant ESI "as a result of the routine, good-faith operation of an electronic information system." Although practitioners debate how "safe" the harbor really is in federal courts, several states have eliminated the "safe harbor" altogether. This means that litigation holds in state courts should be implemented as soon as litigation is reasonably anticipated.
4. Sanctions. It also is important to know what activities (or failure to act) will prompt the court in your jurisdiction to levy sanctions. Counsel should not assume (especially in states that don't follow the federal rules) that state courts will levy sanctions in the same manner and for the same conduct

as federal courts. This analysis will inform your discovery strategy and help insulate against the risk of state court sanctions.

Although there is no substitute for becoming familiar with each state's e-discovery rules before formulating an e-discovery plan, there are a few fundamental practices that will help manage e-discovery costs (and help avoid sanctions) regardless of your jurisdiction.

Savvy litigants should:

1. Budget for e-discovery costs in every case (based on the rules of the jurisdiction where the dispute is venued) so that you (and your outside counsel) are forced to address how the state's approach to e-discovery might affect your case
2. Discuss e-discovery issues and attempt reach agreement about the parameters of ESI preservation and production as early in the case as practical regardless of whether your jurisdiction requires a "meet and confer." If the state court rules do not require a "meet and confer" and the opposition refuses, ask the court to order the parties to meet and discuss e-discovery
3. Know the most likely circumstances where the jurisdiction has awarded sanctions in e-discovery cases
4. Oversee the data collection process in your cases, but try to avoid having your internal IT department collect the data
5. Document the steps taken to prevent the destruction of potentially relevant ESI

In addition to local counsel, good resources to check on current state court discovery rules and decisions are maintained by [Kroll Ontrack](#).