COSTS AND BURDENS OF CIVIL DISCOVERY

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

DECEMBER 13, 2011

Serial No. 112–72

Printed for the use of the Committee on the Judiciary

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U.S. GOVERNMENT PRINTING OFFICE

71–623 PDF WASHINGTON : 2012

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COSTS AND BURDEN OF CIVIL DISCOVERY

TUESDAY, DECEMBER 13, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 1:39 p.m., in room 2141, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Chabot, Jordan, Nadler, Conyers, Scott, and Quigley.

Staff Present: (Majority) Holt Lackey, Counsel; Sarah Vance, Clerk; (Minority) Heather Sawyer, Counsel; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. Well, thank you all for being here. I thank those in the audience and the panel members and the Members here. I want to welcome you to the Constitution Subcommittee hearing on the "Costs and Burdens of Civil Discovery."

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

Since January, this Committee and the House of Representatives as a whole have worked to identify Federal rules and regulations that impose undue costs and burdens and destroy American jobs.

Today's hearing examines whether unclear rules governing discovery in civil litigation are making our civil justice system too expensive. Rule I of the Federal Rules of Civil Procedure provides that all of the other rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Current discovery rules appear to fall short of this ideal.

Instead of encouraging quick, fair and affordable fact-finding, the current system of civil discovery encourages parties to bury each other in onerous requests for more and more data of dubious evidentiary value. The problem is exacerbated by the explosion of potentially discoverable data in our digital world. The amount of data generated in the world is increasing geometrically today, doubling every 2 years. In 2010, the world created the zettabyte, which is 1 billion terabytes of data.

By comparison, it is estimated that if one scanned every book and magazine in the entire Library of Congress, it would equal about 136 terabytes of information. This means that in the year 2010 alone, the world produced as much data as could be contained or would be contained in 7.4 million Libraries of Congress. The cost

of retaining, collecting, producing and reviewing all of the data that may be subject to discovery runs from tens of thousands of dollars in a typical case to many millions of dollars in a larger case.

The costs of civil discovery are increasing because the discovery rules are too vague. Current law gives parties little guidance as to what discoverable information truly is, when they are required to preserve information, and what their discovery obligations are. But the sanctions for running afoul of a court's interpretation of the discovery rules can be onerous, including striking a party's pleadings or adverse jury instructions. These vague standards and harsh sanctions combine to leave parties with little or no choice but to err on the side of preserving more documents and data, driving costs higher still.

This system imposes considerable costs on American businesses, forcing them to spend money that could be put to more productive uses. It also makes access to the justice system more expensive for individuals and businesses alike. Everyone agrees that parties to civil litigation are entitled to discovery of relevant documents in the other party's possession, and that destruction of evidence for the purpose of preventing its use at trial should be sanctioned. Even a perfect discovery system would still cost money, but the current system is inefficient and costs far more money than needed to do justice.

The high costs of discovery have led to a world in which cases are often resolved based upon the parties' ability to impose discovery costs on one another instead of the merits of their respective cases. The result is that many meritorious cases are not brought because the cost of litigation exceeds the plaintiff's likely recovery.

Other cases settle based on the cost of litigation rather than the merits. As one of our distinguished witnesses, Justice Rebecca Kourlis has written, "The status quo is not good enough. We created the current system. We must now create a better one."

The Civil Rules Advisory Committee of the Judicial Conference is currently considering proposed rule changes to address many of these issues, and I salute their efforts and look forward to their recommendations. Today's hearing is part of the same effort to create a better civil discovery system, and I hope that today's hearing helps return the rules of civil procedure to their purpose, "to secure the just, speedy, and inexpensive determination of every action and proceeding."

With that, I thank you all for being here and would like to recognize now the distinguished Mr. Nadler for his opening statement.

Mr. NADLER. Thank you, Mr. Chairman.

Nothing in the title of today's hearing even remotely acknowledges any upside to civil discovery or recognizes its role in allowing parties and the courts to uncover the facts so that cases can be resolved based on the merits and in a timely and just manner. Discovery allows for early testing of claims, helping to cull those without merit and encouraging prompt resolution where culpability is revealed, and it minimizes the ability of any party to conceal facts or otherwise rely on gamesmanship or surprise.

Electronic discovery, while unquestionably posing new challenges and burdens, has proven particularly valuable in uncovering critical evidence and improving accountability. For example, in a fraud

lawsuit brought against the Swiss bank UBS AG related to sale of asset-backed securities, the types of securities that led to massive defaults on debt tied to subprime mortgages and to a worldwide credit crisis, email exchanges revealed employees referring to the asset-backed securities that they were selling as "vomit" and "crap."

In a Medicaid fraud case brought against a pharmaceutical company for inflating prices of its drugs, the Attorney General of Mississippi attributed a $38.2 million verdict to the discovery of emails from a drug company executive revealing the pricing scheme.

As Attorney General Jim Hood explained, "It took a lot of hours and expense for the State to uncover these types of smoking gun documents to make our case. The facts are clear that the company used voodoo math to defraud the State."

We should not lose sight of the tremendous benefits of discovery in our focus on its alleged costs and burdens. And while we undoubtedly will hear much today about an urgent need to change our civil discovery rules to address skyrocketing discovery costs, that claim is not shared by many of the key experts and stakeholders in our civil justice system.

In preliminary views provided to the Advisory Committee on Civil Rules of the Judicial Conference of the United States regarding reform of discovery rules, the Department of Justice has expressed, "Significant concerns that a rule is being considered without adequate empirical evidence that a rule change is, in fact, needed."

The Justice Department is involved in one-third of all Federal civil cases, either as a plaintiff or a defendant. Its views on this issue should not be taken lightly, and I ask unanimous consent to include the DOJ's September 7 letter to the Federal Judicial Conference in the record of today's hearing.

Mr. FRANKS. Without objection.

[The information referred to follows:]

U. S. Department of Justice

Civil Division

Assistant Attorney General

Washington, D.C. 20530

September 7, 2011

The Honorable David G. Campbell
Chair, Advisory Committee on Civil Rules
United States District Court
623 Sandra Day O'Connor
United States Courthouse
401 West Washington Street
Phoenix, Arizona 85003-2146

Dear Judge Campbell:

The Department of Justice (the Department) respectfully submits its preliminary views regarding the potential changes to the Federal Rules of Civil Procedure. The changes under consideration, first raised at the 2010 Civil Litigation Review Conference (Duke Conference) in May 2010 and subsequently modified and circulated by the Discovery Subcommittee (Subcommittee),[1] prescribe new rules for the preservation of information and seek to define the sanctions that would result from the failure to preserve. Three different versions of a potential "rule" (two versions focusing on amendments to both Rule 26 and Rule 37 and one version focusing solely on amendments to Rule 37) have been circulated for comment. Each version is intended to address a perceived need for clarity and uniformity in preservation obligations.

The Department understands that the Subcommittee is still at the information gathering stage. The Department welcomes this opportunity to provide its views to the Subcommittee. The Department is uniquely situated to assess how new preservation and/or sanctions rules would impact a wide range of litigants, as approximately one-third of all federal civil cases involve the United States as either a plaintiff or a defendant.

The Department's preliminary investigation suggests that a rule may not be needed, that further analysis is required before any rule changes should be made, and that the potential changes present substantial legal, policy, and operational concerns, particularly for the federal government. A number of federal agencies have significant reservations about the potential rule language circulated and question whether the proposals alleviate the perceived preservation problems. Accordingly, the Department respectfully urges the Subcommittee not to propose any changes to the Federal Rules of Civil Procedure regarding preservation or related sanctions at this time.

Lack of Empirical Evidence

The Department has significant concerns that a rule is being considered without adequate empirical evidence that a rule change is, in fact, needed.

[1] *See* Memorandum to Participants in September 9, 2011 Mini-Conference on Preservation and Sanctions, Honorable David Campbell and Professor Richard Marcus, June 29, 2011.

The 2011 Federal Judicial Center (FJC) report raises questions about whether a rule is needed to address perceived preservation issues in civil discovery. In particular, the data suggests that sanctions are sought by parties and imposed by the court in only a small percentage of cases. Furthermore, the majority of the cases in which the courts imposed sanctions did not involve pre-litigation preservation conduct. The FJC analysis (based on data from 19 districts and the 131,992 cases filed in 2007 and 2008 in those districts) shows that requests for spoliation sanctions were relatively rare (in just 0.15% of cases in the study districts), and sanctions were granted even more rarely (in only 18% of the 0.15% cases).[2] When the court granted sanctions, only 25% of those sanctions cases involved pre-litigation preservation conduct.[3] Thus, sanctions were imposed based on pre-litigation preservation conduct in only 0.00675% (25% of 18% of 0.15%) of the cases studied.

Further, a 2009 FJC survey reported that of the approximately 250,000 civil cases filed each year in federal courts, approximately 90,000 of those cases involved requests for electronically stored information (ESI cases).[4] In examining how frequently sanctions were imposed, one study found that sanctions were awarded in 46 out of the 90,000 ESI cases.[5] Another recent nationwide review showed that by mid-year 2011, sanctions were sought in 68 instances and awarded in 38 cases.[6] In light of these findings, the Department believes that several questions remain unanswered, including:

- What is the problem that a new potential rule would seek to solve?
    - Is the problem an increase in preservation issues in litigation?
    - Is the problem an inconsistency in the standards for spoliation sanctions across different jurisdictions?
    - Is the problem the cost of preservation? And if so, does sufficient evidence support that preservation costs are due to litigation retention obligations rather than other retention requirements arising under statute or regulation, or inadequate data management and record-keeping?
- Has the Rules Committee examined whether litigants are effectively using the existing rules and litigation tools?[7]
- Should the case law and technology be left to continue to develop and mature before a new rule is proposed?
- What, if anything, has changed since 2006 when the Rules Committee confronted a similar issue and decided not to develop a specific preservation rule?

---

[2] *See* Motion for Sanctions Based Upon Spoliation of Evidence in Civil Cases, Report to the Judicial Conference Advisory Committee on Civil Rules, Emery G. Lee III, 2011.

[3] *See* Spoliation Motions, Presentation to the Civil Rules Committee by Federal Judicial Center Research Division, Emery G. Lee III, November 2010.

[4] Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., *National, Case-Based Civil Rules Survey* (2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf.

[5] Dan H. Willoughby, Jr., Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789 (2010).

[6] Gibson Dunn, *2011 Mid-Year E-discovery Update* (July 22, 2011).

[7] While 82% of respondents in a recent ABA survey stated that discovery is too expensive, "61% of respondents believe that counsel do not typically request limitations on discovery under available mechanisms." Further, "while the cost of discovery was identified as a problem, amending the Rules was <u>not</u> among the possible solutions in which the ABA survey found general agreement." Milberg and Hausfeld, *E-Discovery Today: The Fault Lies Not In Our Rules*, 4 FED. CTS. L. REV. 2, 15-16 (2011) (citing ABA Section of Litigation, Member Survey on Civil Practice: Full Report (American Bar Ass'n. 2009), http://www.abanet.org/litigation/survey/docs/report-aba-report.pdf).

General Concerns About a Rule Imposing Preservation Obligations

The Department has a number of concerns about the prospect of enacting any broadly applicable rule that defines preservation obligations and/or related sanctions. Some of these concerns are applicable to all litigants, and others are unique to the federal government. First and foremost, the Department believes that further analysis of the Rules Enabling Act is warranted. Second, questions about the practical effect of a preservation and/or related sanctions rule should be more fully explored. Third, some examination of how the proposed rule would interact with existing statutory and regulatory requirements governing preservation obligations of the United States should be addressed. Finally, the unintended consequences a rule may have on civil investigations must be considered. Each of these issues, while reflecting just a subset of the Department's overall concerns, is described further below.

1. *Rules Enabling Act Issues*

The Department agrees with the observations of the Advisory Committee and others that the rule proposals may exceed the constraints of the Rules Enabling Act, 28 U.S.C. § 2072. Because at least some of the potential rules changes could be understood to regulate conduct significantly removed from litigation (including conduct related to documents that may never become the subject of litigation), the Department believes there is some risk that a court might conclude that they are not "rules of practice or procedure" or that they "abridge, enlarge or modify" substantive rights. *See* 28 U.S.C. § 2072(a) & (c). The Department encourages the Subcommittee and the Rules Committee to take up this analysis early in any rules evaluation process.

2. *Practical Questions Regarding How a New Rule Would be Applied*

The Department believes that additional focus and consideration should be given to the practical application of a new rule addressing preservation and/or related sanctions. The following questions reflect the potential implications of a rules change:

- Will a new rule supplant or supplement preservation and document retention requirements and practices governed by statute, case law, or party agreement? If not, how would uniformity be achieved?
- Will a new rule prevent a court from continuing to utilize its inherent authority to sanction a party for preservation errors?
- Has the Rules Committee determined whether statutes and regulations would need to be amended to accommodate a new preservation and/or sanction rule that affects document retention?
- How will a preservation and/or sanction rule reconcile with substantive tort law?[8]
- Will any proposed rule be drafted to accommodate future technological changes?[9]
- Has a study been conducted (or is one contemplated to be mandated or funded by Congress), to provide the Rules Committee with sufficient information about the costs to the federal government and taxpayers associated with a rules change?
- Has the Committee considered whether Congress should appropriate funds to federal agencies to respond to a rules change?

[8] Many states have treated spoliation as a separate cause of action under state tort law, entitling the aggrieved party to compensatory damages. Some states have recognized causes of action for intentional spoliation of evidence; others have recognized causes of action for negligent spoliation of evidence.

[9] For example, the use of terms such as "ephemeral data" and "physically damaged media" in the potential rules is imprecise and subject to evolving technological debate.

These are just a few of the unanswered questions that the Department believes must be answered before the Subcommittee proceeds.

3. *Interaction with Regulatory and Statutory Rules Governing Document Preservation*

A rule imposing automatic, pre-litigation triggers before litigation is reasonably anticipated may be inconsistent with the Federal Records Act,[10] agency Touhy regulations,[11] and established procedures for numerous other administrative proceedings. Federal records are already being preserved pursuant to existing statutes. There are also established statutory and regulatory claims processes that have been legislatively approved for inquiries or disputes to be resolved without judicial involvement. A new rule may conflict with these policy decisions made by Congress.

4. *Unintended Consequences on Civil Investigations*

A preservation rule that would impose a standard trigger for preservation in civil investigations may have unintended consequences. Such a rule could create new and substantial burdens on the federal government, as well as confuse others about existing preservation obligations under regulation or statute.

It is neither legally required under the current case law, nor operationally feasible during this period of economic austerity, for the federal government to institute new preservation duties upon the mere opening of a civil investigation. As an initial matter, litigation is not always anticipated at the opening of an investigation. If a rule were to impose preservation duties at the opening of a civil investigation, the cost incurred by the federal government, particularly when litigation is not reasonably foreseeable, would likely be prohibitive and beyond existing budget capabilities. Funds needed for civil investigations to protect the American public and enforce the laws of the United States may well be diverted for unnecessary preservation.

Qui tam cases are an illustrative example. From 1987 to mid-2010, approximately 7,200 *qui tam* cases were filed pursuant to 31 U.S.C. § 3729 *et seq.*, alleging fraud against government agencies.[12] These are matters filed by private litigants, known as relators, on behalf of the United States. After investigation, the government may intervene and litigate the case or decline to do so and allow the relator to litigate. Since 1986, the United States has intervened in approximately twenty-two percent (22%) of the cases that were filed, government-wide.[13] In those cases where the federal government declined intervention, the relators frequently did not proceed to litigation, choosing to dismiss cases voluntarily or settle before litigation occurred. In short, the initial filing of a *qui tam* complaint by a relator does not necessarily result in litigation against the named defendants. In fact, a small percentage of the filed *qui tam* cases result in actual litigation.

Apart from resulting in additional burden, a preservation rule that applies to civil investigations may also confuse other parties as they attempt to adhere to existing retention obligations during government investigations. For example, 18 U.S.C. § 1519 addresses the destruction, alteration, or falsification of

[10] *See, e.g.*, 44 U.S.C. §§ 2101 *et seq.*, 2501 *et seq.*, 2701 *et seq.*, 2901 *et seq.*, and 3101 *et seq.*

[11] The "head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." 5 U.S.C. § 301.

[12] *See* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.

[13] In many of the intervened cases, intervention was contemporaneous with dismissal of the *qui tam* action in order to complete settlement with the defendant and litigation did not commence.

records in federal investigations and bankruptcy.[14] It is not immediately clear how parties would navigate a new preservation rule and this statute. Moreover, entities and individuals under investigation may reasonably anticipate litigation at a point earlier than a preservation rule may contemplate, or they may be obligated to preserve documents at an earlier time as a result of the receipt of a subpoena or civil investigative demand.

Concerns Regarding the Potential Preservation Rule Language

The Department has concerns regarding the specific language currently being considered and would request more evaluation before the Subcommittee proceeds in making any rule amendment recommendations. In particular, several of the enumerated triggers would create new and unworkable burdens on the federal government, and the sanctions language under consideration would not result in the consistency or predictability sought.

1. Trigger Issues

There are several, specific triggers in the potential rule language that cause the Department great concern. An agency would expend unnecessary resources, for example, if it were required to preserve information as to every "claim," regardless of its merit or credibility. Potential Rules 26.1(b)(1) and (b)(2) include triggers when there is a "document asserting a claim" and when there is "receipt of a notice of claim or other communication – whether formal or informal – indicating an intention to assert a claim." Communications are often sent to agencies that do not represent a reasonable threat of potential litigation. The mere receipt of a communication, without a requirement that it relay a reasonable or credible threat of litigation, could potentially drain resources and distract the government from its core missions.

Potential Rule 26.1(b)(4) would also add a new trigger and possibly chill the necessary use and retention of experts and attorneys. Experts and attorneys are often employed to analyze issues, and to develop or determine remedies outside the realm of litigation, regardless of whether or not litigation is reasonably anticipated. Potential Rule 26.1(b)(6) would add a new trigger of "knowledge of an event that calls for preservation under a person's own retention program." This trigger may cause the narrowing or elimination of retention programs.

Similarly, the Department is concerned about the "discussion of possible compromise of a claim" as a triggering event. In order to further settlement negotiations, these discussions should not trigger an obligation to preserve. In many situations, the United States is required to pursue settlement or alternative dispute resolution prior to bringing a suit, so as to lessen the burden and cost of litigation for all parties. A preservation rule including this pre-litigation trigger could undermine these valuable policy decisions.

2. Sanctions Issues

In regard to sanctions, the prospect of sanctions – both against a party and its lawyer – may encourage meritless claims and lead to wasteful ancillary litigation. As discussed earlier, sanctions are not frequently sought by litigants or awarded by the courts. A new rule may increase the frequency of

[14] *See* 18 USC § 1519 ("Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.").

sanctions motions as litigants consider new tactics available that may or may not advance the merits of a case.

Under potential Rule 37(g)(2), the requirement for "irreparable" or "substantial" prejudice may set too high of a burden of proof. It may be very difficult to show how information that is no longer available would have affected a case. With respect to potential Rule 37(g)(3)(D), the United States may often be presumed to have great resources in matters of litigation – even though this may not always be the case. The Department believes that proportionality and costs should be a consideration when determining sanctions. It is critical, however, that the actual resources of an agency that are designated for litigation be considered separate and apart from other governmental resources to avoid the misperception that an agency has all federal resources at its disposal.

Further, the rules currently allow parties and the court wide latitude for addressing whether and when sanctions are appropriate on a case-by-case basis. The Department is not aware of a greater need to codify or standardize sanctions rules for preservation conduct as opposed to sanctions, for example, for improper deposition conduct.

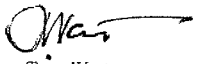
Finally, the Department questions whether a rule addressing only sanctions will achieve the goal of uniformity in the way sanctions are imposed. Even with a new sanctions rule, courts would likely maintain their inherent authority to sanction a party for preservation conduct,[15] thus continuing the development of case law involving spoliation sanctions – potentially with inconsistent results. Further, it is unclear how a new sanctions rule would interact with preservation and document retention requirements governed by statute, current case law, or party agreement. If a new rule merely supplements existing law, the conflicts between those sources of law may lead to additional, costly ancillary litigation. Given these uncertainties, a new sanctions rule may actually create more confusion and unpredictability for litigants.

Conclusion

In conclusion, the Department's preliminary view is that a Federal Civil Rule of Procedure addressing preservation of information and related sanctions may not be needed, that further analysis is required before any rule changes are suggested, and that the suggestions currently under consideration present substantial legal, policy, and operational concerns, particularly for the federal government. The Department, therefore, respectfully requests that the Subcommittee make no rule change recommendation to the Rules Committee at this time.

The Department looks forward to continuing to assist the Subcommittee and Rules Committee in conducting this important legal and factual analysis.

Respectfully submitted,



Tony West
Assistant Attorney General

[15] *See Chambers v. Nasco, Inc.*, 501 U.S. 32, 49-50 & n.14 (1991) (discussing the inherent authority of federal court to sanction a litigant for bad-faith conduct and explaining that "the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct.").

Mr. NADLER. Thank you.

The Committee on Rules of Practice and Procedure of the Judicial Conference also sent a letter to the Subcommittee for this hearing. And I ask that a copy of that letter be included in the record as well.

Mr. FRANKS. Without objection.

[The information referred to follows:]

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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December 9, 2011

Honorable Jerrold Nadler
Ranking Member
Subcommittee on the Constitution
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Representative Nadler:

We understand that the Subcommittee on the Constitution is holding a hearing on December 13 to address "The Costs and Burdens of Civil Discovery." On behalf of the Judicial Conference's Committee on Rules of Practice and Procedure (the "Standing Rules Committee") and the Advisory Committee on Civil Rules (the "Advisory Committee"), we write to provide you an update on the Advisory Committee's work on reducing the costs, burdens, and delays of discovery in civil cases and request that it be made part of the record of your hearing. The Rules Committees understand that discovery is an important issue to all litigants, whether plaintiffs or defendants, and are closely examining ways to improve the current system. Thus, we understand the impetus for this hearing and look forward to learning additional facts it may develop on this important subject.

As the discussion below demonstrates, the Rules Enabling Act process for examining and addressing these concerns is already well underway. The Advisory Committee is taking a close look at discovery and other aspects of civil litigation to explore ways to reduce costs, burdens, and delays. We urge you to allow the Rules Committees to continue their consideration of these issues through the thorough, deliberate, and time-tested procedure Congress created in the Rules Enabling Act.

Preservation and Sanctions

The Advisory Committee is engaged in an extensive study of the difficulties facing litigants, courts, and third parties in dealing with issues related to preserving documents and information for litigation and the related issue of the sanctions imposed when preservation obligations are not met. In May 2010, the Committee hosted a conference on civil litigation at Duke University (the "2010 Conference") to examine ways to address costs and delays in the federal civil justice system. The Conference gathered over 200 judges, lawyers, in-house counsel, state judges, and nonprofit organizations to consider the state of the civil justice system. The Conference had numerous panels devoted to particular topics. The panelists, as well as many other organizations, submitted empirical data and papers on a variety of topics relating to the civil justice system.[1] A significant amount of the work of the 2010 Conference was devoted to electronic discovery. The Conference resulted in a strong recommendation that the Advisory Committee consider ways to provide more clarity and guidance on preservation obligations and spoliation sanctions through changes to the Federal Rules of Civil Procedure. As a result, the Committee and its Discovery Subcommittee have been closely examining potential rule amendments. The Discovery Subcommittee began work on preservation immediately after the 2010 Conference and has met repeatedly over the past year and a half to focus its work on this issue.

The Subcommittee commissioned research into how federal courts throughout the country are addressing triggers for the preservation of electronic information, the scope of the preservation obligation, and sanctions for the failure to preserve such information.[2] The Subcommittee asked the Federal Judicial Center ("FJC") to conduct empirical research on motions for federal court sanctions based on allegations of spoliation of evidence.[3] The Subcommittee also commissioned research on statutes, regulations, and rules requiring preservation at the national, state, and local level, to assist in its examination of how other preservation obligations might interact with obligations imposed by courts and potential rule amendments.[4]

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[1]The empirical data and papers submitted for the 2010 Conference are available at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DukeWebsiteMsg.aspx.

[2]The research is summarized in a long memorandum available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Case_Law_on_Potential_Preservation_2011-11.pdf.

[3]The results of the FJC study are available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Empirical_Data/Federal%20Judicial%20Center.pdf.

[4]The results of the research are summarized in a memorandum available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Laws%20Imposing%20Preservation%20Obligations.pdf.

In September of this year, the Subcommittee hosted a one-day conference in Dallas, Texas, to further examine possible rulemaking responses to preservation and spoliation sanction issues. The Subcommittee invited about 25 participants, including in-house counsel, plaintiff and defense lawyers, academics, judges, and technology experts, to provide their views on these issues. The Subcommittee circulated ideas for possible rule amendments in advance of the conference to focus the conversation on possible solutions to current preservation burdens. The Subcommittee received very valuable input at the Dallas conference. The Subcommittee also received, and continues to receive, written commentary and proposals from participants and other organizations interested in these issues.[5]

At the Advisory Committee's recent meeting on November 7 and 8, 2011, the Subcommittee solicited the views of the full Committee on whether and how to proceed with rulemaking efforts to address preservation issues. The agenda materials included a 31-page report from the Subcommittee, charts summarizing case law from around the country on relevant issues, minutes of the Dallas conference and discussions of the Subcommittee, and 13 submissions from corporations and organizations on the issues being addressed by the Subcommittee.[6] A large number of observers, including some congressional staff, attended the Committee meeting. The discussion was robust. The Subcommittee will continue to consider both providing detailed guidance on preservation obligations and providing more clarity on sanctions, as well as other rulemaking possibilities for addressing preservation concerns. The Subcommittee plans to present a recommendation on how to proceed at the next Advisory Committee meeting, scheduled for March 22 and 23, 2012.

Committee Work on Litigation Costs

Another subcommittee formed after the 2010 Duke Conference (the "2010 Conference Subcommittee") is addressing other proposals for reducing costs in civil litigation. This Subcommittee is considering possible rulemaking approaches, as well as other means for addressing costs and efficiency concerns, such as judicial education, lawyer education, revisions to the *Benchbook for U.S. District Court Judges*, and guides to "best practices." The FJC has already undertaken several projects to emphasize the advantages of active case management in reducing litigation time and expense.

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[5]All of the written materials that were prepared by the Subcommittee and considered at the September conference, as well as submissions received by the Advisory Committee, are posted on the federal rulemaking website at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx.

[6]The full agenda materials are available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf. The materials considered by the Committee in connection with its discussion of preservation issues can be found at pages 53–469 of the pdf file.

Empirical work also continues to be done to build on the work undertaken for the 2010 Conference. The FJC has concluded the first phase of work on the impact of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), on federal pleading practice,[7] and is continuing work on a second phase of that project.[8] The FJC is also examining the frequency and timing of initial case-management orders.[9] Another project on discovery conferences conducted under Civil Rule 26(f) is expected to begin early next year. Other organizations are also conducting empirical research on the costs of discovery, and the Subcommittee will be considering the results of their work.

The 2010 Conference Subcommittee, together with the FJC, is also gathering information on pilot projects being conducted in federal courts around the country. These include a pilot project in the Southern District of New York on managing complex cases more efficiently, a project in the Seventh Circuit on reducing the complexity of electronic discovery, and an expedited trial program adopted in the Northern District of California.

The 2010 Conference Subcommittee has worked with a group of plaintiffs' and defense lawyers to develop a set of standard discovery requests that should significantly streamline the discovery process in employment cases. Such cases are a significant part of federal district court dockets.[10] The protocols were presented at the Advisory Committee's meeting and will be offered as a model for adoption by individual judges around the country. Experience in those courts may encourage more general adoption and may inspire other groups to develop similar discovery protocols to simplify and reduce the cost of discovery in federal civil litigation.

The 2010 Conference Subcommittee is examining the possibility of several rulemaking responses to concerns about costs and delays in civil litigation. Many proposals are currently being considered, including reducing the amount of time before a scheduling order is entered; emphasizing cooperation among the parties in the rules; giving even greater emphasis to proportionality limits on discovery; implementing methods to avoid evasion in responding to discovery; setting presumptive limits on certain types of discovery; and implementing a pre-motion conference with the court before discovery motions are filed. The Subcommittee has

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[7]The FJC's first report on motions to dismiss after *Iqbal* is available at http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf.

[8]The FJC's report with an update on its study of motions to dismiss after *Iqbal* is available at http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/$file/motioniqbal2.pdf.

[9]The FJC's report on the timing of scheduling orders and discovery cut-off dates is available at http://www.fjc.gov/public/pdf.nsf/lookup/leetiming.pdf/$file/leetiming.pdf.

[10]*See* SEAN FARHANG, THE LITIGATION STATE 3 (2010) ("Next to petitions by prisoners to be set free, job discrimination lawsuits are the *single largest category* of litigation in federal courts.").

Honorable Jerrold Nadler
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asked the Advisory Committee's reporters to draft rule language so the Subcommittee can consider concrete approaches. The Subcommittee continues to actively solicit suggestions for other innovative ways to make pretrial litigation more efficient and effective.

The Advisory Committee discussed these efforts at its recent meeting.[11]

Conclusion

The Advisory Committee is examining the issue of cost reduction in civil litigation in great detail. Any rulemaking proposals will go through the full Rules Enabling Act process, including publication for public comment and review by the Standing Rules Committee, the Judicial Conference, the Supreme Court, and Congress. This multi-layered process ensures the thorough evaluation of proposals to address problems in litigation, while reducing the possibility of unintended consequences.

We appreciate your consideration of the Rules Committees' current work in this area. We will continue to pursue the goal, as stated in Rule 1 of the Federal Rules of Civil Procedure, of securing the just, speedy, and inexpensive determination of every action in federal court. If you or your staff have any questions, please contact Jonathan Rose, Rules Committee Officer, Administrative Office of the United States Courts, at 202-502-1820.

Sincerely,

Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Committee on Rules
of Practice and Procedure

David G. Campbell
United States District Judge
District of Arizona
Chair, Advisory Committee
on Civil Rules

Identical letter sent to: Honorable Trent Franks

[11] The portion of the November 2011 Committee agenda materials that relate to the 2010 Conference Subcommittee's work can be found at page 567–622 of the materials located at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf. An addendum to the materials is available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/Tab%20VI%20Appendix%20F%20SDNY%20Pilot%20Project%20for%20Complex%20Litigation.pdf.

Mr. NADLER. Thank you. The Judicial Conference is the body that Congress has charged with responsibility for making rules governing "practice, procedure and evidence" in the Federal courts and, as explained in its letter to the Subcommittee, the "process for examining and addressing concerns [regarding the costs, burdens, and delays of discovery in civil cases] is already well underway."

The Judicial Conference Advisory Committees have conducted empirical research, reviewed existing statutes, regulations, and rules to assess how potential changes would interact with existing

obligations, and have sought input from hundreds of judges and lawyers.

In light of the considerable work that has and will continue to be done, the Judicial Conference's rules advisory committee, "Urges us to allow the Rules Committee to continue their consideration of these issues through the thorough, deliberate, and time-tested procedure Congress created in the Rules Enabling Act."

Through this same process, we recently amended the civil discovery rules to address concerns about the increased costs and burdens of electronic discovery. Those amendments were made in 2006, a mere 5 years ago, and they emphasize greater coordination and cooperation among lawyers and parties to lawsuit driven by increased court oversight and management.

Through these amendments, litigants can take advantage of the fact that existing rules require consideration of whether the costs of discovery outweighs potential benefits.

Indeed, existing Federal Rules of Civil Procedure, 26(b)(2)(C) tells courts that they must limit discovery if, among other things, "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount of controversy, the partyies' resources, the importance of issues at stake in the action, and the importance of the discovery resolving the issues."

Existing rules already require proportionality, and early and consistent efforts by parties and the courts to manage discovery. Before anyone rushes to amend the rules, we should first make sure there is a clear need to do so.

I urge similar skepticism and exploration with regard to the claimed need to amend the rules to standardize preservation obligations or to revise discovery sanctions. The Justice Department is cautioning that language addressing these particular issues might, "Create new unworkable burdens on the Federal Government, and would not result in the consistency or predictability sought."

While the need for revision of the rule seems far from clear, the potential for significant and unlikely—I'm sorry—the potential for significant and likely unintended consequences, at perhaps a much greater cost, from making amendments is not.

Given that, I am particularly interested in learning from our witnesses today how the committees of the Judicial Conference who are studying these issues have responded to their concerns and any recommendations that they have made to that body.

With that, I yield back the balance of my time.

Mr. FRANKS. I thank the gentleman. I yield now to the distinguished Ranking Member of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you very much, Mr. Chairman.

We're here today to consider what could be a very important issue that concerns the Judicial Conference, the Federal Judicial Conference and the first question that has to arise is, they have been working on this for a considerable period of time, and on behalf of all those that are wondering why are they not scheduled as witnesses at this hearing on a subject matter that they have been working on longer than the Committee has, and so I would yield to our distinguished Chairman if he cares to respond to that part of my opening statement.

Mr. FRANKS. Mr. Conyers, we conferred with those—did you ask me to respond to your question, sir?

Mr. CONYERS. Yes.

Mr. FRANKS. Okay, I am sorry. I didn't want to—we did confer with some of those judges that they felt that a letter would be more appropriate since they were Article III judges, it wouldn't be appropriate for them to come to the Committee, just to clarify.

Mr. CONYERS. Well, then apparently their letter may not have been as persuasive upon you as they would have hoped that it would, because you determined to continue the hearings anyway.

Now, let's be clear about this, we're talking about the largest kinds of cases, civil cases, that we can have. These are the very large corporation cases, and I should report to you that the Federal Judicial Conference pointed out that less than one-tenth of 1 percent of the total number of cases would fit the requirements of what it is we're discussing here today. And, even so, that only a fraction of those one-tenth of 1 percent of the cases have the courts granted sanctions.

And so what we're talking about is a small handful of cases, and this suggests that this may have—this whole hearing may be based on some corporation insisting that they be heard about this matter, and it would seem to me, gathering this much evidence, is an indication of creating jobs, not costing jobs. And so it's, to me, a very interesting look inside the court procedures.

I think we have to remember that the Judicial Conference has been conducting themselves appropriately over the years, as far as I am concerned. Their recommendations, if any, could have come out from the Civil Rules Committee in—next spring. The Standing Committee of the Judicial Conference could have approval by the summer of next year. It would go to the full Judicial Conference in the fall, September of next year, then to the Supreme Court the end of the year. And then it would then go to the Congress in the summer of June, 2013, and we in the Congress—I am trusting that all of the Members, including myself, will be back in June of 2013—in which time we would have 6 months to approve or disapprove the recommendations of the conference committee.

Now, I want to ask the witnesses, the distinguished witnesses that will appear before us, and the Members of the Subcommittee, what's wrong with this timeline and why are we complaining about this when it is not a confidential or secret matter, and we could get this with another letter.

So I approach this hearing with the kind of skepticism that has been voiced in my opening statement, and I thank the Chairman.

Mr. FRANKS. And I thank the gentleman for his opening statement.

And now, without objection, other Members' opening statements will be made part of the record and I would invite the witnesses to come forward and be seated at the table. I want to welcome all of you again here this afternoon.

Our first witness is Rebecca Love Kourlis. She is a former justice of the Colorado Supreme Court. She is now the Executive Director of the Institute for the Advancement of the American Legal System at the University of Denver. One of the areas in which the Insti-

tute works is its rule 1 initiative, which seeks to make the civil justice system more accessible, efficient and accountable.

Our second witness, Professor William Hubbard, is an Assistant Professor of Law at The University of Chicago Law School. Professor Hubbard holds both a J.D. and a Ph.D. in economics from The University of Chicago. Professor Hubbard's current research primarily involves economic analysis of litigation, courts and civil procedure, including conducting empirical research on the costs of electronic discovery.

Our third witness, William Butterfield, is a partner and the chair of the financial services practice group at Hausfield, LLP, in Washington, D.C. Mr. Butterfield is on the steering committee of The Sedona Conference Working Group on Electronic Document Retention and Production, nice short name, Mr. Butterfield. Mr. Butterfield is also an adjunct professor at American University where he teaches a course in electronic discovery. He is on the faculty of Georgetown University Law Center's Advanced E-Discovery Institute.

And our fourth and final witness, Thomas Hill, is the Associate General Counsel For Environmental Litigation and Legal Policy at General Electric Company. Over his 20-year career at GE, Mr. Hill has managed some of the company's most complex litigation and gained first-hand experience of the costs and burdens of civil discovery. Prior to joining GE, Mr. Hill practiced law in Michigan.

And welcome again to all of you. Each of the witnesses' written statements will be entered into the record in its entirety. I would ask that each witness summarize his or her testimony in 5 minutes or less. And to help you stay within that timeframe, there is timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that the witness' 5 minutes have expired.

So before I recognize the witnesses, it is the tradition of this Subcommittee that they be sworn, so if you would please stand.

[Witnesses sworn.]

Mr. FRANKS. Thank you. Please be seated. I would now recognize our first witness, Justice Rebecca Kourlis, for 5 minutes.

TESTIMONY OF REBECCA LOVE KOURLIS, EXECUTIVE DIRECTOR, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, UNIVERSITY OF DENVER

Ms. KOURLIS. Mr. Chairman.

Mr. FRANKS. Pull that microphone to you, Ms. Kourlis, just a little closer and then push the button.

Ms. KOURLIS. Down?

Mr. FRANKS. Yes.

Ms. KOURLIS. There we go, thank you very much.

Thank you for the opportunity to be here and for your interest in this subject.

As a trial court judge in Colorado, and a member of the Colorado Supreme Court, and now as the executive director of IAALS at the University of Denver, I have become increasingly concerned about the functioning of the civil justice system.

Over the three decades of my involvement on every side of the bench, it has become more and more expensive and, accordingly, in-

accessible and mistrusted. As you have heard, one of the areas of focus for IAALS is, indeed, the civil justice process. We have done surveys, conducted legal research and docket studies. We have convened groups of stakeholders, including the American College of Trial Lawyers' Task Force, which consists of plaintiff and defense attorneys, and we have promulgated recommendations for change.

The bottom line in what we have learned is reflected in the title of this hearing. The civil justice system in the United States is too expensive and too complex. A lawsuit takes too long and costs too much, and this is not just about big cases. Recent studies show that attorneys will not even take a case unless there is at least $100,000 at issue and lawsuits do, indeed, frequently settle for reasons related to the costs of litigation, not the merits of the lawsuit.

As you will hear in more detail from other witnesses, the advent of the electronic age has, indeed, added a whole new layer of complexity and corporate counsel will say that if a case involves $2 to $3 million in legal fees, electronic discovery can easily add another 2 to 3 million.

Civil jury trials have all but vanished, and that's a very bad thing. The involvement of citizens in the court system, both infuses common sense and provides another check and balance. The culprit seems to be, to some significant extent, the way in which the pretrial process unfolds.

All of us here at this table and most of the bench and bar across the country, share a commitment to the preservation and realignment of the system. I would venture to say all of us would say that the goal of the pretrial process is to protect the search for the truth, but in a way that keeps the doors of the courthouse and the jury box open, a way that maintains certainty, efficiency and fairness, and these are not inconsistent goals.

The solutions to these problems that are being addressed across the country and that you will hear addressed here today generally fall into three categories, rules changes, more effective judicial case management and cooperation among attorneys during the discovery phase of the trial. IAALS supports all three, the need for early judicial intervention, attentive and astute case management by judges, the need for cooperation and professionalism among counsel.

However, it is IAALS' view that real change will only be institutionalized if it is accompanied by rules changes. Otherwise, it runs the risk of being episodic courtroom by courtroom or case by case.

The Standing Committee and the Civil Rules Advisory Committee are struggling with these issues. The mandate of the judicial conference and the court is, indeed, to assure that the system is truly just, speedy and inexpensive. This is a problem that is bigger than a preservation rule.

Some of the steps that the Judicial Conference will need to take to meet the goal of a just, speedy and inexpensive system will require courage and leadership. All of us defer to the Judicial Conference in that role, but all of us have a stake in the outcome far beyond the application of civil cases filed in Federal courts. It is not an overstatement to say that the public trust and confidence in the system is at stake.

Our system must work for plaintiffs and defendants alike, it must be accessible and efficient. Our social contract depends upon it.

Thank you.

Mr. FRANKS. Thank you, Justice Kourlis.

[The prepared statement of Ms. Kourlis follows:]

WRITTEN STATEMENT
Of

Rebecca Love Kourlis
Executive Director
Institute for the Advancement of the American Legal System
University of Denver

on "The Costs and Burdens of Civil Discovery"
December 13, 2011

Before the
Subcommittee on the Constitution
Committee on the Judiciary
United States House of Representatives

DISCOVERY: The Scope of the Problem, and Role of Rules

I. Overview

Chairman Franks and Ranking Member Nadler. My name is Rebecca Love Kourlis. I am a former Colorado Supreme Court justice and trial judge, and currently the Executive Director of IAALS, the Institute for the Advancement of the American Legal System at the University of Denver. IAALS is a national, independent and non-partisan research center that develops research, convenes stakeholders and proposes solutions for problems associated with the civil justice system in the United States. IAALS has undertaken significant research on the costs, delays and gamesmanship that plague the civil litigation process, and it is from that research that this statement derives. Thank you for convening these hearings and for inviting my testimony.

II. Summary

- In 1938, the Federal Rules of Civil Procedure were launched: the drafters' intent was to ensure that litigants could get into court easily at the front end, and then gain access to information from the other side that would allow them to go to trial without fear of being ambushed. The initial model for discovery was to provide litigants with a panoply of different tools that they could use to obtain information, with no thought that in every case every litigant would use every tool.

- The overarching commitment of the rules from the onset has been to a "just, speedy and inexpensive" system. However, recent national studies confirm that discovery has become a punishingly expensive process for both plaintiffs and defendants alike, and is frequently <u>not</u> proportional to the dispute at issue.

- The advent of the electronic age, with the profusion of electronic data, has created new challenges for the discovery model, and has 'upped the ante' significantly for parties to many lawsuits. It has highlighted and accelerated the need for change.

- There is a growing consensus that change is required. The system cannot continue to function as it has. Over 77 percent of attorneys (over 90 percent for general counsel) surveyed nationwide[1] agree that the system has become too expensive. Electronic discovery ("e-discovery") costs are part of the problem, and they can dwarf even attorneys' fees, particularly in a business case. Three out of four attorneys[2] believe that discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of e-discovery. Over 80 percent of respondents to nationwide surveys of attorneys and general counsel indicated that costs drive cases to settle for reasons unrelated to the merits.[3]

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[1] As part of the American College of Trial Lawyers ("ACTL") survey, American Bar Association ("ABA") Section of Litigation survey, National Employment Lawyers Association ("NELA") survey and Civil Litigation Survey of Chief Legal Officers and General Counsel belonging to the Association of Corporate Counsel ("general counsel survey").
[2] In the ACTL and ABA surveys.
[3] ACTL Fellows: 83 percent; ABA Litigation: 83 percent; general counsel: 81 percent.

- The costs of discovery are impacting access to the courts. Surveys of attorneys suggest that for an attorney to take a case, at least $100,000 must be at issue—otherwise it is not cost-effective.[4] A small business owner with a defaulted payment on delivery of goods may simply be out of luck because the costs of litigation would leave him with a judgment that has cost more to obtain than the amount of the original debt. Again, this is a problem that negatively impacts both defendants and plaintiffs.

- There are differing opinions as to the solutions to these problems. Generally, the proposals fall into three categories: suggestions for rules changes (both pinpoint and systemic); suggestions for enhanced management of cases by judges to control costs and delay and keep the case on track; and suggestions for cooperation among attorneys to defuse the 'Rambo-esque' style of litigation that runs up both tempers and tabs. The ultimate answer is quite likely a combination of all three.

- It is IAALS' view that rules changes must comprise part of the solution. The Federal Rules of Civil Procedure create the bounds within which judges manage cases and within which attorneys shape their decisions and actions. Rules play a fundamental role in controlling over-processing of cases and the current rules scheme is not living up to this role. Preservation is an example of the need for rules reform—but certainly not the only example.

- The responsibility for rules rests with the federal courts. Congress has authorized the federal judiciary to prescribe the rules of practice, procedure and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify or defer any of the rules. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act.[5] The federal judiciary undertakes that responsibility through the Judicial Conference of the United States, which oversees the operation of the general rules of practice and procedure.[6] As part of this continuing obligation, the Judicial Conference is authorized to recommend amendments and additions to the rules to promote:
    - simplicity in procedure,
    - fairness in administration,
    - the just determination of litigation, and
    - the elimination of unjustifiable expense and delay.

- The Judicial Conference acts through the Committee on Rules of Practice and Procedure, commonly referred to as the "Standing Committee."[7] There are five advisory committees that make recommendations to the Standing Committee, one of which is the Civil Rules Advisory Committee. Standing Committee recommendations go to the Judicial Conference, which recommends changes to the Supreme Court, which in turn promulgates rules amendments with which it agrees, subject to a layover period to allow Congress to take whatever action it wishes.

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[4] This was the most commonly cited threshold in the ACTL, ABA and NELA surveys.
[5] 28 U.S.C. §§2071-2077 (2011).
[6] 28 U.S.C. §331 (2011).
[7] 28 U.S.C. §2073(b).

- The Standing Committee and the Civil Rules Advisory Committee have acknowledged the problems associated with the costs of discovery and are evaluating solutions. In fact, the 2010 Civil Litigation Conference at Duke University School of Law with its express focus on exploring the current costs of civil litigation, particularly discovery, and discussing possible solutions was an unprecedented step toward building the momentum necessary for systemic change. Subsequent conferences, such as the Mini-Conference on Preservation and Sanctions, and Civil Rules Advisory Committee meetings have continued to focus on possible rules changes designed to address those problems.

- One of the issues hampering the movement toward rules changes is disagreement about the scope and magnitude of the problem.[8] The Standing Committee and the Civil Rules Advisory Committee are collecting information and input that will enable them to make decisions about fundamental changes to the rules.[9] However, with respect to preservation—the specific focus of this hearing—significant empirical data already support the need for a preservation rule.[10]

- The Standing Committee is the appropriate forum for the discussion, both the immediate and the long-term discussion, but it is a discussion in which all of us have a legitimate and significant stake—as this hearing demonstrates.

III. Background on the Federal Rules of Civil Procedure

At the turn of the twentieth century, American civil procedure was confusing at best, chaotic at worst. An attorney practicing in one state had to learn the procedural rules for state actions in equity, federal actions in equity, and federal and state actions at law.[11] In many states, procedure was further complicated by the formalistic requirements of the Field Code[12] under which parties were

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[8] The Federal Judicial Center undertook a closed-case study, which concluded that the costs of discovery were really not as much of a concern as predicted. However, the study did not separate out the cases in which discovery did not occur at all—either because of early resolution, or as a cost-avoidance measure. And, as Professor William Hubbard demonstrates, litigation costs "are highly skewed, with a long tail in which a small number of highly complex and burdensome cases account for a large share of the total costs." *The Costs and Burdens of Civil Discovery: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 7 (2011) (statement of William H.J. Hubbard, Assistant Professor of Law, Univ. of Chi. Law Sch.).

[9] There are various pilot projects underway across the country that are testing possible solutions to some of the broader discovery and civil litigation problems. Data are being collected from those projects by the National Center for State Courts, the Federal Judicial Center and IAALS.

[10] *See* FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 12-14 (rev. Apr. 15, 2009), *reprinted in* 268 F.R.D. 407, 420-422 (rev. Apr. 15, 2009). The *Final Report* is attached at the end of this written statement. *See also* CIVIL JUSTICE REFORM GROUP, LAWYERS FOR CIVIL JUSTICE & U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, LITIGATION COST SURVEY OF MAJOR COMPANIES (2010) (submitted for presentation to the Committee on Rules of Practice and Procedure at the 2010 Conference on Civil Litigation); U.S. COURTS, DALLAS CONFERENCE ON PRESERVATION/SANCTIONS (9/9/11), http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx (last visited Nov. 14, 2011).

[11] Thomas O. Main, *Reconsidering Procedural Conformity Statutes*, 35 W. ST. U. L. REV. 75, 89-94 (2007).

[12] Pleading of the facts constituting the cause of action, complicated joinder of parties and extremely limited discovery. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in*

required, in order to plead a cause of action, to set out specific facts supporting each element of a cause of action at the outset. The rigidity of the pleading requirements prompted widespread concern that meritorious claims were being dismissed on the basis of procedural technicalities. These concerns and the complexity of the state and federal civil procedure scheme in general, led to increased demand for simple, uniform rules of federal civil procedure. The Rules Enabling Act of 1934 paved the way for this development by empowering the Supreme Court to promulgate general rules of procedure, thereby streamlining the rulemaking process.[13] An Advisory Committee appointed by the Supreme Court spent 18 months drafting the Federal Rules of Civil Procedure ("FRCP") which went into effect on September 16, 1938.

The gist of the new procedural scheme was relatively straightforward: the plaintiff would initiate the case with a short and plain statement sufficient to put the defendant on notice of the nature of the claim and the parties would engage in discovery to collect information relevant to the claims before trial and thus avoid any surprises once trial began. The new rules, therefore, did away with the rigid pleading requirements of the Field Code by fashioning "a system in which initial access to the courthouse would be virtually guaranteed."[14] Under the FRCP, the defendant would have opportunities to test the nature of the plaintiff's claims before trial, either at the pleading stage (Rule 12) or at the summary judgment stage (Rule 56). If disputed issues of material fact remained, the case would proceed to trial for resolution.

The FRCP were by most measures a good fit for the civil litigation climate of the 1940s and 1950s. Transcontinental travel was a rare luxury and most cases were handled exclusively by local counsel. Discovery was necessarily limited because computers, copy machines and email were not yet a part of daily life. And major categories of substantive litigation, such as class actions, mass tort litigation and civil rights litigation had not yet appeared in any significant volume. Under these conditions, and especially in comparison to the complicated system that preceded it, the new procedural scheme was largely embraced by the legal community and during this period many states incorporated the FRCP, in whole or in part, into their own procedural codes.

IV. Modern Challenges

Many of the problems with the FRCP today have been tied to discovery and as early as 1968, studies were being undertaken to explore the relationship between discovery practices and cost increases in civil litigation.[15] The process exploded in the 1970s when the volume of available information and

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Historical Perspective, 135 U. PA. L. REV. 909, 939-40 (1987); *see also* Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision,* 6 LAW & HIST. REV. 332, 328-33 (1988). Twenty-seven states copied the Field Code. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 696 (1998).

[13] In 1911, Thomas Shelton, the Chairman of the ABA Committee on Uniform Judicial Procedure, and Henry Clayton, Chair of the House Judiciary Committee, made an initial attempt to pass the bill. Although unsuccessful, proponents (including then-Chief Justice William Howard Taft) launched a successful redrafting effort in 1923 and a version similar to this 1923 draft became the Rules Enabling Act of 1934. *See* Jay Tidmarsh, *Pound's Century and Ours,* 81 NOTRE DAME L. REV. 513, 513 (2006); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1045-73, 1097 (1982).

[14] Rebecca Love Kourlis et al., *Reinvigorating Pleadings*, 87 DENV. U. L. REV. 245, 245 (Winter 2010).

[15] *See* WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM (1968) (presenting the findings of the Columbia Law School's Project for Effective Justice).

the scope of permitted discovery both expanded simultaneously and, in at least some cases, this convergence led to skyrocketing costs, over-discovery and discovery abuse.

The first proposed solution was greater judicial case management[16] and amendments to the FRCP in the 1980s and early 1990s provided for increased judicial control over discovery practices.[17] Beginning in the early 1990s and through to 2000, amendments to the FRCP included limits on the methods and scope of discovery[18] and provided for the front-loaded exchange of information through initial disclosures.[19]

Technological developments of the past decade, while making our lives more efficient in many respects, have exacerbated the problems of cost and delay in the discovery process. The parabolic growth of electronically stored information ("ESI") generated by e-mails, text messages, instant messages, voice mails, websites, call logs, word processing documents and digital photos has exponentially increased the amount of information that must be unearthed in the discovery process during the course of a lawsuit. The FRCP were amended in 2006 to respond to some of the issues generated by ESI but problems remain.

The history of rules amendments since 1970, therefore, is largely a history of trying to put the discovery genie back in the bottle, first by increasing judicial control over case management, then by limiting the methods of available discovery, then by mandating disclosures at the outset of the case and most recently, by addressing issues specific to the discovery of ESI. In fact, the discovery rules have been amended more frequently than any others,[20] yet widespread concerns and complaints persist.

V. The Data

These concerns have come to a head in recent years and rule makers, practitioners and academics alike have turned their attention to a comprehensive assessment of the state of the civil justice system, involving significant empirical research to pinpoint problems and examine solutions. In May 2010, at the request of the Standing Committee, the Civil Rules Advisory Committee held a two-day conference at the Duke University School of Law "designed as a disciplined identification of litigation problems and exploration of the most promising opportunities to improve federal civil

[16] Calls for increased judicial management began in earnest with a series of Federal Judicial Center studies in the late 1970s that found that the use of court management techniques could help keep discovery under control and decrease time to resolution for a case. STEVEN FLANDERS ET AL., CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS (1977); PAUL R. CONNOLLY ET AL., JUDICIAL CONTROLS AND THE CIVIL LITIGATION PROCESS: DISCOVERY (1978).

[17] FED. R. CIV. P. 26(f) cmt. background (1980); FED. R. CIV. P. 16 cmt. background (1983); FED. R. CIV. P. 16 cmt. background (1993).

[18] FED. R. CIV. P. 30 cmt. background (1993); FED. R. CIV. P. 33 cmt. background (1993); FED. R. CIV. P. 26 cmt. background (2000).

[19] In 1993, provisions requiring parties to disclose certain information relevant to the case without waiting for a discovery request were introduced in optional format. These provisions were made mandatory in 2000. FED. R. CIV. P. 26 cmt. background (2000).

[20] Report from the Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure to the Chief Justice of the United States on the 2010 Conference on Civil Litigation 1 (2010) [hereinafter Report to the Chief Justice on the 2010 Conference].

litigation."[21] Submissions to the 2010 Conference on Civil Litigation (also referred to as the Duke Conference) included numerous white papers issued by national organizations, groups and prominent lawyers and an unprecedented amount of empirical studies and data.
For example, in 2008, the Joint Project of the American College of Trial Lawyers ("ACTL") Task Force on Discovery[22] and IAALS surveyed attorney Fellows of the ACTL. To expand the pool of views and gather comparative data, IAALS supported the Federal Judicial Center's ("FJC") administration of similar surveys of members of the American Bar Association ("ABA") Section of Litigation and members of the National Employment Lawyers Association ("NELA").[23] IAALS partnered with Northwestern University School of Law's Searle Center on Law, Regulation, and Economic Growth ("Searle Center") to gain the judicial perspective by administering a survey to state and federal judges, and IAALS surveyed general counsel to capture the company/litigant experience. The FJC conducted a closed-case study of federal civil cases that terminated in the last quarter of 2008 and the Searle Center administered a survey of Fortune 200 companies regarding litigation costs.

This list is not exhaustive and indeed has expanded. The Duke Conference highlighted priority areas, among which were preservation and spoliation of electronically stored information.[24] In pursuit of further discussion on preservation and sanctions, the Discovery Subcommittee of the Civil Rules Advisory Committee held a mini-conference on preservation and sanctions (also referred to as the Dallas Conference). In advance of the mini-conference, the FJC studied motions for sanctions based upon spoliation of evidence in civil cases and RAND Corporation's Institute for Civil Justice reported preliminary results of research into costs associated with pretrial discovery of ESI. Numerous comments were submitted, many of which suggested proposed rules. Empirical work continues, building on the studies prepared for the Duke and Dallas Conferences.

From the empirical studies and data already developed, broad themes have emerged, many of which are troubling. According to an IAALS analysis, together, the ACTL Fellows, ABA Section of Litigation, NELA member and state and trial judge surveys "suggest a plausible theory: cost inefficiencies in the civil justice process reduce court access, delay contributes to unnecessary cost, and discovery procedure is a key factor with respect to both cost and delay."[25]

With respect to cost, the ACTL, ABA and NELA surveys asked respondents to evaluate whether "[l]itigation is too expensive" (i.e., relative to what it ought to cost) and more than three out of four attorneys in every group expressed agreement with this statement.[26] Ninety-seven percent of general counsel surveyed agreed that the system is too expensive, with 78 percent of respondents expressing strong agreement.[27] Agreement with this statement tended to become stronger as the geographic scope of the respondent company increased, from 92 percent for local companies to 98 percent for multinational companies.[28] Over 80 percent of respondents to both the ABA and NELA surveys

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[21] *Id.*
[22] Now the Task Force on Discovery and Civil Justice.
[23] Report to the Chief Justice on the 2010 Conference, *supra* note 20, at 2.
[24] *Id.* at 12.
[25] CORINA GERETY, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, EXCESS & ACCESS: CONSENSUS ON THE AMERICAN CIVIL JUSTICE LANDSCAPE 2 (2011).
[26] ACTL Fellows: 85 percent; ABA Litigation: 81 percent; NELA Members: 77 percent.
[27] INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL 17-18 (2010).
[28] *Id.* at 18.

indicated that litigation costs are not proportional to the value of a small case (i.e., small amount in dispute). The ACTL and general counsel surveys did not distinguish between small and large cases, but in both surveys majorities[29] indicated agreement that litigation costs are not proportional to case value. A majority of respondents to the general counsel survey reported that the cost of pretrial litigation for a typical company has increased, as has the total yearly cost of pretrial litigation.[30]

The discovery process plays a key role in generating cost and delay. The FRCP's structure does not always promote early identification of issues, which often leads to a lack of focus in discovery. Further, the discovery rules provide for virtually unlimited discovery, unless and until the court says otherwise, which occurs far less frequently than one would hope. At least 70 percent of respondents to the ACTL, ABA and NELA surveys expressed agreement with the statement that "[d]iscovery is too expensive,"[31] demonstrating a widespread belief that discovery is more costly than it needs to be. Respondents to the FJC closed-case study were asked to rate how "the costs of discovery to your side in the named case compare to your client's stakes."[32] A majority of respondents indicated costs were "just the right amount" in relation to the stakes and in a sizeable minority of cases (23 percent for plaintiffs and 27 percent for defendants) attorney respondents deemed discovery costs too high in relation to the stakes.[33] The FJC study concluded that litigation "costs appear to be proportionate to the monetary stakes" for most cases within the federal system[34]—to which we should be asking whether success in most cases is good enough.

With respect to delay, the ACTL, ABA and NELA surveys asked respondents to identify one "primary cause of delay in the litigation process" and in all three surveys, attorneys identified the "time required to complete discovery" as the primary cause, over any other single cause.[35] Respondents to the IAALS/Searle Center survey of state and federal trial court judges asked a slightly different question, but with a generally consistent result. Judges were permitted to select multiple causes of "significant" delay, and requested to rank the causes selected on a scale from one (most significant) to five (least significant). Over 80 percent of trial judges identified the time required to complete discovery as a significant cause of delay[36] and this cause ranked the highest in significance.[37]

When asked to provide "the percentage of total expenses and time spent … in connection with discovery (including discovery motions and other discovery related disputes)" in "typical cases that do not go to trial," the aggregate responses in the ACTL, ABA and NELA surveys were nearly identical. Half of respondents reported that discovery consumes at least 70 percent of expenditures in cases that are not tried; on average, respondents reported that two-thirds of expenditures are

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[29] Sixty-nine percent and 88 percent; respectively.
[30] IAALS, CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL, *supra* note 27, at 16.
[31] ACTL Fellows: 87 percent; ABA Litigation: 82 percent; NELA Members: 70 percent.
[32] EMERY G. LEE III AND THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER, NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 97 (Oct. 2009). Certainly, this rating will be affected by respondents' subjective judgments, views, beliefs, and attitudes.
[33] *Id.* 27-28, 97.
[34] Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 768 (2010).
[35] ACTL Fellows: 55 percent; ABA Litigation: 48 percent; NELA Members: 35 percent.
[36] State Judges: 82 percent; Federal Judges: 84 percent.
[37] State Judges: 1.8 average rank; Federal Judges: 1.7 average rank.

discovery related.[38] The ABA and NELA surveys went further and requested an assessment of total time and expenses that *should* be incurred in connection with discovery in such cases. Responses were again similar, and identified an appropriate level of discovery expenditures lower than the current level reported.[39] The consistency among these groups shows that attorneys believe there is room for improvement with respect to the time and cost required to complete discovery.

With respect to e-discovery, Fulbright & Jaworski L.L.P. reports that this issue emerged in 2005 as "the most troublesome new litigation challenge," cited by approximately one of every five respondents to the *Litigation Trends Survey*.[40] Respondents to the general counsel survey reporting an increase in pretrial litigation costs for the typical case most commonly cited discovery in general—e-discovery in particular—as the basis for this trend.[41] In Fulbright & Jaworski L.L.P.'s 2007 *Litigation Trends Survey*, more than 60 percent of U.S. and U.K. companies reported little change following the December 2006 e-discovery amendments; in fact, 27 percent of respondents thought the changes had "made the situation more difficult to deal with in federal litigation" and this sentiment was even stronger in mid-sized (31 percent) and larger (35 percent) companies.[42] In 2010, when asked to evaluate whether "the U.S. Rules of Civil Procedure Should Be Modified In Some Way to Limit Electronic Discovery in Civil Actions," 79 percent of all U.S. company respondents to the *Litigation Trends Survey* answered "yes."[43] With respect to sanctions, a majority of respondents to the general counsel survey disagreed that "motions for sanctions are a useful tool in responding to e-discovery abuse" although a majority did agree that "the threat of sanctions is a significant consideration in my company's e-discovery decisions."[44]

The cumulative effects of increasing cost and delay, and disproportionate discovery processes resulting in both, have had devastating consequences on the public's ability to access the civil justice system, and further threaten to undermine the public's confidence in the system. Attorney respondents to the ACTL, ABA and NELA surveys indicated that the cost-benefit analysis affects whether some parties can commence and maintain a civil action. Over 80 percent of attorneys in every group answered "yes" to the following question: "In general, does your firm turn away cases when it is not cost-effective to handle them?"[45] In all three surveys, $100,000 was the most commonly cited monetary threshold for not taking a case.

Survey results also suggest that some cases are settling primarily because of cost concerns. More than 80 percent of respondents to the ACTL, ABA and general counsel surveys and a majority of respondents to the NELA survey indicated that costs drive cases to settle for reasons unrelated to the merits.[46] These feelings were strongly held by those representing primarily defendants, although majorities of those representing primarily plaintiffs or representing both equally also indicated a direct causation between cost and settlement. In the FJC survey, 58 percent of defense lawyers and

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[38] ACTL Fellows: 70 percent median, 67 percent average; ABA Litigation: 70 percent median, 66 percent average; NELA Members: 70 percent median, 66 percent average.
[39] ABA Litigation: 50 percent median, 50 percent average; NELA Members: 50 percent median; 53 percent average.
[40] FULBRIGHT & JAWORSKI L.L.P., E-DISCOVERY FINDINGS FROM THE 2005-2010 FULBRIGHT & JAWORSKI L.L.P. LITIGATION TRENDS SURVEYS 3 (2010).
[41] IAALS, CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL, *supra* note 27, at 16.
[42] Notably, U.K. companies were more positive about the changes than their U.S. counterparts. FULBRIGHT & JAWORSKI, *supra* note 40, at 7, 78-79, 117.
[43] *Id.* at 213.
[44] IAALS, CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL, *supra* note 27, at 34.
[45] ACTL Fellows: 81 percent; ABA Litigation: 82 percent; NELA Members: 88 percent.
[46] ACTL Fellows: 83 percent; ABA Litigation: 83 percent; general counsel: 81 percent. NELA Members: 59 percent.

those representing both parties equally agreed that "[t]he cost of litigating in federal court, including the cost of discovery, has caused at least one of my clients to settle a case that they would not have settled but for that cost."[47] Those representing primarily plaintiffs were split, with 39 percent agreeing and 38 percent disagreeing.[48]

VI. Modern Solutions

In short, the various surveys suggest that the FRCP are not meeting the promise of Rule One: "These rules … should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Efforts to bring the rules—both the FRCP and state analogs—back in line with Rule One's goals are increasing. In 2009, the *Final Report on the Joint Project of the ACTL Task Force on Discovery and IAALS* set forth 29 Proposed Principles that the two organizations suggested "will ultimately result in a civil justice system that better serves the needs of its users."[49] Since their release, these Principles have been the subject of extensive discussions on rules-based changes and select Principles have been implemented in various forms in state courts across the nation where rules changes are being evaluated and measured.

The importance of rules and rules-based solutions cannot be understated. In a perfect world, judges, attorneys and the rules would all interact in a way that would ensure the maximum level of cooperation, fairness, efficiency and cost-effectiveness: the rules would be simple to understand, cost-effective and easy to follow, attorneys would be cooperative, professional and consistently follow the rules, and judges would consistently apply and enforce the rules in a way that ensures the just, speedy and inexpensive determination of the dispute. However, the civil justice system is not operating in such a manner and the rules play a primary role in both creating the problems and defining the solutions.

Too many attorneys believe they should—or must—take advantage of the full range of procedures available to them under the rules, and the FRCP do little to dissuade them from this view. The problem is especially acute with respect to the discovery rules. In fact, respondents to the ACTL, ABA and NELA surveys, and IAALS/Searle Center survey of state and federal trial court judges, generally hold attorneys more responsible for discovery inefficiencies than the litigants themselves. Overall, not more than one in ten respondents agreed with the statement that "[litigants], not attorneys, drive excessive discovery."[50] In too many cases, discovery has become an end in itself and the process does little, if anything, to promote the just, speedy and inexpensive determination of actions.

VII. Conclusion

Active and effective case management by judges and attorney professionalism and civility play a large role in this process, to be sure; however, judges cannot be forced to practice active case

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[47] LEE AND WILLGING, NATIONAL CASE-BASED CIVIL RULES SURVEY, *supra* note 32, at 72-73.
[48] *Id.*
[49] FINAL REPORT, *supra* note 10, at 1.
[50] ACTL Fellows: 11 percent; ABA Litigation: 11 percent; NELA Members: 6 percent; State Judges: 7 percent; Federal Judges: 7 percent.

management and attorneys cannot be forced to cooperate and/or act in a civil manner. At the end of the day, it is the rules that provide the structure within which judges and attorneys operate and it is the rules that create the expectations to which the players in the civil justice system are held. In order to avoid the expenditure of unnecessary time and money, either the rules—particularly those relating to discovery and providing judicial discretion to limit discovery—need to be much more strictly enforced or the rules need to be rewritten to achieve the same result. After decades of calls for increased case management, numerous rounds of rules amendments authorizing judges to play a greater role in the discovery process and arguably little progress to-date in reigning in discovery costs, relying solely on case management or cooperation to bring the process back in line with the needs of the users no longer seems a viable option.

The goal of rules in general is predictability and consistency. The specific goal of the FRCP is a just, speedy and inexpensive system. The FRCP neither create predictability and consistency nor serve justice, efficiency and cost-effectiveness. Accordingly, they must be changed: both with respect to e-discovery and preservation, and also more broadly—to serve all litigants and potential litigants.

ATTACHMENT

INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM
UNIVERSITY OF DENVER

Final Report

ON THE JOINT PROJECT OF

THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY

AND

THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM

March 11, 2009

Revised April 15, 2009

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The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.

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INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM

The Institute for the Advancement of the American Legal System (IAALS) at the University of Denver was the brainchild of the University's Chancellor Emeritus Daniel Ritchie, Denver attorney and Bar leader John Moye and United States District Court Judge Richard Matsch. IAALS Executive Director Rebecca Love Kourlis is also a founding member and previously served for almost twenty years as a Colorado Supreme Court Justice and trial court judge.

IAALS staff is comprised of an experienced and dedicated group of men and women who have achieved recognition in their former roles as judges, lawyers, academics and journalists. It is a national non-partisan organization dedicated to improving the process and culture of the civil justice system. IAALS provides principled leadership, conducts comprehensive and objective research, and develops innovative and practical solutions. IAALS' mission is to participate in the achievement of a transparent, fair and cost-effective civil justice system that is accountable to and trusted by those it serves.

In the civil justice reform area, IAALS is studying the relationship between existing Rules of Civil Procedure and cost and delay in the civil justice system. To this end, it has examined alternative approaches in place in other countries and even in the United States in certain jurisdictions.

The Institute benefits from gifts donated to the University for the use of IAALS. None of those gifts have conditions or requirements, other than accounting and fiduciary responsibility.

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JOINT PROJECT OF THE THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM

FINAL REPORT[1]

The American College of Trial Lawyers Task Force on Discovery ("Task Force") and the Institute for the Advancement of the American Legal System ("IAALS") at the University of Denver have, beginning in mid-2007, engaged in a joint project to examine the role of discovery in perceived problems in the United States civil justice system and to make recommendations for reform, if appropriate. The project was conceived as an outgrowth of increasing concerns that problems in the civil justice system, especially those relating to discovery, have resulted in unacceptable delays and prohibitive expense. Although originally intended to focus primarily on discovery, the mandate of the project was broadened to examine other parts of the civil justice system that relate to and have a potential impact on discovery. The goal of the project is to provide Proposed Principles that will ultimately result in a civil justice system that better serves the needs of its users.

THE PROCESS

The participants have held seven two-day meetings and participated in additional lengthy conference calls over the past 18 months. They began by studying the history of the Federal Rules of Civil Procedure, past attempts at reforms, prior cost studies, academic literature commenting on and proposing changes to the rules and media coverage about the cost of litigation.

The first goal of the project was to determine whether a problem really exists and, if so, to determine its dimensions. As a starting point, therefore, the Task Force and IAALS worked with an outside consultant to design and conduct a survey of the Fellows of the American College of Trial Lawyers ("ACTL") to create a database from which to work. IAALS contracted with Mathematica Policy Research, Inc. to manage the survey and bore its full cost. Mathematica then compiled the results of the survey and issued an 87-page report.

[1] Accepted and approved by the Board of Regents of the American College of Trial Lawyers on February 25, 2009.

The survey was administered over a four-week period beginning April 23, 2008. It was sent to the 3,812 Fellows of the ACTL, excluding judicial, emeritus and Canadian Fellows, who could be reached electronically. Of those, 1,494 responded. Responses of 112 not currently engaged in civil litigation were not considered. The response rate was a remarkably high 42 percent.

On average, the respondents had practiced law for 38 years. Twenty-four percent represent plaintiffs exclusively, 31 percent represent defendants exclusively and 44 percent represent both, but primarily defendants. About 40 percent of the respondents litigate complex commercial disputes, but fewer than 20 percent litigate primarily in federal court (although nearly a third split their time equally between federal and state courts). Although there were some exceptions, such as with respect to summary judgment, for the most part there was no substantial difference between the responses of those who represent primarily plaintiffs and those who represent primarily defendants, at least with respect to differences relating to the action recommended in this report.

SURVEY RESULTS

Three major themes emerged from the Survey:

1. Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them.

2. The existing rules structure does not always lead to early identification of the contested issues to be litigated, which often leads to a lack of focus in discovery. As a result, discovery can cost far too much and can become an end in itself. As one respondent noted: "The discovery rules in particular are impractical in that they promote full discovery as a value above almost everything else." Electronic discovery, in particular, needs a serious overhaul. It was described by one respondent as a "morass." Another respondent stated: "The new rules are a nightmare. The bigger the case the more the abuse and the bigger the nightmare."

3. Judges should have a more active role at the beginning of a case in designing the scope of discovery and the direction and timing of the case all the way to trial. Where abuses occur, judges are perceived not to enforce the rules effectively. According to one Fellow, "Judges need to actively manage each case from the outset to contain costs; nothing else will work."

In short, the survey revealed widely-held opinions that there are serious problems in the civil justice system generally. Judges increasingly must serve as referees in acrimonious discovery disputes, rather than deciding cases on their merits. From the outside, the system is often perceived as cumbersome and inefficient. The emergence of various forms of alternative dispute resolution emphasizes the point.

On September 8, 2008, the Task Force and IAALS published a joint Interim Report, describing the results of the survey in much greater detail. It can be found on the websites of both the American College of Trial Lawyers, www.actl.com, and IAALS, www.du.edu/legalinstitute. That report has since attracted wide attention in the media, the bar and the judiciary.

The results of the survey reflect the fact that circumstances under which civil litigation is conducted have changed dramatically over the past seventy years since the currently prevailing civil procedures were adopted.

The objective of the civil justice system is described in Rule 1 of the Federal Rules of Civil Procedure as "the just, speedy, and inexpensive determination of every action and proceeding." Too often that objective is now not being met. *Trials, especially jury trials, are vital to fostering the respect of the public in the civil justice system. Trials do not represent a failure of the system. They are the cornerstone of the civil justice system.* Unfortunately, because of expense and delay, both civil bench trials and civil jury trials are disappearing.

PROPOSED PRINCIPLES

Recognizing the need for serious consideration of change in light of the survey results, the Task Force and IAALS continued to study ways of addressing the problems they highlighted. They have had the benefit of participants who practice under various civil procedure systems in the United States and Canada, including both notice pleading and code pleading systems. They have examined in detail civil justice systems in Canada, Australia, New Zealand and Europe, as well as arbitration procedures and criminal procedure and have compared them to our existing civil justice system.[2]

After careful study and many days of deliberation, the Task Force and IAALS have agreed on a proposed set of Principles that would shape solutions to the problems they have identified. The Principles are being released for the purpose of promoting nationwide discussion. These Principles were developed to work in tandem with one another and should be evaluated in their entirety.

RECOMMENDED ACTION

The Task Force and IAALS unanimously recommend that the Proposed Principles set forth in this report, which can be applied to both state and federal civil justice systems, be made the subject of public comment, discussion, debate and refinement. That process should include all the stakeholders with an interest in a viable civil justice system, including state and federal judiciaries, the academy, practitioners, bar organizations, clients and the public at large.

[2] IAALS's review of civil procedural reforms in certain foreign jurisdictions and States in the United States is attached as Appendix A.

Some of the Principles may be controversial in some respects. We encourage lively and informed debate among interested parties to achieve the common goal of a fair and, we hope, more efficient, system of justice. We are optimistic that the ensuing dialogue will lead to their future implementation by those responsible for drafting and revising rules of civil practice and procedure in jurisdictions throughout the United States.

PRINCIPLES

The Purpose of Procedural Rules: Procedural rules should be designed to achieve the just resolution of every civil action. The concept of just resolution should include procedures proportionate to the nature, scope and magnitude of the case that will produce a reasonably prompt, reasonably efficient, reasonably affordable resolution.

1. GENERAL

- **The "one size fits all" approach of the current federal and most state rules is useful in many cases but rulemakers should have the flexibility to create different sets of rules for certain types of cases so that they can be resolved more expeditiously and efficiently.**

When the Federal Rules of Civil Procedure became effective in 1938 they replaced the common law forms of actions at law and the differing sets of procedures for those actions required by the Conformity Act of 1872 (each district court used the procedures of the state in which it was located) as well as the Equity Rules of 1912, which had governed suits in equity in all of the district courts. The intent was to adopt a single, uniform set of rules that would apply to all cases. Uniform rules made it possible for lawyers to appear in any federal jurisdiction knowing that the same rules would apply in each.

It is time that the rules generally reflect the reality of practice. This Principle supports a single system of civil procedure rules designed for the majority of cases while recognizing that this "one size fits all" approach is not the most effective approach for all types of cases. Over the years, courts have realized this and have informally developed special rules and procedures for certain types of cases. Examples include specific procedures to process patent and medical malpractice cases. Congress also perceived the need for different rules by enacting the Private Securities Litigation Reform Act for securities cases.[3]

[3] Another example is specific rules that have been developed to process cases of a lower dollar amount, for example Rule 16.1 in Colorado which requires the setting of an early trial date, early, full and detailed disclosure, and presumptively prohibits depositions, interrogatories, document requests or requests for admission in civil actions where the amount in controversy is $100,000 or less.

The concern that the development of different rules will preclude lawyers from practicing across districts is no longer a reality of present-day practice, as advances in technology allow for almost instant access to local rules and procedures.

We are not suggesting a return to the chaotic and overly-complicated pre-1938 litigation environment, nor are we suggesting differential treatment across districts. This Principle is based on a recognition that the rules should reflect the reality that there are case types that may require different treatment and provide for exceptions where appropriate. Specialized rules should be the exception but they should be permitted.

2. PLEADINGS

The Purpose of Pleadings: Pleadings should notify the opposing party and the court of the factual and legal basis of the pleader's claims or defenses in order to define the issues of fact and law to be adjudicated. They should give the opposing party and the court sufficient information to determine whether the claim or defense is sufficient in law to merit continued litigation. Pleadings should set practical limits on the scope of discovery and trial and should give the court sufficient information to control and supervise the progress of the case to trial or other resolution.

- **Notice pleading should be replaced by fact-based pleading. Pleadings should set forth with particularity all of the material facts that are known to the pleading party to establish the pleading party's claims or affirmative defenses.**

One of the principal reforms made in the Federal Rules of Civil Procedure was to permit notice pleading. For many years after the federal rules were adopted, there were efforts to require specific, fact-based pleading in certain cases. Some of those efforts were led by certain federal judges, who attempted to make those changes by local rules; however, the Supreme Court resolved the issue in 1957 by holding, in *Conley v. Gibson*, 355 U.S. 45 (1957), that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. States that adopted the federal-type rules have generally followed suit.

One of the primary criticisms of notice pleading is that it leads to more discovery than is necessary to identify and prepare for a valid legal dispute. In our survey, 61 percent of the respondents said that notice pleading led to more discovery in order to narrow the claims and 64 percent said that fact pleading can narrow the scope of discovery. Forty-eight percent of our respondents said that frivolous claims and defenses are more prevalent than they were five years ago.

Some pleading rules make an exception for pleading fraud and mistake, as to which the pleading party must state "with particularity" the circumstances

constituting fraud or mistake. We believe that a rule with similar specificity requirements should be applied to all cases and throughout all pleadings.

This Principle replaces notice pleading with fact-based pleading. We would require the parties to plead, at least in complaints, counterclaims and affirmative defenses, all material facts that are known to the pleading party to support the elements of a claim for relief or an affirmative defense.

Fact-based pleading must be accompanied by rules for responsive pleading that require a party defending a claim to admit that which should be admitted. Although it is not always possible to understand complex fact situations in detail at an early stage, an answer that generally denies all facts in the complaint simply puts everything at issue and does nothing to identify and eliminate uncontested matters from further litigation. Discovery cannot be framed to address the facts in controversy if the system of pleading fails to identify them.[4]

- **A new summary procedure should be developed by which parties can submit applications for determination of enumerated matters (such as rights that are dependent on the interpretation of a contract) on pleadings and affidavits or other evidentiary materials without triggering an automatic right to discovery or trial or any of the other provisions of the current procedural rules.**

The Task Force recommends that consideration be given the development of alternate procedures for resolution of some disputes where full discovery and a full trial are not required. Contract interpretations, declaratory orders and statutory remedies are examples of matters that can be dealt with efficiently in such a proceeding. In a number of Canadian Provinces, the use of a similar procedure, called an Application, serves this purpose. In Canada, the Notice of Application must set out the precise grounds of relief, the grounds to be argued including reference to rules and statutes and the documentary evidence to be relied on. The contextual facts and documents are contained in an affidavit. The respondents serve and file their responsive pleadings. Depositions may be taken but are limited to what is contained in the affidavits. At or before the oral hearing, the presiding judge can direct a trial of all or part of the application on terms that he or she may direct if satisfied that live testimony is necessary. The time from commencement to completion is most often substantially shorter and less costly than a normal action.

Such an action is similar to but sufficiently different from a declaratory judgment action that it deserves consideration. It is similar to state statutes such as Delaware Corporation Law § 220 (permitting a stockholder to sue to examine the books and records of a corporation). The purpose, obviously, is to streamline the

[4] Some members of the Task Force believe that the fact-based pleading requirement should be extended to denials that are contained in answers but a majority of the Task Force disagrees.

civil justice system for disputes that do not require the full panoply of procedural devices now found in most systems.

3. DISCOVERY

The Purpose of Discovery: Discovery should enable a party to procure in admissible form through the most efficient, nonredundant, cost-effective method reasonably available, evidence directly relevant to the claims and defenses asserted in the pleadings. Discovery should not be an end in itself; it should be merely a means of facilitating a just, efficient and inexpensive resolution of disputes.

- **Proportionality should be the most important principle applied to all discovery.**

Discovery is not the purpose of litigation. It is merely a means to an end. If discovery does not promote the just, speedy and inexpensive determination of actions, then it is not fulfilling its purpose.

Unfortunately, many lawyers believe that they should—or must—take advantage of the full range of discovery options offered by the rules. They believe that zealous advocacy (or fear of malpractice claims) demands no less and the current rules certainly do not dissuade them from that view. Such a view, however, is at best a symptom of the problems caused by the current discovery rules and at worst a cause of the problems we face. In either case, we must eliminate that view. It is crippling our civil justice system.

The parties and counsel should attempt in good faith to agree on proportional discovery at the outset of a case but failing agreement, courts should become involved. There simply is no justification for the parties to spend more on discovery than a case requires. Courts should be encouraged, with the help of the parties, to specify what forms of discovery will be permitted in a particular case. Courts should be encouraged to stage discovery to insure that discovery related to potentially dispositive issues is taken first so that those issues can be isolated and timely adjudicated.

- **Shortly after the commencement of litigation, each party should produce all reasonably available nonprivileged, non-work product documents and things that may be used to support that party's claims, counterclaims or defenses.**

Only 34 percent of the respondents said that the current initial disclosure rules reduce discovery and only 28 percent said they save the clients money. The initial-disclosure rules need to be revised.

This Principle is similar to Rule 26(a)(1)(ii) of the Federal Rules of Civil Procedure's requirement for initial disclosures but it is slightly broader. Whereas the current Rule permits description of documents by category and location, we

would require production. This Principle is intended to achieve a more meaningful and effective exchange of documents in the early stages of the litigation.

The rationale for this Principle is simple: each party should produce, without delay and without a formal request, documents that are readily available and may be used to support that party's claims, counterclaims or defenses. This Principle, together with fact-based pleadings, ought to facilitate narrowing of the issues and, where appropriate, settlement.

To those charged with applying such a Principle, we suggest that the plaintiff could be required to produce such documents very shortly after the complaint is served and that the defendant, who, unlike the plaintiff, may not be presumed to have prepared for the litigation beforehand, be required to produce such documents within a somewhat longer period of time, say 30 days after the answer is served.

There should be an ongoing duty to supplement this disclosure. A sanction for failure to comply, absent cause or excusable neglect, could be an order precluding use of such evidence at trial.

We also urge specialty bars to develop specific disclosure rules for certain types of cases that could supplement or even replace this Principle.

- **Discovery in general and document discovery in particular should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness.**

The current rules permit discovery of all documents and information relevant to a claim or defense of any party. As a result, it is not uncommon to see discovery requests that begin with the words "all documents relating or referring to . . .". Such requests are far too broad and are subject to abuse. They should not be permitted.

Especially when combined with notice pleading, discovery is very expensive and time consuming and easily permits substantial abuse. We recommend changing the scope of discovery so as to allow only such limited discovery as will enable a party to prove or disprove a claim or defense or to impeach a witness.

Until 1946, document discovery in the federal system was limited to things "which constitute or contain evidence material to any matter involved in the action" and then only upon motion showing good cause. The scope of discovery was changed for depositions in 1946 to the "subject matter of the action". It was not until 1970 that the requirement for a motion showing good cause was eliminated for document discovery. According to the Advisory Committee Notes, the "good cause" requirement was eliminated "because it has furnished an

uncertain and erratic protection to the parties from whom production [of documents] is sought . . ." The change also was intended to allow the system to operate extrajudicially but the result was to afford virtually no protection at all to those parties. Ironically, the change occurred just as copying machines were becoming widely used and just before the advent of the personal computer.

The "extrajudicial" system has proved to be flawed. Discovery has become broad to the point of being limitless. This Principle would require courts and parties to focus on what is important to fair, expeditious and inexpensive resolution of civil litigation.

- **There should be early disclosure of prospective trial witnesses.**

Identification of prospective witnesses should come early enough to be useful within the designated time limits. We do not take a position on when this disclosure should be made but it should certainly come before discovery is closed and it should be subject to the continuing duty to update. The current federal rule that requires the identification of persons who have information that may be used at trial (Rule 26(a)(1)(A)(i)) probably comes too early in most cases and often leads to responses that are useless.

- **After the initial disclosures are made, only limited additional discovery should be permitted. Once that limited discovery is completed, no more should be allowed absent agreement or a court order, which should be made only upon a showing of good cause and proportionality.**

This is a radical proposal. It is our most significant proposal. It challenges the current practice of broad, open-ended and ever-expanding discovery that was a hallmark of the federal rules as adopted in 1938 and that has become an integral part of our civil justice system. This Principle changes the default. Up to now, the default is that each party may take virtually unlimited discovery unless a court says otherwise. We would reverse the default.

Our discovery system is broken. Fewer than half of the respondents thought that our discovery system works well and 71 percent thought that discovery is used as a tool to force settlement.

The history of discovery-reform efforts further demonstrates the need for radical change. Serious reform efforts began under the mandate of the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, commonly referred to as the Pound Conference. Acting under the conference's mandate, the American Bar Association's Section of Litigation created a Special Committee for the Study of Discovery Abuse, which published a report in 1977 recommending numerous specific changes in the rules to correct the abuse identified by the Pound Conference. The recommendations, which included narrowing the subject-matter-of-the-action scope, resulted in substantial

controversy and extensive consideration by the Advisory Committee on Civil Rules and numerous professional groups. In a long process lasting about a quarter of a century, many of the recommendations were eventually adopted in one form or another.

There is substantial opinion that all of those efforts have accomplished little or nothing. Our survey included a request for expressions of agreement or disagreement with a statement that the cumulative effect of the 1976-2007 changes in the discovery rules significantly reduced discovery abuse. Only about one third of the respondents agreed; 44 percent disagreed and an additional 12 percent strongly disagreed.

Efforts to limit discovery must begin with definition of the type of discovery that is permissible, but it is difficult, if not impossible, to write that definition in a way that will satisfy everyone or that will work in all cases. Relevance surely is required and some rules, such as the International Bar Association Rules of Evidence, also require materiality. Whatever the definition, broad, unlimited discovery is now the default notwithstanding that various bar and other groups have complained for years about the burden, expense and abuse of discovery.

This Principle changes the default while still permitting a search, within reason, for the "smoking gun". Today, the default is that there will be discovery unless it is blocked. *This Principle permits limited discovery proportionately tied to the claims actually at issue, after which there will be no more.* The limited discovery contemplated by this Principle would be in addition to the initial disclosures that the Principles also require. Whereas the initial disclosures would be of documents that may be used to support the producing party's claims or defenses, the limited discovery described in this Principle would be of documents that support the requesting party's claims or defenses. This Principle also applies to electronic discovery.

We suggest the following possible areas of limitation for further consideration:

(1) limitations on scope of discovery (i.e., changes in the definition of relevance);

(2) limitations on persons from whom discovery can be sought;

(3) limitations on the types of discovery (e.g., only document discovery, not interrogatories);

(4) numerical limitations (e.g., only 20 interrogatories or requests for admissions; only 50 hours of deposition time);

(5) elimination of depositions of experts where their testimony is strictly limited to the contents of their written report;

(6) limitations on the time available for discovery;

(7) cost shifting/co-pay rules;

(8) financial limitations (i.e., limits on the amount of money that can be spent—or that one party can require its opponent to spend—on discovery); and

(9) discovery budgets that are approved by the clients and the court.

For this Principle to work, the contours of the limited discovery we contemplate must be clearly defined. For certain types of cases, it will be possible to develop standards for the discovery defaults. For example, in employment cases, the standard practice is that personnel files are produced and the immediate decisionmaker is deposed. In patent cases, disclosure of the inventor's notebooks and the prosecution history documents might be the norm. The plaintiff and defense bars for certain types of specialized cases should be able to develop appropriate discovery protocols for those cases.

We emphasize that the primary goal is to change the default from unlimited discovery to limited discovery. No matter how the limitations are defined, there should be limitations. Additional discovery beyond the default limits would be allowed only on a showing of good cause and proportionality.

We hasten to note again that this Principle should be read together with the Principles requiring fact-based pleading and that each party forthwith should produce at the beginning of litigation documents that may be used to support that party's claims or defenses. We expect that the limited discovery contemplated by this Principle and the initial-disclosure Principle would be swift, useful and virtually automatic.

We reiterate that there should be a continuing duty to supplement disclosures and discovery responses.

- **All facts are not necessarily subject to discovery.**

This is a corollary of the preceding Principle. We now have a system of discovery in which parties are entitled to discover all facts, without limit, unless and until courts call a halt, which they rarely do. As a result, in the words of one respondent, discovery has become an end in itself and we routinely have "discovery about discovery". Recall that our current rules were created in an era before copying machines, computers and e-mail. Advances in technology are overtaking our rules, to the point that the Advisory Committee Notes to Rule 26(b)(2)(B) of the Federal Rules of Civil Procedure state that "It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information."

There is, of course, a balance to be established between the burdens of discovery on the one hand and the search for evidence necessary for a just result on the other hand. This Principle is meant to remind courts and litigants that discovery is to be

limited and that the goal of our civil justice system is the "just, speedy, and inexpensive determination of every action and proceeding".

Discovery planning creates an expectation in the client about the time and the expense required to resolve the case. Additional discovery issues, which may have been avoidable, and their consequent expense may impair the ability of the client to afford or be represented by a lawyer at trial.

- **Courts should consider staying discovery in appropriate cases until after a motion to dismiss is decided.**

Discovery should be a mechanism by which a party discovers evidence to support or defeat a valid claim or defense.[5] It should not be used for the purpose of enabling a party to see whether or not a valid claim exists. If, as we recommend, the complaint must comply with fact-based pleading standards, courts should have the ability to test the legal sufficiency of that complaint in appropriate cases before the parties are allowed to embark on expensive discovery that may never be used.

- **Discovery relating to damages should be treated differently.**

Damages discovery is significantly different from discovery relating to other issues and may call for different discovery procedures relating to timing and content. The party with the burden of proof should, at some point, specifically and separately identify its damage claims and the calculations supporting those claims. Accordingly, the other party's discovery with respect to damages should be more targeted. Because damages discovery often comes very late in the process, the rules should reflect the reality of the timing of damages discovery.

- **Promptly after litigation is commenced, the parties should discuss the preservation of electronic documents and attempt to reach agreement about preservation. The parties should discuss the manner in which electronic documents are stored and preserved. If the parties cannot agree, the court should make an order governing electronic discovery as soon as possible. That order should specify which electronic information should be preserved and should address the scope of allowable proportional electronic discovery and the allocation of its cost among the parties.**

Electronic information is fundamentally different from other types of discovery in the following respects: it is everywhere, it is often hard to gain access to and it is typically and routinely erased. Under judicial interpretations, once a complaint is served, or perhaps even earlier, the parties have an obligation to preserve all

[5] We recognize that discovery need not be limited to admissible evidence, but if the discovery does not ultimately lead to evidence that can be used at trial, it serves very little purpose.

material that may prove relevant during a civil action, including electronic information. That is very difficult, if not impossible, to accomplish in an environment in which litigants maintain enormous stores of electronic records. Electronic recordkeeping has led to the retention of information on a scale not contemplated by the framers of the procedural rules, a circumstance complicated by legitimate business practices that involve the periodic erasure of many electronic records.

Often the cost of preservation in response to a "litigation hold" can be enormous, especially for a large business entity.

Under Federal Rule of Civil Procedure 16(b), which was amended in 2006 to include planning for the discovery of electronic information, the initial pretrial conference, if held at all, does not occur until months after service of the complaint. By that time, the obligation to preserve all relevant documents has already been triggered and the cost of preserving electronic documents has already been incurred. This is a problem.

It is desirable for counsel to agree at the outset about electronic-information preservation and many local rules require such cooperation. Absent agreement of counsel, this Principle requires prompt judicial involvement in the identification and preservation of electronic evidence. We call on courts to hold an initial conference promptly after a complaint is served, for the purpose of making an order with respect to the preservation of electronic information. In this regard, we refer to Principle 5 of the Sedona United States *Principles for Electronic Document Production*.[6]

We are aware of cases in which, shortly after a complaint is filed, a motion is made for the preservation of certain electronic documents that otherwise would be destroyed in the ordinary course. See, e.g., *Keir v. Unumprovident Corp.*, No. 02 Civ. 8781, 2003 WL 21997747 (S.D.N.Y. Aug. 22, 2003) (counsel told court that simply preserving all backup tapes from 881 corporate servers "would cost millions of dollars" and court fashioned a very limited preservation order after requiring counsel to confer).

This Principle would mandate electronic-information conferences, both with counsel and the court, absent agreement. Before such a conference, there should

[6] The Sedona Conference is a nonprofit law and policy think tank based in Sedona, Arizona. It has published principles relating to electronic document production. Sedona Canada was formed in 2006 out of a recognition that electronic discovery was "quickly becoming a factor in all Canadian civil litigation, large and small." An overview of the Principles developed by Working Group 1 and Working Group 7 ("Sedona Canada") are in Appendix B. The complete publications of both Working Groups are *The Sedona Principles, Second Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production (The Sedona Conference® Working Group Series, 2007)* and *The Sedona Canada Principles Addressing Electronic Discovery (A Project of The Sedona Conference® Working Group 7, Sedona Canada, January 2008)*, and the full text of each document may be downloaded free of charge for personal use from www.thesedonaconference.org.

be a safe harbor for routine, benign destruction, so long as it is not done deliberately in order to destroy evidence.

The issue here is not the scope of electronic discovery; rather the issue is what must be preserved before the scope of permissible electronic discovery can be determined. It is the preservation of electronic materials at the outset of litigation that engenders expensive retention efforts, made largely to avoid collateral litigation about evidence spoliation. Litigating electronic evidence spoliation issues that bloom after discovery is well underway can impose enormous expense on the parties and can be used tactically to derail a case, drawing the court's attention away from the merits of the underlying dispute. Current rules do not adequately address this issue.

- **Electronic discovery should be limited by proportionality, taking into account the nature and scope of the case, relevance, importance to the court's adjudication, expense and burdens.**

Our respondents told us that electronic discovery is a nightmare and a morass. These Principles require early judicial involvement so that the burden of electronic discovery is limited by principles of proportionality. Although the Advisory Committee on Civil Rules attempted to deal with the issues in new Rule 26(b)(2), many of our respondents thought that the Rule was inadequate. The Rule, in conjunction with the potential for sanctions under rule 37(e), exposes litigants to a series of legal tests that are not self-explanatory and are difficult to execute in the world of modern information technology. The interplay among "undue cost and burden," "reasonably accessible," "routine good faith operation," and "good cause," all of which concepts are found in that rule, presents traps for even the most well-intentioned litigant.

We understand that more than 50 district courts have detailed local rules for electronic discovery. The best of those provisions should be adopted nationwide.

We are well aware that this area of civil procedure continues to develop and we applaud efforts such as new Federal Rule of Evidence 502 seeking to address the critical issue of attorney-client privilege waiver in the production of documents, including electronic records. It remains to be seen, however, whether a nonwaiver rule will reduce expenses or limit the pre-production expense of discovery of electronic information.

- **The obligation to preserve electronically-stored information requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation; however, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information.**

- **Absent a showing of need and relevance, a party should not be required to restore deleted or residual electronically-stored information, including backup tapes.**

- **Sanctions should be imposed for failure to make electronic discovery only upon a showing of intent to destroy evidence or recklessness.**

- **The cost of preserving, collecting and reviewing electronically-stored material should generally be borne by the party producing it but courts should not hesitate to arrive at a different allocation of expenses in appropriate cases.**

The above Principles are taken from the *Sedona Principles for Addressing Electronic Document Production* (June 2007) and the *Sedona Canada Principles Addressing Electronic Discovery* (January 2008). They are meant to provide a framework for developing rules of reasonableness and proportionality. They do not replace or modify the other Principles relating to the limitation of discovery. They are merely supplemental.

By way of explanation, we can do no better than to quote from two Canadian practitioners who have studied the subject extensively and who bring a refreshing viewpoint to the subject:

> The proliferation in recent years of guidelines, formal and informal rules, articles, conferences and expert service providers all dealing with e-discovery may, at times, have obscured the reality that e-discovery must be merely a means to an end and not an end unto itself. E-discovery is a tool which, used properly, can assist with the just resolution of many disputes; however, used improperly, e-discovery can frustrate the cost-effective, speedy and just determination of almost every dispute.
>
> E-discovery has had, and it will continue to have, a growing importance in litigation just as technology has a growing importance in society and commerce. It is up to counsel and the judiciary to ensure that e-discovery does not place the courtroom out of the reach of parties seeking a fair adjudication of their disputes.
>
> B. Sells & TJ Adhihetty, *E-discovery, you can't always get what you want*, International Litigation News, Sept. 2008, pp. 35-36.

- **In order to contain the expense of electronic discovery and to carry out the Principle of Proportionality, judges should have access to, and attorneys practicing civil litigation should be encouraged to attend, technical workshops where they can obtain a full understanding of the complexity of the electronic storage and retrieval of documents.**

Although electronic discovery is becoming extraordinarily important in civil litigation, it is proving to be enormously expensive and burdensome. The vast majority (75 percent) of our respondents confirmed the fact that electronic discovery has resulted in a disproportionate increase in the expense of discovery and thus an increase in total litigation expense. Electronic discovery, however, is a fact of life that is here to stay. We favor an intensive study to determine how best to cope with discovery of this information in an efficient, cost-effective way to ensure expenses that are proportional to the value of the case.

Unfortunately, the rules as now written do not give courts any guidance about how to deal with electronic discovery. Moreover, 76 percent of the respondents said that courts do not understand the difficulties parties face in providing electronic discovery. Likewise, trial counsel are often uninformed about the technical facets of electronic discovery and are ill-equipped to assist trial courts in dealing with the issues that arise. Some courts have imposed obligations on counsel to ensure that their clients fully comply with electronic discovery requests; litigation about compliance with electronic discovery requests has become commonplace. We express no opinion about the legitimacy or desirability of such orders.

It does appear, however, that some courts do not fully understand the complexity of the technical issues involved and that the enormous scope and practical unworkability of the obligations they impose on trial counsel are often impossible to meet despite extensive (and expensive) good-faith efforts.

At a minimum, courts making decisions about electronic discovery should fully understand the technical aspects of the issues they must decide, including the feasibility and expense involved in complying with orders relating to such discovery. Accordingly, we recommend workshops for judges to provide them with technical knowledge about the issues involved in electronic discovery. We also recommend that trial counsel become educated in such matters. An informed bench and bar will be better prepared to understand and make informed decisions about the relative difficulties and expense involved in electronic discovery. Such education is essential because without it, counsel increasingly will be constrained to rely on third-party providers of electronic-discovery services who include judgments about responsiveness and privilege among the services they provide, a trend we view with alarm.

- **Requests for admissions and contention interrogatories should be limited by the Principle of proportionality. They should be used sparingly, if at all.**

Requests for admission can be abused, particularly when they are used in large numbers to elicit admissions about immaterial or trivial matters. Used properly, they can focus the scope of discovery by eliminating matters that are not at issue, presumably shortening depositions, eliminating substantial searches for documentary proof and shortening the trial. We recommend meaningful limits on the use of this discovery tool to ensure that it is used for its intended purposes. For example, it could be limited to authentication of documents or numerical and statistical calculations.

Even greater abuse seems to arise with the use of contention interrogatories. They often seek to compel an adversary to summarize its legal theories and then itemize evidence in support of those theories. Just as frequently, they draw lengthy objections that they are premature, seek the revelation of work-product and invite attorney-crafted answers so opaque that they do little to advance the efficient resolution of the litigation. This device should be used rarely and narrowly.

4. EXPERTS

- **Experts should be required to furnish a written report setting forth their opinions, and the reasons for them, and their trial testimony should be strictly limited to the contents of their report. Except in extraordinary cases, only one expert witness per party should be permitted for any given issue.**

The federal rules and many state rules require written expert reports and we urge that the requirement should be followed by all courts. The requirement of an expert report from an expert should obviate the need for a deposition in most cases. In fact, some Task Force members believe that it should obviate altogether the need for a deposition of experts.

We also endorse the proposed amendment to Federal Rule of Civil Procedure 26(b)(4)(B) and (C) and recommend comparable state rules that would prohibit discovery of draft expert reports and some communications between experts and counsel.

5. DISPOSITIVE MOTIONS

The Purpose of Dispositive Motions: Dispositive motions before trial identify and dispose of any issues that can be disposed of without unreasonable delay or expense before, or in lieu of, trial.

Although we do not recommend any Principle relating to summary judgment motions, we report that there was a disparity of views in the Task Force, just as there was a disparity of views among the respondents. For example, nearly 64 percent of respondents who represent primarily plaintiffs said that summary judgment motions were used as a tactical tool rather than in a good-faith effort to narrow issues. By contrast, nearly 69 percent of respondents who represent primarily defendants said that judges decline to grant summary judgment motions even when they are warranted. This subject deserves further careful consideration and discussion.

6. JUDICIAL MANAGEMENT

- **A single judicial officer should be assigned to each case at the beginning of a lawsuit and should stay with the case through its termination.**

The survey respondents agreed overwhelmingly (89 percent) that a single judicial officer should oversee the case from beginning to end. Respondents also agreed overwhelmingly (74 percent) that the judge who is going to try the case should handle all pretrial matters.

In many federal districts, the normal practice is to assign each new case to a single judge and that judge is expected to stay with the case from the beginning to the end. Assignment to a single judge is the most efficient method of judicial management. We believe that the principal role of the judge should be to try the case. Judges who are going to try cases are in the best position to make pretrial rulings on evidentiary and discovery matters and dispositive motions.

We are aware that in some state courts, judges are rotated from one docket to another and that in some federal districts, magistrate judges handle discovery matters. We are concerned that such practices deprive the litigants of the consistency and clarity that assignment to a single docket, without rotation, brings to the system of justice.

We are also cognizant of the fact that in some courts, the scarcity of judicial resources will not allow for the assignment of every case to a single judge, but in those cases, we recommend an increase in judicial resources so that this Principle can be consistently followed.

- **Initial pretrial conferences should be held as soon as possible in all cases and subsequent status conferences should be held when necessary, either on the request of a party or on the court's own initiative.**

In most systems, initial pretrial conferences are permissible but not mandatory. This Principle would require such conferences in all cases. Sixty-seven percent of our respondents thought that such conferences inform the court about the issues in the case and 53 percent thought that such conferences identified and, more important, narrowed the issues. More than 20 percent of the respondents reported that such conferences are not regularly held.

Pretrial conferences are a useful vehicle for involving the court at the earliest possible time in the management of the case. They are useful for keeping the judge informed about the progress of the case and allowing the court to guide the work of counsel. We are aware that there are those who believe that judges should not become involved in litigation too early and should allow the parties to control the litigation without judicial supervision. However, we believe that, especially in complex cases, the better procedure is to involve judges early and often.

Early judicial involvement is important because not all cases are the same and because different types of cases require different case management. Some, such as complex cases, require more; some, such as relatively routine or smaller cases, require less. The goal is the just, cost-effective and expeditious resolution of disputes.

Seventy-four percent of the Fellows in the survey said that early intervention by judges helped to narrow the issues and 66 percent said that it helped to limit discovery. Seventy-one percent said that early and frequent involvement of a judicial officer leads to results that are more satisfactory to the client.

We believe that pretrial conferences should be held early and that in those conferences courts should identify pleading and discovery issues, specify when they should be addressed and resolved, describe the types of limited discovery that will be permitted and set a timetable for completion. We also believe the conferences are important for a speedy and efficient resolution of the litigation because they allow the court to set directions and guidelines early in the case.

- **At the first pretrial conference, the court should set a realistic date for completion of discovery and a realistic trial date and should stick to them, absent extraordinary circumstances.**

There has been a good deal of debate about the benefits of the early setting of a trial date.

In 1990, the Federal Judicial Center asked the Advisory Committee on Civil Rules to consider amending Rule 16 to require the court to set a trial date at the Rule 16 conference. The Advisory Committee chose not to do so "because the docket conditions in some districts would make setting a realistic trial date early in the case unrealistic". R. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 Tulane J. of Int'l & Comp. Law 153, 179 (1999).

A majority of our respondents (60 percent) thought that the trial date should be set early in the case.

There can be significant benefits to setting a trial date early in the case. For example, the sooner a case gets to trial, the more the claims tend to narrow, the more the evidence is streamlined and the more efficient the process becomes. Without a firm trial date, cases tend to drift and discovery takes on a life of its own. In addition, we believe that setting realistic but firm trial dates facilitates the settlement of cases that should be settled, so long as the court is vigilant to ensure that the parties are behaving responsibly. In addition, it will facilitate the trials of cases that should be tried.

In Delaware Chancery Court, for example, where complex, expedited cases such as those relating to hostile takeovers are heard frequently, the parties know that in such cases they will have only a limited time within which to take discovery and get ready for trial. The parties become more efficient and the process can be more focused.

A new IAALS study provides strong empirical support for early setting of trial dates. Based on an examination of nearly 8,000 closed federal civil cases, the IAALS study found that there is a strong positive statistical correlation between the overall time to resolution of the case and the elapsed time between the filing of the case and the court's setting of a trial date. *See* Institute for the Advancement of the American Legal System, *Civil Case Processing in the Federal Courts: A Twenty-First Century Analysis* (forthcoming January 2009).

We also believe that the trial date should not be adjourned except under extraordinary circumstances. The IAALS study found that trial dates are routinely adjourned. Over 92 percent of motions to adjourn the trial date were granted and less than 45 percent of cases that actually went to trial did so on the trial date that was first set. The parties have a right to get their case to trial expeditiously and if they know that the trial date will be adjourned, there is no point in setting a trial date in the first place. It is noteworthy that the IAALS study also found that in courts where trial dates are expected to be held firm, the parties seek trial adjournments at a much lower rate and only under truly extraordinary circumstances.

- **Parties should be required to confer early and often about discovery and, especially in complex cases, to make periodic reports of those conferences to the court.**

Discovery conferences work well and should be continued. Over half (59 percent) of our respondents thought that conferences are helpful in managing the discovery process; just over 40 percent of the respondents said that discovery conferences — although they are mandatory in most cases — frequently do not occur.

Cooperation of counsel is critical to the speedy, effective and inexpensive resolution of disputes in our civil justice system. Ninety-seven percent of our respondents said that when all counsel are collaborative and professional, the case costs the client less. Unfortunately, cooperation does not often occur. In fact, it is argued that cooperation is inconsistent with the adversary system. Professor Stephen Landsman has written that the "sharp clash of proofs presented by adversaries in a highly structured forensic setting" is key to the resolution of disputes in a manner that is acceptable to both the parties and society. S. Landsman, ABA Section of Litigation, *Readings on Adversarial Justice: The American Approach to Adjudication*, 2 (1988).

However, Chief Magistrate Judge Paul W. Grimm of the United States District Court for the District of Maryland, referring specifically to Professor Landsman's comment, responded that

> However central the adversary system is to our way of formal dispute resolution, there is nothing inherent in it that precludes cooperation between the parties and their attorneys during the litigation process to achieve orderly and cost effective discovery of the competing facts on which the system depends. *Mancia v. Mayflower Textile Servs. Co. et al.*, Civ. No. 1:08-CV-00273-CCB, Oct. 15, 2008, p. 20.

Involvement of the court is key to effective cooperation and to a productive discovery conference. Even where the parties agree, the court should review the results of the agreement carefully in order to ensure that the results are conducive to a just, speedy and inexpensive resolution of the dispute. Unlike earlier studies and literature, the survey revealed that experienced trial lawyers increasingly see the role of the judge as a "monitor" whose involvement can critically impact the cost and time to resolution of disputes.

- **Courts are encouraged to raise the possibility of mediation or other form of alternative dispute resolution early in appropriate cases. Courts should have the power to order it in appropriate cases at the appropriate time, unless all parties agree otherwise. Mediation of issues (as opposed to the entire case) may also be appropriate.**

This is a controversial principle; however, it recognizes reality.

Over half (55 percent) of the respondents said that alternative dispute resolution was a positive development. A surprisingly high 82 percent said that court-ordered alternative dispute resolution was a positive development and 72 percent said that it led to settlements without trial.

As far as expense was concerned, 52 percent said that alternative dispute resolution decreased the expense for their clients and 66 percent said that it shortened the time to disposition.

Three conclusions could be drawn. First, this could be a reflection of the extent to which alternative dispute resolution has become efficient and effective. Second, it could be a reflection of how slow and inefficient the normal judicial process has become. Third, it could be a reflection of the fact that ADR may afford the parties a mechanism for avoiding costly discovery.

Whatever the reason, we acknowledge the results and therefore recommend that courts be encouraged to raise mediation as a possibility and that they order it in appropriate cases. We note, however, that if these Principles are effective in reducing the cost of discovery, parties may opt more often for judicial trials, as opposed to ADR. That is, at least, our hope.

We also note that under the Alternative Dispute Resolution Act of 1998 (28 USC § 651, et seq.), federal courts have the power to require parties to "consider" alternative dispute resolution or mediation and are required to make at least one such process available to litigants. We are aware that many federal district courts require alternative dispute resolution and that some state courts require mediation or other alternative dispute resolution in all cases. Some courts will not allow discovery or set a trial date until after the parties mediate. While we believe that mediation or some other form of alternative dispute resolution is desirable in many cases, we believe that the parties should have the ability to say "no" in appropriate cases where they all agree. This is already the practice in many courts.

- **The parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution.**

Judicial delay in deciding motions is a cause — perhaps a major cause — of delay in our civil justice system.[7] We recognize that our judges often are overworked and without adequate resources. Judicial delay in deciding certain motions that would materially advance the litigation has a materially adverse impact on the

[7] One of our respondents described a case in which it took the court two years to decide a summary judgment motion. Such a delay is unacceptable and greatly increases the cost of litigation.

ultimate resolution of litigation.[8] In this respect, we endorse Section 11.34 of the Manual For Complex Litigation (Fourth) 2004:

> It is important to decide [summary judgment] motions promptly; deferring rulings on summary judgment motions until the final pretrial conference defeats their purpose of expediting the disposition of issues.

It would be appropriate to discuss such motions at a Rule 16 conference so that the court could be alerted to the importance of a prompt resolution of such motions, since delay in deciding such motions almost certainly adds to the expense of litigation.

- **All issues to be tried should be identified early.**

There is often a difference between issues set forth in pleadings and issues to be tried. Some courts require early identification of the issues to be tried and in international arbitrations, terms of reference at the beginning of a case often require that all issues to be arbitrated be specifically identified. Under the Manual For Complex Litigation (Fourth), Section 11.3, "The process of identifying, defining, and resolving issues begins at the initial pretrial conference." We applaud such practices and this Principle would require early identification of the issues in all cases. Such early identification will materially advance the case and limit discovery to what is truly important. It should be carefully done and should not be merely a recapitulation of the pleadings. We leave to others the description of the form that such statement of issues should take.[9]

- **These Principles call for greater involvement by judges. Where judicial resources are in short supply, they should be increased.**

This Principle recognizes the position long favored by the College. Judicial resources are limited and need to be increased.

- **Trial judges should be familiar with trial practice by experience, judicial education or training and more training programs should be made available to judges.**

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[8] At present, the Civil Justice Reform Act and current Judicial Conference policy require each federal district court to report on (1) motions and certain other matters pending for over six months and (2) cases pending for over three years, broken out by judicial officer. These reports are available for a fee only on the PACER Service Center web site. We strongly encourage that CJRA reports be made available at no cost on the United States Courts official web site (www.uscourts.gov), as well as on each district court's individual web site within a reasonable time period after the reports are completed. We also encourage state court systems to provide similar information if they are not already doing so.

[9] Section 11.33 of the Manual For Complex Litigation (Fourth) 2004, identifies six possible actions that can help identify, define and resolve issues.

Knowledge of the trial process is critical for judges responsible for conducting the trial process. We urge that consideration of trial experience should be an important part of the judicial selection process. Judges who have trial or at least significant case management experience are better able to manage their dockets and to move cases efficiently and expeditiously. Nearly 85 percent of our respondents said that only individuals with substantial trial experience should be chosen as judges and 57 percent thought that judges did not like taking cases to trial. Accordingly, we believe that more training programs should be made available so that judges will be able more efficiently to manage cases so that they can be tried effectively and expeditiously.

NEXT STEPS

There is much more work to be done. We hope that this joint report will inspire substantive discussion among practicing lawyers, the judiciary, the academy, legislators and, most importantly, clients and the public. In the words of Task Force member The Honourable Mr. Justice Colin L. Campbell of the Superior Court of Justice, Toronto, Ontario:

> Discovery reform . . . will not be complete until there is a cultural change in the legal profession and its clients. The system simply cannot continue on the basis that every piece of information is relevant in every case, or that the 'one size fits all' approach of Rules can accommodate the needs of the variety of cases that come before the Courts.

With financial support provided by IAALS, the members of the Task Force and the IAALS staff have applied their experience to a year-and-a-half-long process in which they collectively invested hundreds of hours in analyzing the apparent problems, studying the history of previous reform attempts and in debating and developing a set of Proposed Principles. The participants believe that these Principles may one day form the bedrock of a reinvigorated civil justice process; a process that may spawn a renewal of public faith in America's system of justice.

These men and women whose collective knowledge of these issues may be critical to future reform efforts and the organizations they represent, are committed to participating in discussion and activities engendered by the release of this Report.

Our civil justice system is critical to our way of life. In good times or bad, we must all believe that the courts are available to us to enforce rights and resolve disputes – and to do so in a fair and cost-effective way. At present, the system is captive to cost, delay, and in many instances, gamesmanship. As a profession, we must apply our experience, our differing perspectives and our commitment to justice in order to devise meaningful reforms that will reinstate a trustworthy civil justice system in America.

APPENDIX A

IAALS REVIEW OF PROCEDURAL REFORMS IN FOREIGN JURISDICTIONS AND IN SOME STATES IN THE UNITED STATES

The Principles set forth in this report were not developed in a vacuum. Many are part of routine civil practice and procedure in a wide variety of civil law and common law jurisdictions around the world. While some have recently been developed in foreign jurisdictions in response to concerns about cost and delay, others have had a long and successful history of minimizing those concerns. The Principles have been developed in recognition of these practices and procedures. We summarize below the application of both the Principles and the march toward comprehensive reform in several foreign and state jurisdictions.

The Nature of Reform in Foreign Jurisdictions

There is a growing trend in foreign jurisdictions toward fact pleading, limited discovery and active case management. Where recent reforms have been adopted, they have been systemic and sweeping—not nibbles around the edges. Some of the jurisdictions have measured their reforms, and our Principles build on that information as well.

In 1997, England and Wales undertook a complete overhaul of the civil justice system, resulting in a rewrite of the rules of civil procedure. The new rules instituted a number of pre-action protocols, a more detailed pleading requirement, defined limits on disclosure and discovery, strict limits on expert witnesses and a track system in which cases are treated with different procedures depending on complexity and amount in controversy. To ensure the success of the new rules in practice, the English reforms granted courts broad case management powers and encouraged judges to play an active role in the progression of a case.

In 2007, a review of the Scottish civil justice system began with a commitment to considering widespread reform proposals, however radical. In the area of judicial management, Scotland has already been experimenting with the use of a single judicial officer to handle a case from filing to disposition—a practice that users have hailed as increasing consistency and facilitating agreement.

More recently, Spain has made significant reforms to its code of civil procedure that established greater judicial control and limits on the parties' use and presentation of evidence. Germany is presently engaged in a second round of procedural reforms, also employing increased case management powers and a focus on simplifying procedure.

Canada, too, is taking a new look at its civil justice system. Drafts of revised civil procedure rules are currently under consideration in the Canadian provinces of Alberta, British Columbia and Ontario. Alberta's standard of relevance in the context of discovery has already been narrowed and the draft rules in Ontario and British Columbia would do the same. A comprehensive reform proposal was recently released in New Zealand, part of which also proposes to narrow the standard of relevance.

Practices and Procedures in Foreign Jurisdictions

Specialized Rules. In recognition of the fact that trans-substantive rules are not necessarily the most effective approach, many foreign jurisdictions have developed specialized rules and procedures to deal with specific types of cases. Special procedures and case management practices for commercial cases have been developed in England and Wales, Scotland, New Zealand, and Toronto, Canada. In Scotland, practices and procedures have also been developed in the area of personal injury litigation.

Fact-Based Pleading. Outside of the United States, fact pleading is largely the standard practice. Foreign jurisdictions differ in the level of detail required by the pleadings; however, even in common law countries like Canada, Australia and the United Kingdom, pleadings must at the very least give a summary of the material facts. Many civil law countries have more stringent pleading requirements. For example, Spain requires a complete narrative of the claim's factual background and German complaints must contain a definite statement of the factual subject matter of the claim. French and Dutch pleadings must contain all the relevant facts and Dutch rules further require that plaintiffs articulate anticipated defenses. The Transnational Principles and Rules of Civil Procedure—drafted in part by the American Law Institute—specifically reject notice pleading, opting instead for a fact-based pleading standard that applies to the claim, denials, affirmative defenses, counterclaims and third-party claims.

Initial Disclosures. In most foreign countries, the initial disclosure requirements are closely related to the pleading standard. The jurisdictions with the strictest pleading standards also usually require parties to supplement the pleadings with documents or evidence that propose an appropriate means of proof for the factual assertions made in the pleadings. This is the practice in The Netherlands, Spain, Germany, France and Scotland and under the Transnational Principles. In the jurisdictions with more lax fact-pleading standards—generally common law countries—parties are usually not required to supplement the pleadings with documentary evidence; however, initial disclosures must be made at a specified time shortly after the close of the pleadings.

Discovery. Unbridled discovery is almost solely a hallmark of the United States civil justice system. Many civil law countries do not have discovery at all as we understand it in the United States, and even foreign common law jurisdictions have defined limits on the practice and tools of discovery. In Australia, New Zealand, England, Wales and Scotland and under the Transnational Principles, depositions are allowed only in limited circumstances or with court approval. Scotland similarly limits interrogatories to specific circumstances, as does Australia with the further restriction that interrogatories must relate to a matter in question. Recent rule changes in Nova Scotia place presumptive limits on depositions where the amount in controversy is under $100,000 and a draft proposal in Ontario would allow the court to develop a discovery plan in accordance with the principle of proportionality.

The scope of permissible discovery in many jurisdictions is directly tied to the issues set forth in the pleadings. "Relevant documents" in England and Wales are those that obviously support or undermine a case; specifically excluded are documents that may be relevant as background information or serve as "train of enquiry". Courts in New South Wales, Australia, and the Transnational Principles similarly reject the "train of enquiry" approach. Courts in Queensland

and South Australia employ a "directly relevant" standard under which the fact proved by the document must establish the existence or nonexistence of facts alleged in the pleading. In Queensland, this approach has been recognized as having substantially reduced the expense of discovery.

Related Civil Justice Reforms in the United States. Some state jurisdictions in the United States have also moved, or are moving, in a similar direction. State rules of civil procedure in Oregon, Texas and Arizona—the last of which traditionally modeled state rules on their federal counterparts—show that practices like fact pleading, early initial disclosures and presumptive limits on discovery are not inconsistent with the style of civil justice in the United States. At the federal level, the Private Securities Litigation Reform Act and recent Supreme Court decisions also illustrate the perceived shortcomings of notice pleading in today's complex litigation environment.

Specialized rules and procedures have also been developed in United States courts for certain case types, including commercial, patent and medical malpractice cases. Some state jurisdictions have simplified procedures for claims under a certain amount in controversy or in which the parties elect a more streamlined process—e.g., Rule 16.1 in Colorado.

APPENDIX B

The Sedona Principles for Electronic Document Production

Second Edition

1. Electronically stored information is potentially discoverable under Fed. R. Civ. P. 34 or its state equivalents. Organizations must properly preserve electronically stored information that can reasonably be anticipated to be relevant to litigation.

2. When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(2)(C) and its state equivalents, which require consideration of the technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing electronically stored information, as well as the nature of the litigation and the amount in controversy.

3. Parties should confer early in discovery regarding the preservation and production of electronically stored information when these matters are at issue in the litigation and seek to agree on the scope of each party's rights and responsibilities.

4. Discovery requests for electronically stored information should be as clear as possible, while responses and objections to discovery should disclose the scope and limits of the production.

5. The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information.

6. Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.

7. The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronically stored information were inadequate.

8. The primary source of electronically stored information for production should be active data and information. Resort to disaster recovery backup tapes and other sources of electronically stored information that are not reasonably accessible requires the requesting party to demonstrate need and relevance that outweigh the costs and burdens of retrieving and processing the electronically stored information from such sources, including the disruption of business and information management activities.

9. Absent a showing of special need and relevance, a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual electronically stored information.

10. A responding party should follow reasonable procedures to protect privileges and objections in connection with the production of electronically stored information.

11. A responding party may satisfy its good faith obligation to preserve and produce relevant electronically stored information by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data reasonably likely to contain relevant information.

12. Absent party agreement or court order specifying the form or forms of production, production should be made in the form or forms in which the information is ordinarily maintained or in a reasonably usable form, taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case.

13. Absent a specific objection, party agreement or court order, the reasonable costs of retrieving and reviewing electronically stored information should be borne by the responding party, unless the information sought is not reasonably available to the responding party in the ordinary course of business. If the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information may be shared by or shifted to the requesting party.

14. Sanctions, including spoliation findings, should be considered by the court only if it finds that there was a clear duty to preserve, a culpable failure to preserve and produce relevant electronically stored information, and a reasonable probability that the loss of the evidence has materially prejudiced the adverse party.

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The Sedona Conference

The Sedona Canada Principles

Addressing Electronic Discovery

Principle 1: Electronically stored information is discoverable.

Principle 2: In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.

Principle 3: As soon as litigation is reasonably anticipated, parties must consider their obligation to take reasonable and good faith steps to preserve potentially relevant electronically stored information.

Principle 4: Counsel and parties should meet and confer as soon as practicable, and on an ongoing basis, regarding the identification, preservation, collection, review and production of electronically stored information.

Principle 5: The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.

Principle 6: A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information.

Principle 7: A party may satisfy its obligation to preserve, collect, review and produce electronically stored information in good faith by using electronic tools and processes such as data sampling, searching or by using selection criteria to collect potentially relevant electronically stored information.

Principle 8: Parties should agree as early as possible in the litigation process on the format in which electronically stored information will be produced. Parties should also agree on the format, content and organization of information to be exchanged in any required list of documents as part of the discovery process.

Principle 9: During the discovery process parties should agree to or, if necessary, seek judicial direction on measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronic documents and data.

Principle 10: During the discovery process, parties should anticipate and respect the rules of the forum in which the litigation takes place, while appreciating the impact any decisions may have in related actions in other forums.

Principle 11: Sanctions should be considered by the court where a party will be materially prejudiced by another party's failure to meet any obligation to preserve, collect, review or produce electronically stored information. The party in default may avoid sanctions if it demonstrates the failure was not intentional or reckless.

Principle 12: The reasonable costs of preserving, collecting and reviewing electronically stored information will generally be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.

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Mr. FRANKS. And now we will recognize Mr. Hubbard for 5 minutes, sir.

TESTIMONY OF WILLIAM H.J. HUBBARD, ASSISTANT PROFESSOR OF LAW, THE UNIVERSITY OF CHICAGO LAW SCHOOL

Mr. HUBBARD. Thank you, Chairman Franks and Ranking Member Nadler for this opportunity to testify.

I'm going to begin by simply highlighting a few of the points with respect to the empirical data on the cost of litigation, discovery and preservation in particular.

I'm going to begin with the data on the cost of litigation and discovery. In this context, I mean the cost of the processing, review, and production of documents and data in litigation. The studies that address the costs of litigation discovery do not include in those costs the costs of preservation. I'm going to address those separately in a moment.

A recent major study shows that most cases in Federal court involve relatively modest spending on discovery. According to the study, the median case in Federal court has about $35,000 in litigation costs split between the Plaintiff and the defendant. And of these costs, about one-third is attributable to discovery.

In the median case, then, discovery costs do not appear to be overwhelmingly high. One needs to be careful in interpreting this data, however. If cases settle in order to avoid what would have been high discovery costs, we are unable to observe those costs, and those will not show up in the data. Furthermore, the median case is not representative of the entire distribution of cases, and in this respect, I'm drawing not only on the data from the FJC study, which was referenced in the comments earlier, but also a number of other studies focusing on the costs of litigation, and my own interpretation of data that I have collected.

The median case is not representative of the entire distribution of cases. In fact, the distribution of litigation and discovery costs has what I'd like to refer to as a long tail. There are many cases that have relatively modest costs, but a small but substantial number of cases whose costs vastly exceed the cost of the median case.

In this respect, looking only at the Federal Judicial Center study data, we see that the top 5 percent of cases have discovery costs that go into the hundreds of thousands of dollars. And, in fact, the distribution of costs is so skewed that the top 5 percent of cases in terms of litigation costs account for 60 percent of all litigation costs. This data suggests that this long tail of extreme outliers may have a great impact on the overall costs of the civil justice system.

I'll now turn to the costs associated with the preservation of data. Here I'm going to highlight two findings. First, it appears that the costs of preservation, much like the costs of discovery, are highly skewed. There are a large number of matters that have a moderate amount of preservation and a long tail of matters in which the preservation burdens are very high and very costly.

Secondly, there are many matters for which there are little or no discovery or litigation costs in the sense that I discussed above, but nonetheless have preservation costs and may, in fact, have very high preservation costs. This is because there are many cases that settle either before a lawsuit is filed or shortly after a lawsuit is filed and therefore have very little attorneys' fees.

To the eyes of judges and outside counsel, these cases appear to be relatively inexpensive to the system. But to a party that has had to preserve large amounts of data in anticipation of litigation, the cost of that matter could be in the tens or hundreds of thousands of dollars.

This is because, under current law, which is the product of judicial decisionmaking, parties are required to disrupt or alter their normal business activities for the sake of preservation, even before a lawsuit is filed. This brings me to the question of how the Fed-

eral rulemaking process might reduce the cost and burdens of the civil litigation system. In this respect, the rules need to create incentives for the proper consideration of both the costs and benefits of preservation and discovery.

As I mentioned, under current law, there's an obligation imposed on parties not only in Federal court to abide by Federal judicial decisions on preservation, but also parties outside of Federal court, and, in fact, parties who may anticipate litigation but, in fact, never end up in Federal court, are, nonetheless, obligated to observe these rules with respect to preservation and incur the costs of preservation, even if, as I said, the matters for which they are preserving do not end up in court, let alone any Federal court.

Clear Federal rules should help to reduce the ambiguity and overbreadth of current case law and reduce the costs of civil litigation to society. Thank you.

Mr. FRANKS. Thank you, Professor Hubbard.

[The prepared statement of Mr. Hubbard follows:]

WRITTEN STATEMENT

of

William H. J. Hubbard
Assistant Professor of Law
University of Chicago Law School

for the hearing entitled

"The Costs and Burdens of Civil Discovery"

on

December 13, 2011

before the

Subcommittee on the Constitution
Committee on the Judiciary
United States House of Representatives

I. INTRODUCTION

As part of a larger reexamination of the Federal Rules of Civil Procedure ("Rules"), the Advisory Committee on Civil Rules is considering the possibility of amendments to the Rules that would govern discovery in civil litigation, and in particular the preservation of documents and electronically stored information (ESI).[1] This activity comes amid a widespread call for rules reform arising out of frustration with the cost of discovery and the patchwork of federal case law on preservation obligations. Many companies, generally companies who frequently find themselves defendants in federal court, argue that uncertainty over preservation obligations forces them to "over-preserve"—i.e., preserve more than a proper cost-benefit analysis would otherwise require. Over-preservation involves potentially large and otherwise unnecessary costs.

How serious are the problems of discovery costs and over-preservation? There is a wealth of anecdotal evidence that these costs can be enormous in some cases, and that the cost of discovery (including preservation) outweighs its benefit. Until recently, however, there was virtually no empirical data on the costs of discovery and preservation. New empirical work has begun to provide essential information on the nature and scope of discovery costs, including the costs of preservation.

The key studies on discovery costs are:

- Lee and Willging, *Civil Rules Survey* (2009),[2]
- Lawyers for Civil Justice, et al., *Litigation Cost Survey* (2010).[3]

With respect to preservation, I am leading the first major study of preservation costs, the Preservation Costs Survey, which was commissioned by the Civil Justice Reform Group.[4] Preliminary results from this study have already yielded important findings, which I will describe below. I report these findings in greater detail in:

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[1] Note that herein I will use "documents" and "information" interchangeably to refer both the paper records and ESI.

[2] Emery G. Lee III and Thomas E. Willging, *National, Case-Based Civil Rules Survey* 35 (Federal Judicial Center 2009). I will refer to this study throughout as the "*Civil Rules Survey*."

[3] Lawyers for Civil Justice, Civil Justice Reform Group, and U.S. Chamber Institute for Legal Reform, *Litigation Cost Survey of Major Companies* (Searle Center on Law, Regulation, and Economic Growth 2010) (herein, "*Litigation Cost Survey*").

[4] The Civil Justice Reform Group describes itself as an organization formed and directed by general counsel of Fortune 100 Companies concerned about America's justice system.

- Hubbard, *Preliminary Report* (2011),[5]
- Hubbard, *Letter to Judge Campbell* (2011),[6]
- Hubbard, *Preservation under the Federal Rules* (2011).[7]

These three documents are attached as Appendices to this Written Statement.

The goal of this Written Statement is to summarize the central findings of the Civil Rules Survey, the Litigation Costs Survey, and the Preservation Costs Survey, and provide analysis of how this data should inform the Rulemaking process. Part II provides a short overview of the discovery process to frame the following discussion. Part III discusses the data on discovery costs. Importantly, existing studies of discovery costs do not capture the costs of preservation. Part IV discusses the data on preservation costs. Part V addresses some policy implications for Rulemaking with respect to three aspects of preservation: trigger, scope, and sanctions. It then provides estimates of potential cost savings from new Rules and explains why some proposed alternatives to new Rules will not work. The analysis in this Written Statement will necessarily be brief; more detailed discussion can be found in the Appendices.

II. THE STAGES OF DISCOVERY

Discovery—the legal processes by which the parties unearth information to be used in a case—is typically divided into five stages. These stages are illustrated in the "discovery pyramid" in Figure 1 below. The discovery process begins with the *preservation* of information that may be relevant to ongoing or threatened litigation. Next comes the *collection* of documents for processing and review. *Processing* refers to actions such as decryption, decompression, and de-duplication of data. This renders data amenable to review and reduces redundancies and other costs further downstream. *Review* is the work of lawyers to determine relevance and privilege of the documents in discovery, and *production* turns over to the other side the relevant, non-privileged materials within the scope of discovery. The ultimate goal of discovery, of course, is the use in litigation of information valuable to the finder of fact.

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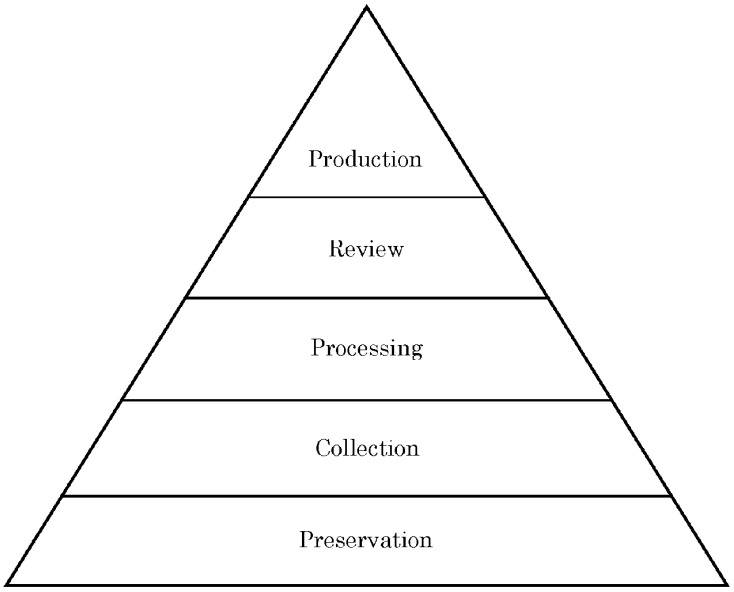
[5] William H. J. Hubbard, *Preliminary Report on the Preservation Costs Survey of Major Companies* (Civil Justice Reform Group Sept. 8, 2011) (Attached as Appendix A) (herein *Preliminary Report*).

[6] William H. J. Hubbard, *Letter to the Hon. David G. Campbell* (Nov. 3, 2011) (Attached as Appendix B).

[7] William H. J. Hubbard, "Preservation under the Federal Rules: Accounting for the Fog, the Pyramid, and the Sombrero," unpublished working paper (Dec. 2, 2011) (Attached as Appendix C).

FIGURE 1: THE DISCOVERY PYRAMID



The pyramid shape is deliberately chosen and will be familiar to many practitioners. It indicates that not everything that is preserved is collected, and not everything that is collected is processed and reviewed, and so on. The question for the policymaker is whether the Rules governing discovery unnecessarily expand the base of the pyramid in a way that increases costs out of proportion to any benefit. I will return to this question shortly. First, I will summarize some data on the costs of discovery and preservation in particular.

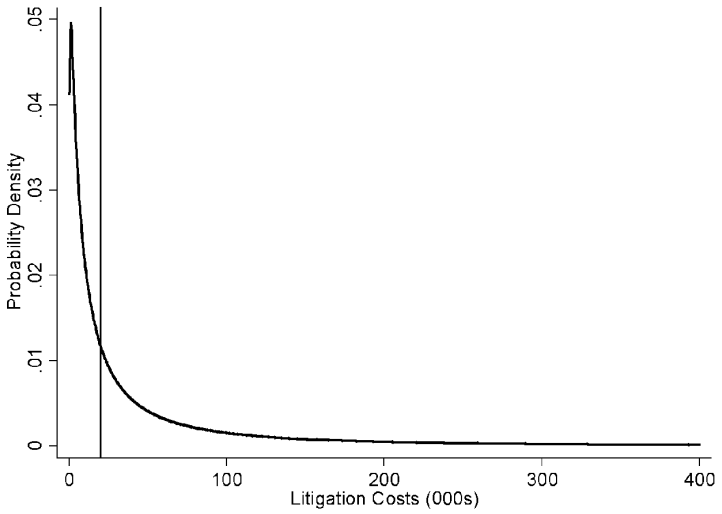
III. COMMENTS ON THE COSTS OF DISCOVERY

Two studies on litigation costs, the Civil Rules Survey and the Litigation Cost Survey, shed light on the role of discovery in the costs of litigation. The Civil Rules Survey covers a large sample of outside counsel from a broad cross-section of federal cases. Perhaps its most salient finding is that the median per-case cost of litigation to defendants in cases with discovery is $20,000. (The median cost for plaintiffs is $15,000.) And in this sample, the cost of discovery is maybe 30 percent of litigation costs. This result seems to suggest that discovery costs may not be a major problem.

The Litigation Cost Survey covers a different sample: in-house counsel at large companies were asked about the costs of their largest

lawsuits. The per-case average cost of discovery in this sample was over $700,000. This result suggests that improving the efficiency of discovery could lead to cost savings for the economy.

FIGURE 2: LITIGATION COSTS WITH MEDIAN OF $20,000, GIVEN A LOG NORMAL DISTRIBUTION OF COSTS



While the studies' results appear to contradict each other, a careful analysis shows otherwise. A closer look at the Civil Rules Survey shows why: the 10th percentile of defendants' litigation cost, $5,000, is one-fourth the median, but the 95th percentile, $300,000, is fifteen times the median! In other words, it appears that the cost of litigation, and of discovery in particular, is a "long tail" phenomenon. The distribution of costs has many cases close to zero, but also a long tail of extreme, and extremely important, outliers. To illustrate this, I fit the data from the Civil Rules Survey to the log-normal distribution, which is commonly used by economists and fits the Civil Rules Survey data remarkably well. See Figure 2. The median ($20,000) is marked with a vertical line. Perhaps contrary to our intuition, the median case is hardly representative. There is a bulk of cases with low costs, and then there is a "long tail" of extremely costly cases far above the median. These latter cases are exactly the kinds of cases that the Litigation Cost Survey addresses and investigates in greater detail.[8]

[8] For further discussion of discovery costs, see Appendix A, pp. 5-7.

How important is this "long tail"? Consider the following: in the distribution illustrated above, *the top 5 percent of cases accounts for 60 percent of all litigation costs.*

IV. COMMENTS ON THE COSTS OF PRESERVATION

Although preservation is a stage of discovery, it is important to recognize that the studies cited above do *not* include the costs of preservation in their estimates. Studies such as the Civil Rules Survey obtain their cost data from outside counsel in litigated cases, and consequently cannot measure costs, such as preservation and collection, that are borne by the parties themselves. Hence, the estimates of discovery costs in the Civil Rules Survey are really estimates of processing, review, and production costs. The Litigation Cost Survey, on the other hand, did collect data from in-house counsel, and thus was able measure the cost of collection in addition to the costs of processing, review, and production. Even the Litigation Cost Survey, however, did not capture preservation costs. This is for two reasons: First, many of the costs of preservation, such as the costs of committing IT resources and infrastructure and the lost time of employees who must comply with "litigation holds," are not observable by in-house counsel; they don't appear on any legal department's budget. Second, many of the disputes that currently impose preservation costs on companies are not lawsuits—they are *potential* lawsuits, and may never develop into litigation. The costs of preservation in these disputes are totally invisible to the court system, but are very really to the parties that must bear them.

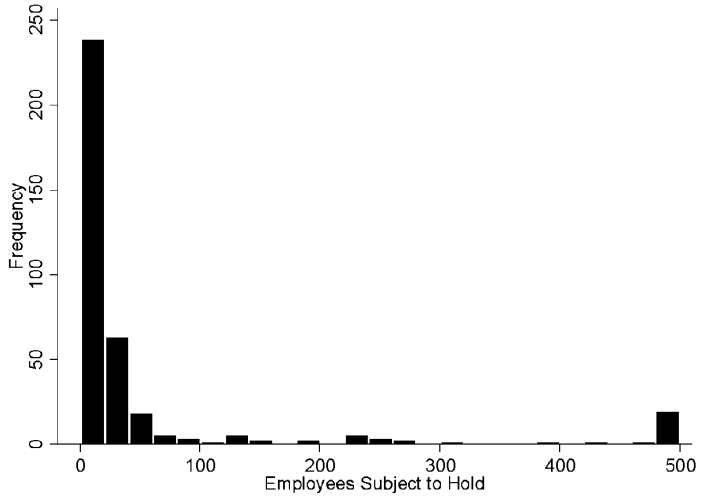
In this Part, I will show that the distribution of preservation costs has a "long tail," similar to other discovery costs. I will then briefly discuss some of the "fixed costs of preservation" that can't be detected when looking at individual cases. I will then examine the volume of data subject to preservation obligations relative to the amount of data involved in other stages of litigation.

A. The Long Tail in Preservation

Preliminary results from the Preservation Costs Survey suggest that there is a "long tail" of preservation costs. The data displayed in Figure 3 are for a sample of 390 distinct matters involving 43,011 litigation holds issued at a large company over a five year period.[9]

[9] In Figure 3, note that for graphical clarity, matters with more than 500 employees subject to hold have been included in the category for 500 employees subject to holds.

FIGURE 3: DISTRIBUTION OF NUMBER OF EMPLOYEES ON LITIGATION HOLD PER MATTER



This preliminary data suggests that preservation costs, like litigation costs, are highly skewed, with a long tail in which a small number of highly complex and burdensome cases accounts for a large share of the total costs borne by individuals subject to holds.[10]

B. The "Fixed Costs" of Preservation

While many costs of preservation, such as the cost of responding to litigation holds, accrue on a per-case basis, other preservation costs are not tied to a particular matter. They instead reflect the costs for a company to create internal systems to handle preservation across all cases. These "fixed costs" include expensive investments in technology that companies make in order to control what would otherwise be even higher per-case preservation costs.

Preliminary results from the Preservation Costs Survey provide examples of these fixed costs. One fixed cost is the cost of systems to handle litigation hold notices. Two companies report that implementing such systems cost approximately $800,000 to $900,000, with upkeep and maintenance costs of $150,000 per year. Other examples include a tool for collecting data to be preserved separately that cost $4,800,000 to implement. One company's data vault system cost $12,000,000 to implement and maintain in 2010.

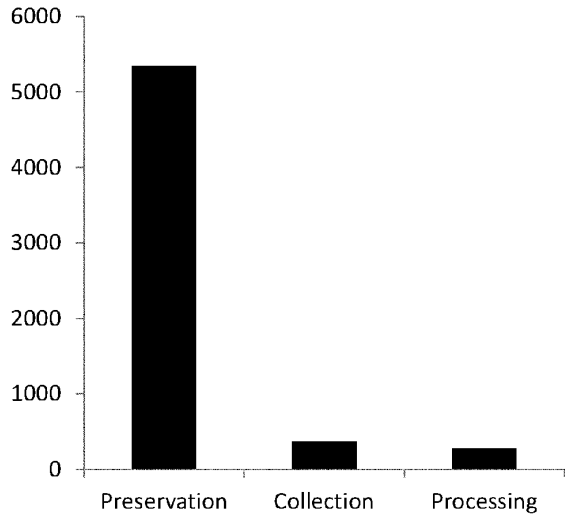
[10] For further evidence and discussion, see Appendix A, pp. 8-10.

Further research is necessary to provide estimates of the costs of preservation that better capture the full range of costs. These initial examples, however, indicate that compliance with broad preservation obligations can be a very expensive undertaking for many companies.[11] As I estimate in Part V, the total cost of current Rules is in the billions of dollars. Reducing these costs will potentially lower product prices and create jobs.

C. The Discovery Sombrero

How does the amount of data subject to preservation compare to the amount of data affected by other stages of discovery? Figure 4 presents data from a large company on the number of custodians involved in three stages of discovery: preservation, collection, and processing. Out of over 5000 custodians placed on litigation hold, and thus subject to preservation obligations, fewer than 10 percent ultimately see their data collected, let alone processed.

FIGURE 4: NUMBER OF CUSTODIANS SUBJECT TO PRESERVATION, COLLECTION, AND PROCESSING, FORTUNE 100 COMPANY

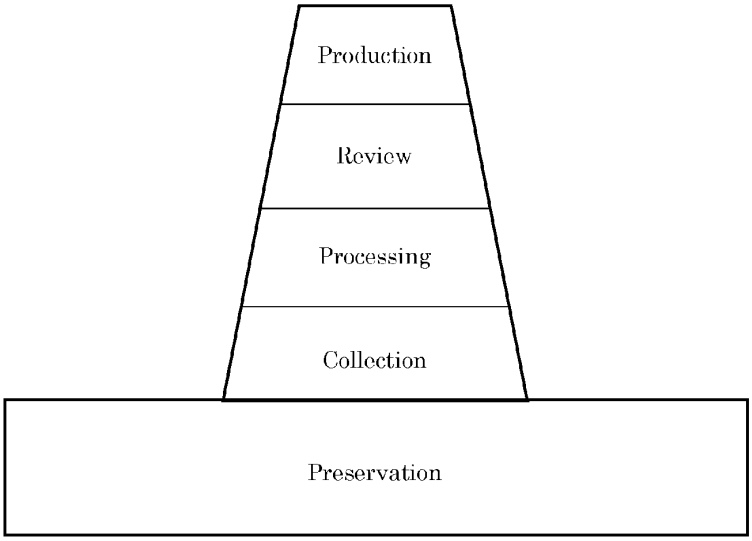


Source: Hubbard, *Preliminary Report*.

[11] For further discussion, see Appendix A, pp. 10-11.

Let's return to the discovery pyramid in Part II. In light of this data, a more accurate representation would be a sombrero: a wide "brim" of preservation, and a much narrower, tapering set of documents subject to collection, processing, and so on. See Figure 5.[12]

FIGURE 5: THE DISCOVERY SOMBRERO, WITH STAGES OF DISCOVERY



When we see the disproportionate bulk associated with preservation, we begin to understand the urgency for new Rules governing preservation. It is also important to understand *why* we see this sombrero shape. Preservation is unique in two important respects, both of which bear directly on the proper direction of Rules reform.

First, preservation is governed by Rules that are broad, unclear, and lacking uniformity. This leads preserving parties to "over-preserve" because the boundaries of their obligations, and therefore their risk of sanctions, are uncertain.

Second, under current law, preservation is an obligation imposed not only on parties *in* federal court, but also on parties *outside* of federal court, i.e., parties who are not involved in litigation at all. The other stages of discovery all occur *in* litigation, and the Federal Rules

[12] The illustration, of course, is not quite to scale. If this were drawn to scale, the brim would be even wider, and the top of the sombrero would be extremely narrow!

governing discovery apply only to cases in *federal* court. But the current federal law on preservation places affirmative obligations on parties to undertake costly preservation activity before litigation commences. As a consequence, companies have to incur the costs of preservation in matters that never become lawsuits (and also matters that end up in state, not federal, court).

Of course, the conduct of companies and individuals outside of federal court is regulated by federal law all the time. But it is usually substantive federal law, enacted by Congress. The federal courts should be cautious before using the Federal Rules or their inherent power to create affirmative obligations on individuals and businesses in matters that never cross the threshold of a federal courthouse.[13]

With this in mind, I now turn to question of whether new Rules could improve the law governing preservation and generate significant cost savings for the economy.

V. POLICY ANALYSIS

A. Trigger, Scope, and Sanctions

There are three major subjects that preservation Rules must address. I provide a detailed analysis of these three subjects in my paper, "Preservation under the Rules," which is attached as Appendix C. I summarize my arguments here.

The first question that Rules governing preservation must address is when an obligation to preserve is triggered. Currently, the trigger is the onset of litigation or the "reasonable expectation" of litigation. As shown above, such a rule has the unintended consequence of federal courts regulating the activity of parties in disputes that never end up in federal court. Hence, **the Rules should limit the triggering event for the affirmative duty of preservation under the Rules and under the federal court's inherent power to the initiation of proceedings in federal court.**

Such a Rule would be good policy; in the next section I estimate the cost savings from such a Rule. It also respects the myriad state and federal laws that govern data preservation outside the context of federal court, and it avoids the concern that the federal courts might be imposing too much (in the way of affirmative duties) on parties not in federal court.

Importantly, too, triggering the duty to preserve at the onset of federal litigation would *not* limit the ability of federal courts to police attempts to destroy incriminating information. The *duty to preserve* should not place affirmative obligations on parties who are not in litigation to change their normal business activities and undertake

[13] For further discussion, see Appendix C, pp. 11-19.

costly actions to set aside documents and data. But parties out of court have never been allowed to—and must never be allowed to—deliberately destroy evidence with the purpose of preventing its use in future litigation. This latter rule, which I call the *duty not to spoliate*, would not be affected by a Rule governing trigger for the duty to preserve. Unlike the duty to preserve, the duty not to spoliate does not impose costly obligations on parties: it requires that businesses and individuals *not* interrupt their usual activities; i.e., *not* override their usual records management activities in order to dispose of incriminating materials. The Rules will not affect any prohibition against changing one's usual activities in order to destroy incriminating data.

The next major issue is the scope of the preservation obligation, once triggered. Here, **the Rules should set presumptive limits on the scope of preservation**, for example by setting a limit of 15 custodians subject to a litigation hold in a case. Presumptive limits not only reduce the costs of preservation; they give parties the incentive to meaningfully negotiate over the scope of preservation. Currently, with no presumptive limits on preservation, plaintiffs' lawyers have the incentive to ask that "everything" be preserved, and defense lawyers have no incentive to involve the other side in the preservation process.

Third, the Rules should address the standard for imposing sanctions. Here, I will simply note that the reality of modern discovery is that it often takes the form of a search for the needle in the haystack. As such, when data is lost, the overwhelming likelihood (absent evidence of bad faith) is that the lost data was neither relevant nor prejudicial, if only because the vast majority of data is never relevant or material. **Rules governing sanctions should take care to protect parties from sanctions that rest on presumptions that any lost data is relevant and material.**

B. Estimating Cost Savings from New Rules

Well-designed Rules governing preservation should generate substantial savings in the costs of preservation and litigation. Many of the costs savings are hard to project, given the limitations of current data and the fact that some benefits of improved Rules will be indirect, such as more meaningful and productive negotiations between parties. To estimate one set of cost savings from improved Rules, I will focus on two specific suggestions for Rules changes, one regarding trigger and one regarding scope. (I do not separately quantify the effect of a new Rule addressing sanctions, but my estimates for the effects of Rules addressing trigger and scope assume that a Rule appropriately clarifying sanctions is put in place.) These are rough, "back of the envelope" calculations.

To estimate some of the cost savings from a Rule regarding trigger, I will consider a Rule that places the trigger for the duty to preserve at the filing of a lawsuit in federal court, which I have argued is the appropriate trigger point. Such a Rule would have two direct effects on costs: First, it would reduce the number of matters subject to litigation holds, because many or even most litigation holds at large companies are for matters for which there is no filed lawsuit. Second, it would reduce the average scope of any given litigation hold. Why? Because litigation holds would be implemented at, rather than (in some cases) long before the onset of litigation, meaning that preserving parties will have the benefit of a complaint (or subpoena) that clarifies the proper scope of preservation. This allows parties to design litigation holds to more efficiently capture the data most likely to be useful to the parties.

To estimate some of the cost savings from a Rule regarding scope, I will focus solely on a potential provision that would set a presumptive, numerical limit for how many custodians would be subject to the duty to preserve. In my *Letter to Judge Campbell,* I use the example of a presumptive limit of 15 custodians.

Taken together, and using conservative estimates of the impact of the new Rules, the total effect is a reduction in litigation hold costs of 63 percent. Focusing only on the lost employee productivity caused by litigation holds, **I would estimate the dollar value of these savings for a single, large company to be about $2 million. This is intended as a lower bound estimate**, because it includes only the cost savings in employee time, and no other cost savings. Given the thousands of large companies that face significant preservation costs, one can extrapolate from this number to estimate that **the savings for all companies would be in the billions of dollars.**[14]

C. Why Rulemaking Is Needed

Finally, I note that the dialogue on rulemaking has included two suggested alternatives to new Rules. First, there is the possibility that improved technology will render moot concerns about preservation costs (and maybe even discovery costs generally). Second, there is the possibility that continued development of legal rules on a case-by-case basis in the federal courts will eventually lead to the clarity that is needed. I do not believe that either of these alternatives is viable.

Technology. There is no doubt that in some ways, technology has reduced the costs of preservation. The per-unit-of-data cost of storage has fallen exponentially for decades, and continues to fall. If the cost

[14] For further discussion, and the details of the calculations underlying these figures, see Appendix B at pp. 1-4.

of preservation were simply the cost of storing a fixed amount of data, the cost of preservation would have ceased to be a live issue long ago.

But as discussed above, the main costs of preservation are not storage costs. There is the human cost in terms of workers diverted away from productive, business activity to preservation obligations. There is also the cost of adapting new systems to preservation obligations and managing the complexities of legacy data and outdated storage formats. The rapid advance of technology actually exacerbates these costs. More importantly, technology's full potential to offer low-cost solutions to preservation cannot be realized so long as legal obligations are amorphous and unclear. Computers and technology can help effectuate clear legal rules, but they can't make confusing rules clear.[15]

Case-by-case law making. It has been suggested that the continued evolution of the case law on preservation will lead to a gradual convergence of rules, reducing the current uncertainty and conflicting obligations imposed by the case law. I am skeptical that this process offers significant hope for national uniformity. The law on discovery, and preservation especially, is almost exclusively created at the district court level. (Virtually all discovery rulings are "non-final judgments" and thus not appealable.) District court opinions, of course, are not even binding precedent in their own district, and in the eight years since the landmark *Zubulake* case,[16] there is not even uniformity *within* circuits, let alone across circuits.[17]

CONCLUSION

The Advisory Committee on the Civil Rules has undertaken a reexamination of the Federal Rules to consider amendments that would improve the efficiency and reduce the burdens of litigation. It is focusing first on the Rules governing discovery and preservation rules, and has requested empirical data on the costs of discovery and preservation. Although the empirical studies to date are preliminary, it appears that companies could save billions of dollars with new Rules clarifying the events triggering the duty to preserve, the scope of preservation, and the standards for sanctions.

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[15] For further discussion, see Appendix A at pp. 16-17.
[16] *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003).
[17] For further discussion, see Appendix C at pp. 27-29.

APPENDIX A

to the

WRITTEN STATEMENT

of

William H. J. Hubbard
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University of Chicago Law School

for the hearing entitled

"The Costs and Burdens of Civil Discovery"

on

December 13, 2011

before the

Subcommittee on the Constitution
Committee on the Judiciary
United States House of Representatives

Preliminary Report on the Preservation Costs Survey of Major Companies

prepared for

Civil Justice Reform Group

William H.J. Hubbard, J.D., Ph.D.
Assistant Professor of Law
University of Chicago Law School

Draft dated: September 8, 2011

Introduction

The Discovery Subcommittee of the Advisory Committee on Civil Rules is currently pursuing the possibility of proposing federal rules to address preservation and spoliation issues in civil litigation. At its most recent major conference, the May 2010 Conference on Civil Litigation at Duke Law School, there was considerable support for new rules in this area. The E-Discovery Panel led by Judges Scheindlin and Facciola issued a statement that the Panel "holds the consensus view that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure."[1] Nonetheless, much work remains before specific rules can be proposed.

One consensus that emerged at the May 2010 Duke Conference was the need for further empirical research on the magnitude and nature of the costs associated with civil litigation, including discovery and in particular preservation. In response to this need, the Civil Justice Reform Group commissioned me in the spring of 2011 to design and implement an empirical survey of preservation costs borne by large companies in civil litigation.[2] This survey, which I will refer to as the "Preservation Costs Survey" in this report, is part of a larger research agenda in which I am studying the size and distribution of discovery costs, and preservation costs in particular. While this report will focus primarily on the Preservation Costs Survey, I will discuss preliminary results from other aspects of my research to the extent that they are relevant.

Many of the questions that the Preservation Costs Survey seeks to shed light on are the same questions raised by Judge David Campbell and Prof. Richard Marcus as discussion points for the September 2011 Dallas Mini-Conference.[3] These include the following:

- What is the nature of the problem [of preservation of electronically stored information (ESI)], and how are you addressing it?

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[1] Scheindlin, Shira A., John M. Facciola, Thomas Y. Allman, John M. Barkett, Joseph D. Garrison, Gregory P. Joseph, Dan H. Willoughby, Jr. 2010. Elements of a Preservation Rule. online at http://civilconference.uscourts.gov/.

[2] The Civil Justice Reform Group describes itself as an organization formed and directed by general counsel of Fortune 100 Companies concerned about America's justice system. For biographical information on the author of this report, please see Appendix A.

[3] David Campbell and Richard Marcus, Memorandum (June 29, 2011). The following bullet points are all quoted from this Memorandum.

- In what percentage of lawsuits or potential lawsuits is the problem arising?
- Are problems confined to very large, information-intensive cases, or do they arise in medium and small cases as well?
- What do the problems cost your organization and similar organizations on an annual basis?
- Where are the costs incurred—in identifying and segregating relevant ESI, in storing ESI, in reviewing ESI before production in litigation, in litigating ESI issues in court, in other ways?

  . . .

- The FJC study [Lee (2011)] suggests that spoliation of ESI is rarely raised in federal motions practice. Is that consistent with your experience?

  . . .

- Is there a significant cost associated with storing information preserved for litigation? . . .
- How will technology help reduce the cost of dealing with ESI in litigation over the next few years?

  . . .

- Are cost savings more likely to be achieved through advances in technology than through a rule of civil procedure?

By presenting these questions, Judge Campbell and Professor Marcus highlight the crucial reality that the first order of business in developing sound rules to govern preservation is fact-finding. The current state of knowledge on discovery costs—let alone preservation costs—is rudimentary. While many practicing attorneys have rich and detailed knowledge of their own experience with preservation, commentators have struggled to collect and organize this anecdotal expertise into a coherent empirical picture.

Indeed, to this day there is not even consensus on what litigation costs are for a typical case, with reputable sources providing numbers that may seem surprisingly low (e.g., median defendant's discovery costs of $20,000 in

the *Civil Rules Survey*[4]) to surprisingly high (e.g., discovery costs of $3.5 million for a "midsize" case in the *View from the Front Lines*[5]). As another example, there is anecdotal evidence that many companies fear spoliation sanctions arising out of unclear preservation obligations, yet—as alluded to in the bullet points above—there is also evidence that the imposition of sanctions is rare. Clearly, we need a better handle on the magnitude and nature of the problems with preservation and spoliation before deciding how to address them.

Ongoing research on the discovery process, of which the Preservation Costs Survey is a part, serves to advance our understanding of preservation costs, with the ultimate objective of a better-informed rulemaking process. Indeed, preliminary results that I present below already begin to reconcile some of the disparate results from earlier studies. Nonetheless, the Preservation Costs Survey is currently in its early stages, and more time is required before a more complete picture of the scale and scope of preservation costs emerges.

This preliminary report has four parts, which correspond to its four objectives:

(1) To assess the need for empirical work in this area,

(2) To preview the contributions that this study of preservation costs can provide,

(3) To provide an outline of the design of the Preservation Costs Survey, which includes an initial phase of gathering data from a small sample of companies, followed by a determination of whether a second phase, involving a survey of a broader spectrum of companies, is feasible, and

(4) To describe the preliminary results from the first phase of the Preservation Costs Survey, which involved detailed interviews with, and data gathering from, counsel at four large companies.

I. The Need for Empirical Study of Preservation Costs

Lack of data has been a long-standing impediment to constructive dialogue and reforms addressing the costs of discovery. Over the last few years,

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[4] Emery G. Lee III and Thomas E. Willging, *National, Case-Based Civil Rules Survey* 35 (FJC 2009). I will refer to this study throughout as the "*Civil Rules Survey*."

[5] Institute for the Advancement of the American Legal System (IAALS), *Electronic Discovery: A View from the Front Lines* 5 (U. Denver 2008).

however, growing awareness of the importance of quantifiable evidence on the benefits and burdens of procedural rules has led to increasingly ambitious efforts to empirically study the costs of civil litigation. Several such studies were presented at the May 2010 Duke Conference. These included the *Civil Rules Survey* by the Federal Judicial Center (FJC), the *Member Survey on Civil Practice* by the ABA Section of Litigation,[6] and the *Litigation Cost Survey of Major Companies*.[7]

Existing studies, to varying degrees, address aspects of the costs of discovery, such as attorney's fees in litigation, document review and production costs, and costs associated with the processing of ESI. These studies provide very little discussion, however, of the costs of preservation.

Relatedly, there is little evidence on the costs associated with legal disputes that do not result in a filed lawsuit. For most categories of legal disputes, many or most disputes never escalate into full-blown litigation—but the possibility of litigation means that preservation obligations and other litigation-related rules impose costs in matters that never even reach the courthouse. One limitation of studies such as the ABA Study and the FJC Study is that they are essentially surveys of outside counsel, and consequently cannot begin to quantify costs that are internal to the client, or costs associated with legal disputes that never reach the point that outside counsel becomes involved.[8]

Understanding the full scope of preservation costs, therefore, requires a close examination of preservation from the potential litigant's perspective, to investigate the time and money devoted to preservation both before and after lawsuits are actually filed. For many individuals and small businesses, of course, litigation is unusual, but for large companies, litigation is an inevitability, with hundreds or thousands of matters (lawsuits or potential lawsuits) active at any given time. Thus, while large companies' preservation activities may not be representative of all litigants, studying large companies provides the best opportunity for the collection of data on preservation costs across a large number of matters, including both actual and potential litigation. The

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[6] ABA Section of Litigation, *Member Survey on Civil Practice: Detailed Report* (ABA: Chicago, IL 2009) (herein, "ABA Study").

[7] Civil Justice Reform Group, Lawyers for Civil Justice, and U.S. Chamber Institute for Legal Reform, *Litigation Cost Survey of Major Companies* (Searle Center on Law, Regulation, and Economic Growth: Chicago, IL 2010) (herein, "*Litigation Cost Survey*").

[8] A preliminary report from one of the companies participating the Preservation Costs Survey indicates that 44 percent of matters with preservation hold notices do not involve a filed lawsuit.

Preservation Costs Survey intends to collect more data, and richer data, on preservation costs than is currently known.

II. Contributions a Study of Preservation Costs Can Provide

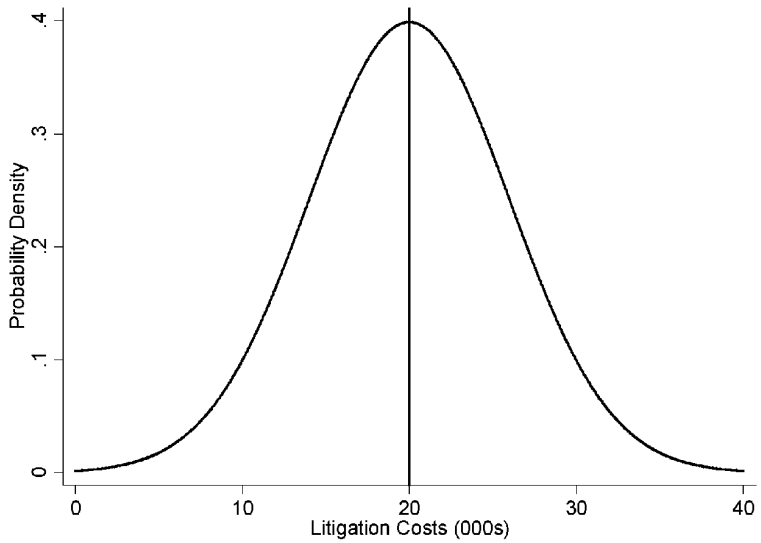
As noted above, this preliminary report is intended to preview the Preservation Costs Survey in light of the need for more empirical evidence on the costs of preservation. Evidence alone, however, is not sufficient to fill the gaps in our knowledge of the challenges presented by preservation obligations. What is also essential is an ongoing dialogue on how to interpret the evidence. My research intends to contribute to this dialogue by applying some fundamental statistical and economic insights to the results of various studies, including the Preservation Costs Survey, and providing context to what otherwise might be conflicting or incomplete statistical accounts.

Litigation Costs and the Long Tail

For example, consider the fundamental question: what does the distribution of litigation costs look like? This is a question that recent studies have not specifically taken up—but, as I will explain, is essential to understanding the nature of the costs that discovery and preservation obligations impose. An important source of information to date on the costs of litigation (but not preservation) is the *Civil Rules Survey*. One of the most striking results of the survey is that in the median case—specifically, the median case *with* discovery—the costs of litigation are (arguably) modest, $15,000 for plaintiffs and $20,000 for defendants. And of these costs, only a fraction (20 to 30 percent) are due to discovery.

Given these numbers, it would be fair to ask whether discovery is in fact such a significant source of costs. If the median cost of discovery for defendants is $20,000, we are likely to visualize a distribution of costs that looks something like a bell curve, or normal distribution, as illustrated in Figure 1. Our intuition is that, given a median cost of $20,000 for defendants (the vertical line in Figure 1), most defendants experience costs close to that median amount, in the same way that most test scores are close to the median score and students' grades tend to fall into a bell curve.

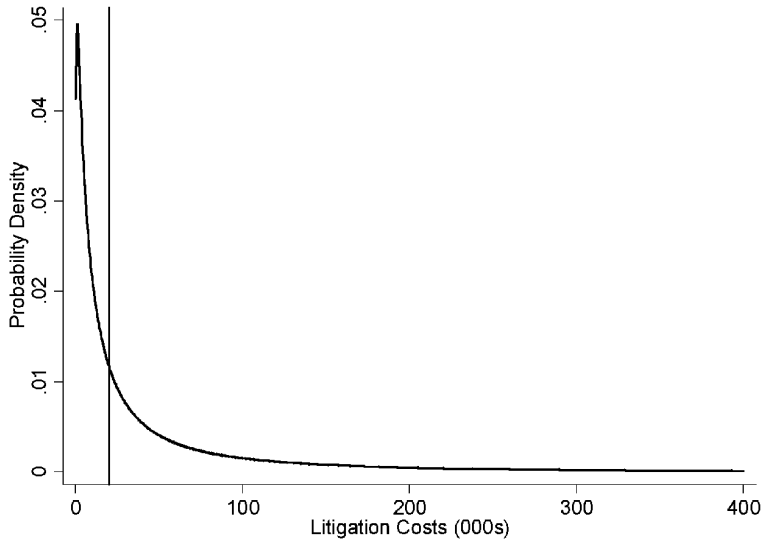
FIGURE 1: LITIGATION COSTS WITH MEDIAN OF $20,000, ASSUMING A NORMAL DISTRIBUTION OF COSTS



This intuition, however, would lead us astray. Litigation costs are not normally distributed. The clue to seeing this is to look at the *Civil Rules Survey* reports of the 10th and 95th percentiles of the distribution of costs. The 10th percentile, $5,000 is one-fourth the median, but the 95th percentile, $300,000, is fifteen times the median! In other words, this is a clue that litigation costs are not like test scores, with a normal distribution of costs clustered close to the median, but instead more like the distribution of income, or the distribution of stock returns—in other words, a "long tail" phenomenon, where there is a large mass close to zero, but also a long tail of extreme, and extremely important, outliers.

How does this change our intuition about litigation costs? Let's fit the data from the *Civil Rules Survey* to the log-normal distribution, which is a distribution used to describe the distribution of income and which fits the data published in the *Civil Rules Survey* quite well. This is what the distribution of costs looks like:

FIGURE 2: LITIGATION COSTS WITH MEDIAN OF $20,000, ASSUMING A LOG NORMAL DISTRIBUTION OF COSTS



Once again, the median is marked with a vertical line. But we now see that while the bulk of cases are still close to the median, there is also a "long tail" of extremely costly cases that are nowhere close to the median. How important is this "long tail"? Consider the following: in the distribution illustrated above, *the top 5 percent of cases accounts for 60 percent of all litigation costs.*

In this light, it is helpful to consider the *Civil Rules Survey* together with the *Litigation Cost Survey*. The *Litigation Cost Survey* can be (rightly) criticized as *not* a representative sample of all lawsuits, or even of all lawsuits at large companies. It focuses on the cases with the highest litigation costs. But the *Civil Rules Survey,* which does canvas a representative sample of lawsuits, reveals that the distribution of litigation costs is such that the largest, most expensive cases carry great weight in the calculus of litigation costs.

In short, one response to the *Civil Rules Survey* is to ask, "If most cases have low discovery costs, why should we devote resources to rules reform that may affect only the 5 percent of cases with high discovery costs?" But perhaps a better question would be, "Should we explore rules reform, if a reform that affected only 5 percent of cases could help control 60 percent of litigation costs?"

Do Preservation Costs Have a Long Tail?

The next question that arises is whether we find a similar, "long tail" pattern for preservation costs. To answer this question, the Preservation Costs Survey will be essential. Without data, we won't know whether preservation costs have a skewed distribution in the same way that litigation costs do.

After all, we might expect the skewness of the distribution of litigation costs to arise out of the litigation process itself. Many cases settle early with little discovery, while a few cases go all the way to trial. The low median of litigation costs could merely reflect the fact that most cases settle early.

This factor, however, should not affect the distribution of preservation costs, because the preservation obligation attaches at or before the onset of litigation. Most preservation costs will be imposed on the parties regardless of whether the case settles early or goes all the way to trial.

A second factor is that case complexity may have a highly skewed distribution, so that the long tail of litigation costs partly reflects a long tail of very complex disputes. To the extent that the skewness of litigation costs is driven by case complexity, we might expect preservation costs to have a distribution with a long tail as well.

Some preliminary results from the Preservation Costs Survey offer suggestive evidence in this regard. Two of the companies participating in Phase I of the Survey (described in more detail below) have provided data on a sample of litigation matters opened during two recent sample periods. In the Company A data, for each matter there is information on the number of hold notices issued and interviews conducted during a two-year window. In this sample, there are 112 distinct matters representing actual or anticipated civil litigation.[9] During the sample period, a total of 5021 distinct actions were taken—these include issuances of a litigation hold notice to an individual, interviews, and revisions to and terminations of litigation holds. Of the 112 sample matters, the top five (which is 4.5% of the total) account for 1410 of the 5021 actions—which is more than 28 percent of all actions. Indeed, more than half of all preservation activity was generated by only 16 (or 14.3%) of the matters. As Figure 3 illustrates, preservation activity across cases as Company A has a long tail, although not as extreme as the long tail for litigation costs in the *Civil Rules Survey*.

[9] Note that this sample excludes certain categories of cases, such as asbestos cases, but is otherwise representative of civil matters requiring litigation holds.

FIGURE 3: DISTRIBUTION OF PRESERVATION ACTIONS TAKEN, COMPANY A LITIGATION HOLD SAMPLE

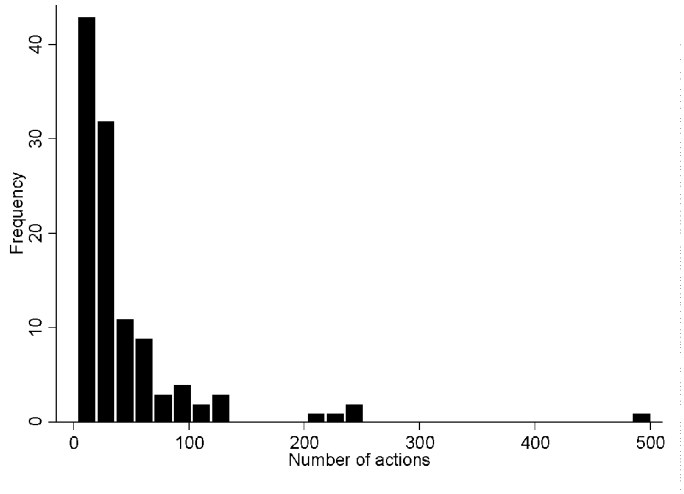
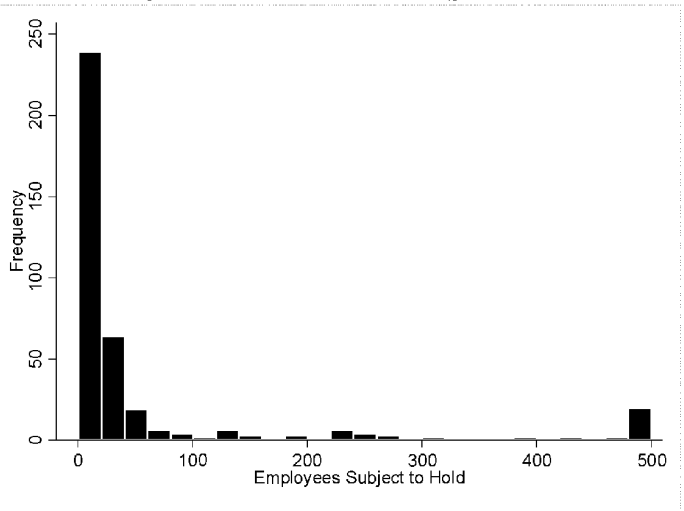


FIGURE 4: DISTRIBUTION OF NUMBER OF EMPLOYEES ON HOLD PER MATTER, COMPANY D LITIGATION HOLD SAMPLE



The data from Company D covers 390 distinct matters representing actual or anticipated civil litigation. For each matter the dataset provides the number of individuals subject to a litigation hold in that matter. During the five-year sample period, a total of 43,011 holds were issued. In this sample, five percent of the matters account for more than 62 percent of the holds issued (26,864 holds out of 43,011). See Figure 4.[10]

This preliminary data suggests that preservation costs, like litigation costs, are highly skewed, with a long tail in which a small number of highly complex and burdensome cases account for a large share of the total costs borne by individuals subjects to holds. It may therefore be productive to think in terms of steps that can address the burdens of large, information-intensive cases in particular.

The "Fixed Costs" of Preservation

Existing surveys of litigation costs, such as the *Civil Rules Survey* and the *Litigation Cost Survey* focus on the costs of litigation on a per-case basis. As the figures above illustrate, the Preservation Costs Survey seeks to measure the per-matter costs of preservation as well. But a study of preservation costs has to account for a second type of cost as well. While many costs of preservation, such as the costs of responding to litigation holds, accrue on a per-case basis, other preservation costs are not tied to a particular matter, but instead reflect the costs for a company to create internal systems to handle preservation across all cases. These "fixed costs" include expensive investments in technology that companies make in order to control what would otherwise be even higher per-case preservation costs.

Importantly, while fixed costs are not captured at all by the figures above, the Preservation Costs Survey is measuring fixed costs separately. I have initial data from two companies on the costs of computer systems (both hardware and software) implemented by those companies to handle aspects of preservation. One fixed cost is the cost of systems to handle litigation hold notices. Company A implemented a system to partially automate the issuing and tracking litigation holds at a cost of approximately $900,000. Company B is in the processing of implementing a new system with similar goals, and at a similar cost (estimated to be $800,000). In addition to implementation costs are upkeep and maintenance costs, which Company A estimates to be $150,000 per year.

[10] In Figure 4, note that for graphical clarity, matters with more than 500 employees subject to hold have been included in the category for 500 employees subject to holds.

By far the largest fixed costs, however, are associated with the preservation of data itself. Every large company that I have encountered, both in my practice experience and in connection with the Preservation Costs Survey, has had a diverse set of systems used to address preservation obligations. This is because of the large variety of types of ESI, many of which have distinct business purposes and are used and stored in different ways on a company's computer systems. To preserve all types of ESI, therefore, requires multiple preservation solutions.

Gathering data on the costs of all of the systems used for preservation in any given company is a daunting task; it may not be feasible for the Preservation Costs Survey to collect such a comprehensive set of costs data. But Phase I of the Survey has been able to identify costs for specific, recently-implemented systems for which individual companies have information on costs. For example, the tools used by Company A to collect data to be preserved at the outset of litigation—which is only a fraction of the data preserved—cost $4,800,000 to implement. The data vault system that Company B uses to preserve certain types of ESI, including email, cost $12,000,000 to implement and maintain in 2010.

These are the costs for individual systems designed to address specific elements of the preservation obligation. A more comprehensive measure of costs is much harder to quantify, both because of the number of systems involved and because so many personnel within a company share responsibilities for preservation, including individuals who otherwise have no connection with the law or litigation. Unlike litigation costs for outside counsel, there are no itemized records of the costs of time spent by company employees on preservation. One of the goals of the Preservation Costs Survey is to measure the cost of time spent on preservation by these individuals.

Ideally, too, we would like data from a larger set of companies to measure both fixed costs and preservation costs associated with individual cases. With this in mind, I will now turn to a description of the Preservation Costs Survey.

III. The Preservation Costs Survey

As noted above, I am currently in the process of undertaking a survey of preservation costs at large companies. There are a number of aspects of preservation costs that are unlike other litigation costs and which are particularly difficult to quantify. These include:

- Costs of discovery borne by in-house counsel and non-legal employees, rather than by outside counsel;
- Costs to IT infrastructure;

- Costs from diversion of resources from non-legal functions; and
- Costs from risk and uncertainty of legal rules governing preservation.

The goal of the Preservation Costs Survey is to obtain quantitative data on these previously unmeasured costs and apply statistical and economic analysis to this data. The desire is to inform the discussion on preservation costs and rules reform.

Given the complexity of the topic, and the largely unprecedented nature of a study focused on preservation costs, I have established a two-phase study design. Both phases of the Preservation Costs Survey involve the gathering of information from large companies on a strictly confidential basis to ensure that responses are as candid and complete as possible.

Phase I has already begun. Phase I has involved a set of four, in-depth "case studies" of large companies. These case studies have involved both qualitative interviews and requests for quantitative data to be used for statistical analysis. The case studies have also included extensive written survey testing in order to explore the feasibility of data gathering on each of the questions above. This information will be used to determine whether a broader survey is feasible, and if so, to draft an effective survey instrument for use with a larger sample of companies during Phase II.

Phase II, if feasible, will begin some time after the Dallas mini-conference. It will involve the creation of a final survey instrument to be used in a survey of a larger number of companies. Together with the administration of this survey, I will continue qualitative interviews and the collection of datasets of preservation activity from selected companies in order to create as complete a picture of the sources and amounts of preservation costs for large companies. The goal of Phase II is to have the survey responses collected by early 2012. Based on analysis of the surveys, interviews, and datasets, I will prepare a report on the Preservations Costs Survey in early 2012.

While Phase I has primarily served to lay the groundwork for Phase II, the case studies I have conducted have already yielded some valuable, even if preliminary, results. I have discussed some of these insights above. Below, I describe other results from Phase I of the Survey.

IV. Additional Results of Phase I of the Preservation Costs Survey

In my initial investigations, I am encountering a few recurring themes in the interviews and responses from companies. I will describe these themes here, with the caveat that these are only preliminary impressions, and that a final report at the conclusion of Phase II will present a more systematic review of the responses of a larger sample of companies.

Quantifying the Costs of Preservation Is Difficult, as the Costs Are Diverse and Borne by Many Groups within a Company

Phase I of the survey design focused not only on quantifying some elements of the costs of preservation, but on understanding which aspects of the costs of preservation are most susceptible to study and which will be the hardest to estimate. Not surprisingly, the interviewed companies expressed that estimating the costs of preservation is difficult. The reasons for this are several:

First, unlike litigation costs such as outside counsel fees, the costs of preservation are borne in-house. Further, although some individuals, particularly in the Legal and Legal IT functions, may spend most or all of their time dealing with preservation issues, the vast majority of individuals affected by the preservation obligation are not connected to the legal function at all. Instead, they are employees devoted to the business function, who happen to be custodians of data that may be relevant to a legal matter or they are employees devoted to the IT function, who happen to be responsible for systems that may contain data relevant to a legal matter. As noted above in Part II, the time and energy they must divert towards preservation is never recorded or compensated, unlike the time spent by dedicated lawyers, such as outside counsel.

Second, in today's environment, preservation essentially requires the use of automated systems for some or all aspects of preservation, including identifying custodians, issuing holds, and facilitating the preservation of ESI. Quantifying the cost of designing, implementing, and maintaining such systems can be difficult. Even systems purchased from outside vendors, for which there is an identifiable price tag, have costs that are hard to quantify, such as the time of in-house lawyers and IT specialists, the time of users, and the costs of upkeep and maintenance.

Third, not only are the individuals affected by preservation diffused throughout a company, but the types of actions that must be taken to preserve data are widely varied as well. Some actions are routine and easily described (even if estimating cost is difficult), such as designing and issuing litigation hold notices, or creating an archive of preserved emails. But other actions arise irregularly and sometimes require ad hoc solutions. These situations may arise in the context of departing employees, from whom data may need to be collected from hard drives or loose media. This may sound like a trivial undertaking if a single employee is involved, but the interviewed companies see thousands of employees leave each year.

Other issues arise less frequently, but are even more tricky. Obsolete data formats or storage systems need to be updated, and migrating data to new systems without the loss of information on hold can be difficult, requiring workarounds tailored to the specific systems. These steps can cost millions.

This is not to say that the costs of preservation should not be, or cannot be, estimated. Rather, the costs of preservation are extensive and varied, requiring further study before we can measure them with any confidence.

Some of the Largest Costs of Preservation Are Related to Relatively Small Categories of Preserved Material

Interviewees in Phase I have explained that many of the largest costs of preservation are related to the less salient aspects of preservation: legacy data, data migration, data that was on hold but which has been released, and data left over when a litigation hold ends. For example, Company A notes that some of the biggest headaches for preservation involve departing employees' hard drives, the migration of legacy data to current systems, the preservation of data on computers and systems that require maintenance, repair, or updates. Attempts to reduce these costs have led to delays in the roll-out of new applications and the delay of roll-out of new computers to employees on hold. This has not only impacted productivity, but invited an understandable backlash from employees on hold. In this way, some of the seemingly obscure aspects of preservation have had outsized effects on business efficiency and employee morale.

Uncertainty about Preservation Obligations Leads to Overbroad Preservation

Another common theme is that uncertainty about the scope of the preservation obligation and the consequent fear of sanctions leads companies to preserve more than would otherwise be justified. Sanctions, of course, can be very costly in monetary terms and can lead to adverse outcomes on the merits in litigation as well. They also have a severe reputational cost, and large companies, no less than individuals, tend to work hard to avoid even the appearance of being a scofflaw. For example, Company A expressed that its policy is to make legal compliance a top priority, and thus the company seeks to avoid sanctions or the perception of spoliation even if it is very costly to do so—and it appears that it often is.

This reluctance to risk sanctions is consistent with a recent study of motions for sanctions, which found a motion related to spoliation of evidence in only 0.15 percent of cases.[11] This figure is supported by initial Phase I survey results, where Company A estimates that motions for sanctions are filed in less than 0.5 percent of its cases.

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[11] Emery G. Lee III, *Motions for Sanctions Based Upon Spoliation of Evidence in Civil Cases: Report to the Judicial Conference Advisory Committee on Civil Rules* (Federal Judicial Center 2011).

FIGURE 5: NUMBER OF MATTERS WITH PRESERVATION, COLLECTION, AND PROCESSING (COMPANY A)

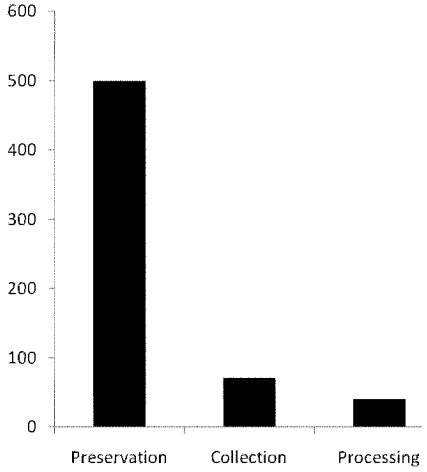
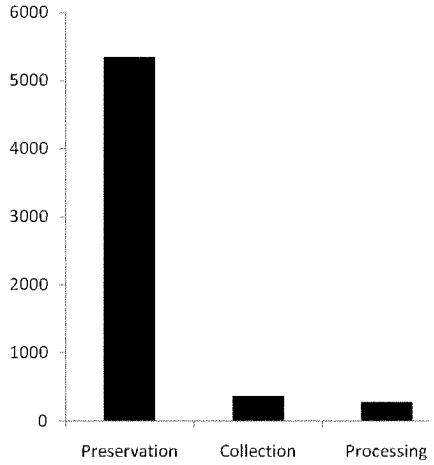


FIGURE 6: NUMBER OF CUSTODIANS WHOSE DATA IS SUBJECT TO PRESERVATION, COLLECTION, AND PROCESSING (COMPANY A)



What is the cost that Company A must pay in order to avoid the specter of a spoliation claim? More research is required before I can quantify these costs, but some preliminary data provides some insight into the extent of overbroad preservation. At Company A, data is collected in only 14 percent of matters in which data is preserved, and data is processed for review in only about 8 percent of matters. See Figure 5. Looking at individual custodians rather than matters, there is an even more stark difference between the amounts preserved and the amounts ultimately collected and processed. See Figure 6. In short, the vast majority of the data that is preserved is ultimately judged unnecessary to the litigation. But the vast majority of data that is never used still imposes preservation costs.[12]

Technology Both Creates More Efficient Methods of Preservation and Creates New Costs and Complexities

Technology has become a central part of business life, and it has come to dominate the practice of discovery and preservation in particular. My interviews have revealed that rapidly advancing technology for data storage and processing has been both a source of rising costs and of cost savings.

One major cost, alluded to above, is that advancing technology means that companies have to account for an ever-growing number of legacy formats and platforms, which often require expensive and time-consuming data migration and archiving efforts. Even advances in hardware cause problems, because as computers are replaced, special efforts are needed to preserve data on individual hard drives and other storage media.

One cost that is less often discussed is the fact that technology has necessitated the creation of entirely new departments within companies. The companies interviewed all have what could be called (and usually is called) a "Legal IT" function. This is a group or department that spans the space between Legal and IT to ensure that the company's legal obligations with respect to its IT infrastructure are met. As a practical matter, this means that most of what Legal IT does is handle matters relating to the preservation of ESI. For example, Company D has at least seven employees whose time is essentially dedicated to coordinating the IT aspects of preservation and collection in-house.

Of course, it is important to recognize that technology creates opportunities for efficiencies, in addition to creating complexities. Company D describes how it is working with outside vendors to improve the process for defining searches for email, so that a more precise set of emails is preserved in re-

[12] The Preservation Costs Survey is working to determine the extent to which these costs can be quantified.

sponse to a litigation hold. Another example is software designed to assist in indexing, searching, and foldering preserved data for collection and processing. Company D has spent around $1 million to implement and maintain such a system over the last two years, but the interviewees see this cost as a fraction of the savings it has generated.

Conclusion

This preliminary report on the Preservation Costs Survey begins to address the serious need for data and analysis on the nature of preservation costs. While the Preservation Costs Survey is currently in its early stages, some initial results have emerged. For example, the costs of preservation, like the costs of litigation, exhibit a "long tail," meaning that a small fraction of cases account for most of the expenses associated with individual cases. Further, many costs of preservation are "fixed costs," representing multi-million dollar investments in technology to track and manage the preservation of an ever-expanding universe of ESI. Both case-specific costs, and the fixed costs of preservation, could potentially be subjects for rules reform.

Of course, I should reiterate that these results are preliminary, and it would be premature to judge any proposed rules based only on preliminary findings. The Preservation Costs Survey will generate additional results from a larger sample of companies in the coming months. I will prepare a detailed report on the Survey in early 2012 to describe and analyze the full set of results.

Appendix A: Biographical Information on William H.J. Hubbard

After graduating from the University of Chicago Law School with high honors, I clerked for the Honorable Patrick E. Higginbotham of the U.S. Court of Appeals for the Fifth Circuit during the 2000 term. I worked as a litigation associate at Mayer Brown LLP from 2001 through 2006, where I was an original member of the firm's Electronic Discovery and Records Management Group. As a member of this Group, I developed protocols for the preservation of electronically stored information and created materials to be used for defense-of-process in e-discovery disputes. My experience included conducting on-site interviews and investigations related to preservation technology and processes for large companies. Other aspects of my practice consisted of a broad range of pre-trial litigation and appellate litigation.

In 2006, I entered the PhD program in Economics at the University of Chicago. I received my PhD in August of this year. I have published or forthcoming papers in the *American Economic Review Papers & Proceedings*, *Journal of Human Resources*, and *Journal of Human Capital*. I have presented working papers at the Annual Meetings of the American Economic Association, the Milton Friedman Institute, and the University of Chicago Law School.

I am an Assistant Professor of Law at the University of Chicago Law School. I teach courses and seminars on civil procedure and economic analysis of law.

APPENDIX B

APPENDIX B

to the

WRITTEN STATEMENT

of

William H. J. Hubbard
Assistant Professor of Law
University of Chicago Law School

for the hearing entitled

"The Costs and Burdens of Civil Discovery"

on

December 13, 2011

before the

Subcommittee on the Constitution
Committee on the Judiciary
United States House of Representatives

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William H. J. Hubbard
Assistant Professor of Law

November 3, 2011

Honorable David G. Campbell
Chair, Advisory Committee on Civil Rules
United States District Court
Sandra Day O'Connor U.S. Courthouse, Suite 623
401 West Washington Street, SPC 58
Phoenix, AZ 85003-2156
email: David_Campbell@azd.uscourts.gov

Dear Judge Campbell:

I respectfully submit this letter, and the attached working paper, for the Committee's consideration.

I had the privilege of attending the Discovery Subcommittee's mini-conference in Dallas, Texas on September 9, 2011. The thoughtful discussion at the mini-conference prompted me to reconsider some of my views on preservation, as well as identify what I believe are some important facts and considerations that have been neglected in the debate so far. I present these ideas in the attached working paper, *Preservation under the Federal Rules: Accounting for the Fog, the Pyramid, and the Sombrero*. I hope the Committee finds this paper useful.

One specific issue that arose out of the mini-conference was the question of whether it is possible to estimate the potential cost savings from new Rules addressing preservation. The remainder of this letter attempts to estimate some of the potential effects that Rules changes may have on the costs of preservation.

Of course, there have been many suggestions for Rules changes, and I cannot consider them all. Instead, I will focus on two specific suggestions for Rules changes, one regarding trigger and one regarding scope. (I do not separately quantify the effect of a new Rule addressing sanctions, but my estimates for the effects of Rules addressing trigger and scope assume that a Rule appropriately clarifying sanctions is put in place.) I have chosen these potential Rules for two reasons: First, they are sufficiently clear that they can generate significant, measurable savings in the costs of preservation. Second, they are examples of Rules changes that I believe, for the reasons expressed in my attached paper, would be prudent to consider.

Initially, I should note that these are rough, "back of the envelope" calculations. The numbers are very tentative, and I am conducting ongoing research to gather more data.[1] In the near future, I hope to estimate the costs of preservation and the effects of Rules changes more precisely. Note, however, that to the extent that these estimates are accurate they should be considered lower bounds on the total cost savings, because data limitations require me to focus only on the most easily quantifiable avenues by which the Rules may affect the costs of preservation.

Trigger

To estimate some of the cost savings from a Rule regarding trigger, I will consider a Rule that places the trigger for the duty to preserve at the filing of a lawsuit in federal court, or to crib language from one suggestion, at "the reasonable expectation of the certainty of litigation" in federal court.[2] Such a Rule would have two direct effects on costs: First, it would reduce the number of matters subject to litigation holds, because many or even most litigation holds at large companies are for matters for which there is no filed lawsuit. Statements at the Dallas mini-conference from large companies indicated that perhaps 40 to 67 percent of their holds were for matters not in active litigation. Second, it would reduce the average scope of any given litigation hold. Why? Because litigation holds would be implemented at, rather than (in some cases) long before the onset of litigation, meaning that preserving parties will have the benefit of a complaint (or subpoena) that clarifies the proper scope of preservation. This allows litigation holds to more efficiently capture the data most likely to be useful to the parties.

How could one quantify these effects? Let's use the example of Microsoft, whose statistics on preservation were discussed at the Dallas mini-conference. For the first effect, 67 percent of Microsoft's holds that are for matters not in active litigation; let's say that half will no longer be needed under the new trigger Rule. Why only half? Some of those holds will still be implemented, because the matter eventually matures into litigation, or is subject to preservation obligations from a source other than the federal courts. This implies a 33.5 percent reduction in the number of matters subject to holds. For the second effect, Microsoft indicated that it has an average of 45 custodians on hold per matter. Let's assume a modest increase in precision, leading to a new average of 40 holds per matter.

Scope

To estimate some of the cost savings from a Rule regarding scope, I will focus solely on a potential provision that would set a presumptive, numerical limit for how many custodians would be subject to the duty to preserve. While my attached paper emphasizes the benefit of such a rule to courts and litigation process as a whole (by

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[1] For a description of this research, see Wilham H. J. Hubbard, *Preliminary Report on the Preservation Costs Survey of Major Companies* (Sept. 8, 2011), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf, p. 193. The *Preliminary Report* was commissioned by the Civil Justice Reform Group.
[2] *Preservation—Moving the Paradigm to Rule Text* (LCJ 2011).

encouraging meaningful dialogue between parties), for the current calculations, I will focus only on the direct reduction of costs to preserving parties. To continue the Microsoft example from above, Microsoft indicates that it has 329 matters with 14,805 separate custodian litigation holds, or 45 custodians per matter.[3] Without committing to a specific numerical limit, let us suppose that the presumptive limit is in the ballpark of 15 custodians, a number I mention in my paper. Because it is only a presumption, and in order to give a *conservative* estimate, let us say that the effect of the Rule is reduction of the average number of holds per matter to 25.

Total Effect on Costs

The total effect, in percentage terms, of the trigger and scope rules is a reduction in litigation hold costs of 63 percent.[4] To put this in dollar terms requires an estimate of the value of the time lost due to litigation holds. A 63 percent reduction in the 14,085 holds described by Microsoft amounts to a reduction of 9,327 holds. If each hold takes only 3 hours of employee time (creating the hold and interviewing the custodian from legal department's perspective; responding to the hold, preserving documents and data, and changing routines to preserve data going forward from the custodian's perspective), then this is a savings of 27,981 hours of employee time. Based on the wage and salary profiles of custodians at another large company (I do not have data from Microsoft), I would estimate that the average hourly wage (including bonuses) of a custodian is approximately $70 per hour. This places the savings for a single company at about $2 million.[5]

Given the thousands of large companies that face significant preservation costs, one can extrapolate from this number to estimate that the savings for all companies would be in the billions of dollars.

Limitations of the Estimates

It is important to note that the figures above are estimates of the cost of employee time lost to litigation holds. Employee time is only one source of the costs of litigation holds. Other costs of litigation holds include the cost of new or modified IT infrastructure, both to create additional storage and to generate and process litigation hold notices. Further, litigation holds are only one source (but a big source) of preservation costs. Other costs include the new or modified IT infrastructure to address data not held by custodians, increased demands on legal and IT staff (outside the litigation hold context), and the costs of retaining, retrieving and processing largely inaccessible data such as legacy system data.

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[3] David M. Howard, Jonathan Palmer, and Joe Banks, *Letter to the Hon. David G. Campbell* (Microsoft Corp. Aug. 31, 2011). Based on a review of the initial data I have compiled in the Preservation Costs Survey, the number reported by Microsoft appears roughly representative of large companies.

[4] Holds per matter falls from 45 to 25 (44.4 percent), and total matters fall by 33.5 percent. The cumulative effect is 0.556 * 0.665 = 0.370.

[5] The calculation is 27,981 hours * 70 dollars/hour = $1.96 million.

I do not have sufficient data to attempt estimates of such costs at this time, or how new Rules would affect those costs. Ongoing work will try to remedy this. In the meantime, it is safe to say that based on the employee time cost of litigation holds, estimates of the potential savings from new Rules are in the order of billions of dollars.

Sincerely,

William H. J. Hubbard

Attachment

cc: Honorable Steven M. Colloton
Honorable Paul S. Diamond
Honorable Paul W. Grimm
Honorable Arthur I. Harris
Honorable John G. Koeltl
Honorable Mark R. Kravitz
Honorable Michael W. Mosman
Honorable Solomon Oliver, Jr.
Honorable Gene E. K. Pratter
Honorable Lee H. Rosenthal
Honorable Randall T. Shepard
Honorable Tony West
Honorable Diane P. Wood
Professor Edward H. Cooper
Professor Richard L. Marcus
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Dean Robert H. Klonoff
Andrea Kuperman
Peter G. McCabe
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Jonathan C. Rose
Anton R. Valukas, Esq.

APPENDIX C

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Preservation under the Federal Rules: Accounting for the Fog, the Pyramid, and the Sombrero

William H. J. Hubbard†

DRAFT – PRELIMINARY AND INCOMPLETE

The issue of preservation presents vexing problems for litigants. Federal courts enforce a duty to preserve under the Federal Rules of Civil Procedure, but the nature of this duty remains uncertain. A number of amendments to the Federal Rules have been suggested, and the Civil Rules Advisory Committee is considering the possibility of proposing rules. In this paper, I assess the need for Rules amendments in light of the unique place that preservation occupies in the discovery process. Because preservation occurs at the earliest stages of litigation, often before a lawsuit is even filed, parties must make preservation decisions in an environment of great uncertainty and sparse information—the "fog of litigation." I identify how the Federal Rules can better address trigger, scope, and sanctions taking into account the fog of litigation. I then note why reliance on evolving case law will not fully address the problems facing parties.

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† Assistant Professor of Law, The University of Chicago Law School. I am grateful for comments from Douglas Baird, Emily Buss, Steve Hagenbuch, and Ashish Prasad.

INTRODUCTION

The Judicial Conference Subcommittee on Discovery is considering formally proposing amendments to the Federal Rules of Civil Procedure ("Rules") that would govern the preservation of documents and electronically stored information (ESI) in federal litigation.[1] This activity comes amid a widespread call for rules reform arising out of frustration with the patchwork of case law that currently governs preservation and sanctions for spoliation in federal court litigation. Many companies, generally companies who frequently find themselves defendants in federal court, argue that uncertainty over preservation obligations forces them to "over-preserve"—i.e., preserve more than a proper cost-benefit analysis would otherwise require. Over-preservation involves potentially large and otherwise unnecessary costs.

How serious is the problem of over-preservation? There is a wealth of anecdotal evidence that preservation costs can be enormous in some cases, and that these costs can be disproportionate to the value of discovery in some cases.[2] Empirical studies of preservation are currently underway that will attempt to provide a less selective assessment of preservation costs across a spectrum of cases.[3] Initial evidence is consistent with the anecdotal accounts that there are a significant number of cases with unusually high preservation costs and that the total costs of preservation for businesses may be very high.

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[1] Note that here and throughout this paper I will use "documents" and "information" interchangeably to refer both the paper records and ESI.

[2] Statements from a number of companies at a mini-conference on the possibility of rulemaking on preservation are summarized in Richard Marcus, *Notes: Mini-Conference on Preservation and Sanctions, Dallas, Texas, Sept. 9, 2011*. This memo and a number of written submissions for this conference which describe the experiences of specific companies are available online at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx (visited October 24, 2011) (herein "Dallas mini-conference site").

[3] William H. J. Hubbard, *Preliminary Report on the Preservation Costs Survey of Major Companies* (Civil Justice Reform Group Sept. 8, 2011) (online at Dallas mini-conference site) (herein *Preliminary Report*); Nicolas M. Pace and James N. Dertouzos, *Letter to the Hon. David Campbell, Hon. Mark Kravitz, and Hon. Lee Rosenthal* (RAND Corp. Sept. 7, 2011) (online at Dallas mini-conference site). The *Preliminary Report* was work commissioned by the Civil Justice Reform Group, and I was compensated for my time preparing that report.

But even taking as given that preservation costs are unduly high and that there is substantial legal uncertainty that leads to over-preservation, there remains the question whether amending the Rules can solve these problems.[4] Rulemaking is a time-consuming and intricate process; it is reasonable to ask "whether converting from common law preservation doctrines to rules-based guidance provides sufficient benefits in predictability and perceived fairness to be worth the effort."[5] How can we know?

To begin to answer this question, we need to understand the source of the problems that preservation costs are creating for parties in litigation. We then need to determine why *existing* rules have been inadequate to address the needs of litigants. From there, we can assess whether and how amending the Rules can improve the situation. This paper's goal is to begin to work through these steps.

Part I begins by exploring a familiar feature of litigation and a source of the problems posed by preservation: the "fog of litigation." This paper will partly confirm our common intuition that the fog of litigation means that preservation will have to be relatively broad. But this paper will also challenge some of our intuitions about preservation. The fog of litigation only exists *ex ante*—a party anticipating litigation and facing decisions about preservation may not know the who the plaintiff will be, where the case will be filed, which legal theories will be raised, or even whether he or she has relevant and material information (and if so, *where* it is). Yet *ex post* after the case is filed, the issues joined, and outside counsel and judges get involved, much of this uncertainty is gone.

For judges, outside counsel, and academics, understanding the *ex ante* perspective is essential to designing sound rules governing preservation, because the parties must make crucial preservation decisions *ex ante*, in the fog of litigation. Yet judges, lawyers, and academics—precisely because our experience is based on what happens *in* federal litigation—almost exclusively see preservation from the *ex post* perspective. In this paper, I draw upon the *ex ante* perspective, as well as data on company's preservation activities, to examine how the Rules could better address preservation. Perhaps surprisingly, the

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[4] Emery Lee and Thomas Willging raised this question in the context of calls for Rules reform to address litigation costs. Emery G. Lee III and Thomas E. Willging, "Defining the Problem of Cost in Federal Civil Litigation," 60 Duke L. J. 765 (2010). Perhaps presciently, Lee and Willging suggest "more-focused reforms of particularly knotty issues (such as preservation duties with respect to ESI)." *Id.* at 787.

[5] Thomas Y. Allman, "Rulemaking: The September 2011 Mini-Conference of the Civil Rules Subcommittee," 79 USLW 2457 (2011).

right response to the fog of litigation is clearer and narrower Rules, not amorphous and broad case-based standards.

Part II reviews the existing rules governing preservation and sanctions for spoliation, and shows how, despite the rules being well-designed in many respects, the fog of litigation renders them largely ineffective at properly regulating preservation.

Part III examines three problems that currently exist—one for each of three facets of preservation: trigger, scope, and sanctions. First, the Rules should make clear that the triggering event for the duty to preserve is the initiation of proceedings in federal court. When the litigation process is viewed from the *ex ante* perspective, it becomes clear that under current case law, the federal duty to preserve places affirmative obligations on companies and individuals who never set foot in federal court. Triggering the duty to preserve at the onset of federal litigation respects the myriad state and federal laws that govern data preservation outside the context of federal court, but does *not* limit the ability of federal courts to police attempts to destroy incriminating information.

Second, I will argue that in the current environment of unconstrained preservation obligations, plaintiffs and defendants have little incentive to engage in meaningful negotiation. Yet meaningful negotiation about preservation is essential when the fog of litigation means that courts do not have sufficient information to engage in detailed cost-benefit analysis under the Rules. I will argue that by setting presumptive limits on the scope of discovery, the Rules can promote meaningful negotiation between the parties.

Third, the *ex ante* and *ex post* perspectives are in particular tension when a court must rule on a motion for sanctions. I will identify pitfalls that occur when a court, presented with *ex ante* probabilities of relevant information being lost, must make an *ex post* ruling on sanctions. I argue that the Rules should ensure that negligence (let alone bad faith) cannot be inferred from the bare fact that, *ex post*, there is undisputed evidence of data being lost. Further, absent evidence of bad faith, relevance and materiality cannot be inferred from the mere fact that data subject to the duty to preserve was lost. Modern discovery takes the form of a search for the needle in the haystack, and thus—absent evidence of bad faith—when data is lost, the overwhelming likelihood is that it is neither relevant nor material.

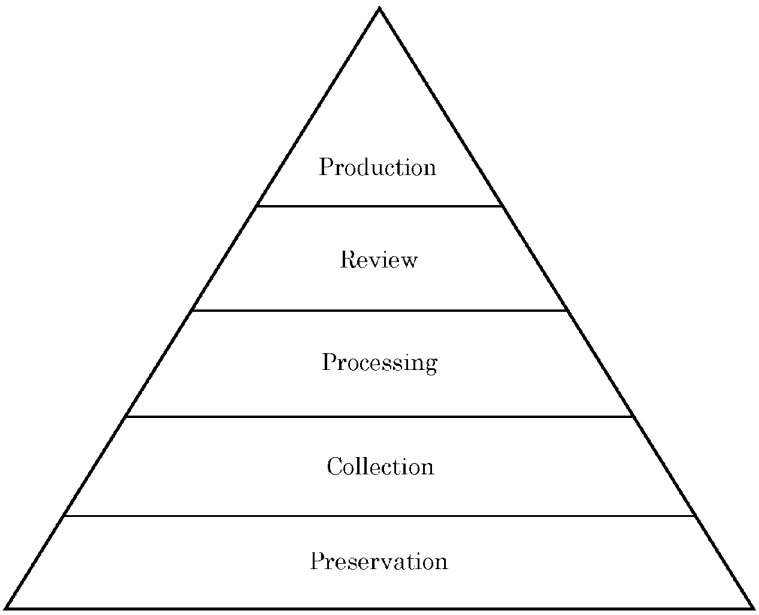
Part IV considers whether there is an alternative to the Rules amendment process: specifically, reliance on the continued evolution of the case law on preservation. I argue that the structure of litigation makes reliance on case-by-case adjudication particularly unsuitable for resolving the issues raised by the duty to preserve.

I then conclude.

I. THE PYRAMID AND THE FOG

One intuitive way to summarize the stages of discovery is the "discovery pyramid" illustrated below. This pyramid and its components will probably seem familiar, even trite, to any judge or litigation practitioner. The pyramid shape is a way to visualize the fact that not everything that is preserved is collected, and not everything that is collected is processed and reviewed, and so on. This isn't ideal—we don't *want* a party to preserve more documents than either party will ever use—but this is necessary given the fog of litigation, for two reasons.

FIGURE 1: THE DISCOVERY PYRAMID



First, what is "relevant" is never perfectly revealed to either party *ex ante*, but can only be judged so *ex post*. Thus, what parties preserve is based on best guesses about what is most likely to be relevant. In the face of such uncertainty, parties deliberately preserve more than will be ultimately deemed relevant, because they cannot tell *ex ante* which is relevant and which is not. Second, even if parties perfectly

know which documents are relevant, they do not know which cases will settle and which will go to trial. For this reason, too, parties end up preserving documents in cases that end up settling before collection, and so on.

The great uncertainty faced by parties *ex ante* has several implications for our understanding of the current Rules (which I address next, in Part II) and our consideration of potential new Rules (which I address in Part III). Here, I note two important implications that will loom in the background throughout this paper.

First, the inevitable uncertainty under which a preserving party must make preservation decisions will lead to a tendency to over-preserve. In this context, over-preservation is not necessarily a bad thing: if more documents are preserved, there is always a chance that documents of dubious relevance will turn out to be useful to the litigation in some way. But in general over-preservation is a problem, because it raises the cost of litigation for a benefit that, by definition, is minimal. (The marginal document being preserved is probably not relevant.) This cost should be measured not merely by the dollar cost of ensuring that documents are retained, but by the human cost in terms of time and energy diverted from productive activity. It is hard to estimate the magnitude of these costs, but initial estimates from ongoing research suggest that they can be large.[6]

Second, over-preservation is likely to cause problems for defendants rather than plaintiffs in litigation. This is because the plaintiff in any given dispute has a larger degree of control over the legal theories raised and the forum. The plaintiff can therefore undertake his preservation obligations in a state of *relative* certainty, while the defendant, in some cases acting without the benefit even of a filed complaint, must make decisions in nothing better than a haze of uncertainty. We should therefore expect—and indeed find—that the failure of the Rules to account for the fog of litigation has had a particularly negative impact on parties who are frequently defendants in court, such as large companies.[7]

In short, the fog of litigation and the costs of preservation are inextricably intertwined. Even in a world with perfectly designed Rules, some degree of over-preservation will still occur. As I will show, however, the current case law on preservation sometimes works to exacer-

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[6] See Hubbard, *Preliminary Report*, *supra* note 3.

[7] For this reason, I will use occasionally use "defendant" as shorthand for the party who has information potentially subject to preservation, and "plaintiff" as the party who has a potential interest in discovery of that information. Obviously, in some cases the labels should be reversed, and in others both parties have significant preservation obligations.

bate, rather than ameliorate, the effects of the fog of litigation on the costs of preservation.

II. THE RULES

How do the current Rules interact with the duty to preserve and the fog of litigation? The Rules do not explicitly address preservation; it is case law that has defined the duty to preserve. But the Rules governing discovery provide the framework for addressing preservation. After reviewing the rules, I will consider the implications of the fog of litigation for preservation under the Rules and in the case law.

Rule 1 dictates that the Rules "should be construed and administered to promote the just, speedy, and inexpensive determination of every action and proceeding."

Rule 26(b)(1) outlines the scope of discovery and therefore preservation: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . . Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

Rule 26(b)(2) sets out the limits of permissible discovery. Subparts (B) and (C) are particularly relevant here. Rule 26(b)(2)(B) creates a presumption 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*" (emphasis added).

Rule 26(b)(2)(C) outlines the bases for limiting discovery. It says:

> On motion or on its own, the court must limit the frequency or extent of discovery . . . if it determines that:
>
> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit . . . .

Taken together, these rules present a coherent vision of discovery (including, presumably, preservation).[8] The scope of discovery is de-

[8] I say "presumably" because although, as the *Victor Stanley* court noted, Rule 26(b)(2)(C) "cautions that all permissible discovery must be measured against the yardstick of proportionality," many courts appear to overlook this

fined by Rule 26(b)(1) in terms of admissibility, privilege, and relevance to the determination of a claim or defense. Put another way, the presumptive scope of discovery is defined by its *benefit*. The limits on the scope of discovery are given by Rule 1 and elaborated by Rule 26(b)(2) and are based on concerns of speed, expense, and burden. In other words, discovery is to be limited by its *costs*. And the repeated admonitions and appeals to justice, reasonableness, and weighing imply that the permissible scope of discovery must be governed by a weighing of cost against benefit. The *proportionality* or *cost-benefit* principle that animates these Rules forms an almost indisputable normative and operational framework for discovery.

Notably, the framework is mandatory. By its literal terms, Rule 26(b)(2)(C) commands that the court "must"—even *sua sponte*—limit discovery if any *one* of its three conditions (subparts (i), (ii), and (iii)) are met, and these three conditions together broadly capture any circumstances when the marginal cost of a given piece of discovery outweighs its marginal benefit.

Which makes all the more remarkable the fact that these Rules have been by all accounts ineffective at providing meaningful guidance to courts and litigants on questions of preservation.[9] But when one considers how the fog of litigation impacts preservation, it is easier to explain the ineffectiveness of current rules. A cost-benefit analysis by a court of what should and should not be preserved is simply infeasible.

First, under current case law, the duty to preserve attaches before a suit is even filed, and thus a court has no ability to regulate or control preservation at the point in time when judicial oversight would be called for. Indeed, even after a suit is filed, the inevitable delay between the need to incur or avoid the costs of preservation and the time when a court will be able to render a decision means that many of the cost savings that well-informed judicial decisions could provide are mooted.

Second, even if and when a court could timely address a preservation question, the court and parties suffer from a dearth of information on the costs and benefits of preservation. At the outset of litigation, the benefits of preserving almost any given piece of information

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fact. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010).

[9] See sources cited in note 2 above. *Preservation—Moving the Paradigm* (Lawyers for Civil Justice Nov. 10, 2010), notes that "only two courts have considered the application of proportionality to the scope of preservation pursuant to FRCP Rule 26(b)(2)(C) although neither court specifically analyzed its application."

are, by definition, unknown—it has not been collected, processed, and reviewed, which means that even the party to whom the document belongs does not know its value to the case. Further, the parties' theories of the case have not solidified, so that even the relevance of documents whose contents are known may not be clear.

From this we can identify two potential shortcomings of the current Rules. One, the current Rules require application of a *fact-intensive* standard. Under ideal circumstances, a detailed cost-benefit analysis by the court would be feasible, but under realistic circumstances, information is too sparse for courts to conduct detailed analysis. Two, the current Rules allocate to the *court* rather than the *parties* the task of calibrating the costs and benefits of preservation. In reality, the parties are in a better position to leverage limited information in weighing costs and benefits of preservation.

Courts themselves complain that the current Rules are intractable in this context. Only weeks ago, in a case called *Pippins v. KPMG LLP*, a judge noted:

> [C]ourts have recognized that in the context of preservation, "this [proportionality] standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle."[10]

In the absence of any way to meaningfully apply the proportionality standard, this court essentially called for more clarity in the rules:

> Accordingly, "[u]ntil *a more precise definition is created by rule*," prudence favors retaining all relevant materials.[11]

But without clarity from a new rule, what does the *Pippins* court do? It decides to abdicate its application of the Rules entirely, abjuring any consideration of cost, no matter how unjustified, in determining the scope of preservation. (It requires preservation of "all relevant materials," at a cost of $1.5 million and counting.) While this is clearly the wrong result, it is hard to fault the court—what else could it do, in the absence of guidance from Rules on what to do in the absence of enough information to conduct a meaningful cost-benefit calculus?

Thus, because courts have even less information than the parties do, we cannot expect the courts to proactively enforce the balancing that Rule 1 and Rule 26(b)(2)(C) envision. Instead, the Rules should be structured to give the parties incentives to balance cost and benefit on

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[10] *Pippins v. KPMG LLP*, 2011 WL 4701849, *6 (S.D.N.Y. Oct. 7, 2011) (quoting *Orbit One Communications, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010)).

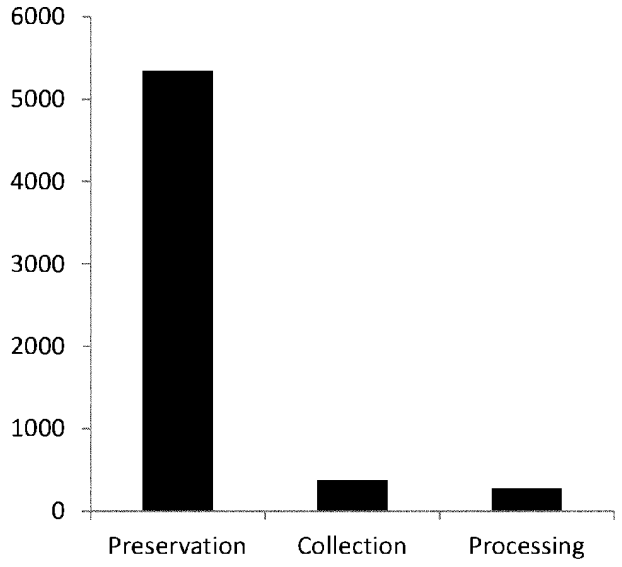
[11] *Id.* (emphasis added).

their own. In the fog of litigation, this balancing will never be perfect, but some balancing is better than none.

III. Three Problems and Three Proposals

I now turn to the question of whether concrete proposals for Rules amendments could address the weaknesses of current law. I should emphasize that this paper is by no means intended to give all the reasons for or against adopting any particular proposal for a Rule change. Instead, my more modest goal is to show the (perhaps) unexpected ways that the fog of litigation informs the discussion of what rules amendments are worth adopting.

Figure 1: Number of Custodians Subject to Preservation, Collection, and Processing, Fortune 100 Company



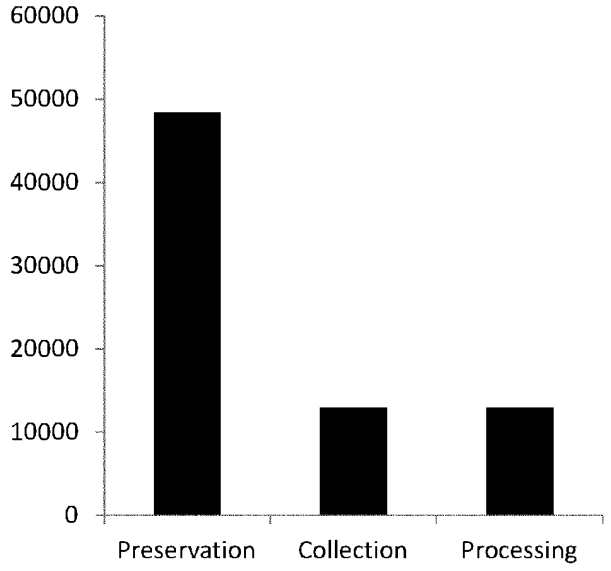
Source: Hubbard, *Preliminary Report*.

A. Trigger: When Is a Pyramid Not a Pyramid?

Let's take a look at some data that allows us to attach some numbers to the discovery pyramid. Consider Figures 1 and 2. Figure 1

presents data from a large company on the number of custodians involved in three stages of discovery: preservation, collection, and processing. Out of over 5000 custodians placed on litigation hold, and thus subject to preservation obligations, fewer than 10 percent ultimately see their data collected, let alone processed.

FIGURE 2: NUMBER OF PAGES (IN 1000S) PRESERVED, COLLECTED, AND PROCESSED, MICROSOFT CORPORATION



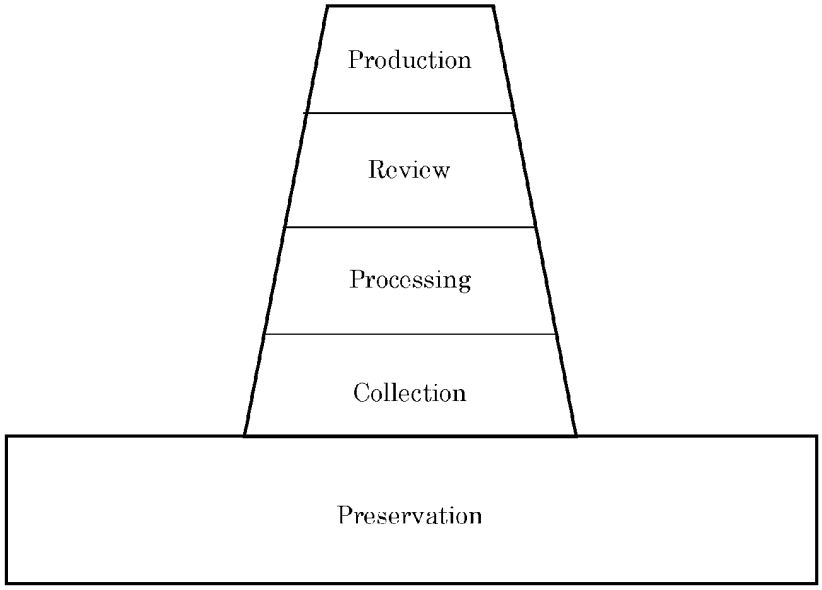
Source: David M. Howard, Jonathan Palmer, and Joe Banks, *Letter to the Hon. David G. Campbell* (Microsoft Corp. Aug. 31, 2011) (online at Dallas mini-conference site).
Note: "Pages" refers to paper pages or data equivalent (approximately 16 KB per page).

Figure 2 presents a similar picture with data from a different company. In Figure 2, the unit of measurement is the quantity of data preserved, collected, and processed rather than the number of custodians subject to those activities. While the ratios are different, the pattern is the same: vast preservation and sharply less collection and processing. These are only two data points, but this empirical data

jibes with the legion of anecdotes about the volume of preservation at many companies. (More data is currently being gathered, too.)

Let's return to the discovery pyramid in Part I. In light of this data, it appears that the discovery pyramid is not a pyramid at all. It is a sombrero: a wide "brim" of preservation, and a much narrower, tapering set of documents subject to collection, processing, and so on. See Figure 3.[12]

FIGURE 3: THE DISCOVERY SOMBRERO, WITH STAGES OF DISCOVERY



When we see the disproportionate bulk associated with preservation, we begin to understand the sense of urgency in some quarters for new Rules governing preservation. But why is the "discovery sombrero" a sombrero? Why not, say, a pyramid?

The answer, I think, has to do with the difference between the *ex ante* and the *ex post* perspectives. Federal judges, academics (like myself), and many lawyers who have worked at law firms (like myself) spend their whole careers looking at lawsuits, and in particular federal lawsuits. And when one's focus is on federal lawsuits, the discovery

[12] The illustration, of course, is not to scale. If this were drawn to scale, the top of the sombrero would be very narrow!

pyramid is a pretty accurate description of what one sees. But the crucial difference between preservation and the later stages of discovery is that law firms, judges, and academics are brought into a federal lawsuit long *after* many preservation decisions have to be made by a company. In other words, the perspective that most lawyers, academics, and judges have—because it is the only perspective they *can* have—is *ex post*.

But now consider the perspective of the company itself, and its in-house counsel. The company faces the question of preservation from an *ex ante* perspective. This is, by the way, also the proper perspective for the policymaker—in this case, the rulemaking body—because decisions on preservation are made *ex ante*, and it is therefore this perspective that reveals how the Rules affect behavior.

From this perspective, we're not dealing with "federal lawsuits"—we're dealing with "disputes," and these disputes may or may not turn into lawsuits, let alone federal lawsuits. The key fact here is that collection, processing, and so on only occur in the context of litigation, but preservation can occur before a lawsuit is filed. Hence, the universe of disputes where preservation becomes an issue is much larger than the set of cases that outside counsel, judges, and academics are generally able to observe. This is the crucial difference between production—a phase of discovery that federal courts have long regulated under the Rules and, in the mine run of cases, with great success[13]—and preservation—a phase of discovery that currently is the source of great controversy in the federal courts.

To illustrate, let's divide up the discovery sombrero by *where the dispute ends up*, rather than by stage of discovery. This gives us Figure 4.[14] From the *ex ante* perspective, we see why the discovery sombrero is a sombrero, rather than a pyramid: many disputes that involve preservation never end up in federal court, or even any court at all.

More importantly, however, viewing discovery from the *ex ante* perspective reveals a serious oversight in the current federal case law governing preservation. Let me explain:

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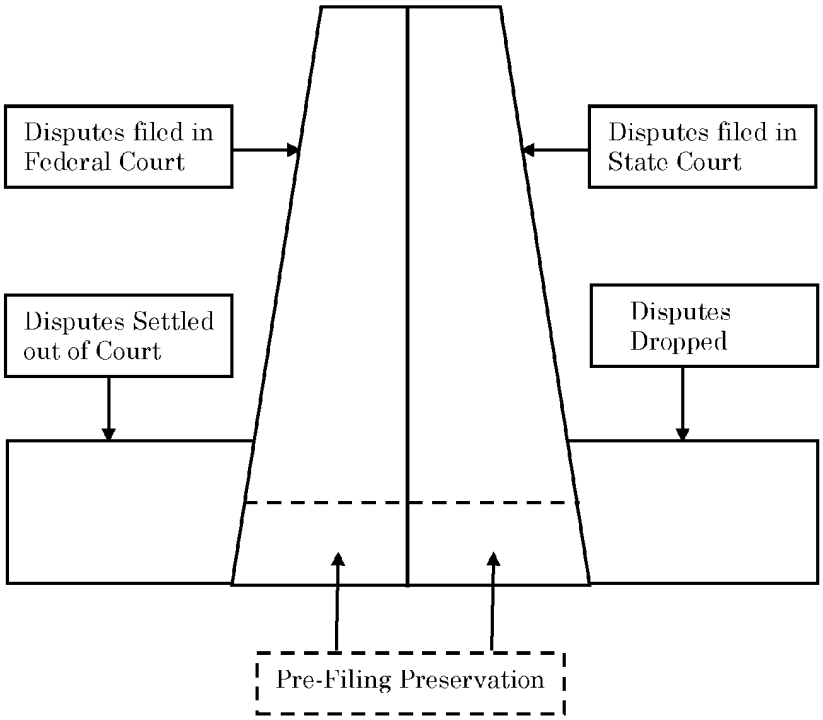
[13] Emery G. Lee III and Thomas E. Willging, *National, Case-Based Civil Rules Survey* (FJC 2009).

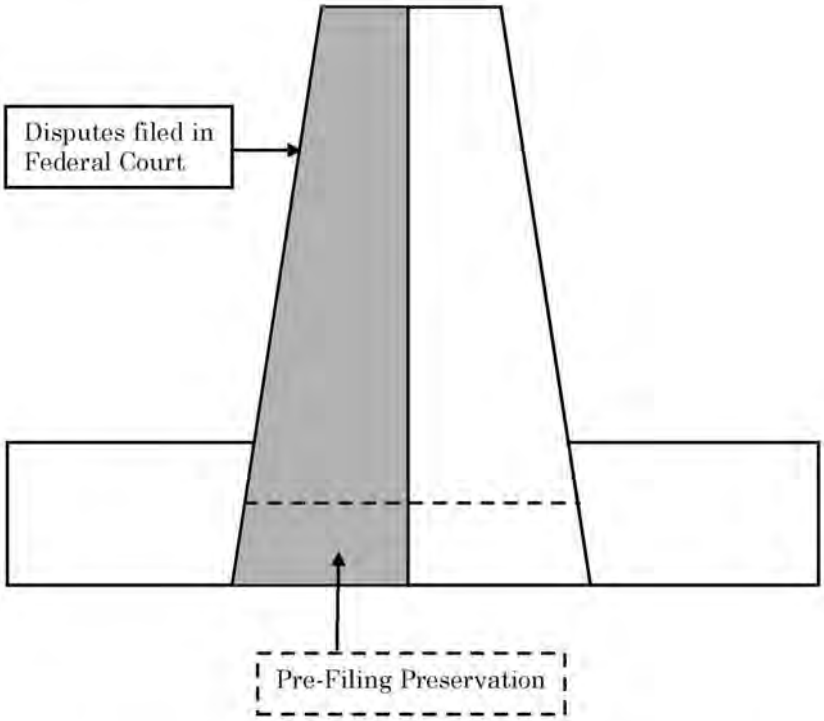
[14] Note that the dashed line indicates that, among matters that end up in state or federal court, some preservation occurs before the matter becomes a filed lawsuit, and some preservation occurs after. The remaining stages all occur after filing, of course.

FIGURE 4: THE DISCOVERY SOMBRERO, WITH LOCUS OF DISPUTE



Current federal law governing preservation is clear that preservation obligations precede the filing of suit in federal court. It is equally clear that any federal judicial power to regulate preservation stems from the Rules (pursuant to the Rules Enabling Act) or from the inherent power of a federal court to ensure the integrity of *its* proceedings and judgments. When discovery is viewed from an *ex post* perspective, these two concepts are not inconsistent. See Figure 5. From the federal judge's perspective, if a given case is before a federal court, then *of course* the judge can invoke the Rules or the federal courts' inherent power to regulate *this* case's pre-filing preservation activity. And by definition, if a federal judge is deciding a case, then that case is before a federal court.

FIGURE 5: THE INTENDED SCOPE OF THE DUTY TO PRESERVE



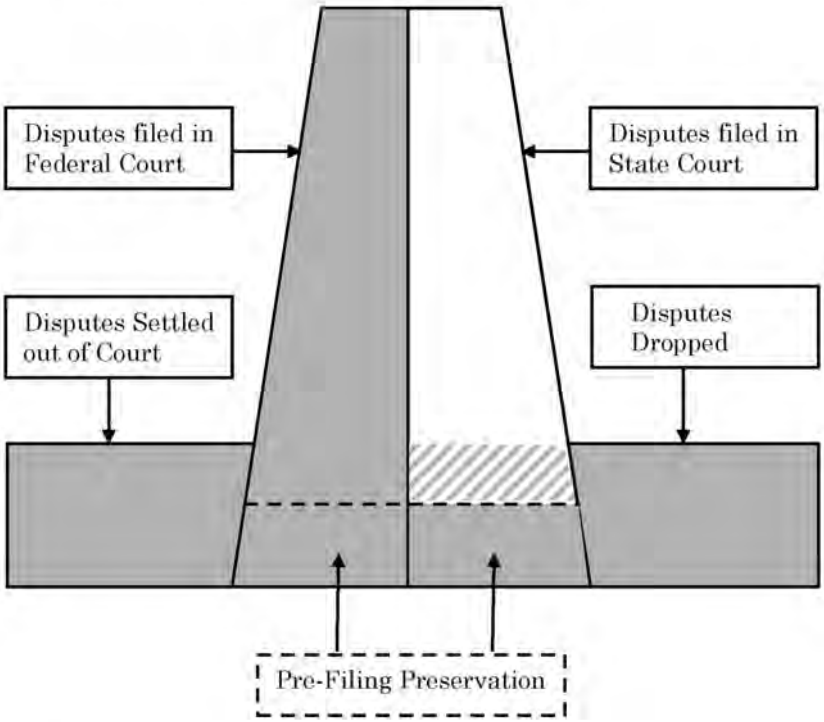
This reasoning is so straightforward that it seems inescapable, and, speaking for myself, it is exactly how I thought about federal court authority over preservation—until I saw the data (presented above in Figures 1 and 2) and realized that from an *ex ante* perspective, the discovery pyramid wasn't a pyramid at all, but a sombrero.[15]

Preservation decisions have to be made *ex ante*, often before a lawsuit is ever filed, let alone filed in federal court, and hence if federal rules governing preservation apply to pre-filing conduct, the federal rules govern the conduct of parties in *every* dispute that *could* end up in federal court, including disputes that are never litigated any-

[15] At the Dallas mini-conference, one company reported that two-thirds of its litigation holds are not for active litigation, and another reported that 40 percent of its holds are unconnected to filed lawsuits. See Dallas mini-conference site. I had to ask myself, Where are these disputes ending up?

where—and indeed even disputes that end up in state court, so long as removal to, or re-filing in, federal court remains a possibility. See Figure 6.[16]

FIGURE 6: THE EFFECTIVE SCOPE OF THE DUTY TO PRESERVE



The conduct of companies and individuals outside of federal court is regulated by federal law all the time, of course. But it is usually substantive federal law, enacted by Congress. The federal courts, on the other hand, should be cautious before using the Federal Rules or their inherent power to create affirmative obligations on individuals and businesses in matters that never cross the threshold of a federal courthouse.[17]

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[16] The possibility that federal preservation obligations may operate even in cases filed in state court is indicated by the partial shading in the figure.

[17] This point raises the question of whether imposing a duty to preserve prior to the initiation of federal litigation is permitted under the Rules Enabling

What is the bottom line? The Rules should limit the triggering event for the duty to preserve under the Rules and under the federal court's inherent power to the initiation of proceedings in federal court. In most cases, the triggering event would be the filing of a complaint, but there will be exceptions, such as the issuance of a subpoena by the federal court.

There is the natural fear that a bright line rule such as this one will invite unethical companies and individuals to race to destroy relevant documents and information before a complaint is filed. Such a concern, however, misunderstands the nature of the "duty to preserve." The duty to preserve is a duty to take affirmative steps to ensure that data within the scope of discovery are retained (i.e., protected from loss). It requires businesses and individuals to interrupt their usual activities and undertake special and in some cases extraordinary costs in terms of time and money. This duty is not the sole means by which the law regulates the retention and destruction of information that may be relevant and material to litigation. There is also the *duty not to spoliate*.

The duty not to spoliate is the converse of the duty to preserve. It is a duty *not* to take affirmative steps to destroy data. It requires that businesses and individuals *not* interrupt their usual activities; i.e., *not* override their usual records management activities in order to dispose of incriminating materials. The duty not to spoliate exists as a creature of both judge-made and statutory state and federal law.[18]

There is a third layer of duties superimposed on the duty to preserve and the duty not to spoliate: statutory and regulatory *duties to retain*. Countless federal and state regulatory regimes require the retention of many types of records for prescribed periods and even in prescribed formats.[19]

Act. This is an interesting question, one I do not address here. I argue that as a prudential matter, the federal courts should be very reluctant to assign affirmative duties, such as a duty to preserve, to parties that are not in federal court. This is good policy and avoids the most serious concerns under the Rules Enabling Act.

[18] The intentional, bad faith destruction of evidence to prevent its use in litigation is prohibited by the criminal law or civil law (or both) of the United States and every one of the fifty states. For a survey of the law in all of these jurisdictions, see Margaret M. Koesel, David A. Bell, and Tracey L. Turnbull, *Spoliation of Evidence: Sanctions and Remedies for Destruction of Evidence in Civil Litigation* (ABA 2000).

[19] See *id. Spoliation of Evidence* was published in 2000; more recent regulations include, most notably, the Sarbanes-Oxley Act.

Hence, it is essential to isolate what duties are and are not at stake here: the "trigger" under consideration is the trigger for the *duty to preserve* in federal litigation. It is not the trigger for existing duties not to spoliate and duties to retain.

Distinguishing between the duty to preserve and the duty not to spoliate makes for sound policy. As noted above, the duty to preserve (unlike the duty not to spoliate) imposes extra costs on businesses and individuals—costs that would never be incurred but for the duty. Further, the duty to preserve, unlike the duty not to spoliate, in effect imposes obligations on parties with respect to data most of which *is neither material nor relevant.* As the discovery sombrero reminds us, much of what is within the scope of preservation turns out not to be relevant (let alone material). This is an unfortunate but inevitable consequence of the fog of litigation. It is also an important reason why the costs of the duty to preserve should only be imposed when most needed—in the context of active litigation, where at least the parties are known, legal theories have begun to coalesce, and collection and processing are likely to follow.

Before litigation commences, the duty not to spoliate operates, regardless of whether a dispute is destined for state court, federal court, or no court at all. And the genius of the duty not to spoliate is that rather than pitting cost savings against fact-finding benefits, it aligns the interest in cost savings with the interest in fact-finding: it calls on individuals and companies *not* to change their *usual* activities. The company that throws a "shredding party" or the individual who purchases software to "wipe" his computer's hard drive are imposing a double whammy on society—incurring costs *and* destroying data. The duty not to spoliate rewards companies and individuals who do the right thing with respect to both costs *and* data that may someday become relevant evidence.[20]

One might ask how federal courts can address pre-litigation spoliation if it is not within the purview of the duty to preserve. Here we must note that the scope of the information subject to the duty to preserve need not be (and is not) coterminous with the scope of information subject to discovery in a case. It is sometimes assumed that any-

[20] Of course, in the normal course of business or personal affairs, data that someday might have become relevant to a lawsuit will get deleted or lost. But the whole point of both proportionality under the Rules and good records management generally is that the costs of retention are not justified when the value of a document or piece of data is minimal or remote. The only danger is if the company or individual is *discriminating* between incriminating documents and other documents, and destroying the incriminating ones. But this is spoliation.

thing outside the duty to preserve is outside the scope of the litigation. Not so! The duty to preserve is simply one of many duties that the Rules place upon parties in federal litigation, and the Rules allow the court to sanction a party for violating any number of those duties. The duty not to spoliate, a duty so fundamental that courts have invoked their inherent power to enforce it, is such a duty that the Rules can and should address. And as noted above, the duty not to spoliate does not create the problems that the duty to preserve creates in the pre-litigation environment. The duty not to spoliate places no affirmative obligation—and thus imposes no extra costs—on individuals or businesses to change their behavior when they are not in litigation. It simply says that persons cannot go out of their way to destroy data.[21]

Take the case of a person who, in anticipation of the possibility of litigation but long before a federal lawsuit is filed or even reasonably expected, destroys data that is highly relevant to a lawsuit that is later filed, knowing what information the data contained and knowing that it would be material. These actions are outside of the duty to preserve; even under current case law, the trigger (reasonable expectation of litigation) has not occurred. But does the fact that the trigger has not yet occurred mean that this activity cannot be sanctioned? I doubt it. Precisely because the conduct was consciously directed toward thwarting the functioning of a court, I suspect that any court (state or federal) would believe it had the power to sanction the spoliation, even in the absence of a duty to preserve.

In short, it is essential to clearly distinguish between the duty to preserve, the duty not to spoliate, and the duties to retain, all of which affect the behavior of litigants and potential litigants with respect to data. Crucially, it is only the duty to preserve for which trigger is at issue. The duty to preserve properly operates only *in* federal court.

B. Scope: Bargaining over What?

Once the duty to preserve is triggered, the next issue that arises is the scope of that duty. A common refrain at the Dallas mini-conference was that the scope of preservation was highly uncertain and, as a consequence, preserving parties were essentially forced to

[21] For this reason, any concern about the federal courts' authority under the Rules Enabling Act is minimized. Only parties whose pre-litigation conduct is intentionally directed toward affecting the outcome *of litigation* can be sanctioned under the Rules amendments I suggest.

preserve far more broadly than a well-designed system of discovery would require.[22]

The scope of preservation obligations must account for the fog of litigation. As I argued in Part II, the Rules should be designed to effectuate the aspirations of Rule 1 and Rule 26—a fair balancing of marginal costs and marginal benefits—in an information-sparse environment. The fine-tuning implied by the "proportionality" concept must give way to a rougher balance of interest, and scope of preservation must be determined in the first instance by the parties, and not the court.

The obvious step at this point is to look to the Rule 26(f) meet and confer. Why not "beef up" Rule 26(f) to require negotiations over the proper scope of preservation? Doesn't this solve the problem?

The short answer is no. The reason this approach is doomed is that it is pointless to demand that someone address a problem if you don't give them the *tools* and the *incentive* to address the problem.

Consider settlement negotiations. There is no Federal Rule that requires parties to conduct settlement negotiations. And yet most cases settle. In fact, many if not most disputes settle out of court, without the filing of a complaint or even the involvement of an attorney. Why does this happen if the parties aren't required to negotiate? The answer is easy: they have an incentive to negotiate. Lawyers are expensive, litigation is nerve-wracking, and so everyone can save money and aggravation by sitting down and working things out.

Now return to the idea of simply requiring parties to sit down and work out their preservation issues.[23] While they may have tools to address preservation (or at least slightly better tools than the court), under the current Rules they don't have any incentive to do so. Why not? As we've seen, under the current Rules courts lack the information to effectuate the careful balancing envisioned by Rule 26, and thus the default rule often becomes "keep everything." This is what some courts explicitly say,[24] and certainly what many companies perceive.[25]

How does this affect incentives? If the court's default is not to place any limits on preservation, then how do we expect negotiations to proceed? Consider the case of an individual plaintiff (or putative class

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[22] See Dallas mini-conference site.

[23] Of course, there is the point that if preservation must occur before the 26(f) conference, or even litigation, occurs, then as one participant put it, "I can't talk to opposing counsel because there is no opposing counsel." (Reporter's Notes at 4.) The approach governing trigger that I advocate has the additional benefit of minimizing this weakness of Rule 26(f).

[24] See, e.g., *Pippins*, 2011 WL 4701849 at *6.

[25] See Dallas mini-conference site.

action representative) suing a large company. The plaintiff has essentially no data relevant to the case, but the company has vast quantities of data, some of which may be relevant to the case and some of which may not. Against a backdrop of "keep everything," what incentive does the plaintiff's attorney have to make *any* concessions? What can the plaintiff possibly gain from negotiating that he can't gain from refusing to negotiate, and having a court say, "keep everything"? In other words, the problem here is not a lack of "civility" or a need for "good faith bargaining." It is that the parties don't have anything over which to negotiate.[26]

Now, to be fair, this overstates the problem. If both sides to a dispute have similar preservation burdens, then there certainly is something to negotiate over: each party can agree that each will preserve only the documents most likely to be relevant and not preserve the rest. Each then saves a lot of time, money, and aggravation at the cost of a small potential loss in the number of relevant documents. This is exactly the sort of sound cost-benefit analysis that the Rules anticipate. Of course, because it is early in the litigation, the agreed-upon scope of preservation may be over- or under-inclusive, but the costs and benefits are symmetrical and, more importantly, agreed upon—and therefore settled and insulated from wasteful second-guessing down the road.

If this analysis is correct, then we would expect to see the majority of preservation headaches arising in the context of "asymmetrical" litigation—where one side has little or nothing to preserve, and the other has large quantities of data. And although the evidence is anecdotal for the most part, this is exactly what we see.[27]

So where do we go from here? Requiring negotiations, or "beefing up" Rule 26(f) is neither here nor there; such a proposal, whether adopted or not, will make little difference. The key is to structure the Rules so that in every case, *both* parties have something to lose and something to gain in preservation negotiations. The Rules governing

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[26] As a self-respecting economist, I have to add a qualification. The defendant and the plaintiff *could* negotiate over how much the defendant has to *pay* the plaintiff in order to avoid the unconfined duty to preserve. But this sort of negotiation—usually referred to as a "nuisance settlement"—is definitely *not* the kind of negotiation the Federal Rules aspire to encourage.

[27] See Dallas mini-conference site. Even compared to other stages of discovery in "asymmetrical" litigation, we would expect preservation to be problematic. A plaintiff with no information of his own will still have an incentive to limit discovery requests for production, because larger production increases the plaintiff's costs of review. But a broad demand for preservation has no such self-correcting feature.

production in discovery already do this. Rule 30 sets presumptive limits on the number and length of depositions.[28] Rule 33 sets presumptive limits on the number of written interrogatories.[29] To avoid obvious injustices, Rule 26(b)(2)(A) permits the court to issue an order altering these presumptive limits, but in practice, most exceptions to these presumptions are negotiated by the parties, not determined by judicial order.[30] We see meaningful negotiation in this context because the Rules, by construction, ensure that both sides of any discovery dispute have some bargaining chips—you can agree to more depositions, or fewer.

Thus, in the preservation context, a similar approach should be effective. Establishing a presumptive limit of, say, fifteen custodians to be subject to litigation holds ensures that every party to a preservation dispute has bargaining chips. In most cases, this presumptive limit will be uncontroversial and will not be disturbed. In the cases where it is controversial, the plaintiff will have an incentive to make meaningful rather than outlandish preservation demands (because the baseline is fifteen custodians rather than "keep everything") and the defendant will have an incentive to offer concessions in exchange for cost-justified concessions from the plaintiff—maybe on scope of the litigation hold, or cost sharing for certain aspects of preservation, or sampling of the available data.

A presumptive limit of fifteen custodians immediately raises two questions. First, is it worthwhile proposing a rule that sets a limit on custodians, if the limit is only presumptive and not absolute? I believe the answer is yes. Recall that the goal of the Rules ought to be to encourage the parties to negotiate the scope of preservation. A presumption facilitates this process. Further, it instructs the court on what do when faced with a lack of information: respect the presumption and treat it as the default. While any given number will not *always* be the ideal default, the current temptation is to default to "keep everything"—which is *never* the ideal default.

Second, why fifteen? The short answer is: It doesn't have to be fifteen. This is just a guess, and a different number may emerge out of further study. I am currently gathering data on litigation holds at large companies, and this data may help inform the discussion of an appropriate default level.

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[28] Under Rule 30, each party may take no more than 10 depositions, each of which may be no longer than 7 hours.

[29] Under Rule 33, each party may serve no more than 25 written interrogatories upon another party.

[30] This claim is admittedly based on anecdotal evidence and personal experience.

With these comments in mind, the rationale for a baseline of fifteen custodians is that in the majority of cases, fifteen custodians should be easily enough to satisfy the needs of the case. Most cases—even in federal court—are not terribly complex, do not require massive discovery, and can be resolved at modest cost.[31] Initial data from my ongoing study of preservation costs suggests that the distribution of custodians per case is highly skewed, with a small number cases with incredibly broad (and expensive) litigation holds, but most cases with a moderate number of holds—in the ballpark of fifteen or fewer.[32] (And keep in mind that this data is based on the current environment, where there is pressure to over-preserve.) For these cases, it is straightforward to argue that we should set a default that easily accommodates the needs of the case, but prevents scorched earth litigation strategies that exploit the "keep everything" tendency of some courts.

Some cases, of course, are complex, high stakes, or for whatever reason require more preservation, even if the parties are being mindful (as they should be) of the costs as well as the benefits of preservation. These cases may very well require that more than fifteen custodians be subject to a litigation hold. The problem with these cases, especially from the court's perspective, is that because of the fog of litigation, it can't always tell these cases from the cases that don't require so much preservation. Hence, we want the parties—who should have at least a slightly better sense of the complexity of the case and of the need for preservation than the court—to negotiate a scope of preservation that exceeds fifteen custodians. A presumptive rule allows for exactly that.

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[31] See Lee and Willging, *Civil Rules Survey*, supra note 13.

[32] These findings reflect original research using data from the Preservation Costs Survey. The survey is described in *Preliminary Report*, supra note 3. My initial results contain data on the distribution of holds for two companies. In Company A, over 70 percent of matters have 20 or fewer custodians; in Company D, more than half had fewer than 22 custodians. Notably, data from Company A (I do not yet have comparable data from Company D) indicates that among matters with both preservation and collection, *slightly fewer than half* of custodians on litigation hold are subject to collection. This implies that the median case in Company A would involve collection from 8 custodians and the median case in Company D would involve 11 custodians. Setting a default at 15, therefore, should reduce over-preservation while still respecting the need to preserve more than will ultimately be collected.

C. Sanctions: When Is an Easy Case Not an Easy Case?

Consider again the difference between the *ex ante* perspective of the party preserving data and the *ex post* perspective of the court called upon months or years later to rule on a sanctions motion.

Let's say that the odds of a defendant innocently (i.e., despite her very best efforts) failing to produce any given relevant document is one in one million. This is probably an underestimate of the probability of an innocent mistake, but as a conservative estimate it should be uncontroversial. Let's say that in any given case there are only one thousand relevant documents. And let's say the average case in federal court has $150,000 at stake. This means that in one out of a thousand cases, there will be an innocent failure to produce a relevant document. In that case, if the plaintiff brings a sanctions motion (either because the document eventually surfaces, or because it becomes clear that a relevant document was not preserved), what does the court see? A document that was not produced, which is (we have assumed) relevant. And the plaintiff can say, "Your Honor, it would have cost the defendant five cents to print out this document, which is relevant to this $150,000 case. And she didn't. This *must* be, at the very least, *gross* negligence. After all, the odds of the defendant innocently failing to produce any given document is one in one million."

And the court reasons to itself, "Five cents of cost in a $150,000 case? I don't need the Hand formula to know that this looks like gross negligence. And the odds that the defendant would have missed this document by accident are one in a million. If I have ever seen an easy case, this is it!"

But we know this would be a mistake. The plaintiff and the court have fallen victim to the "prosecutor's fallacy." The prosecutor's fallacy arises when one attempts to apply *ex ante* probabilities of error in an *ex post* context. Take DNA evidence. Let's say that the odds of any two samples of DNA from different people matching by pure chance is one is one thousand. The police obtain a sample of DNA from a crime scene and compare it to a database of 10,000 samples. A person from the database whose DNA matched the crime-scene sample is brought to trial. The prosecutor says to the jury, "The evidence proves the defendant guilty. His DNA sample matched the DNA at the crime scene, and there is only a one-in-one-thousand chance that two people's DNA samples match." In this example, is there a 999 in 1000 chance that the defendant is guilty? Hardly. Based on the odds of getting a match purely by chance, there are probably nine other people in the database whose DNA also matches the sample from the crime scene! In the ab-

sence of any other evidence incriminating the defendant, his odds of guilt are, at best, 1 in 10.

How does the prosecutor's fallacy work in the context of discovery sanctions? As noted above, if there is a one in one million chance that any given relevant document will not be produced, and there are one thousand relevant documents per case, then the odds of a conscientious defendant failing to preserve a relevant document purely by chance is 1 in 1,000. Now, let's say that the court has before it 2,000 cases (and therefore 2 cases with failure to preserve due solely to chance). How many sanctions motions will it see? According to a recent study, motions for sanctions are filed in 0.15 percent of cases.[33] This means that in 2,000 cases, there will be 3 motions for sanctions. Yet in two out of these three cases, the failure to produce relevant documents was completely innocent. The likelihood that the defendant is innocent in the hypothetical case given above is not 1 in 1,000,000. It is 2 out of 3.

So in the hypothetical given above, the case really is an easy case! The court should *deny* the motion for sanctions. Without affirmative evidence showing that the loss of relevant data was *not* innocent, it's more likely than not (by a considerable margin) that the error was innocent. This is why the Rules should not permit inferences of *mens rea* to be drawn from the mere fact that some documents or data were lost.[34]

What is the bottom line? The Rules should state that negligence (let alone bad faith) *cannot* be inferred from the mere fact that some documents or data within the scope of preservation were not, in fact, preserved. Current law is equivocal on this crucial point.[35]

By the same token, in the absence of affirmative evidence of bad faith, it is inappropriate to draw inferences of relevance or prejudice from the fact that some data within the scope of preservation was lost. We know from the discovery sombrero that even within the scope of preservation, most data is never deemed relevant and produced, and only a tiny fraction of that data is considered material enough to be used in court. The reality of current discovery practice is that it represents the search for a needle in a haystack—a needle that may or

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[33] Emery G. Lee III, *Motions for Sanctions Based Upon Spoliation of Evidence in Civil Cases* (FJC 2011).

[34] On the other hand, if there is evidence that the defendant knowingly and purposefully destroyed relevant evidence . . . that, too, is an easy case.

[35] See *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) ("Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.").

may not exist. To push the metaphor a little farther, if a party unwittingly loses a handful of hay, the odds that a needle was lost are tiny.

Of course, if a party goes out of its way to selectively destroy data, or if a party overrides its regular document retention and destruction practices in order to accelerate destruction in advance of discovery, then an inference that the party knew that relevant and material evidence was being destroyed may be entirely justified. But this is bad faith, intentional conduct. The mere fact of data loss, even in the context of a litigation hold or other preservation obligation, can't justify an inference of relevance or materiality.

IV. CAN WE RELY ON CASE LAW?

There remains the question whether the rulemaking process is needed to implement these (or other) reforms. An alternative is to simply rely on the continuing "percolation" of preservation issues in the federal courts. The hope would be that over time, well-designed rules would emerge and address the current concerns with the current state of the case law.

I doubt that reliance on case law can achieve, even over a horizon of years, the kind of clarity or certainty that Rules amendments could accomplish. It has been eight years since the landmark *Zubulake* case.[36] While there has been considerable progress (including Rules amendments) since then on many issues of electronic discovery, there remains great uncertainty about what conduct will or will not be deemed a sanctionable violation of preservation obligations. Most notably, courts have not even converged on a standard for the state of mind required for severe (or less severe, for that matter) sanctions. Depending on how one reads a case, it seems the standard in some courts approaches strict liability or ordinary negligence,[37] while the standard is bad faith in others.[38] Some courts distinguish "willfulness" and bad faith.[39]

Thus, the passage of time has not lead to consensus. The problem with the lack of consensus is that "[g]iven this conflict among the courts, entities and individuals are compelled to conform to the strict-

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[36] *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003).

[37] See, e.g., *id.* at 220; *Pension Committee v. Banc of America*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

[38] See, e.g., *Rimkus Consulting v. Cammarta*, 688 F. Supp. 2d 598 (S.D. Tex. 2010).

[39] See, e.g., *Nucor Corp. v. Bell*, 251 F.R.D. 191 (D.S.C. 2008); *Goodman v. Praxair Services, Inc.*, 632 F. Supp. 2d 494 (D. Md. 2009).

est interpretation of any court in order to avoid the risk of sanctions."[40] In other words, preservation policies are designed for the "most demanding requirements of the toughest court to have spoken."[41] This is the very phenomenon of over-preservation that needs to be addressed.[42]

It seems clear, then, that Rules are needed. But why has the case law been inadequate, when the common law process of legal development has often served both courts and litigants well?[43] In the development of substantive law, or even of trial procedure, we expect the following process of legal evolution and refinement to occur: Cases arise in the district courts, and district court judges use their legal acumen and experience to fashion rules. Dissatisfied litigants then appeal their cases to the appellate courts, and over time the various fact patterns, legal arguments, and district court rulings filter upwards to the appellate level. At the appellate level, disagreements and uncertainties are resolved, and new, uniform legal rules emerge. The heterogeneity of cases and the institutional knowledge of district court judges gives vitality to the early development of the case law; while the deliberative structure and precedential authority of the appellate courts promotes the eventual distillation of uniform legal rules.

With this in mind, the inability of the case law to achieve stability in the area of preservation is unsurprising. There are very few district court rulings on preservation.[44] And even among this subset of cases few are appealed; virtually every ruling on preservation is a non-final, pre-trial decision, and as such is almost never appealable. Hence, there is scarce opportunity for cases to filter upwards and provide the foundation for the development of uniform, legally binding precedents at the appellate level. And because district court decisions are not legally binding precedent, the case law of preservation remains in a state of indefinite limbo.

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[40] Allman, *Rulemaking*, supra note 5.

[41] *Victor Stanley v. Creative Pipe*, 269 F.R.D. 497, 523 (D. Md. 2010).

[42] This claim depends on the premise that the most demanding standard is not the optimal one. It should be clear now that the "keep everything" approach of the *Pippins* court and the suggestion in *Zubulake* that "any destruction of documents is . . . negligence" are mistaken.

[43] The argument that follows is a condensed version of part of a more comprehensive theoretical study of the relationship between the litigation process, appeal, and the development of legal rules that Lisa Bernstein and myself have underway.

[44] As noted above, supra note 44, Lee, *Motions for Sanctions*, finds litigated motions for sanctions on preservation issues in only 0.15 percent of cases.

In sum, it is doubtful that continued development of case law will resolve the uncertainty that motivates the suggested Rules amendments under consideration.

CONCLUSION

Uncertainty in the early stages of a dispute is inevitable. Not only the evidence, but the legal arguments, the forum, and even the identity of the other party may be unknown. This "fog of litigation" is especially thick for potential defendants, who, unlike potential plaintiffs, have little or no control over the choice of forum, timing or legal claims of the law suit. Accounting for the fog litigation, however, deepens our understanding of the ways in which the Federal Rules can alleviate or aggravate the uncertainty that parties face.

I make three points with regard to trigger, scope, and sanctions in this paper.

First, the Rules should make clear that the triggering event for the duty to preserve under the Federal Rules (and under the court's inherent power) is the initiation of proceedings in federal court. Under current case law, the federal duty to preserve places affirmative obligations on companies and individuals who never set foot in federal court. Triggering the duty to preserve at the onset of federal litigation conforms to the proper role of federal rulemaking and respects the myriad state and federal laws that govern data preservation outside the context of federal court.

Second, the Rules should set presumptive limits on the scope of discovery. The goal here is not to fine tune the quantity of preservation. Instead, the objective is to give the parties the incentive to work things out on their own. And by setting presumptive limits that endow each party with both something to gain and something to lose in negotiation, the Rules will facilitate meaningful negotiation.

Third, with regard to sanctions, the Rules should ensure that neither bad faith, nor relevance, nor prejudice can be inferred merely from the fact that, *ex post*, it turns out that some data has been lost. The nature of much modern discovery is the search for the needle in the haystack, and thus, absent evidence of bad faith, the overwhelming likelihood is that any data that is lost is neither relevant nor prejudicial.

Mr. FRANKS. We will now hear from Mr. Butterfield.

TESTIMONY OF WILLIAM P. BUTTERFIELD, PARTNER, HAUSFELD LLP

Mr. BUTTERFIELD. Thank you, Mr. Chairman, Ranking Member Nadler, Members of the Subcommittee. The purpose of discovery under our Federal rules is not a trivial one. The purpose of our civil justice system is to determine the truth and decide cases on the merits, and this depends on discovery of the facts. Making sure that cases get decided on the merits is one of the primary reasons why Congress stressed the ability to obtain discovery when it instituted the Federal Rules of Civil Procedure in 1938. Now, you have heard a lot, and you will hear undoubtedly a lot more today about the exorbitant costs of discovery, the costs of overpreservation and the urgent need to rein in those costs.

But here's what you need to know. Let's talk about discovery costs in general. There's no question that in the electronic age, litigation has dramatically changed the way discovery is conducted and has increased the complexity and difficulty of discovery. But, even so, discovery costs are not significantly higher than they were 15 years ago. Objective empirical data—and that primarily comes from the Federal Judicial Conference—demonstrates that discovery costs for cases involving electronic discovery are about $30,000 to $40,000 at the median, and they're also modest in comparison to the stakes of the litigation and in comparison to the total litigation costs.

Those who promote drastic changes to the Federal rules on discovery concede this because they must. Instead, they focus on what they admit are the outliers, and you have just heard Professor Hubbard talk about it. Discovery costs in the largest cases involving the largest corporations, what professor Hubbard refers to as cases in the long tail, the top 5 percent, most complex and costly cases.

Well, it should come as no surprise to anyone here that discovery in those cases is costly. It always will be because there always will be some large, important and complex cases, but amendments to the Civil Rules won't change that. And clarifying the Rules of Civil Procedure that apply to all 300,000 cases filed annually, to address the complexities in a few thousand of those cases, poses substantial risks to our civil justice system.

So what do we know about the costs of preservation specifically? Well, as Professor Hubbard has acknowledged, our knowledge of that is rudimentary. We know next to nothing.

And what about sanctions? Are they out of control? One of the things you are being told here today is that companies are overpreserving because there's no clarity by courts regarding sanctions. They're overpreserving and bearing the costs of that over-preservation because they sold fewer sanctions.

What we do know is that the risks of sanctions for inadvertent failure to preserve documents is minimal. The data support that. A recent study by the Federal Judicial Conference showed that motions for sanctions were sought in just one-fifteenth of 1 percent of the cases that were studied, one-fifteenth of 1 percent. They were granted in only more than slightly half the time.

So if my math is correct, you have about a one-thirtieth of 1 percent chance of getting sanctioned for evidence spoiliation. As one e-discovery expert suggested the other day, you have a better chance of getting struck by lightning than getting sanctioned for failure to preserve.

Beware of the unintended consequences here. Let me give you a few examples. One of the proposals would seek to apply preservation obligations only for loss of material information. Now, how do you know what is material? It's hard enough to know what's relevant before a lawsuit is filed or before we get very far in litigation. It's even more difficult to figure out what's material to that litigation.

Another proposal would trigger preservation only on the filing of a complaint. So what happens when critical information gets destroyed between an event and the filing of a lawsuit where it's obvious that litigation will follow that event? Wouldn't this type of standard eviscerate long-standing statutes of limitation by forcing people to file lawsuits immediately without any opportunity to work things out before a lawsuit is filed, and wouldn't that cause more lawsuits to be filed? Wouldn't companies spend more money to litigate those lawsuits that were being filed?

Companies say that they're worried about their reputation when they get sanctioned. Shouldn't they worry about their reputation when lawsuits are filed against them, and more lawsuits will be filed against them if people have to rush to the courthouse.

Another proposal calls only for sanctions regarding willful conduct. What we do when conduct is not in bad faith, though a simple mistake, causes a complete loss of evidence to the other party.

What do we tell the other innocent party in that case? Sorry, you're out of luck. Tough luck, you're out of court? We suggest that it's not appropriate to rush to amend the rules at this time. The Federal Judiciary Conference is closely studying it, and they should be allowed to continue.

Thank you.

Mr. FRANKS. Thank you, Mr. Butterfield.

[The prepared statement of Mr. Butterfield follows:]

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Testimony of

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before the

United States House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution

regarding the

Costs and Burden of Civil Discovery

December 13, 2011

Testimony of
William P. Butterfield[1]
Partner, Hausfeld LLP

U.S. House of Representatives
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Costs and Burden of Civil Discovery
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INTRODUCTION

I appreciate the opportunity to testify today on the current state of civil discovery and welcome the Subcommittee's interest in the strides made in recent years to manage electronic discovery, as well as existing and emerging electronic discovery challenges and solutions. While electronic discovery raises concerns that did not exist in a predominantly "paper world," those concerns can be addressed without drastic rule changes that fundamentally undermine the foundations of our civil justice system. Quite simply, the cure proposed by some advocates of rules reform would kill the patient.

Modern civil discovery rules reflect the inherent and critical importance of discovery to our federal judicial system. Because discovery supports the underlying goal of our civil justice system—the resolution of disputes based on facts—the Federal Rules of Civil Procedure encourage broad fact discovery and provide courts with tools to prevent the parties' gamesmanship from interfering with the search for those facts.

Importantly, the modern Rules have evolved to account for the complexities and burdens associated with today's undeniable reality: that most information is now created and stored electronically. There is no question that this reality has fundamentally transformed discovery. The ease and speed of communications in an electronic age, coupled with the range of electronic devices now used to communicate, have, quite simply, increased exponentially the number of "documents" created. The physical space limitations that once constrained the number of documents that could be retained no longer exist in light of increasingly low-cost electronic storage solutions. And unlike paper records, for which an affirmative act of destruction was

[1] William Butterfield is a partner of Hausfeld LLP, where his practice focuses on antitrust and financial services litigation and electronic discovery. Butterfield has been involved in electronic discovery management since the term was formulated in the early 1990s. He serves on the Steering Committee of The Sedona Conference® Working Group on Electronic Document Retention and Production (WG1), and was the editor-in-chief of the Conference's publication, The Case for Cooperation (2009), a co-editor of The Sedona Conference® Commentary on Preservation, Identification and Management of Sources of Information that are Not Reasonably Accessible (2008), and a member of Sedona Conference® Working Group on International Electronic Information Management, Discovery and Disclosure. He currently serves as an adjunct professor at American University, Washington College of Law, where he teaches a course in electronic discovery, and on the faculty of Georgetown University Law Center's Advanced E-Discovery Institute.

required to discard a document once it was created, electronic records are much more easily altered or destroyed, either inadvertently, intentionally or by automated programs. As a result, discovery, which once involved copying reams of paper documents and a manual, page-by-page physical review, now involves discs, hard drives, servers, backup tapes, electronic search protocols and algorithms, and web-hosted platforms for document review. And issues associated with timing and intent when discoverable documents are destroyed have become more complex.

It is this reality that is largely responsible for the difficulties, real and perceived, of electronic discovery. Yet despite the exponential growth in the volume of electronically stored information, or "ESI", objective empirical evidence demonstrates that discovery costs are, as they were in a predominantly paper world, still relatively low and proportionate to the nature and complexity of the litigation at issue. In most cases, discovery costs are only a small fraction of the monetary stakes of the litigation, and, though by no means nominal, are an order of magnitude or more below the astronomic figures asserted by proponents of drastic "discovery reform."

Moreover, a review of empirical evidence and relevant case law suggest that assertions that fear of court sanctions for failing to preserve ESI lead to excessive and costly over-preservation of ESI are overblown: e-discovery sanctions are rarely sought, and even less frequently granted. And, despite the contention that there is no consistent judicial standard for e-discovery sanctions, case law suggests that courts have generally imposed significant sanctions only for egregious discovery misconduct and even then rarely impose sanctions so severe that they determine the outcome of the litigation.

This is not to suggest there are not legitimate concerns about the burdens and cost of e-discovery, particularly in complex, multi-party litigation. But jurists and litigants are addressing those issues through a combination of (1) traditional litigation management tools long relied on by the courts and provided for under the Federal Rules of Civil Procedure, including the 2006 Amendments; (2) enhanced and early cooperation among the litigants that reduce the likelihood of discovery disputes, particularly with respect to ESI; (3) existing and evolving technological tools that reduce the costs and burdens of preservation, review, and production of ESI; and (4) careful and studied consideration by the Advisory Committee on Civil Rules as to whether Rules amendments are necessary to address purported uncertainty regarding preservation obligations and discovery sanctions.

Contrary to the assertions by proponents of immediate and drastic rule changes, there is no empirical evidence that costs of e-discovery are excessive or that the proposed changes will substantially reduce costs or uncertainty regarding preservation obligations. A rush to implement hastily-conceived solutions before the scope and nature of the problem are documented and understood, and the appropriate mechanisms to ease them are carefully evaluated, will erode the level playing field for litigants established by the Rules and undermine the foundation of our civil justice system.

DISCOVERY LIES AT THE HEART OF OUR FEDERAL CIVIL JUSTICE SYSTEM

The Federal Rules provide for broad discovery to ensure that disputes are resolved on the facts rather than on the gamesmanship that often determined case outcomes before the

discovery rules were enacted in 1938. As the Supreme Court has noted, "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."[2] The federal courts' post-1938 approach to discovery—to ensure that all relevant facts are discovered—"has made the search for truth a realistic enterprise rather than an obstacle course festooned with devices for denying evidence to the unwary and the unadvised."[3]

The federal courts have continually reaffirmed that the purpose of discovery, quite simply, is to ascertain the truth[4] —an outcome that benefits litigants and the public. The courts have also recognized that, as a direct corollary to the importance of discovery, "the imposition of sanctions for discovery abuse is essential to the sound administration of justice."[5]

Presumably, no one in this room disagrees with these long-standing tenets. The question is *whether*, and if so, *how and when*, to address perceived growing e-discovery burdens. It is thus critical that, as we attempt to grapple with emerging discovery issues, the courts, Congress, and the relevant rule-making bodies do not inadvertently sacrifice this essential tool of our civil justice system—a tool that provides everyone from ordinary people to the most sophisticated of corporations access to the truth and therefore access to justice.

Electronic discovery is undeniably effective in uncovering facts that might have been concealed in a paper world. Electronic communications—e-mail, text and instant messages—often reveal important information about a party's intent, knowledge, and actions.[6] Denying access to that information by permitting its destruction through lax preservation obligations and denying meaningful recourse to parties injured by that destruction by unnecessarily restricting the availability of appropriate remedies denies access to facts, and, ultimately, access to justice.

THE AVAILABLE EVIDENCE REVEALS THAT DISCOVERY COSTS ARE PROPORTIONAL TO THE NATURE OF THE LITIGATION

Is discovery expensive? In some cases, it is. It depends primarily on the complexity of the case, based on the nature and number of claims, the number of parties, the nature of those parties, and the relevant time period. For example, the discovery burden of a simple, two-party contract dispute would, in most instances, be significantly lower than the burden associated with a complex patent case[7] or an antitrust case alleging a price-fixing conspiracy or attempted

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[2] *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

[3] *Levin v. Clark*, 408 F.2d 1209, 1227 (D.C. Cir. 1967).

[4] *Tesar v. Potter*, No. 05-956, 2007 WL 2783386 (D.S.C. Sept. 21, 2007) ("The Supreme Court of the United States has held that accurate and truthful discovery is essential to the civil justice system, such that a violation of the requirement justifies a harsh penalty") (citing *ABF Freight Systems, Inc. v. NLRB*, 510 U.S. 317, 323 (1994)); *Nat'l Union Fire Ins. Co. v. Cont'l Ill. Grp.*, No. 85-C-7080, 1988 WL 79529 (N.D. Ill. July 22, 1988) (the "fundamental purpose of discovery [is] to ascertain the truth"); *Goff v. Kroger Co.*, 121 F.R.D. 61, 62 (S.D. Ohio 1988) ("[T]he broad rules of discovery are essential tools to facilitate that truth-finding process").

[5] *Penthouse Int'l, Ltd. v. Playboy Enters., Inc.*, 663 F.2d 371, 392 (2d Cir. 1981).

[6] *See* Milberg LLP & Hausfeld LLP, *E-Discovery: The Fault Lies Not in Our Rules . . .*", 4 FED. CTS. L. REV. 1, 10 (2011), *available at* http://www.fclr.org/fclr/articles/html/2010/Milberg-Hausfeld.pdf.

[7] Emery G. Lee III & Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis* 8 (Fed. Judicial Ctr. 2010) (hereinafter "Lee & Willging, *Litigation Costs*") *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/FJC,%20Litigation%20Costs

monopolization over the course of a decade, involving multiple, multinational corporations spread across the globe and multiple corporate plaintiffs. It is largely the former type—relatively simple, two-party cases—not the latter, that appear to populate the dockets of the federal judiciary.[8]

Are discovery costs too high given the stakes involved in litigation? The purported evidence of discovery costs is not only largely anecdotal, it is also highly mixed. Research conducted by objective organizations, such as the Federal Judicial Center ("FJC"), show relatively modest discovery costs. Meanwhile, "back of the envelope" estimates by some advocates for radical rules reform have suggested discovery costs of up to 175 times higher.

To date, the most reliable source of empirical information regarding discovery costs is the survey conducted by the FJC in mid-2009.[9] That survey shows that discovery costs are proportional to the stakes of the litigation. The FJC survey found that median discovery costs (including related attorney fees) amounted to 1.6% of the litigation stakes for plaintiffs, and 3.3% of the litigation stakes for defendants.[10] At the 95th percentile (i.e., in only 5% or fewer of the cases), plaintiffs' attorneys reported discovery costs totaling 25% of litigation stakes and defense attorneys reported discovery costs totaling 30% of the litigation stakes.[11] The FJC's survey also demonstrated that a majority of attorneys view the cost of discovery as proportional to the stakes, suggesting that complaints regarding disproportionality are overblown.[12] And discovery costs are also proportional to the costs of the litigation. In cases involving electronic discovery, the median discovery costs amounted to 25% and 32.5% of the total litigation costs for plaintiffs and defendants, respectively.[13] The FJC data hardly demonstrate that discovery costs are excessive, or that discovery costs are disproportionate to the stakes of the litigation[14] as some have suggested, or to litigation costs in general.

%20in%20Civil%20Cases%20-%20Multivariate%20Analysis.pdf ("Intellectual Property cases had costs almost 62% higher, all else equal, than the baseline 'Other' category.").

[8] For example, in 2011, well over half of the nearly 300,000 cases filed in federal court involve bankruptcy, personal and real property damage, contract disputes, prisoner petitions, social security benefits, personal injury (excluding asbestos), forfeiture and penalty, immigration and deportation, and labor law violations (excluding Fair Labor Standards Act violations). *See* Caseload Statistics 2011, Table C-2, U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending March 31, 2010 and 2011, http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2011.aspx. Intellectual property disputes, among the more costly cases to litigate (*see supra* note 7 and accompanying text) account for about 10,000 cases filed. Antitrust cases account for just over 500 cases filed.

[9] Emery G. Lee III and Thomas E. Willging, *National, Case-Based Civil Rules Survey: FJC Civil Rules Survey: Prelim. Report to the Committee* (hereinafter "Lee & Willging, *Case-Based Civil Survey*") at 35-44 (Fed. Judicial Ctr. 2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf. The FJC surveyed attorneys in recently closed civil cases litigated in federal court, of which nearly half responded. The survey covered a wide array of litigation activities including discovery, case management, litigation and discovery costs, and attorney attitudes toward the Federal Rules of Civil Procedure.

[10] *See id.* at 43.

[11] *See id.*

[12] Emery G. Lee & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L. J. 766, 773–75 (2010) (noting that the Federal Judicial Center's survey found that a majority of plaintiffs' and defense attorneys viewed discovery costs as "just about right" given the stakes of the litigation).

[13] *See id.* at 38-39.

[14] *See* Institute for the Advancement of the American Legal System, *Electronic Discovery: A View from the Front Lines* (2008) (hereinafter, "*IAALS Report*"), at 4, *available at* www.du.edu/legalinstitute/pubs/EDiscovery-

Nor are discovery costs, in the ordinary case, excessive. The FJC cost survey found that the median reported discovery costs for cases involving electronic discovery were $30,000 and $40,000 for plaintiffs and defendants, respectively.[15] And for the top 5% most costly cases, reported discovery costs for cases involving electronic discovery were $500,000 for plaintiffs and $600,000 for defendants.[16] This stands in stark contrast to the contention by the Institute for Advancement of the American Legal System that, for a *midsize* case, discovery costs range from $2.5 million to $3.5 million.[17] To be sure, although other surveys have produced varying results, there is no clear evidence that discovery costs are excessive or disproportionate to the financial stakes and nature of the litigation. Further, despite the sturm and drang about the degree to which e-discovery has escalated the cost of discovery, the FJC's data suggests that discovery costs in 1997, before the ubiquity of e-mail, text messaging, instant messaging, and PDAs, were only modestly lower than in 2008.[18]

Likewise, the costs of *preservation*—one aspect of the e-discovery process—make up only a small portion of discovery costs. The Sedona Conference®[19] Working Group on Electronic Document Retention and Production (WG1), widely recognized as the preeminent think tank focused on e-discovery issues, recently surveyed its members on the proportion of costs spent on preservation and other specified litigation activities. 132 Working Group members responded to the survey, and 69% of the survey respondents identified themselves as representing defendants.[20] The survey revealed that only about 19% of the total costs of discovery were attributable to preservation of potentially discoverable information.[21] In other

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FrontLines.pdf (describing as "a familiar predicament" that "the cost of e-discovery rivals or even exceeds the amount at issue").

[15] *See* Lee & Willging, *Case-Based Civil Survey, supra* note 9, at 35, 37. Median costs of discovery are even lower when accounting for all types of discovery.

[16] *Id.*

[17] *See IAALS Report, supra* note 14, at 5. The Institute's conclusion can be most charitably characterized as hyperbole. The Institute came to this extraordinary figure by concluding, based on a single, anecdotal, undocumented comment by a freelance journalist, that a "midsize" case now involves production of an astounding 500 gigabytes of data, and then multiplying that figure by $5,000 to $7,000—the purported cost of producing one GB of data, as estimated by an unidentified source at Verizon. Neither of the inputs to this equation have been empirically substantiated, much less peer-reviewed.

In that same paper, the Institute suggested that a case involving a single employee-plaintiff bringing a claim for non-payment of compensation and employment discrimination against a 20-person firm-defendant would generate 500 GB of data in discovery, costing the defendant $3.5 million for electronic discovery. *See id.* at 4. But no litigator on the "front lines" could reasonably expect this run-of-the-mill, two-party case to generate such extravagant discovery needs. In my experience as a litigator prosecuting complex antitrust and financial services cases, only the most complex (often multi-party) litigation would be expected to generate such heavy production volumes.

[18] *See* Lee & Willging, *Case-Based Civil Survey, supra* note 9, at 35–36.

[19] The Sedona Conference provides a forum for leading jurists, lawyers, experts, academics and others working in antitrust law, complex litigation, and intellectual property rights to develop forward-looking principles, best practices and guidelines in specific areas of the law. The Conference holds educational conferences and institutes and produces a range of practice and other educational materials. The Conference relies on a thorough peer-review process to ensure its output is balanced, authoritative, and of immediate practical benefit to the courts, practitioners and public. *See* The Sedona Conference, http://www.thesedonaconference.org/.

[20] *See Sedona Conference Working Group 1 Membership Survey on Preservation and Sanctions*, included in Agenda Materials for the Advisory Committee On Civil Rules Meeting, Nov. 7-8, 2011, Appx. K at 1, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf.

[21] *Id.* at 4.

words, the Sedona survey does not support, but rather calls into question, the contention that preservation costs, in particular, are excessive.

In truth, we don't have a definitive answer to the question of how much electronic discovery costs litigants. But we do know that it is far too early to reach conclusions that such costs are excessive or that the discovery rules as now written and when used properly are inadequate. As my fellow panelist, Professor Hubbard, concluded just 3 months ago, "[t]he current state of knowledge on discovery costs—let alone preservation costs—is rudimentary."[22] There can be little disagreement that additional empirical research must be done regarding discovery and preservation costs, coupled with an assessment of advancing technological tools (e.g., software solutions) which will inevitably help to solve some, and likely many, of the purported problems. Thus, modifying the rules governing discovery now without sufficient research and a real understanding of the scope of the purported problem would be premature, inefficient and inevitably ineffective.

WHAT FACTORS DRIVE DISCOVERY COSTS?

Undoubtedly, the single most significant factor driving civil discovery costs today is exponential increase in the amount of electronically stored information. Moreover, ESI is now stored in an ever-growing variety of locations (hard drives, servers, home computers, backup media, removable media, in the "cloud", on cell phones, etc.), adding to the cost and complexity of search, preservation, collection and production in litigation.

But many other factors cause high discovery expenses. First, the ease of retaining ESI is a significant contributor to discovery costs. Although the volume of ESI has greatly increased, the cost of storing that information has significantly *decreased*.[23] Not surprisingly, the low cost of storing ESI leads to poor records management practices: it is cheaper and less time consuming in the short-run to retain and store everything than it is to identify records no longer needed for business or legal purposes and develop a routine document retention and destruction system.[24] A

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[22] William H.J. Hubbard, *Preliminary Report on the Preservation Costs Survey of Major Companies* at 2, Sept. 8, 2011, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Empirical_Data/Civil%20Justice%20Reform%20Group.pdf.

[23] In 1990, it cost about $20,000 to store a gigabyte of data. By 2008, the same amount of storage cost about one dollar. *See* Irene S. Fiorentinos & Steven C. Bennett, *Can Technology Reduce E-Discovery Search Costs?*, 5-12 MEALEY'S LITIG. REPORT: DISCOVERY 18 (Sept. 2008) ("The ability to create and store electronic data has increased dramatically by virtue of new technologies and ever-increasing reliance on electronic communications. At the same time, the cost of storing ESI has greatly decreased."). Today, businesses now have available to them extremely low cost external storage solutions, permitting storage of a terabyte of data (1000 gigabytes) for about $250 per year. *See, e.g.*, http://docs.google.com/support/bin/answer.py?answer=39567 (price list for cloud storage using Google docs).

[24] *See* Fiorentinos & Bennett, *supra* note 23, at 1 ("Cheap data storage provides an incentive to packrats in business, who save instead of deleting stale information"); The Sedona Conference, *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* (2d ed. 2007) at 23 ("At the heart of a reasonable information and records management approach is the concept of the "lifecycle" of information based on its inherent value. In essence, this means that information and records should be retained only so long as they have value as defined by business needs or legal requirements. . . . Retaining superfluous electronic information has associated direct and indirect costs and burdens that go well beyond the cost of additional electronic storage.").

2009 survey found that 35% of responding organizations have no record retention schedules in place for electronic records of any kind.[25] Sixty to eighty percent of the information retained by corporate America has little practical value to the entity.[26] Companies that keep information they no longer need (because it is inexpensive to store) or can no longer access without difficulty (such as "legacy data" on obsolete systems), create added complexity and expense in litigation.[27]

Adding to corporate litigation expenses is the lack of well-defined internal policies and procedures governing data management and ESI preservation, search, collection and processing in a litigation setting.[28] Many companies elect to forgo the effort and upfront costs of instituting sound data management practices and technologies before litigation arises, i.e. the proper tagging and/or organization of useful information and deletion of useless information, resulting in increased costs when litigation occurs. According to a 2008 Gartner Group report, companies that had not implemented formal e-discovery processes spent nearly twice as much to gather and produce documents as those that have adopted formal procedures.[29]

Still other factors are responsible for unnecessary discovery expenses. As any review of the applicable case law makes clear, attorneys and judges who are poorly educated about the use and management of ESI in litigation contribute to excessive and unnecessary discovery expenses.[30] Attorneys who refuse to cooperate with opposing counsel to identify e-discovery issues and develop mutually agreeable ESI protocols[31] also cause unnecessary and additional expenses for their clients.[32]

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[25] *See* Cohasset Associates & ARMA Int'l, *2009 Electronic Records Management Survey: Call for Sustainable Capabilities* at 23 (on file with author).

[26] Dennis Kiker, *How to Manage ESI to Rein In Runaway Costs*, Corporate Counsel (Online) July 18, 2011.

[27] *See* The Sedona Conference® Commentary on Inactive Information (July 2009) *available at* http://www.thesedonaconference.org/content/miscFiles/publications_html?grp=wgs110 ("[P]roactive review of inactive information is most commonly justified by comparing the cost of such review to the costs of collection, review, and production (as well as the risk of potential liability) that would be incurred if these materials become potentially relevant in a legal dispute. While these costs are real, many organizations faced with tight budgets find it difficult to justify the expenditure in advance of an actual litigation event.").

Additional difficulties arise from corporate mergers and acquisitions. When companies merge, their respective computer systems are sometimes incompatible. This creates a trove of "legacy" data and systems, with unused data and systems sitting on virtual shelves, instead of in the trash can, where useless information belongs.

[28] *IAALS Report*, *supra* note 14, at 19 ("Most organizations do not organize their ESI in ways that facilitate a quick and easy review of potentially relevant ESI. For this reason, a client sometimes locates massive amounts of ESI early in the case and sends it to outside lawyers to determine which documents should be produced to the other side and which documents should be withheld for reasons of privilege. . . . The reactive approach toward e-discovery causes inefficiencies at both the front-end search and retrieval stage and at the back-end attorney review stage. Both stages are responsible for high e-discovery costs.").

[29] Gartner Research, *The Costs and Risks of E-discovery in Litigation* 2 (on file with author).

[30] One observer points to attorneys poorly educated on ESI issues as a source of the perceived preservation problem:

> "We must confront the fact that the high cost of preservation stems from the senseless, wasteful way we approach preservation, not the obligation to preserve. We can do better, and when it suits businesses to have information at hand, businesses know how to do it well. What businesses have not done is insist their lawyers understand information systems and approach preservation with confidence and competence."

See Craig Ball, *A Fish Story*, Ball in Your Court, http://ballinyourcourt.wordpress.com/2011/12/11/another-fish-story/#more-333.

[31] Cooperation to develop agreed upon ESI protocols can preempt a range of electronic discovery disputes and reduce discovery costs. For example, in advance of production and review, the parties may agree to the format in which ESI is produced, the manner in which potentially relevant data will be electronically searched, the

Finally, sometimes discovery expenses are exacerbated due to abusive tactics by counsel. Unfortunately, this conduct occurs when requesting parties propound unfocused and overly broad discovery requests, and when responding parties use delay tactics, unwarranted objections, overbroad assertions of privilege and other tactics to avoid producing discoverable information, or produce excessive amounts of nonresponsive documents ("data dumps") to exacerbate the costs and duration of their opponents' review of that data.

Uncertainty regarding preservation obligations and the threat of judicial sanctions are purported to be major contributors to excessive discovery costs.[33] But the empirical evidence regarding the frequency and severity of sanctions suggests that fear of sanctions is overblown and does not support the theory that such fears lead to over-preservation.

For example, according to a recent study by the Federal Judicial Center, motions for sanctions were *sought* by parties in just 1/15th of one-percent of the cases filed in the 19 districts studied.[34] And according to Gibson Dunn's 2010 Year End Survey, e-discovery sanctions were granted in only 55% of the cases in which they were sought.[35]

According to the Gibson Dunn studies, the most common sanctions are also generally the lightest: monetary sanctions "to compensate aggrieved parties for the fees and costs incurred in bringing the motion for sanctions and any other injury caused by the discovery misconduct."[36] And though sometimes mischaracterized as "sanctions," courts also impose relatively light, curative remedies, such as permitting a party to re-depose a witness, or denying summary judgment where the undisclosed document might reveal disputed facts.[37] The 2010 Gibson Dunn

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repositories that will be searched, and the terms, phrases and algorithms that will be used to conduct that search. The parties may also agree, in some circumstances, to designate communications from certain sources to be presumptively privileged, eliminating the need for a privilege review of those documents.

[32] Disputes over e-discovery have been estimated to increase overall litigation costs by 10 percent per dispute. Lee & Willging, *Litigation Costs*, *supra* note 7, at 5, 8. As discussed *infra*, various courts have instituted pilot programs which have incorporated form orders or protocols governing the issues that often give rise to disputes. *See, e.g.*, Ariana J. Tadler and Henry J. Kelston, *Working Toward Normalcy in E-Discovery*, N.Y.L.J. (Oct. 3, 2011).

[33] Some have argued that fear of sanctions for preservation failures induces litigants to over-preserve. *See, e.g.*, William H.J. Hubbard, *Preservation under the Federal Rules: Accounting for the Fog, the Pyramid, and the Sombrero*, preliminary draft submitted to Judicial Conference Subcommittee on Discovery, Nov. 3, 2011.

[34] Emery G. Lee, *Motions for Sanctions Based Upon Spoliation of Evidence in Civil Cases: Report to the Judicial Conference Advisory Committee on Civil Rules*, Federal Judicial Center (2011) at 1, 4, *available at* http://www.fjc.gov/public/pdf.nsf/lookup/leespoli.pdf/$file/leespoli.pdf. Lee found that for the years 2007 and 2008, only 209 motions for sanctions for failure to preserve or destruction of evidence were filed in these districts. Though Lee cautions that his results "should not be taken as denying that the fear of spoliation motions might motivate parties to over-preserve ESI for fear of being subject to a motion in the future" or to suggest fear of sanctions is irrational, *id.* at 5, it is difficult to draw any other conclusion.

[35] *See* Gibson Dunn, *2010 Year-End Electronic Discovery and Information Law Update* ("*2010 Year End Update*") (Jan. 13, 2011) at 9, http://www.gibsondunn.com/publications/Documents/2010YearEndE-Discovery-InformationLawUpdate.pdf. Courts granted sanctions in only 55 of the 100 discovery-sanctions opinions studied. *Id.* This rate has remained constant in 2011.

[36] *See* Gibson Dunn, *2011 Mid-Year E-Discovery Update* ("*2011 Mid-year Update*") (Jul. 22, 2011) at 5, http://www.gibsondunn.com/publications/Documents/2011Mid-YearE-DiscoveryUpdate.pdf; *see also 2010 Year-End Update* at 11.

[37] *2011 Mid-year Update* at 7. Though the Gibson Dunn classifies such curative remedies as "sanctions," they may be better characterized as case-management tools. As the U.S. Judicial Conference's Discovery

report concluded that a "notable trend in preservation decisions . . . was an increasing lenience toward preservation failures that did not result in any demonstrable prejudice to the requesting party."[38]

"Case-terminating sanctions"—dismissal or default judgment—are far less frequently imposed and are reserved for the most egregious conduct: willful or bad faith violation of discovery obligations or a court order, intentional destruction of evidence, or fabrication of evidence.[39] In other words, they served to eliminate the severe prejudice resulting from the loss of information relevant to the dispute and adjudication of the merits. To the extent that fear of such *severe* sanctions deters such egregious conduct, sanctions serve their purpose.

Given the limited number of cases in which spoliation sanctions are actually sought and the modest sanctions actually imposed in only some those cases, relative to the more than 250,000 civil cases filed annually in recent years,[40] it is difficult to credit the largely unsupported assertion that such a weak threat drives over-preservation.[41] It seems more likely that counsel's reluctance to make necessary preservation decisions drives over-preservation. As DLA Piper's Browning Marean astutely observed, a decision on the proper scope of preservation "requires reasoned thought, flexibility and some degree of risk-taking. . . . You also have to have the courage to decide when it is reasonable not to go out with 'all your guns blazing' (i.e., preserve everything forever), taking instead a reasoned and proportional response to the litigation threat."[42]

In their submission to the United States Judicial Conference's Discovery Subcommittee, the defense bar advocacy group Lawyers for Civil Justice and representatives of the defense bar, confronted with statistics demonstrating the infrequency of ESI-related sanctions, attempt a tortured reinterpretation of their significance. LCJ contends that the *absence* of sanctions

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Subcommittee noted, there are other curative measures employed to by courts to remedy spoliation impacts, such as requiring production of data from alternative but less accessible sources. *See* Subcommittee Memorandum on Preservation/Sanctions, *included in* Agenda Materials for the Advisory Committee On Civil Rules Meeting, Nov. 7-8, 2011, Appx. G at 15 n.39, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publications/Preservation.pdf . By contrast, discovery sanctions under the Federal Rules include: payment of expenses, striking a pleading in whole or part, dismissing a claim in whole or part, imposing default judgment, or issuing a contempt order. *See* Fed. R. Civ. P. 37(b)(2). For this reason, caution must be used when evaluating statistical data on "sanctions."

[38] *2010 Year-end Update* at 14.

[39] *Id.* at 12; *2011 Mid-year Update* at 6 ("Courts continued to reserve this harshest of sanctions for cases in which the culpable party violated its e-discovery obligations willfully and in bad faith and caused the aggrieved party significant damage.").

[40] United States Courts, Federal Judicial Caseload Statistics, http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx.

[41] *See* Ball, *supra* note 30 ("The claim that litigants acting reasonably and diligently to preserve data are being sanctioned is another fish story. When you read the reported decisions, it's clear that sanctions are being imposed only for disgraceful, often intentional, destruction of evidence. [T]he chance of being sanctioned for failure to preserve remains smaller than the chance of being struck by lightning.").

[42] Browning E. Marean III, *It's Up to Us to Right-Size Our Preservation Efforts*, http://e-discoveryteam.com/2011/02/15/pension-committee-retrospective-third-in-a-series-of-guest-blogs-john-jablonski-browning-marean-and-ralph-losey/.

decisions demonstrates that litigants are over-preserving data.[43] Because parties are not being sanctioned, LCJ argues (without support), it *necessarily* follows that this is because they have over-preserved (i.e., preserved more than required and for a period longer than necessary) at great expense, thus heading off any possible spoliation motion. The defense bar's inferential leap, however, fails to consider other explanations for the paucity of sanctions: the parties may be cooperating to address reasonable and appropriate preservation and production requirements; the parties may have preserved the appropriate amount and type of information (no more and no less) and at the appropriate time; the court and the parties may have considered proportionality issues to constrain the scope of preservation and production; the parties may have appropriate document retention and destruction systems that reduced the amount of discoverable information before any preservation obligation arose; among others.

Despite LCJ's spin, the empirical evidence demonstrates the low risk of sanctions, the restrained approach of the judiciary, and the lack of any urgent need for drastic rules reform.

CURRENT EFFORTS TO CONTROL DISCOVERY COSTS AND REDUCE DISCOVERY BURDENS

1. The Rules of Civil Procedure are Working to Control Costs and Reduce Both Disputes and Uncertainty

Just five years ago, in 2006, the Federal Rules were amended to address the unique aspects of electronic discovery, and "to assist courts and litigants in balancing the need for electronically stored information with the burdens that accompany obtaining it."[44] The amended Rules "recognize some fundamental differences between paper-based document discovery and the discovery of electronically stored information, and they continue a trend that has become quite pronounced since the 1980s of expanding the role of judges in actively managing discovery to sharpen its focus, relieve its burdens, and reduce costs on litigants and the judicial system."[45]

The Rule amendments both addressed the need for early identification of e-discovery issues and recognized some of the unique issues posed by ESI. For example, Rule 26(f) was amended to require parties to discuss ESI issues as part of the mandatory meet and confer process; highlighting ESI issues early in the litigation can head off both discovery disputes and help narrow ESI production. And amendments to Rules 34(b) and 45 anticipate early discussion of production formats. Under amended Rule 26(b)(2), a producing party generally need not produce ESI that is not reasonably accessible because of undue burden and cost, providing appropriate restraints on the degree to which ESI must be searched and produced. Amended Rule 26(b)(5), recognizing the inherent risks of producing privileged ESI, permits parties to "claw back" such inadvertently produced documents while questions of privilege are resolved. Finally, amended

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[43] *See* Lawyers for Civil Justice, et al., Comment to the Civil Rules Advisory Committee, *The Time is Now: The Urgent Need for Discovery Rule Reforms* (Oct. 31, 2011) at 6, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV%20Suggestions%202011/11-CV-E.pdf.

[44] Jason Fliegel, *Electronic Discovery in Large Organizations*, 15 RICH. J.L. & TECH. 1, 7 (2009).

[45] Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, ¶ 7 (2006), *available at* http://www.law.northwestern.edu/journals/njtip/v4/n2/3; *see also* COMM. ON CT. ADMIN. & CASE MGMT., JUDICIAL CONFERENCE OF THE U.S., CIVIL LITIGATION MANAGEMENT MANUAL 8 (2001), *available at* http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/814.

Rule 37(e) makes clear that sanctions may not be imposed for ESI that has been, in good faith, destroyed or altered through routine operation of electronic information systems, such as automatic overwriting of backup tapes.

Since 2006, as was expected, judges and practitioners alike have been working to understand and apply the new rules and principles under the Amendments. Indeed, it was widely recognized that the changes to the Rules were only one part of the solution to the challenges associated with ESI; practitioners and judges needed to evolve their thinking to keep abreast of the reality of ESI and electronic discovery.[46] Meanwhile, as discussed below, technology has continued to evolve, offering solutions to challenges for which there were once none.

Since their implementation, the amendments—and the education and discovery tools that have developed in their wake[47]—have yielded considerable benefits. Litigants are meeting and conferring to resolve e-discovery disputes without the need for motion practice; judges are becoming more attuned to ESI issues; and many judges are using discovery protocols in their cases either as part of their individual practices or as part of pilot programs.[48]

The court-initiated pilot programs, for example, address, among other things, the challenges associated with high-volume discovery. These programs seek to capitalize upon the intent and breadth of the Federal Rules and maximize their potential in application. For example, in 2009, the Seventh Circuit implemented a pilot program, now in Phase II, which provides "a guide for practitioners to comply with the 2006 amendments and meet the rising judicial expectations that practitioners will be knowledgeable both about the Federal Rules and the benefits of cooperative discovery."[49] The cornerstone of that project is early and informal communications between the parties regarding ESI storage, preservation and discovery. The project provides practice tools to help litigants navigate e-discovery and requires parties to make a good faith effort to agree on ESI production formats. And it sets forth certain default positions, such as the position that data

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[46] Milberg & Hausfeld, *supra* note 6, at 11.

[47] For example, Working Group 1 of the Sedona Conference has published a number of educational materials to help guide jurists and litigants in managing e-discovery. *See, e.g.*, The Sedona Conference® Cooperation Proclamation: Resources for the Judiciary; The Sedona Conference® Database Principles Addressing the Preservation and Production of Databases and Database Information in Civil Litigation; The Sedona Conference® "Jumpstart Outline"; The Sedona Conference® Cooperation Guidance for Litigators & In-House Counsel; The Sedona Conference® Commentary on Proportionality; The Sedona Conference® Commentary on Legal Holds- September, 2010 Version; The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age; The Sedona Conference® Commentary on Email Management, *available at* http://www.thesedonaconference.org/content/miscFiles/publications_html?grp=wgs110.

[48] Though pilot programs initiated in some jurisdictions have not yet produced final empirical results, the Seventh Circuit's program is reporting positive interim results. *See* Tadler & Kelston, *supra* note 32, at 2 (80 percent of the judges surveyed regarding the impact of Phase I of the Seventh Circuit's pilot program reported that the principles articulated by the program had reduced the number of discovery disputes before the court). A report on Phase II of that program is expected in spring 2012.

[49] *See* Milberg & Hausfeld, *supra* note 6, at 30–32; *see also* Tadler & Kelston, *supra* note 32. Additionally, just this fall, the Southern District of New York, one of the busiest district courts in the country, announced its intention to launch a pilot program for complex cases. The Southern District's program likewise demands early attention to ESI preservation issues, with a joint electronic discovery submission incorporated for use by the parties. *See* Standing Order M10-468, *In re Pilot Project Regarding Case Management Techniques for Complex Civil Cases*, No. 11-mc-00388 (S.D.N.Y. Nov. 1, 2011).

requiring extraordinary preservation measures that are not ordinarily used by the business are presumptively not discoverable.[50]

These are just a few of the many advances and adaptations that have improved discovery practices, decreased costs and deterred discovery abuse since the 2006 amendments.

Moreover, the Rules, even absent the 2006 amendments, have long provided practitioners with a framework in which to conduct controlled but effective e-discovery, and they give the courts explicit authority and direction to manage disputes and control e-discovery abuses when the parties are unable or unwilling to do so on their own. As one observer explains, "[p]arties to litigation should not be hesitant to fight for reasonable restrictions on *preservation and production*. The Federal Rules of Civil Procedure allow for—and the intent behind them indeed call for—more restraints on discovery than many courts and parties recognize."[51]

Perhaps of greatest significance is Rule 26(b)(2)(C)—the "proportionality rule"—which specifies the factors[52] courts must consider in determining whether to limit discovery to ensure that it is proportional to the needs of the case and the resources of the parties. "The proportionality rule mandates that '[j]udicial supervision of discovery . . . seek[s] to minimize its costs and inconvenience and to prevent improper uses of discovery requests,' while still allowing parties to obtain the discovery necessary to litigate the case."[53] Under this rule, a court may limit discovery *sua sponte*. And by providing concrete factors relevant to the determination of disproportionality, the rule empowers litigants seeking to limit discovery. Parties, however, appear to infrequently make use of this rule and others that can help constrain discovery.[54]

The evidence suggests the existing rules and 2006 amendments are working. E-discovery case law is more developed and provides more guidance, litigants are meeting and conferring more frequently, disputes over the format of ESI production appear to be falling, and courts appear to be granting sanctions less frequently and adopting joint discovery plans more often than in the past.[55]

2. *Discovery Cooperation Reduces the Costs and Burdens of Discovery; Courts Increasingly Demand It.*

Changes in litigation conduct may be the most promising solution for reducing the costs of e-discovery. "[T]he Federal Rules of Civil Procedure demonstrates that the Rules both promote

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[50] Tadler & Kelston, *supra* note 32, at 2.

[51] Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since December 1, 2006*, 14 RICH. J.L. & TECH. 8, 81 (2008) (emphasis added).

[52] The factors include the needs of the case, the litigation stakes, the parties' resources; the importance of the issues to be resolved, and the importance of discovery in resolving them. Fed. R. Civ. P. 26(b)(2)(C).

[53] *See Metavante Corp. v. Emigrant Sav. Bank*, No. 05-1221, 2008 U.S. Dist. LEXIS 89584, at *20 (E.D. Wis. Oct. 24, 2008) (quoting *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct.*, 482 U.S. 522, 546 (1987)).

[54] ABA Section of Litigation, Member Survey on Civil Practice: Full Report (2009) at 2–3. http://www.abanet.org/litigation/survey/docs/report-aba-report.pdf.

[55] Milberg & Hausfeld, *supra* note 6, at 23–26.

and assume cooperation in discovery between litigating parties throughout the litigation."[56] Building upon this concept, in 2010, The Sedona Conference® issued a *Cooperation Proclamation*, which "urges parties to work in a cooperative rather than an adversarial manner to resolve discovery issues in order to stem the rising monetary costs of discovery disputes."[57] In fact, numerous courts have now cited to the Proclamation, some restating that "the best solution in the entire area of electronic discovery is cooperation among counsel."[58]

Cooperation in discovery demands that opposing parties and their counsel engage in an early and open exchange of information about their data systems, custodians (i.e., users and repositories) of data and key players likely to have information relevant to the dispute. By sharing details about these topics, parties can effectively agree upon scope of preservation and production, solve problems with appropriate technical solutions and better manage costs.[59] For example, they may agree on the source of ESI to be preserved, determine which employees' ESI will be preserved and collected, decide on the format of production, agree to discovery topics and relevant time periods, and select search terms and methodologies to limit production to only responsive information and reduce production and review burdens.[60]

Cooperation helps eliminate the waste of time and resources, including those of the court, by establishing a reasonable plan for e-discovery, including both preservation and production of ESI. By working to achieve such a plan, parties not only ensure effective time and resource management in the context of litigation, but they also eliminate the fear of sanctions that can sometimes arise from obstructive or uncooperative conduct while simultaneously securing better, faster and cheaper e-discovery.

3. Technology Will Continue To Reduce Discovery Costs and Burdens

Technology is developing in response to the exponential growth in ESI and the related e-discovery difficulties. And it is developing rapidly.

For example, in 2005, when amendments to the Federal Rules for Civil Procedure were being considered, a debate was raging over the costs and burdens of retrieving data and documents from backup tapes. At the time, there was no inexpensive way to reveal what was on a backup tape, and it was argued that there never would be. Some wanted the Rules to exclude backup tapes from the discovery process because the costs and burden of accessing the tapes was purportedly too high. Within a year, new technologies were commercialized that generated quick, efficient catalogues of backup tapes and, now, the process of searching backup tapes is considered to be simple, straight-forward and far less expensive.

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[56] The Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 348–49 (2009).

[57] *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 406–07 (S.D.N.Y. 2009).

[58] *See William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009); *see also Technical Sales Assocs., Inc. v. Ohio Star Forge Co.*, No. 07-11745, 2009 WL 728520, at *4 (E.D. Mich. Mar. 19, 2009); *Collins & Aikman Corp.*, 256 F.R.D. at 415; *see generally* Ralph C. Losey, Mancia v. Mayflower *Begins a Pilgrimage to the New World of Cooperation*, 10 SEDONA CONF. J. 377 (2009).

[59] *See* Milberg & Hausfeld, *supra* note 6, at 31–32.

[60] *See id.* at 32.

Today, as the Federal Rules come under scrutiny again, some are arguing that locating, saving and producing documents for a lawsuit, or a potential lawsuit, is too expensive and causes undue hardship for litigants. These arguments are similar to the backup tape arguments of 2005, i.e. there is no technology that helps them, there never will be, and the manual processes are too time-consuming and expensive. Contrary to these assertions, technologies exist today that ease that process, and those technologies are being improved dramatically as the need for them increases.

For example, software exists that helps with the automated location and preservation of many different types of data. In other words, software can do (and does) the work that once required direct and intense manual work. Companies can use software to apply simple word filters and advanced artificial intelligence algorithms to reduce the amount of data preserved. Based on the output that results from these automated searches, parties can either collect that data for preservation, or simply identify it for later examination.[61] These technological tools can manage and provide notifications to identified custodians, automatically build and update data maps, and apply legal hold policies against a company's full corpus of data, whether it is stored on network servers or on employees' remote laptops. In addition, these tools can track data throughout the entire litigation lifecycle, providing a complete audit trail and visibility into the review process.

There is also a popular argument that the logistical management of overlapping legal holds, (i.e., concurrent demands or obligations to preserve that arise from different legal disputes involving the same data or custodians), takes too many people away from their routine work, imposing costs on businesses. But tools exist to facilitate efficient management of overlapping litigation holds, automating many of the processes that were once time-consuming and could overwhelm a legal department or outside counsel. Legal hold notices can now be sent to many people at one time. The notices can require the recipients to affirmatively acknowledge their understanding and acceptance of the hold notice. The acknowledgments can easily be tracked to help put defensible holds in place quickly. These tools also allow for questionnaires and surveys to be sent to help identify sources of needed information. Some tools integrate a mechanism for people to set aside and upload responsive data.[62]

These are only two examples of many affordable technologies that exist today. And, as history has shown, the technology will continue to be refined and evolve to better assist with the needs of the users.

PROPOSED REFORM TO THE FEDERAL RULES TO ADDRESS DISCOVERY COSTS AND BURDENS

The Advisory Committee on Civil Rules

The United States Judicial Conference's Advisory Committee on Civil Rules (the "Rules Committee") has been diligently evaluating the need for additional revisions to the Federal Rules

[61] Autonomy, for example, offers a product known as Legal Hold (http://protect.autonomy.com/products/ediscovery/legal-hold/).

[62] One such tool is Method®, a legal hold technology solution (http://kcura.com/relativity/news/id/72/kcura-introduces-method-for-legal-hold-management).

to address emerging discovery concerns.[63] In May 2010, following the Duke Conference on Discovery, the Rules Committee tasked the Discovery Subcommittee with investigating possible changes to the rules governing preservation of discoverable information and sanctions for failing to preserve. For well over a year, the Subcommittee has been studying possible rules amendments, and the consequences (both intended and unintended) of those amendments. It has reviewed submissions, studies and surveys, and at least six different rules proposals,[64] including those discussed below. The Subcommittee also convened a mini-conference in September 2011, which included active participation by the many stakeholders of rules changes, "to educate the Discovery Subcommittee and assist it in developing possible recommendations for the full committee on preservation and sanctions issues." That conference attempted to identify the specific problems caused by preservation obligations that rule changes might address, the technology changes that might bear on the severity of the problems, and what rule changes should be used to address those problems.[65]

The Discovery Subcommittee subsequently released a Memorandum detailing the work it has done and describing the "difficulties and promises of rulemaking to address concerns about preservation and sanctions."[66] Among the core questions the Subcommittee analyzed was whether it should proceed with rules changes now and whether it should attempt to draft preservation rules or a sanctions rule.

The Subcommittee reached consensus that it should continue its work, but with a focus on crafting a sanctions rule, rather than a preservation rule,[67] concluding that the difficulties of devising a rule to address preservation obligations outweighed the potential usefulness of any new rule.[68] The Subcommittee was skeptical that a preservation rule would provide the certainty that its proponents sought because "[e]ven specific rules do not answer all questions of implementation—particularly in the uncertain setting of pre-litigation decisions when a claim has not been formally asserted." Among its concerns about a preservation rule were:

- Making rules about preservation might result in a greater number of cases in which spoliation issues arise—"probably not a positive outcome;"
- Attempting to craft a preservation rule now, when technology is unsettled and courts and businesses are still transitioning to the information age (and determining appropriate

[63] Congress authorized the federal judiciary "to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules." *See* Rules Enabling Act, 28 U.S.C. §§ 2071-2077 (setting forth authority and procedures for promulgating rules). The Judicial Conference has authorized the appointment of the Rules Committee, the recommendations of which are reviewed by the Standing Committee and then, if appropriate, recommended to the Judicial Conference. The Standing Committee and the Rules Committee is made up of members with direct experience in the practice, application and /or teaching of the law: federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice.

[64] Notes of Conference Call, Discovery Subcommittee, Advisory Committee on Civil Rules, Sept. 13, 2011 at 1, *included in* Agenda Materials for the Advisory Committee On Civil Rules Meeting, Nov. 7-8, 2011, Appx. G.

[65] *See* Agenda Memo for the Sept. 9, 2011 Discovery Subcommittee *included in* Agenda Materials for the Advisory Committee On Civil Rules Meeting, Nov. 7-8, 2011, Tab III, at 3 (hereinafter "Subcommittee Memorandum"), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publications/Preservation.pdf.

[66] *See id.*

[67] *Id.* at 1.

[68] *Id.* at 14.

ways to manage data generally) and to the 2006 Rules amendments, may not only be premature and difficult, but also risky;

- The preservation rules proposed may not reduce the amount of preservation;
- A very specific preservation rule would be unworkable because "the questions it would address are too fact-specific and unsuited to all-purpose solutions;"
- Proposed rules on the scope of preservation would not resolve ambiguities regarding what should be preserved prior to and during the early stages of litigation;
- A preservation rule might interfere with the more productive alternative of resolution of preservation obligations through agreement of the parties.[69]

Instead, the Subcommittee has turned its focus to evaluating the need for revisions in the Rules regarding discovery sanctions, and whether a rule could be crafted that establishes a meaningful federal standard that can be applied regardless of the size or nature of the case.[70] The Subcommittee's "initial consensus [is] that work should continue to design a sanctions . . . rule."[71] However, the Subcommittee also acknowledged that a considerable range of issues will confront the Subcommittee if it proceeds to attempt to draft a sanctions rule, including uncertainty as to what the word "sanction" even means.[72]

Among those issues are: (1) whether a sanctions rule can properly distinguish among sanctions in terms of severity because, for example, even adverse inferences differ in degree of severity; (2) whether culpability can be incorporated into a rule when culpability is not ordinarily necessary for non-punitive "curative measures[s]" that attempt to minimize the harm to the innocent party's case due to the loss of data; and (3) whether culpability can meaningfully be connected to the severity of the sanction.[73] Nonetheless, the Subcommittee determined that further work to attempt to craft a sanctions rule that addressed these challenges was worthwhile, and presented four versions of potential amendments on sanctions. The Subcommittee should be entitled to continue with its thoughtful and studied consideration of those challenges.

Drastic Amendments to the Civil Rules Will Undermine the Civil Discovery Process and Our Civil Justice System

In stark contrast to the careful consideration of the Discovery Subcommittee, the recent submissions to the Committee by members of the corporate defense bar continue to urge immediate and sweeping rule amendments that would drastically and intentionally narrow the scope of discovery and permit knowing destruction of relevant evidence. The Judicial Conference's Discovery Subcommittee has properly resisted calls for reckless adoption of these proposals, just a few of which are discussed here.

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[69] *Id.* at 4–14.

[70] *Id.* at 1.

[71] *Id.* at 14.

[72] *See id.* at 15. The Subcommittee noted, for example, that a remedy of requiring restoration of data on backup tapes that should have been preserved is not appropriately characterized as a sanction.

[73] *See id.* at 14–17.

One proposal would relieve a party of its obligation to preserve relevant data until a claim has been filed, no matter when the party became aware that litigation was likely.[74] The harm of that proposal should be clear. If not consider the following, not far-fetched, scenario: after a surgeon amputates the wrong leg of her patient, there is a flurry of emails between surgical staff and the hospital peer review team indicating the surgical team had committed a grievous error. But the hospital routinely sweeps all email from its active servers and onto back-up tapes after 30 days, and rotates the back-up tapes every 90 days. Thus, unless specific measures are taken to preserve the emails, they would be deleted after 120 days. Under proposals that would trigger preservation obligations only upon the filing of a claim, the hospital, despite the obviousness of the surgical mistake and likelihood of legal action, would have no legal obligation to retain these emails. The emails would be lost unless the patient raced to the courthouse to file a complaint (or perhaps issued a potentially overly broad preservation demand letter[75]).

Second, some commentators recommend that the Rules require preservation of ESI only where the information is "material" or "necessary" to the case, in that "the outcome of the litigation must depend on it"[76]—a proposal with obvious potential to undermine our civil discovery system. First, it destroys the foundations of our civil discovery system. Under the current Rules, information is discoverable if it is *relevant* to the claims and defenses, and a court may order production of documents reasonably likely to lead to discoverable information.[77] Importantly, much relevant information is not, standing alone, outcome determinative, or necessary or material to the case; yet relevant documents inform adjudication on the merits. Moreover, it is often impossible to know at the outset of a case which relevant information will ultimately be necessary, material, or outcome-determinative. Permitting its intentional and knowing destruction simply because it is not judged to be *material* by the party in whose hands it rests (and which may have the most to lose by its disclosure) would dramatically undermine the function of civil discovery.

Third, the defense bar has proposed a sanctions rule that would permit intentional destruction of relevant evidence unless the party prejudiced by the destruction can prove both materiality of the destroyed evidence and that the destruction was conducted with "intent to prevent use of the information in litigation."[78] This proposal creates a likely insurmountable barrier to litigants prejudiced by spoliation. It requires that the injured party prove the

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[74] Letter from Robert D. Owen to Hon. David G. Campbell (Oct. 24, 2011) at 18, available *at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Robert_Owen_Adv_Comm_Submission_final.pdf.

[75] *See* Lawyers for Civil Justice, et al., Comment, *supra* note 43, at 17 (suggesting that one preservation trigger could be the receipt of a "written demand to preserve information. . . . [that] must provide clear indications that the filing of an action is imminent, describe the nature of the claims and the information sought to be preserved, and give an indication that litigation is reasonably certain to occur.").

[76] *Id.* at 6, 9 ("It is no longer enough that ESI might be relevant: it must also be material. Put another way, it is not enough for ESI to have a possible relationship to the issues of the litigation. The ESI must be necessary to the case; the outcome of the litigation must depend on it."); *see also* Letter from David M. Howard, *et al.* to Advisory Committee on Civil Rules , *included in* Agenda Materials for the Advisory Committee On Civil Rules Meeting, Nov. 7-8, 2011, Appx. S at 2.

[77] Fed. R. Civ. P. 26(b)(1).

[78] Lawyers for Civil Justice, et al., Comment, *supra* note 43, at 24 ("Sanctions on a party for failing to preserve or produce relevant and material electronically stored information should be determined by intent to prevent use of the information in litigation.") & 7.

materiality of non-existent evidence, that the evidence is unavailable from any other source, and bad faith—all difficult tasks where the exact nature of the spoliated evidence will be unknowable. Further, it strips courts of their ability to fashion remedies and sanctions that are proportionate to nature of the spoliation conduct and the degree of prejudice suffered by the innocent party. Limiting sanctions to bad faith destruction precludes courts from remedying spoliation even where the loss of data effectively prevents the injured party from litigating the case.

Yet a fourth proposal would limit the scope of preservation to information created during the two years prior to the date the preservation obligation arose and to only ten "custodians."[79] These are equally flawed. First, data created well before the arbitrary two-year cut-off is often relevant and material to the claim; in some cases, the evidence may go back decades. The preserving party would have no obligation to take any steps to preserve it despite its obvious relevance. Moreover, the two-year period may actually be *shorter* than the statute of limitations in a given case, permitting destruction of evidence well before the statute has run.

Consider, for example, the following scenario: A large manufacturing company has publicly admitted to the Justice Department today that, from 2004 to 2010, it conspired with its competitors to fix prices, making it virtually certain that its retailer-customers who paid inflated prices will file antitrust claims. Under federal antitrust laws, the retailers can recover damages extending back four years from the time the lawsuit is filed. And if the manufacturer concealed the conspiracy, damages may extend back even beyond that four-year period. But under the proposed amendment, the manufacturer would be free to destroy all records created prior to December 13, 2009—that is, records created during the pendency of the price-fixing conspiracy that are likely both relevant and essential to any antitrust claim.

Finally, the proposal to limit preservation to ten custodians lacks any logical or empirical foundation. The number of employees holding responsive information will depend on an individual case and the size and nature of the organization. Although the proposal provides that the court may order production of documents from more than ten custodians, such a provision is obviously inadequate to remedy the irrevocable destruction of relevant and unique evidence held by custodians who were not among the original ten whose documents were preserved.

The Discovery Subcommittee, recognizing these and other difficulties with the proposals, has appropriately chosen not to rush to judgment regarding their adoption. Congress should withhold such judgment as well.

CONCLUSION

Rule 1 of the Federal Rules of Civil Procedure commands that "[The Rules] should be construed and administered to secure the *just*, speedy, and inexpensive determination of every action and proceeding."[80] A myopic focus on the expense of litigation risks losing sight of the fundamental purpose of litigation: to achieve justice. When Congress adopted the Federal Rules

[79] *Id.* at 20 n.70 (proposing that the duty to preserve information is limited to information under the control of a reasonable number of key custodians of information, not to exceed 10).

[80] Fed. R. Civ. P. 1 (emphasis added).

in 1938, it did so with the view that discovery was instrumental to an efficient and fair judicial system. Indeed, "the level evidentiary playing field created by discovery . . . lies at the heart of our adversarial system."[81] While reducing litigation costs is a laudable goal, such measures must be considered carefully to avoid tilting the playing field, or worse, denying access to the courts. Overreaching, ill-conceived, and premature restrictions on discovery threaten to do just that.

[81] *Hynix Semiconductor Inc. v. Rambus Inc.*, 645 F.3d 1336, 1347 (Fed. Cir. 2011).

APPENDICES

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Testimony

of

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before the

United States House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution

regarding the
Costs and Burden of Civil Discovery
December 13, 2011

Appendices

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1. Agenda Memo regarding Preservation/Sanctions for the Sept. 9, 2011 Discovery Subcommittee, Rules Advisory Committee, United States Judicial Conference
2. Letter from W. Butterfield and A. Tadler to Hon. David G. Campbell, Nov. 6, 2011.
3. William P. Butterfield & Ariana J. Tadler, *E-Discovery Today: The Fault Lies Not in Our Rules . . . "*, 4 FED. CTS. L. REV. 1 (2011).
4. The Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONFERENCE J. 339 (Fall 2009).
5. *The Sedona Conference® Commentary on Legal Holds: The Trigger & The Process*, 11 SEDONA CONFERENCE J. 265 (Fall 2010).
6. Ariana J. Tadler & Henry J. Kelston, *Working Toward Normalcy in E-Discovery*, N.Y.L.J. (Oct. 3, 2011).
7. Emery G. Lee III and Thomas E. Willging, Executive Summary, *National, Case-Based Civil Rules Survey; FJC Civil Rules Survey: Prelim. Report to the Committee* (Fed. Judicial Ctr. 2009).
8. Emery G. Lee, *Motions for Sanctions Based Upon Spoliation of Evidence in Civil Cases: Report to the Judicial Conference Advisory Committee on Civil Rules* (Fed. Judicial Ctr. 2011).

APPENDIX 1

PRESERVATION/SANCTIONS ISSUES

Since the April meeting, the Discovery Subcommittee has continued to study issues of preservation and sanctions. The purpose of this memorandum is to introduce the issues the Discovery Subcommittee is bringing before the full Committee for discussion. In part, it is designed as an introduction to the more detailed materials included in this agenda book. Attached to this memorandum as appendices should be two charts prepared by Judge Grimm, one illustrating the various attitudes in different circuits about sanctions issues, and the other providing a survey of the trigger directives in federal courts across the country.

This memo attempts to identify and raise questions as well as conveying the Subcommittee's current thinking, recognizing that Subcommittee members may have differing views on some issues. It is likely Subcommittee members will offer their own views during the November meeting. The Subcommittee's current thinking has reached a consensus on the proposition that it should continue work, but focusing on a sanctions rule rather than a preservation rule.

As planned, the Subcommittee held a mini-conference on these subjects in Dallas, TX, on Sept. 9, 2011. Since the conference, the Subcommittee has held two conference calls to discuss the best way of going forward. Included in these agenda materials should be the following records of those two conference calls:

920NOTES.WPD -- Notes of the Sept. 20 conference call

913NOTES.WPD -- Notes of the Sept. 13 conference call

Because any summary would not do justice to the variety of views and materials received by the Subcommittee in connection with the Dallas Conference, many of them are included in the agenda book. These items can also be found at the following website (or accessed through www.uscourts.gov using a link from the What's New section of the main rulemaking webpage):

www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx

The website includes some items that have been included in prior agenda books and are not included again here, such as the original three-page proposal for elements of a preservation rule provided by the Duke E-Discovery panel and the 100 page memorandum by Andrea Kuperman on case law on preservation and sanctions issues. Included in these agenda materials are the following:

<u>Advisory Committee conference materials</u>:

Notes of Dallas Mini-Conference

Memorandum to participants on focus of discussion (including list of participants)

Memorandum on Preservation/Sanctions issues (including three categories of possible rule approaches)

Empirical Data or Research:

Civil Justice Reform Group -- Preliminary Report on the Preservation Costs Survey of Major Companies

Federal Judicial Center -- Motions for Sanctions Based Upon Spoliation of Evidence in Civil Cases

RAND Corporation -- Costs of Pretrial Discovery of Electronically Stored Information

The Sedona Conference -- Membership Survey of Preservation and Sanctions

Comments submitted:

Thomas F. Allman -- Change in the FRCP: A Fourth Way

Thomas F. Allman, Jason R. Baron, and Maura R. Grossman -- Preservation, Search Technology, and Rulemaking

Center for Constitutional Litigation

Department of Justice

Kroll Ontrack

Lawyers for Civil Justice -- Preservation: Moving the Paradigm to Rule Text

Microsoft

New York State Bar Association -- Interim Report on Preservation and Spoliation

The above listings of reports and submissions are alphabetical.

Issues Raised

The goal during the upcoming meeting will be to reach consensus on the type of approach the Subcommittee should pursue in developing a draft of a possible rule amendment to address preservation and sanctions issues. As presented previously, the Subcommittee had identified three basic approaches:

Category 1: Preservation proposals incorporating

considerable specificity, including specifics regarding digital data that ordinarily need not be preserved, elaborated with great precision. Submissions the Committee received from various interested parties provide a starting point in drafting some such specifics. A basic question is whether a single rule with very specific preservation provisions could reasonably apply to the wide variety of civil cases filed in federal court. A related issue is whether changing technology would render such a rule obsolete by the time it became effective, or soon thereafter. Even worse, it might be counter-productive. For example, a rule that triggers a duty to preserve when a prospective party demands that another prospective party begin preservation measures (among the triggers suggested) could lead to overreaching demands, counter-demands, and produce an impasse that could not be resolved by a court because no action had yet been filed.

Category 2: A more general preservation rule could address a variety of preservation concerns, but only in more general terms. It would, nonetheless, be a "front end" proposal that would attempt to establish reasonableness and proportionality as touchstones for assessing preservation obligations. Compared to Category 1 rules, then, the question would be whether something along these lines would really provide value at all. Would it be too general to be helpful?

Category 3: This approach would address only sanctions, and would in that sense be a "back end" rule. It would likely focus on preservation decisions, making the most serious sanctions unavailable if the party who lost information acted reasonably. In form, however, this approach would not contain any specific directives about when a preservation obligation arises or the scope of the obligation. By articulating what would be "reasonable," it might cast a long shadow over preservation without purporting directly to regulate it. It could also be seen as offering "carrots" to those who act reasonably, rather than relying mainly on "sticks," as a sanctions regime might be seen to do.

Specific versions of these three approaches, with questions appended, were presented to the Sept. 9 conferees and are included in this agenda book. The Sept. 9 conference focused mainly on three issues -- (1) What are the specific problems caused by preservation obligations that rule changes might address?; (2) What technology changes might bear on the severity of these problems?; and (3) What rule-amendment approach, if any, should be employed to improve the handling of these problems?

The focus of the discussion at the upcoming meeting will largely be whether the Subcommittee should pursue the general

approach it has identified as presenting the most promise and the fewest difficulties -- some change to Rule 37 designed to guide use of sanctions rather than a rule explicitly addressing the specifics of preservation obligations. Beyond that, the November discussion could address the sort of approach to sanctions that seems most promising. Below, three possibilities are presented in addition to the Category 3 approach the Subcommittee developed before the conference.

(1) Should we proceed now?

A basic starting question is whether to proceed now to try to develop a specific rule amendment proposal. This question involves consideration of a variety of related issues.

The first is the extent and seriousness of problems resulting from the current state of preservation and sanctions law. The FJC research does not show that sanctions are frequently imposed in federal court, but many report that preservation is a large and increasing expense and burden for many organizational potential parties to litigation. Besides the views expressed by those at the Dallas conference, the RAND report, for example, includes confirmation that there is widespread concern with the cost of preservation for litigation. Making further rules about these issues, however, might mean that the 99% of cases in which spoliation does not now arise will begin to sprout spoliation issues, probably not a positive development.

It may be, moreover, that this concern is merely an aspect of a larger transitional phase caused by the "information revolution." The whole problem of how companies should manage their information seems very much in flux. For example, whether the IT department should control all electronic information devices used at the company may be under review. Many employees may prefer to use their own devices to using company devices, and in any event to use various media including social media to communicate about company business. Companies themselves, meanwhile, are beginning to use social media for advertizing and other purposes. These developments almost certainly mean that companies will need to develop best practices for managing information in the new environment.

Preservation will be one aspect of that development of overall information-management practices, and will be necessary because there is a variety of preservation requirements quite separate from the common-law obligation to retain potential evidence for use in litigation. True, there is now very substantial angst about the litigation-anticipation preservation duty, but it may be only a part of a much larger angst about the general problem of information management in this new world. Trying to develop rules to deal with such an unsettled

environment may be risky as well as difficult.

This view can be countered with the repeated report that "lawyers are running the company." True, companies have to try to take account of many new challenges in designing their information systems. But due to preservation, too often the lawyers are interfering with that process, possibly even vetoing approaches that seem desirable for all other reasons because they are not well-adapted to preservation for litigation purposes. If that is impeding efficient operation of companies, it seems backwards. The notion that companies would alter their information systems in response to rule changes was a concern repeatedly raised during the public comment period on the 2006 E-Discovery amendments; this topic raises a related concern.

A related realization is that preservation for litigation is likely to be a special, and perhaps especially difficult, issue. Although there are many other preservation requirements, they may not have the "keep everything about this subject" aspect that litigation preservation seems often to display. And the perceived stakes of failure to comply with other preservation requirements may be much less pressing than the fear that a colossal adverse judgment may result from failure to preserve for litigation purposes. The likelihood that the lawyers will seem to be running the company, at least with regard to IT, is perhaps much more likely with regard to this preservation duty than others.

Putting aside consideration of the transitional nature of information management, there is also an argument for delaying rulemaking because we are in a transitional phase of law-making. For one thing, the 2006 rule amendments designed to deal with E-Discovery are still less than five years old. At least some of them -- the Rule 26(f) directive that preservation be discussed at the outset and the Rule 37(e) limitation on sanctions -- appear to be addressed to issues that bear on the current topic. The bar is understandably reluctant to see the rules changed in important ways with great frequency. Since the most recent relevant changes are only now sinking in, is it not better to allow them more time to sink in? If, for example, there were pervasive and sensible compliance with Rule 26(f) by lawyers well versed in the real issues raised by preservation and E-Discovery, would that not be likely to solve many, perhaps most, problems? At least some report this is beginning to happen in some litigation, perhaps particularly in complex high-stakes litigation. Since that seems to be where the problem is concentrated, it may be that some additional time would permit things to stabilize.

A different argument is that the courts are also in a transitional phase of adapting to these new circumstances through case law. There is understandable support for the fact-specific,

gradual, and continual development the common law method permits. And there is reason to think that even though there may have been some arresting sanctions decisions as this evolving legal development began, the courts are "getting it right" without outside guidance from rulesmakers. Introducing a rule could actually disrupt this process because it would be a new directive not previously considered, and might be interpreted as nullifying some of the case law that already existed. In effect, the case law method is providing the benefits of a diversity of views that might be choked off by rulemaking.

A counter to this line of argument emphasizes the diversity of current case law on important preservation issues. Judge Grimm has prepared a chart summarizing several of these examples that is included as an appendix to this memorandum. Extremely important examples have been discussed already in Committee meetings. For example, the Second Circuit view that negligence suffices for severe sanctions for failure to preserve seems different from the view of other circuits that such sanctions can be justified only by significantly more culpable behavior. These divergences can be particularly unnerving to companies that operate nationwide. True, a federal rule could not bind the state courts, but it might at least achieve relative unanimity on some critical issues in the federal courts.

It may be that the information age has silently ushered in a new implicit attitude toward preservation. Before the last decade or so, the focus of sanctions decisions was on whether a party destroyed evidence in order to make sure it could not be used in court. When such destruction occurred, it resulted most often from some affirmative act animated by exactly the bad faith motive that all agree should justify sanctions. There does not seem to have been rampant spoliation at that time. But the point is that this sort of spoliation readily supported an adverse inference that the lost evidence would prove the spoliator's wrongdoing.

The advent of the information age, with its myriad sources of potential evidence (not just email, but also BlackBerrys, smartphones, additional sorts of PDAs, video surveillance and other sources), and the easy and often automatic destruction or loss of such evidence, means that spoliation law has been transformed from an inference based on bad faith destruction of evidence into an open-ended affirmative preservation duty evaluated by a judge using 20/20 hindsight that may sometimes seem to demand perfection. It seems to some that preservation has been converted into a virtue, and active spoliation has receded into the background. The "litigation hold" effort has become a huge concern where it simply was not before. And it is said that this change has provoked enormous, and enormously costly, over preservation of information. That over preservation may build on itself and become more difficult to manage as time

goes by.

This sketchy introduction suggests the variety of issues that can bear on whether the Subcommittee should proceed now to try to draft proposed rule amendments. It currently is inclined to conclude that the effort would be justified. The multiple concerns we have heard about are both pressing and troubling; although some ongoing empirical work may shed further light, the cries of pain seem real. At the same time, there are major challenges confronting the actual rulemaking task, beginning with the question what it should attempt to do -- focus on preservation itself or only on sanctions. We turn to those issues now.

(2) Should we try to draft preservation rules?

Many have urged that explicit preservation rules would be critical to dealing effectively with the difficulties that have emerged. Presently those who can anticipate litigation have only the most general guidelines about what they should be doing in designing and implementing litigation holds. There is some helpful case law, but much is very dependent on the specific facts of the given case. Moreover, the case law probably consists disproportionately of examples of what *not* to do; instances in which preservation has been satisfactory are likely underrepresented. Indeed, one would hope that they usually don't come to the judge's attention at all, much less lead to a ruling that no spoliation has occurred.

Something of more general application, even if only a default "ordinary" requirement, is said to offer much security. At present, companies that want to make sure they do nothing that would make them susceptible to sanctions say they do not have clear guidance on how to make sure they will not suffer potentially catastrophic consequences due to failure to do what a judge later determines they should have done. The result is said to be enormous over preservation and waste.

One set of questions about this explanation for the urgency of preservation rules is that, given the ongoing information management changes described above, it is not clear that specifics about the various topics we have discussed would really eliminate, or perhaps even dramatically cut, the preservation that currently occurs. All seem to agree that substantial preservation would still be necessary under a more appropriate regime. Maybe a preservation rule, even if adopted, would not work significant improvements, particularly if it did not include very specific (and probably highly debatable) details.

A different set of concerns still exists in the background, and was brought into the foreground by some who commented at the Dallas conference -- the Enabling Act limitations. Rules that in

form direct actors in society about how they are to preserve or what they are to preserve may be challenged as going beyond the scope of rules of procedure to govern cases in U.S. district courts. It appears that, in a significant percentage of situations in which companies impose litigation holds, no litigation ever ensues, which somewhat underscores the difficulties that might result from the most aggressive preservation rules.

At the same time, rules about the standards U.S. district courts should use in deciding whether to impose sanctions in cases pending before them, or the measures to take to cope with the problems resulting in those cases from the absence of important evidence, surely should be a proper subject of rulemaking. As the example of Rule 11 shows, courts may make orders in the cases before them based on whether parties conducted themselves in the required way before the suit was filed.

For the present, the Subcommittee has deferred serious consideration of these Enabling Act concerns. Partly that decision to defer resulted from the appreciation that the issues would depend a great deal on the content of any rules, and that content remained unclear. In part, it was also based on the possibility that if the most desirable rules seemed beyond the rulesmakers' power they could be presented to Congress with a request for legislative implementation. That was the route taken with Fed. R. Evid. 502.[1] Accordingly, while acknowledging that Enabling Act concerns must be kept in mind, the Subcommittee is not inclined presently to undertake an aggressive effort to determine what Enabling Act issues hypothetical rules might engender.

The more pressing question on which the Subcommittee has focused is whether useful rules could be developed to provide the guidance some desire regarding preservation. The materials for the Dallas conference included (in Category 1) efforts at extremely specific rules and (in Category 2) more general rules about the same topics. Many urged adoption of a rule with more

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[1] The current situation is different from the one presented by Rule 502. In that case, 28 U.S.C. § 2074(b) explicitly provided that any "rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." This statute -- adopted as a result of the controversy surrounding the proposed privilege provisions in the original Federal Rules of Evidence as presented in 1973 (effectively abolishing the doctor/patient privilege but including a broad executive privilege) -- seems not to bear significantly on the question of preservation of discoverable information.

specific provisions like Category 1. Many others concluded that such an approach would not be workable, and that it might do affirmative harm.

The Subcommittee's tentative conclusion is that devising a very specific preservation rule is not workable because the questions it would address seem too fact-specific and are unsuited to all-purpose solutions.[2] It entertains some uncertainty about whether even the most specific of rules would provide the sort of certainty some who endorse that goal say they want. Even specific rules do not answer all questions of implementation -- particularly in the uncertain setting of pre-litigation decisions when a claim has not been formally asserted -- and in many instances they would clearly be inapplicable. The following discussion introduces those conclusions with regard to some specific features of the rules in Category 1 and Category 2.

Trigger: The question whether the trigger determination imposes significant uncertainties on companies has been debated. A significant number of respondents indicated that companies don't usually find this determination difficult to make. The main question seemed to be whether a list of specific triggering events would be useful to clarify the trigger question. At least some voiced considerable concern that some of the examples on the list of triggers in the examples provided by the Subcommittee would be harmful. For example, should every letter to the IRS from an irate taxpayer trigger a preservation obligation? Similarly, should every governmental agency that commences an investigation immediately impose a litigation hold in case the investigation leads to litigation?

A different sort of argument regarding trigger may be that the common law standard, while reasonably clear, is not the right standard. Some urged, for example, that the standard should be

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[2] As a comparison, a recently-announced model rule for patent litigation contains some proposed specifics regarding discovery of email, such as directing that discovery requests specify the custodians who are to search for responsive email, and also specify the search terms to be used. The model rule sets a presumptive limit of five custodians and five search terms, and contemplates that the parties will discuss the identities of custodians and the selection of search terms before propounding discovery requests. It also provides that the number of custodians or search terms may vary from the presumptive five. It is not clear that this rule, designed for one specific type of litigation, limited to email discovery, and relying on extensive conferences between the parties to provide the specifics, is a model for a Civil Rule on preservation, particularly since such a rule might be most pertinent to the pre-litigation stage.

"reasonable certainty" of litigation. The Subcommittee's sense is that this articulation does not correspond to what the cases have been holding, and it is not enthusiastic about trying to alter the law on this point. Arguably such a trigger could be said to mean that potential parties need not preserve evidence even after suit has been threatened and pre-litigation settlement discussions are under way because litigation is not "certain" at that point.

Another suggestion was that the trigger should not occur for a defendant until it is actually served with a complaint, but in some circumstances that might well disregard the reality that an injured plaintiff must find a lawyer and the lawyer must draft and file the complaint before it can be served. Under such a rule, would a potential defendant, knowing that a lawsuit is coming, nonetheless be allowed to continue its IT system's routine destruction of relevant emails because no complaint has been served? Although "burn parties" may be almost unknown events, a more precise rule about trigger might invite arguments (clearly wrong) that destruction designed to destroy evidence is itself protected until the trigger is pulled.

Scope: More than trigger, scope seems to be a major headache for companies. As noted above, the proliferation of electronic information devices has caused serious information management headaches in the last decade or so. Before that, the problem of scope probably was more limited. In general, a company would look to its file room, and perhaps also the files employees have in their individual offices.

A different, but related, problem results from the breadth of the scope of discovery under Rule 26(b)(1). Rule 26(f), for example, directs the parties to discuss "any issues about preserving discoverable information," seemingly invoking Rule 26(b)(1). That, in turn, could reach anything "relevant to any party's claim or defense" and includes inadmissible material if the discovery "appears reasonably calculated to lead to the discovery of admissible evidence."

To the extent that parties actually do preserve with an eye to the Rule 26(b)(1) scope of discovery, that could obviously involve a great deal of material. For example, in some employment litigation courts may sometimes order discovery regarding the experiences of employees other than the one who filed the suit. If employers had to keep all records relating to all other employees whose records might be ordered produced by a court, the preservation burden could be wide indeed, particularly if it extended to all email traffic about those other employees.

Another way of looking at preservation -- as opposed to discovery -- is that it is intended to keep the "important" evidence so it will be available. Some have therefore suggested

that the preservation duty only apply to "relevant and material" information, or perhaps "relevant and admissible" information. In a sense, these suggestions might be likened to the original 1991 proposal for Rule 26(a)(1) initial disclosure, which called for disclosure of documents "likely to bear significantly on any claim or defense." Perhaps that should be the scope of the preservation obligation.

Although channeling preservation in this direction has some appeal, it also raises significant problems. For one thing, it would seem peculiar to say that material that would be discoverable can be knowingly discarded before it is requested through discovery. Rule 26(d) says that formal discovery requests are not permitted until after the Rule 26(f) meet-and-confer session, and Rule 26(f) says that session is to include discussion of preservation of "discoverable" information. Defining the scope of preservation more narrowly until a formal request is made does not fit well with those provisions, at least for the period after service of the complaint, which all appear to concede would trigger a preservation duty. Presumably there is a duty not to discard relevant material that has been requested at least from the time it is formally requested.

The more challenging aspect of this treatment of the scope of preservation, however, involves recognizing that in many instances the decision what to include in a litigation hold must be made initially before a lawsuit has been filed. Even after it is filed, it may be difficult for a defendant to determine with confidence what is "likely to bear significantly on any claim or defense," much less what is "material" or will be admissible. Before suit is filed, that determination must be much more difficult. Thus, even if the scope of preservation were narrowed by rule, potential litigants would face difficult issues about the appropriate amount of information to preserve. If they are as risk-averse as some have suggested, they most likely would still err on the side of over-preservation.

At the same time, it does not seem that companies will often have to anticipate every conceivable discovery request in gauging the scope of a litigation hold. In the employment litigation example mentioned above, for example, absent some reason to foresee that the records of another employee will be significant in relation to the possible suit by one employee it is unlikely that a court would conclude that spoliation had occurred because records regarding other employees were not retained unless the disgruntled employee gave some specific reason for retaining the other employees' records. To the contrary, the eventual scope determinations that may have to be made in assessment of specific broad-ranging discovery requests are not likely to cast a backward shadow onto the preservation decisions pre-litigation. Some scope determinations are, by definition, made well after litigation has begun, such as the determination under Rule

26(b)(1) whether good cause exists to expand the scope of discovery to all material relevant to the subject matter involved in the litigation. Put differently, there must be some potential difference between the scope of eventual discovery and the scope of preservation; reasonable preservation efforts take account of likely discovery, but cannot anticipate all twists in actual discovery. And in many cases the gap may be much wider than that.

Number of custodians: As noted above, the whole notion of multiple "custodians" seems largely a product of the information age. Nowadays, it may be that almost every employee -- or at least very many -- could be regarded as a "custodian" of some amount of company electronically stored information. But the effort to preserve should be focused on the ones who are likely to have significant information, or to know where it may be found.

It appears that the identification of such individuals may sometimes be the subject of discussion between counsel after suit is filed. It would probably be desirable if that discussion happened more often than it does. Up until that happens, a company may have to make its own best judgment about how many and which "custodians" to notify that they should retain pertinent information. As with the more general question of scope, that effort may evolve as more information about what the other side is claiming comes to light.

It might be that some sort of default guidepost (e.g., 15 custodians) would provide some companies with useful information. But coming up with a guidepost seems an impossible task. For one thing, it would likely vary greatly with the company involved. Compare General Electric, which was represented at our Dallas conference, with the Mom & Pop Auto Repair Shop, Inc. Besides that, it would also depend on the nature of the issues raised in the potential suit. A potential suit about an accident involving a G.E. vehicle would almost certainly involve fewer custodians than one potentially alleging dangerous defects or price fixing in light bulbs.

Moreover, a hard limit on the number of custodians could mean that potential litigants could attempt to justify allowing their IT system's routine destruction of relevant ESI held by a larger number of custodians. Such a result hardly seems satisfactory. And if the rule's limit on the number of custodians is only presumptive -- if a court could later determine that the company should have realized that more than the presumptive number of custodians should have been placed under the litigation hold -- then companies would still have difficult pre-litigation preservation decisions to make and likely would over-preserve when there is any chance that the presumptive number might be found too small by some future judge.

Duration: There are at least two sorts of duration issues. One has to do with how far back the company must go from the date on which the trigger occurs. The other has to do with how long a litigation hold, once imposed, must continue in effect. Statutes of limitation and like measures might be considered, but they are probably very various. During the pre-litigation stage, there may be no way to know confidently what claim will be asserted (making the scope determination difficult, as discussed above), and even if that can be discerned there may be differing limitations periods for such claims in different places. Some have suggested that the rule identify a fixed time limit for the preservation obligation, such as requiring preservation only of those documents created during the two years prior to the litigation hold. But such a rule clearly would not work for lawsuits concerning older events, such as an environmental case that turns on disposal practices decades ago or a case concerning construction of a contract negotiated ten years ago.[3]

Type of materials: Another particular that might be addressed is whether certain types of information are presumptively not subject to preservation. For example, one could say that backup tapes are not. In fact, Category 1 contains a variety of other specific exclusions.

As with other topics, this effort seems very problematical. For one thing, technological change might quickly make the list obsolete. For another, the idea of categorical exclusions seems somewhat out of keeping with the attitude toward litigation holds embodied in the Committee Notes to the 2006 amendments. Those Committee Notes (to Rules 26(b)(2)(B) and 37(f)) declined to take an absolute position on whether "inaccessible" materials should be retained even though not produced. Instead, they called for considering whether unique information could be found on those media. On the one hand, Rule 26(b)(2)(B) excuses initially searching such electronic sources of information to respond to discovery. On the other hand, it also authorizes the court to order the sources to be searched for good cause. That implicitly assumes they have been retained, for otherwise the court could not later order that the be searched. Given the judicial power to order searching these "inaccessible" sources, it would be odd to provide absolutely that certain things such as backup tapes can always be discarded no matter what is known about the information contained on them and whether it can be obtained elsewhere.

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[3] The model rule for patent litigation mentioned above includes a directive that email discovery requests specify the time frame covered by the request. It does not itself specify a time frame.

In sum, the Subcommittee has reached a consensus that the difficulties that would attend trying to devise a preservation rule outweigh its likely usefulness. At the same time, much of the angst about preservation might be addressed instead through a sanctions rule, to which we now turn.

(3) Should we try to draft a sanctions rule?

One reaction expressed by some Subcommittee members is that the case law on sanctions is gradually becoming more consistent, and that it likely will continue in that direction. In the same vein, it has been observed that there are really no recent examples of federal courts imposing severe sanctions on litigants who have made reasonable preservation efforts. It may be that a number of potential litigants have reacted to the threat of sanctions by adopting an increasingly expensive and wasteful "save everything" philosophy, but it is harder to say that actual federal-court imposition of sanctions has been a prime stimulus for these efforts.

The initial consensus of the Subcommittee, however, is that work should continue to design a sanctions "back end" rule. Even though it seems that federal courts are becoming more nuanced in their handling of preservation sanctions issues, it also appears that divergence among the circuits on the culpability standard that should be employed is considerable. There is no reason to think that divergence will disappear soon without action by this Committee, and a national rule appears to be a method of achieving more consistency.

Adopting a national rule could also serve to provide a framework for analysis of sanctions issues and -- particularly in a Committee Note -- guidance for courts and litigants on methods of dealing with these issues effectively and fairly.

That guidance would hopefully substitute partially for a preservation rule by articulating the preservation goals and practices that should bear on whether preservation efforts were reasonable and which sanctions should be used when reasonable preservation efforts have not been made. Some participants in the Dallas conference urged that only a preservation rule could provide the needed particularity about how potential parties should approach preservation issues. As explained above, the Subcommittee's reaction has been that providing such particulars would likely create more difficulties than it would solve, largely because resolution of such issues in a given case is so dependent the specific circumstances presented. In some instances, a preservation rule full of specifics might also interfere with the more productive alternative of resolution of specifics through agreement; sometimes it seems that lawyers treat specific default provisions in rules as "rights" or "duties" rather than merely guideposts.

One focus for discussion of possible sanctions rules, therefore, is whether they can provide more assurance than current case law that reasonable conduct will protect against severe sanctions. If so, such a rule could go far toward ameliorating the wasteful behaviors we have heard currently afflict some enterprises.

Another focus is on the enduring problem of what is a "sanction." Various actions that judges may take in reaction to the loss of data might be characterized as "sanctions" or "curative measures." A prime example is restoration of backup tapes. Under Rule 26(b)(2)(B), a party need not restore and search material on backup tapes that are "inaccessible" within the meaning of the rule. If those tapes may contain material that the party should have preserved but did not, that shifts the calculus the court should employ in deciding whether to direct that backup tapes be restored, but it does not automatically lead to the conclusion that expensive restoration should be undertaken. For an illustrative analysis, see Major Tours, Inc v. Colorel, 720 F.Supp.2d 587 (D.N.J. 2010) (rejecting plaintiffs' argument that, because defendant failed properly to preserve, it was automatically required to restore all backup tapes). Similarly, Rule 26(b)(2)(B) authorizes the court to order restoration of backup tapes even though a party has fully complied with its preservation duties. In short, whether or not restoration might be included in a package of "sanctions" for failure to preserve in some cases, it is not inherently a "sanction."

A related question is whether a rule can usefully differentiate among sanctions in terms of severity. One approach would be to direct that the court employ the "least severe" sanction necessary to cure the problem created by failure to preserve. Another approach might be to provide a hierarchy of sanctions by rule, with more severe sanctions warranted only upon a showing of more serious culpability.

Whether the hierarchy can be devised in the abstract is unclear, however. See Linde v. Arab Bank, Inc., 269 F.R.D. 186, 199 n.1 (S.D.N.Y. 2010) (stating that "severe" sanctions include dismissal and contempt, not adverse inferences and deemed findings). For example, an "adverse inference instruction" may have very different aspects -- from alerting the jury to the reality that in evaluating the evidence presented it may also consider a party's failure to preserve potential evidence that could not be presented, to directing the jury that because a party failed to preserve certain evidence it should assume certain facts proved. Largely as a consequence, it is difficult to conclude in the abstract that an "adverse inference instruction" should always be regarded as more severe or less severe than, say, a prohibition on using certain evidence or presenting certain claims or defenses. Cases vary too much for

confident generalizations.

This hierarchy issue connects to the question of culpability. One goal of a revision to Rule 37 would be to ensure more national uniformity on the culpability threshold for various more severe sanctions. Culpability is not a required threshold, of course, for a "curative measure," even though it may be relevant to the selection of one and the allocation of the costs of complying with the measure selected. Whether culpability of the desired degree can meaningfully be connected to the presumed or general severity of given sanctions is uncertain. There is a difference between a rule that says "use the least severe sanction necessary" and one that says specifically that a certain culpability threshold must be satisfied for this specified degree of sanction but not for another that is considered a "lesser" sanction. Criminal law is full of examples of degrees of offenses; perhaps a sanctions rule could be organized similarly without becoming something like the Sanctioning Guidelines.

One goal of focusing on culpability would be to reassure those making preservation decisions that they will not be subject to sanctions unless they have acted culpably, as defined in the rule. Whether culpability thresholds would in fact be as protective as some desire could be debated. For example, during the Dallas conference one hypothetical was a situation in which exhaustion of administrative remedies would take 90 days and a prospective defendant had a 90-day automatic delete function on its email system. The question arose regarding the trigger when a participant urged that service of the complaint should be the trigger; if so, that could not occur until after the administrative remedies had been exhausted. The response was that failing to guard against automatic deletion could be regarded as "willful." If "willful" is interpreted that broadly, it might not provide the protection some hope it would provide.

A clear culpability threshold might not be a complete protection against sanctions in some exceptional cases, if it can be shown that the failure to preserve completely defeats the adversary's ability to litigate. The Category 3 draft -- reproduced below -- would therefore permit severe sanctions in "exceptional circumstances" or to avoid "irreparable prejudice." So there are limits to the reassurance a culpability threshold can provide.

A related concern is the question of inherent power to sanction. It is said, for example, that the duty to preserve is ultimately a duty owed to the court. Courts may accordingly have inherent powers to sanction the failure of parties to uphold this duty to the court. But that idea is at some tension with the impulse toward encouraging parties to work out preservation regimes between themselves; we expect ordinarily that where that

is done the court will not often refuse to accept the resulting regime. The parties' preservation agreement on a tailored preservation regime (before or after suit is filed) can readily be seen as satisfying any duty to the court.

For the present, one reason why inherent authority is often advanced as the basis for sanctions for failure to preserve is that preservation orders are rare. The Committee Notes to the 2006 amendments urged that such orders be sparingly used. A result, however, is that Rule 37(b) rarely provides a basis for imposition of sanctions because it applies generally only to failure to obey an order to provide discovery. When there is no order, there is no basis for invoking Rule 37(b). One solution to that problem is to adopt a preservation rule, but as noted the current inclination of the Subcommittee is not to do that.

But it is not clear that inherent authority sanctions should be regarded as a serious source of preservation angst. It appears generally agreed that only bad faith or willfulness will support the imposition of inherent authority sanctions. If that is so, it seems that the prime source of angst -- the risk of being sanctioned for reasonable behavior -- should not result from inherent authority persisting in the background.

One approach to the lack of a preservation order would build on the models of Rule 37(c)(1) and 37(d), which treat certain nonfeasance or malfeasance as sufficient to support resort to at least some 37(b) sanctions without the need for an order. Doing that would seemingly support a Committee Note saying that the goal is to supplant reliance on inherent authority for preservation sanctions. But that is not necessarily as aggressive as Rule 37(e) currently seems to be -- affirmatively forbidding sanctions in some instances, at least as to "sanctions under these rules."

Yet another question is the continued vitality of Rule 37(e), and the possibility of building on it rather than constructing an additional rule provision addressing preservation sanctions. Rule 37(e) was never envisioned as a cure-all for preservation issues, and was very tentative. If it provided a safe harbor, the harbor was not very deep or very safe. One possibility, therefore, might be to replace it with a new provision rather than adding another provision. Whether that would be a step backwards in handling preservation sanctions issues would need to be considered.

As this brief introduction illustrates, a considerable range of issues will confront the Subcommittee if it proceeds to attempt to draft a sanctions rule. The Subcommittee's current thinking is that addressing these challenges is worthwhile. Below are four models of ways to proceed. Some of them were drafted with the idea that a preservation rule would also be

adopted, and adapting them to situations in which there is no such rule could be a delicate task. The first is the Category 3 model which the Subcommittee invited the Dallas conference participants to focus on. The next two were submitted by organizations that began with the assumption that there would be a preservation rule. The fourth approach was sketched by a very experienced former corporate general counsel who endorses a "minimalist" approach and does not favor a detaiiled preservation rule.

It may be that some sort of "mix and match" amalgam of the approaches sketched below would be preferable to choosing one or another. They are presented here to illustrate the models now before the Subcommittee, and to invite reactions from the full Committee on whether there are features of some that seem either highly promising or significantly troubling. If the Subcommittee proceeds, it will need to determine which specifics to try to include in a rule draft as well as the alternative ways in which those specifics might be presented in rule language. Footnotes identify some preliminary questions that have already emerged.

(a) The Category 3 approach

The first example is the one presented as the Subcommittee's Category 3. This approach relies entirely on a "back end" rule provision and has no specific preservation provisions. It is intended to authorize Rule 37(b) sanctions whenever a party does not reasonably preserve, and so should generally make reliance on inherent authority unimportant.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

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(g) FAILURE TO PRESERVE DISCOVERABLE INFORMATION; REMEDIES

(1) If a party fails to preserve discoverable information that reasonably should be preserved[4] in the anticipation or conduct of litigation, the court may[, when necessary][5]:

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[4] Note that the phrase "discoverable information that reasonably should be preserved" has an inherent premise about trigger and scope that would likely support some Committee Note discussion of those topics.

[5] Whether this qualification is helpful could be debated. The idea is to authorize various responses to the loss of data

(A) permit additional discovery;

(B) order the party to undertake curative[6] measures; or

(C) require the party to pay the reasonable expenses, including attorney's fees,[7] caused by the failure.

(2) Absent exceptional circumstances [irreparable prejudice],[8] the court may not impose any of the sanctions listed in Rule 37(b)(2) or give an adverse-

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that would not be characterized as "sanctions." Saying they may be used only "when necessary" might suggest that discovery orders more generally are subject to that limitation. Even Rule 26(b)(2)(B) would not necessarily condition an order to restore inaccessible sources on a showing of "necessity," much as that consideration could matter to judges considering what to do about backup tapes and the like.

[6] Does "curative" have a commonly understood meaning? Would "other remedial" give greater flexibility? The goal here is to emphasize that orders that otherwise not be made are justified due to the loss of data. Again, this is not a "sanction," but an effort by the court to minimize the possible harm to a litigant's case resulting from another party's loss of data.

[7] Would this possibility tend to encourage claims of spoliation? It might be that one could, by succeeding on a spoliation argument, get a "free ride" for discovery one would otherwise be doing at one's own expense. Hopefully, it should be clear that discovery is made necessary by the loss of data, and not something that would happen in the ordinary course. But will there be many instances in which that is not clear?

[8] This proviso is designed to authorize sanctions in the absence of fault in cases like Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001), where the loss of the data essentially preclude effective litigation by the innocent party. One question is whether such instances are truly extraordinary. If they happen with some frequency, this may be the wrong phrase.

The term irreparable prejudice may be preferable to focus on the real concern here. It would be important, however, to ensure that this be limited to extremely severe prejudice. Most or all sanctions depend on some showing of prejudice. Often that will be irreparable unless the "curative" measures identified in (g)(1) above clearly solve the whole problem. The focus should be on whether the lost data are so central to the case that no cure can be found.

inference jury instruction[9] unless the party's failure to preserve discoverable information was willful or in bad faith and caused [substantial] prejudice in the litigation.

(3) In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith,[10] the court may consider all relevant factors, including:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;[11]

(B) the reasonableness of the party's efforts to preserve the information, including the use of a litigation hold and the scope of the preservation efforts;[12]

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[9] Is this too broad? Adverse inference instructions can vary greatly. General jury instructions, for example, might tell the jury that it could infer that evidence not produced by a party even though it should have had access to the evidence supports an inference that the evidence would have weakened the party's case. Is that sort of general instruction, not focusing on any specific topic, forbidden? How about the judge's "comment on the evidence" concerning lost evidence but not in the form of a jury instruction? Would this rule forbid attorney argument to the jury inviting to make an adverse inference if there were no instruction at all on the subject?

[10] Combining an evaluation of reasonableness and willfulness or bad faith in one set of factors is attractive. Often the circumstances that bear on reasonableness also will bear on intent. Would it help to add other factors that bear directly on intent, but also may bear on reasonableness? Examples might include departure from independent legal requirements to preserve, departure from the party's own regular preservation practices, or deliberate destruction.

[11] Is this treatment sufficient to substitute for provisions about trigger? A Committee Note could add detail.

[12] The use of "scope" is designed to permit consideration of a variety of factors. The Committee Note would elaborate about breadth of subject matter, sources searched (including "key custodians:), form of preservation, retrospective reach in time, and so on. Cases are likely to differ from one another, and "scope" will hopefully permit sensible assessment of an array of

(C) whether the party received a request that information be preserved, the clarity and reasonableness[13] of the request, and — if a request was made — whether the person who made the request or the party offered to engage in good-faith consultation regarding the scope of preservation;

(D) the party's resources and sophistication in matters of litigation;[14]

(E) the proportionality of the preservation efforts to any[15] anticipated or ongoing litigation; and

(F) whether the party sought timely guidance from the court[16] regarding any unresolved disputes

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circumstances.

[13] Does this mean that an unreasonable request imposes a lesser duty than a reasonable request? Should clarity be the test here, since reasonableness of preservation efforts is already addressed in (B)?

[14] This consideration seems important to address the potential problem of spoliation by potential plaintiffs who may realize that they could have a claim, but not that they should keep their notes, etc., for the potential litigation. Are resources a useful consideration here? A wealthy individual might be quite unfamiliar with litigation. Is this somewhat at war with considering whether the party obeyed its own preservation standards? Making those relevant to the question of whether preservation should have occurred may be seen to deter organizations from having preservation standards. It is unclear how many organizational litigants -- corporate or governmental -- actually have such standards. Does the fact they exist prove that this litigant is "sophisticated"?

[15] This is broad, but probably the right choice. If the party reasonably anticipates multiple actions, proportionality is measured in contemplating all of them. A party to any individual action should be able to invoke the duty of preservation that is owed to the entire set of reasonably anticipated parties.

[16] This implicitly applies only when there is an ongoing action. Do we need anything more than a Committee Note to recognize that it is difficult to seek guidance from a court before there is a pending action? What if there is a pending action, and the party reasonably should anticipate further actions — is it fair to consult with one court (perhaps chosen from among many), pointing to the overall mass of pending and anticipated actions, and then invoke that court's guidance when

concerning the preservation of discoverable information.

(b) The LCJ approach

The Lawyers for Civil Justice proposed a very detailed preservation rule that included the following provision: "The sole remedy for failure to preserve information is under Rule 37(e)." One question about a directive like that would be whether "remedy" includes all managerial actions of the court taken in response to the loss of information. It might be odd if the court had more latitude to do something like order restoration of backup tapes if the party with the tapes had complied with its preservation duty than if it had not.

Although it is not entirely clear, it may be that the LCJ approach contemplates supplanting current Rule 37(e).

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(e) **Sanctions for failure to preserve information.** Absent willful destruction for the purpose of preventing the use of information in litigation, a court may not impose sanctions on a party for failing to preserve or produce[17] relevant and material information.[18] The determination of the

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addressing other courts?

[17] The inclusion of "or produce" may mean that failure to produce material a party still possesses can only be the cause of sanctions in accordance with this proposed rule. It is not clear that this is intended to supplant the more ordinary authority of the court to order production and punish failure to produce under Rule 37(b).

[18] In general, the use of "material" has been discouraged as an adjective in the Civil and Evidence Rules. The concept of materiality was not included in Fed. R. Evid. 401; relevance as defined there is the sole constraint (subject to other considerations like those identified in later rules in the 400

applicability of this rule to sanctions must be made by the court. The party seeking sanctions bears the burden of proving the following:[19]

(1) a willful breach of the duty to preserve information[20] has occurred;[21]

(2) as a result of that breach, the party seeking sanctions has been denied access to specified information, documents or tangible things;[22]

(3) the party seeking sanctions has been demonstrably prejudiced;[23]

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series and the hearsay requirements). Similarly, Rule 26(b)(1) does not limit discovery to "material" information.

[19] Note the specification of burdens in the rule. This sort of provision directly addressed to burdens of proof may be desirable.

[20] Putting aside the question whether "willful" provides the suitable amount of protection, it is worth asking whether this provision requires proof that the person who deletes the information is subjectively familiar with the duty to preserve.

[21] Note that this requirement seemingly excludes sanctions in cases in which the party that failed to preserve completely deprived the other side of evidence essential to its case. The usual example we use of such a situation is Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001), in which plaintiff failed to ensure that his landlady preserved her wrecked car and its allegedly defective airbag but seemingly was relatively fault free. The district court dismissed plaintiff's case, and the court of appeals affirmed.

[22] This provision appears to focus the court on a realistic assessment of the importance of whatever has been lost. Nonetheless, it may often be true that the party claiming that preservation obligations have been breached will not be able to specify what was lost.

[23] Focus on the extent of any prejudice is surely important to calibration of sanctions in some instances. But to the extent the party must prove "willful" breach of the duty to preserve and specify the information lost, is it important to add a supposedly extra requirement that the party seeking sanctions prove

(4) no alternative source exists for the specified information, documents or tangible things;[24]

(5) the specified electronically stored information, documents or tangible things would be relevant and material to the claim or defense of the party seeking sanctions;[25]

(6) the party seeking sanctions promptly sought relief in court after it became aware or should have become aware of the breach of duty.

(c) The New York State Bar Ass'n approach

Like the LCJ submission, the New York State Bar Association's Special Committee on Discovery and Case Management in Federal Litigation proposed a preservation rule. It also proposed a new Rule 37(g):

"demonstrable" prejudice? If so, should any sanction be limited to undoing that demonstrable prejudice, no matter how much bad faith has been proved?

[24] If "demonstrable prejudice" must be proved (see item 3), it is not clear how much this provision adds. One would think that if an alternative source exists for the specific information that was lost, it would not be possible to demonstrate that prejudice.

[25] Again, it seems that this provision may not add much to the prior provisions regarding "demonstrable" prejudice and absence of an alternative source. Perhaps the additional point is that the lost material be "relevant and material to the claim or defense." Impeachment material, for example, might not reach that level even though loss of it demonstrably weakened a party's case. Compare videos of the plaintiff playing beach volleyball after his supposedly incapacitating accident that were posted to his Facebook page but later deleted and destroyed. They would seem "material" to the defense case in ways that videos that would impeach on a collateral matter (such as whether plaintiff was acquainted with a defense witness) would not be, where plaintiff claimed the witness was a complete stranger. So plaintiff's destruction of the collateral matter videos might not deprive defendant of information material to its defense.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(g) Failure to Comply with Duty to Preserve

(1) If a party or nonparty[26] is shown to have failed to preserve documents, electronically stored information, or things in accordance with [the proposed preservation rule], the court where the action is pending may enter an appropriate order:

(A) providing for further discovery, including the shifting of reasonable expense of the further discovery to the party or nonparty that failed to preserve documents, electronically stored information, or things;[27]

(B) requiring the party or nonparty, or the attorney representing that party or nonparty, or both to pay the movant's reasonable expenses, including attorneys' fees, caused by the failure, including expenses incurred in providing proof of spoliation and in making the motion;[28]

(C) imposing a fine upon the party or nonparty, or the attorney representing the party or nonparty, or both;

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[26] In its preservation rule, the N.Y. Bar Ass'n limited a nonparty's preservation duty to the period after a subpoena is served on it.

[27] As noted above, it would seem the court has authority to provide "further discovery" without a finding of violation of a duty to preserve. That appears to be confirmed by (g)(2)(C)(v) below, for it says that the "remedy" of further discovery can be ordered without regard to culpability.

[28] It may be that the existing authority under Rule 37(a)(5) and 37(b)(2)(C) suffice.

(D) directing that matters or designated facts be taken as established against a party for purposes of the action, with or without the opportunity for rebuttal;

(E) providing for an adverse-inference jury instruction against a party, with or without an opportunity for rebuttal;

(F) prohibiting a party from supporting or opposing designated claims or defenses or from introducing designated matters in evidence;

(G) dismissing the action or proceeding in whole or in part;

(H) rendering a default judgment against the party; or

(I) treating the failure as a contempt of court, if there has been a violation of a previous order.[29]

(2) The court must select the least severe remedy[30] or sanction necessary to redress a violation of [the preservation rule], taking into account all relevant factors, including:

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[29] It is unclear whether or how this enumeration expands upon or contracts the authority now provided in Rule 37(b)(2). It might be easier to invoke 37(b)(2) rather than replicate it, to the extent these are comparable. It might be asked why there is a separate listing so similar for preservation failures from the one already included for violation of discovery orders.

[30] In general, courts managing discovery are not directed by rule to select the "least severe" way of handling disputed discovery matters. True, Rule 26(b)(2)(C)'s proportionality provisions do direct the court to regulate discovery in a waste-conscious manner. This provision seems to treat "further discovery" as a measure the court could take subject to the stated limitations. It is not clear how "severity" of further discovery is to be measured. Could more "severe" discovery directives be employed with a party that has not failed to preserve?

(A) the relevance of the documents, electronically stored information, or things;

(B) the prejudice suffered; and

(C) the level of culpability of the party or nonparty failing in its duty:[31]

(i) A contempt of court may be imposed only if the level of culpability includes bad faith;

(ii) A dismissal or entry of default judgment may be imposed only if the level of culpability includes at least willfulness;[32]

(iii) An adverse-inference jury instruction, direction as to the establishment of matters or facts, or preclusion of evidence may be imposed only if the level of culpability includes at least gross negligence;[33]

(iv) A sanction may be imposed only if the level

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[31] The following is an example of the way in which one might try to tie specific culpability standards to specific sanctions.

[32] It seems likely that "willfulness" here is meant to refer to the conscious decision to discard the information. It seems that "bad faith," as used in (i), means conscious desire to prevent use of known material as evidence. Whether that would be assumed whenever the actor was aware of the content of the material discarded is uncertain. Whether an actor could be guilty of bad faith if not aware of the content of the material discarded is also uncertain. As noted above, there may be considerable room to debate the difference among these terms.

[33] As noted in regard to the standards set in (i) and (ii), it may be that there are some difficulties in application among these differing culpability thresholds. Another sometimes used is "recklessness." If discarding information without knowing its contents is not "willful," it may be reckless to do so without making some effort to know what's within.

of culpability includes at least negligence;[34]

(v) The remedy of further discovery, including shifting of expenses, may be ordered regardless of any culpability;[35]

(vi) Absent exceptional circumstances, it is evidence of due care if a person whose duty to preserver under [the preservation rule] has been triggered timely prepares, disseminates and maintains a reasonable litigation hold.[36]

(d) The Allman "fourth way"

Thomas Allman, a former corporate general counsel, has been deeply involved in consideration of responses to E-Discovery. He was a participant in the Subcommittee's 2000 E-Discovery mini-conference at Brooklyn Law School, a panelist on the topic during the Duke Conference in May, 2010, and an invited participant during the Dallas conference. He does not favor adoption of a detailed preservation rule, and has submitted a recommendation for Rule 37 revisions. The following is an attempt to illustrate this approach, which is explained in his submission "Change in the FRCP: A Fourth Way," a paper that should be included in the agenda book.

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[34] It seems likely that this states a premise regarding sanctions under Rule 37(b), although that has not been specifically investigated.

[35] This statement seems generally consistent with current Rules 37(a) and (b). Note that those rules state that the losing party should ordinarily be required to pay the other side's costs of making the discovery motion unless the losing position was "substantially justified." Presumably a losing argument that preservation was not required could be "substantially justified," so this could justify shifting expenses in situations not authorized under Rule 37(a) and (b).

[36] Although recognizing the importance of a sensible litigation hold seems valuable, this provision does not fit easily with the others. Instead, it seems a factor to weigh in deciding whether a party was guilty of willfulness, bad faith, negligence, etc.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(b) Failure to Comply With a Court Order.

* * * * *

(2) ***Sanctions in the District Where the Action is Pending***

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent -- or a witness designated under Rule 30(b)(6) or 31(a)(4) -- fails to obey an order <u>to preserve evidence or</u> to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders.[37] They may include the following:

* * * * *

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) ***Failure to Disclose or Supplement.*** If a party fails [<u>to preserve information that reasonably should be</u>

[37] It appears that this amendment would apply only if the court entered a preservation order. As noted above, the 2006 amendments cautioned against routine entry of such orders, and in any event they can only come into existence after the litigation has begun. Below, it is suggested that Rule 37(c)(1) might be amended to apply to failure to retain information even though that involves no violation of an order.

preserved, or][38] to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses,including attorneys' fees, caused by the failure;

(B) may inform the jury of the party's failure;[39] and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)((2)(A)(i)-(vi).

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(e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions ~~under these rules~~[40] on a party for failure to

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[38] This phrase is not clearly indicated as an addition in the Allman submission, but it is suggested here as a way to supplant inherent authority and permit resort to Rule 37(b) in the absence of a preservation order. The phrase itself is borrowed from the Category 3 approach set forth above, and should support Committee Note material about the circumstances warranted preservation in the absence of an order.

[39] Note that this existing rule provision seems to invite something like an adverse inference instruction.

[40] The goal of this deletion is apparently to limit inherent authority sanctions. It is not designed to limit liability for failure to preserve information as required for some purpose other than anticipated litigation. For example, the SEC has rules on preservation of information by entities subject to its regulatory authority, and it sometimes imposes fines for failure to preserve such information. This change would no affect the authority of an agency like the SEC to impose such

provide electronically stored information lost as a result of the routine, [good-faith] operation of an electronic information system [absent a showing of intentional actions designed to avoid known preservation obligations].[41]

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fines, or to seek enforcement of them through court action.

[41] The bracketed possible addition is modeled on the recently-adopted Connecticut provision parallel to Rule 37(e). If this were added, it seems that "good faith" might be deleted earlier in the rule, and brackets have accordingly been placed around those words.

How this provision would operate with individual litigants, particularly injured plaintiffs, is not clear. It may be that such litigants do not have a "routine" for operation of their information systems that could earn insulation under this rule. For example, consider an ordinary individual plaintiff. How should the "routine operation" standard be applied to this person's email, or Facebook page?

With regard to those litigants that do have such a routine system, this provision seems to insulate them against sanctions unless it is shown that they have intended to avoid known preservation obligations. Merely intending to destroy evidence might not be enough, unless the person knew also of the preservation obligation. On the other hand, a preservation obligation totally unrelated to anticipation of litigation (e.g., records of tip income) might be covered.

APPENDIX 2

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November 6, 2011

VIA E-MAIL TO RULES_COMMENTS@AO.USCOURTS.GOV

Honorable David G. Campbell
Chairman, Advisory Committee
on Civil Rules
United States District Court
623 Sandra Day O'Connor United States
Courthouse
401 West Washington Street
Phoenix, AZ 85003-2146

Re: Discovery Subcommittee's Consideration of Rule Changes Regarding Sanctions

Dear Judge Campbell:

As two of the plaintiffs' bar practitioners who appreciated the opportunity to actively participate at the recent mini-conference in Dallas, as well as the Duke conference in May 2010, we write to preliminarily respond to the recent flurry of letters submitted to the Advisory Committee on Civil Rules and the Discovery Subcommittee by those who seek comprehensive revisions to the civil rules regarding preservation and sanctions for spoliation. We also wish to reiterate the view we expressed in the paper we submitted for the Duke conference, entitled, *E-Discovery Today: The Fault Lies Not In Our Rules . . .*, which has since been published in the Federal Courts Law Review, and the substance of which we believe is directly relevant to the issues that the Advisory Committee is confronting today.[1] In that paper, we advocated that "it is far too early, and the current data too flawed, inconsistent, or inconclusive to begin efforts to

[1] Milberg LLP and Hausfeld LLP, "E-Discovery Today: The Fault Lies Not in Our Rules...," 2011 Fed. Cts. L. Rev. 4 (February 2011) available at http://www.fclr.org/fclr/articles/html/2010/Milberg-Hausfeld.pdf.

revise the Rules" and advocated that the system "give litigants, lawyers and judges time to catch up. Give the Rules a chance."[2]

After careful consideration of the most recent positions asserted by others who support significant rule changes, our views have not changed.[3] We do not deny that preservation in modern litigation is sometimes expensive. Similarly, we also recognize that on some occasions, there have been different standards imposed by courts regarding preservation and spoliation. Our observation of the Discovery Subcommittee's deliberations since we published our paper makes clear, however, that revising the rules to achieve bright-line guidance will inevitably lead to increased litigation about discovery rather than the merits, be extremely difficult to achieve, may (as pointed out by the Department of Justice and others) lead to unintended consequences,[4] and will almost certainly result in unfairness to some litigants in an effort to lower litigation costs for others - often in the very circumstances where the litigants who suffer the consequences are those that have been aggrieved by some alleged misconduct and are precluded from having their day in court by reason of the now nonexistence of evidence necessary to making their case.

Tellingly, some commentators, like Lawyers for Civil Justice ("LCJ"), have used this latest "crisis" as an opportunity to propose rule amendments that would go far beyond rule guidance on these topics and would, instead, scale back discovery in a way that would be unprecedented since the adoption of the Rules in 1938. However, the Federal Rules are not intended to serve the interests of any particular group or litigants of a particular size, but rather are to be "construed and administered to secure the just, speedy, and inexpensive determination of *every* action and proceeding."[5] Indeed, effective implementation and application of the Rules serves to ensure the *equitable* administration of justice.

Following the Duke Conference in May 2010, the Discovery Subcommittee was assigned to investigate possible changes to the rules governing preservation of discoverable information and sanctions for failing to preserve. For over a year, the Discovery Subcommittee has been studying possible rules amendments. The Subcommittee has reviewed submissions,

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[2] *Id.* at 2. ("Those who are educated about the rules and creative in their use will save themselves, their clients and the courts a great deal of time and money. Those who are not will continue to blame the rules, never realizing that 'the fault lies not in our rules, but in themselves.'" (citing, with apologies, to WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2)).

[3] *See also* Ariana J. Tadler and Henry J. Kelston, "Working Toward Normalcy in E-Discovery," New York Law Journal (October 3, 2011).

[4] *See* Letter to The Honorable David G. Campbell from Tony West, Assistant Attorney General, Department of Justice, dated September 7, 2011.

[5] Fed. R. Civ. P. 1 (emphasis added).

studies and surveys, and at least six different rules proposals.[6] The Subcommittee also convened a mini-conference in September 2011 "to educate the Discovery Subcommittee and assist it in developing possible recommendations for the full committee on preservation and sanctions issues."

In advance of the November 7-8 Advisory Committee meeting, the Discovery Subcommittee published a 31-page Memorandum (the "Subcommittee Memorandum") detailing the work it has done and describing the "difficulties and promises of rulemaking to address the widespread concerns" about preservation and sanctions. The Subcommittee Memorandum clearly conveys the Subcommittee's conclusion that revisions to the rules governing preservation should *not* be considered at this time:

- "In sum, the Subcommittee has reached a consensus that the difficulties that would attend trying to devise a preservation rule outweigh its likely usefulness."[7]
- "The Subcommittee's current thinking has reached a consensus on the proposition that it should continue work, but focusing on a sanctions rule rather than a preservation rule."[8]
- "The focus of the discussion at the [November 7-8 meeting of the Advisory Committee] will largely be *whether* the Subcommittee should pursue the general approach it has identified as presenting the most promise and the fewest difficulties -- some change to Rule 37 designed to guide use of sanctions rather than a rule explicitly addressing the specifics of preservation obligations. Beyond that, the November discussion could address the sort of approach to sanctions that seems most promising."[9]

The Subcommittee has outlined the intended path of pursuit at this time. There can be no doubt that exercised focus on that path - regardless of whether those who wish to comment agree or disagree with this path - will be most productive at this point.

Regarding a possible amendment on the subject of sanctions, the Subcommittee's "initial consensus [is] that work should continue to design a sanctions 'back end' rule."[10] However, the Subcommittee Memorandum also acknowledges that a considerable range of issues will confront

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[6] Notes of Conference Call, Discovery Subcommittee, Advisory Committee on Civil Rules, Sept. 13, 2011 at 1.

[7] Subcommittee Memorandum at 14.

[8] Subcommittee Memorandum at 1.

[9] Subcommittee Memorandum at 3-4 (emphasis added).

[10] Subcommittee Memorandum at 14.

the Subcommittee if it proceeds to attempt to draft a sanctions rule, including uncertainty as to what the word "sanction" even means. The Memorandum presents four versions of potential amendments on sanctions, along with dozens of footnotes identifying "preliminary questions that have already emerged." Answers to those questions and issues attendant to the pros and cons of such a proposed rule change must be treated as the task at hand.

In stark contrast to the careful consideration of the Discovery Subcommittee, the recent submissions to the Advisory Committee by several corporations and members of the corporate defense bar continue to urge immediate and sweeping rule amendments that focus on preservation and would go so far as to reduce the scope of discovery and largely extirpate the longstanding prohibition against spoliation of evidence. The retrogressive amendments proposed in these submissions go far beyond anything the Discovery Subcommittee has recommended or, indeed, even considered. In particular, submissions by Microsoft, Robert Owens, LCJ and others advocate for rule amendments that would, among other things:

(a) allow discovery of ESI only where the material is "necessary to the case; the outcome of the litigation must depend on it;"[11]
(b) jettison fundamental principles of fairness and justice that have been embodied in law of spoliation since well before the age of ESI;[12] and
(c) permit the destruction of relevant evidence -- even intentional destruction -- unless the party prejudiced by the destruction can prove (i) that the *outcome* of the litigation *depended* on the evidence that no longer exists, AND (ii) the state of mind of the spoliating party, specifically, that the evidence was destroyed with the "intent to prevent use of the information in litigation."[13]

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[11] Lawyers for Civil Justice et al., "The Time is Now: The Urgent Need for Discovery Rule Reforms," submitted to Civil Rules Advisory Committee on October 31, 2011 at 6.

[12] Letter to The Honorable David G. Campbell from Robert D. Owens, October 24, 2011 at 2, 9 (asserting that the "radical … new assumption that affirmative steps to preserve [are] legally required" should be overturned); Letter to The Honorable David G. Campbell from Microsoft, August 31, 2011 at 2 (advocating a "bright-line rule that provides sanctions for spoliation only in the case of 'willful destruction' and prejudice to the requesting party.").

[13] "The Time is Now," *supra* n.11 at 24 ("Sanctions on a party for failing to preserve or produce relevant and material electronically stored information should be determined by intent to prevent use of the information in litigation.") and at 7 ("It is no longer enough that ESI might be relevant; it must also be material. Put another way, it is not enough for ESI to have a possible relationship to the issues of the litigation. The ESI must be necessary to the case; the outcome of the litigation must depend on it.").

Some of these submissions have been published only within the past week, effectively precluding a full response in advance of the November 7-8 meeting, and, in many instances, repeat points previously made and considered by the Subcommittee in reaching its *consensus* to focus on *whether* it should pursue some amendment to *Rule 37* to provide some guidance in the context of sanctions.

Although we continue to plow through the submissions and are determining whether to submit a more substantive response, in the interim, we feel bound to note that some of the arguments contained in the recent submissions are built on hyperbole, faulty premises, factual distortions, and misstatements of the history and present state of the law of spoliation.[14] For example, LCJ and Mr. Owens repeatedly suggest that the duty to take affirmative steps to preserve relevant evidence is the recent creation of a few misguided district court judges. Mr. Owens refers to a "radical ... new assumption that affirmative steps to preserve [are] legally required," and opines that "[t]he regime of affirmative preservation and oversight that ***Zubulake*** and its progeny launched is overkill and ... should be overturned." The LCJ writes: "In the past decade, however, that rule somehow shifted into an affirmative duty to preserve material that may become relevant to a dispute." This is just not so. Spoliation has long been defined as "the destruction or material alteration of evidence or the *failure to preserve property* for another's use as evidence in pending or reasonably foreseeable litigation." *See West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir.1999) (citing Black's Law Dictionary 1401 (6th ed.1990)) (emphasis added).

In sum, we urge the Advisory Committee and the Subcommittee to remain focused on the path they have now set based on its review and consideration of discussion and submissions made to date. We remain of the mind that any rule amendments regarding preservation and spoliation sanctions are premature for the reasons that we shared in our paper and at the mini-conference. And we continue to believe that the current Rules are more than adequate to address these issues, and given time, the courts will harmonize much of the common law on preservation and sanctions, just as they have done for other e-discovery issues.[15] We understand, however, that the Advisory Committee and Subcommittee are determined to address whether they should pursue some change to Rule 37 regarding the use of sanctions. Although we are not proponents of such a change, we welcome the opportunity to participate in the process for we are reminded of this admonition about amending the Rules:

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[14] The overheated rhetoric of certain participants in the process is often amplified to near-hysteria in the echo chamber of the blogosphere, a phenomenon that does not contribute to meaningful dialogue or constructive solutions. For example, a recent article on the "Inside Counsel" website contained this lead: "According to a cacophony of surveys, reports and anecdotal evidence, the American litigation system is teetering on the brink of collapse, due in large part to complex electronic discovery issues."

[15] *See* Ariana J. Tadler and Henry J. Kelston, "Working Toward Normalcy in E-Discovery," New York Law Journal (October 3, 2011).

> The pervasive and substantial impact of the [R]ules on the practice of law in the federal courts demands exacting and meticulous care in drafting [R]ule changes.[16]

These words are particularly apt here, and we respectfully urge the Advisory Committee and the Discovery Subcommittee to proceed with caution as they consider proposals that would have a far-reaching effect on how discovery is conducted and justice is achieved.

Respectfully submitted,

s/ Ariana J. Tadler

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AJT:sm

[16] Thomas F. Hogan, Admin. Office of the U.S. Courts, Summary for the Bench and Bar (Oct. 2011), http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx .

APPENDIX 3

THE FEDERAL COURTS LAW REVIEW

Volume 4, Issue 2 2011

E-Discovery Today: The Fault Lies Not In Our Rules . . .

Milberg LLP and Hausfeld LLP*

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* This paper was written by Milberg LLP and Hausfeld LLP for presentation to the Conference on Civil Litigation sponsored by the Advisory Committee on Civil Rules, held at Duke University Law School on May 10 and 11, 2010 (the "Duke Conference"). Contributors include Ariana Tadler, Carla Fredericks, Henry Kelston, Paul McVoy, Roland Marquez, Josh Keller and David Leifer at Milberg LLP; William Butterfield, Megan Jones, Hilary Scherrer, Ralph Bunche, Melinda Coolidge, Faris Ghareeb and Sathya Gosselin at Hausfeld LLP. Thanks also to Jason R. Baron, Director of Litigation at the U.S. National Archives and Records Administration, and Kenneth J. Withers, Director of Judicial Education and Content, The Sedona Conference®, for their helpful comments and suggestions.

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I. INTRODUCTION

> *Those who are educated about the rules and creative in their use will save themselves, their clients and the courts a great deal of time and money. Those who are not will continue to blame the rules, never realizing that "the fault lies not in our rules, but in themselves."*[1]

The Advisory Committee on the Federal Rules of Civil Procedure got it right when it recognized electronically stored information as a fundamental component of discovery. Electronic discovery has enhanced parties'

[1] With apologies to WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2.

abilities to uncover the facts of the case. It serves a fundamental tenet of American jurisprudence, in that it permits cases to be resolved based on the merits—merits that have become increasingly hard to destroy or cloak. Unlike the paper shredder of days past, destroying evidence today requires a level of technological sophistication that few can master. The truth lives on in electronic format, in a complex, ramified trail that is not easily hidden. As a result, electronic discovery has brought about new levels of accountability in litigation. However, rather than being heralded, electronic discovery is relentlessly criticized, undermined by oft-repeated hyperbole, and rejected as a scourge by many practitioners and clients who refuse to take adequate responsibility for management of their information.

Less than four years after they became effective, the 2006 e-discovery amendments to the Federal Rules are under attack. We are told that our discovery system is "broken" and that electronic discovery is a "nightmare" and a "morass" and "[t]he bigger the case, the more the abuse and the bigger the nightmare."[2] The Rules are even blamed for things they were never intended to address, like information preservation, which is primarily subject to common law rather than rule-based authority.[3] Based on unscientific surveys taken from the wrong polling sample,[4] we are asked to consider many dramatic and ill-conceived changes to our legal system, despite the fact that the prescription suggested in various permutations—less pretrial discovery—has been tried before and was ultimately and resoundingly rejected. Never before has the old adage been more applicable: those who do not learn from history are doomed to repeat it.

Less pretrial discovery, like the kind that existed before the enactment of the Federal Rules, led to long, meandering trials that clogged the courts, prevented the testing of unmeritorious cases with facts that might lead to settlement, and rewarded "gotcha" tactics over resolving cases on the merits. Yet, today, motivated parties gloss over the lessons of the past and continue to advocate for less pretrial discovery by tirelessly campaigning for limits on electronic discovery. Make no mistake, advocating for limits on electronic discovery is merely code for "less discovery" and, consequentially, concealment of the truth.

To be sure, discovery can be expensive and time consuming, and the fact that well over 90% of all information is now created and stored electronically is a factor in the expense and complexity of discovery in

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[2] AMERICAN COLLEGE OF TRIAL LAWYERS, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, at 2 (Mar. 11, 2009), http://www.actl.com/AM/TemplateRedirect.cfm?template=/CM/ContentDisplay.cfm&ContentID=4053.

[3] *Id.* at 12-14.

[4] *See infra* note 46 and accompanying text.

modern litigation. But the critics have it wrong: e-discovery is not the problem. One cannot simply ignore that most records are electronic, and therefore blame that fact for most of the perceived ills in our discovery system. And similarly, one cannot blame the 2006 rule amendments for recognizing that fact, and for addressing, head-on, issues that will not go away. Rather, attorneys and judges—many of whom admittedly face a steep learning curve—have to throw out the paper playbook and adapt to the digital world in which we live. Boxes are out, gigabytes are in. Highlighters are out, tagging is in. Making dozens of paper duplicates is out, linguistically analyzing email communication is in. Paper solutions will not solve electronic problems. We must use technology to review technology. We must eclipse our proto-digital past, and embrace the reality that discovery is just different now.

Are the 2006 Rules amendments perfect? They are not. Must the Rules be modified? Perhaps some tweaking is in order. But we submit that it is far too early, and the current data too flawed, inconsistent, or inconclusive to begin efforts to revise the Rules. In other words, give litigants, lawyers and judges time to catch up. Give the Rules a chance.

A recent survey conducted by the American College of Trial Lawyers (ACTL) and Institute for the Advancement of the American Legal System (IAALS) is one of the more prominent sources of criticism of the 2006 amendments, and the perceived need for reform. The ACTL and the IAALS suggest radical changes to the Federal Rules, including:

(1) the replacement of "notice pleading" with fact-based pleading;
(2) limitations on the scope of discovery (i.e., changes in the definition of "relevance");
(3) limitations on persons from whom discovery can be sought;
(4) limitations on the types of discovery (e.g., only document discovery, not interrogatories);
(5) numerical limitations (e.g., only 20 interrogatories or requests for admissions; only 50 hours of deposition time);
(6) elimination of depositions of experts where their testimony is strictly limited to the contents of their written report;
(7) limitations on the time available for discovery;
(8) cost shifting/co-pay rules;
(9) financial limitations on discovery; and
(10) discovery budgets that are approved by the clients and the court.[5]

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[5] *See supra* note 2, at 5-6, 10-11.

Lawyers for Civil Justice, a national organization of corporate counsel and defense lawyers, has advanced a similar agenda.[6]

The proposed cure is far worse than the purported ills of electronic discovery. One cannot overstate the adverse effect that some of these proposals would have on our legal system. Our entire system of jurisprudence is based on adequate disclosure; take that card from the bottom of the pyramid, and we must be prepared to re-build the entire foundation of that system. Would summary judgment motions be a fair way of diverting cases from trial if, due to lack of pretrial discovery, the "real evidence" was only revealed at trial? Or worse, would it be fair if meritorious claims were prevented from reaching trial? Examples abound of how limiting pretrial discovery would impact other fundamental tenets of our legal system.

In many ways, adopting these suggestions would return us to the pre-1938 world that visionary legal scholars such as Roscoe Pound, Judge Charles Clark and Professor Edson Sunderland rejected. Rather than having a system based on an "open and evenhanded development of the facts underlying a dispute, so that justice may be delivered on the merits,"[7] these proposals would effect drastic changes in discovery at the expense of our core principles.

Discovery, including electronic discovery, and the facts it brings to light, is worth protecting. We suggest that there are less drastic alternatives to address the purported concerns of those who histrionically claim discovery is going to break the back of our justice system. These alternatives include:

- Increasing awareness and reliance on the proportionality standard embodied in Rule 26(b)(2)(C);
- Earlier and more active judicial management of cases;
- Increasing the level of cooperation among counsel;
- Taking advantage of Federal Rule of Evidence 502 and other creative solutions to reduce the cost of privilege review;
- Adopting new technology in the management and retrieval of records;

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[6] *See Defense Bar Calls for Changes to the Federal Rules of Civil Procedure: Meaningful Amendments Needed to Improve the Administration of Justice in the Federal Courts*, METROPOLITAN CORP. COUNS. MAG., Aug. 2010, at 24, *available at* http://www.lfcj.com/articles.cfm?articleid=4 (last visited Feb. 22, 2011).

[7] *See* Am. Floral Servs., Inc. v. Florists' Transworld Delivery Ass'n, 107 F.R.D. 258, 260 (N.D. Ill. 1985).

- Enhancing the level of attorney and judicial education regarding electronic discovery topics;
- Greater acceptance and use of sanctions to address and curtail discovery abuses.

These measures, discussed herein, working in conjunction with the present Rules, present a realistic opportunity to address the most serious problems without gutting the laudable gains that discovery has provided our legal system.

II. STATE OF THE UNION

A. The Reality of Electronic Discovery and the Data Deluge

There is no dispute that the discovery process in litigation today involves vast quantities of electronically stored information ("ESI"). Electronic discovery has grown over the past few decades as computers became standard fixtures in the corporate world, but it is largely during the last decade that litigators have seen discovery dominated by ESI, creating a veritable data deluge.[8] As of 2003, 92% of new information was stored on magnetic media (electronically stored), and only 0.01% of new information was on paper.[9] Discoverable information is now found not only on desktop computers and network servers, but on PDAs, smart cards, cell phones, thumb drives and backup tapes, as well as in bookmarked files, temporary files, activity logs, Facebook accounts, and text messages, to name just a few examples.[10] By 2011, the amount of digital data in existence will be ten times the amount in 2006.[11]

The rate of document propagation was limited when information was confined to paper format, but electronically stored information can be disseminated in vast quantities to thousands of people instantly, and the mere act of reading and editing this information creates exponentially more

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[8] *See generally* SHIRA A. SCHEINDLIN & DANIEL J. CAPRA, ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE: CASES AND MATERIALS 39-57 (Thomson Reuters ed. 2009).

[9] Regents of the University of California, *How Much Information?*, UC BERKELEY SCHOOL OF INFORMATION, (2003), http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/execsum.htm (last visited Feb. 2, 2011) (7% of new information was stored on film, and 0.002% was stored on optical media); *see also* Patrick J. Burke & Daniel M. Kummer, *Controlling Discovery Costs*, LEGAL TIMES, Aug. 18, 2003, at 19 ("93 percent of business documents are created electronically; most are never printed").

[10] James N. Dertouzos, *et al.*, *The Legal and Economic Implications of Electronic Discovery: Options for Future Research*, 1-2 RAND Institute for Civil Justice (2008), *available at* http://www.rand.org/pubs/occasional_papers/OP183.

[11] *The Diverse and Exploding Digital Universe*, IDC, Mar. 2008, 2, http://www.emc.com/collateral/analyst-reports/diverse-exploding-digital-universe.pdf.

data.[12] Today, a lawsuit between corporations may involve "more than one hundred million pages of discovery documents, requiring over twenty terabytes of server storage space."[13]

The failure to address electronically stored information adequately in discovery today may constitute malpractice, as most businesses create much of their information electronically and do not convert the majority of their business records into paper in the ordinary course of business. Attorneys who do not adapt to this new reality will not survive in the evolving legal market,[14] and their failure to embrace and use the Federal Rules to conduct effective e-discovery not only disadvantages their clients, but also increases the burden on their adversaries and the courts, and most importantly, undermines the fair administration of justice.

B. The Essential Role of Discovery in American Jurisprudence: Valuing Fair Resolution on the Merits Over Gamesmanship

Prior to the adoption of the Federal Rules of Civil Procedure in 1938, pretrial discovery was rare in U.S. courts.[15] Preparation for trial involved a series of formal pleadings upon which the opposing party was forced to rely for discovery, putting "a premium on gamesmanship at the expense of concealing critical facts until trial."[16] The depositions available in the federal courts fell into narrowly defined categories, virtually unchanged since the Judiciary Act of 1789.[17] Lawyers often proceeded to trial with only the smallest amount of information about their opponent's case.

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[12] *Id.* at 8.

[13] The Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 356 (2009) (citing David M. Trubek, *et al.*, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89-90 (1983); Robert Douglas Brownstone, *Collaborative Navigation of the Stormy E-Discovery Seas*, 10 RICH. J.L. & TECH. 53, at *21 (2004)).

[14] Ralph Losey, *Plato's Cave: Why Most Lawyers Love Paper and Hate E-Discovery and What This Means to the Future of Legal Education*, "E-Discovery Team," http://e-discoveryteam.com/2009/08/11/platos-cave-why-most-lawyers-love-paper-and-hate-e-discovery-and-what-this-means-to-the-future-of-legal-education/ (last visited Feb. 6, 2011) ("Moreover, once the winds of change become obvious, law firms of the future will be forced to put the paper dinosaurs out to pasture well before their prime. That will be the only way they can survive, the only way to try to regain their standing. Early retirement may become mandatory, especially for trial lawyers, as they are no longer able to understand what is really going on.").

[15] *See* 2 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE 2445-55 (1st ed. 1938); P.S. DYER-SMITH, FEDERAL EXAMINATIONS BEFORE TRIAL AND DEPOSITIONS PRACTICE AT HOME AND ABROAD § 58 (1939).

[16] *The Case for Cooperation*, *supra* note 13, at 346; *see* 6 JAMES WM. MOORE, ET AL, MOORE'S FEDERAL PRACTICE § 26.02 (3d. ed. 2008); George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, 28 (2007).

[17] In some jurisdictions, discovery before trial by means of deposition was obtained only on written interrogatories submitted with leave and approval of court. 1922 Mass. Acts 328. In others, discovery could be obtained only by means of an oral examination before a special master. *See* R.S.C., O. XXXI, Rule 1, Annual Practice (1928) 517 (Eng.).

Not only did the outcome of litigation often hinge on the ability of counsel to produce surprise evidence or to counter the tricks of their opponents, but the absence of meaningful discovery also created huge inefficiencies in case preparation. Lawyers in the pre-1938 era faced two equally unpalatable options when preparing for trial, described here by Edson Sunderland, primary author of the discovery provisions of the original Federal Rules:

> If a lawyer undertakes so to prepare his case as to meet all the possible items of proof which his adversary may bring out at the trial, or to meet all the assertions and denials which his adversary has spread upon the record, much of his effort will inevitably be misdirected and will result only in futile expense. If, on the other hand, he restricts his preparation to such matters as he thinks his adversary will be likely to rely upon, he will run the risk of being a victim of surprise.[18]

Practitioners of the day also recognized that extremely limited discovery led to limited settlement possibilities, for it was only when the facts were revealed at trial that counsel could determine whether their client should have avoided the risk and expense associated with proceeding to trial by settling earlier. As Sunderland wrote:

> [S]o long as each party is ignorant of what his opponent will be able to prove, their negotiations have nothing substantial to rest upon. Many a case would be settled, to the advantage of the parties and to the relief of the court, if the true situation could be disclosed before the trial begins.[19]

As a result, the courts were inundated with trials and severely burdened by the resulting monetary costs.[20]

The adoption of the Federal Rules of Civil Procedure in 1938 marked a fundamental turning point in American jurisprudence transforming litigation from a "cards-close-to-the-vest" approach to an "open-deck" policy.[21] The Federal Rules sought "to facilitate open and evenhanded development of the facts underlying a dispute, so that justice may be delivered on the merits and not shaped by surprise or like tactical

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[18] Edson R. Sunderland, *Scope and Method Of Discovery Before Trial*, 42 YALE L.J. 863, 864 (1933).
[19] *Id.* at 865.
[20] *See* Charles E. Clark & Harry Shulman, *Jury Trial In Civil Cases—A Study In Judicial Administration*, 43 YALE L.J. 867, 871 (1934) (noting that after a study of the Superior Court of New Haven County, sitting at New Haven, Connecticut—a trial court of general jurisdiction—it handled 38-130 jury trials each year from 1919 to 1930, spending, on average, 44 percent of their year in trial).
[21] *Am. Floral Servs.*, *supra* note 7, at 260.

stratagems."[22] "[T]he liberalization of discovery beginning in 1938 with the adoption of the Federal Rules was designed to promote the resolution of disputes . . . based on facts underlying the claims and defenses with a minimum of court intervention, rather than on gamesmanship that prevented those facts from coming to light entirely, or at least far too late in the process to serve the fair and efficient administration of justice."[23]

As expected *and* intended, the expanded scope of discovery under the Federal Rules not only promoted resolution on the merits over ambush advocacy, but also *conserved* judicial resources by facilitating a higher rate of settlements.[24] "[D]iscovery was designed . . . to narrow the issues for trial, to lead to the discovery of evidence, and to foster an exchange of information which may lead to an early settlement."[25] While the Rules have been amended over time, the role of broad discovery in promoting settlement is no less important today than it was in 1938, "permitting each side to assess the strengths and weaknesses of their cases in advance, frequently making trials unnecessary because of informed settlement."[26] It is also well-established that discovery encourages settlement from an economic perspective.[27]

Electronic discovery has already proven to be an extremely effective tool for uncovering critical evidence that would otherwise be concealed,

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[22] *Id.*; *see also* Rozier v. Ford Motor Co., 573 F.2d 1332, 1346 (5th Cir. 1978).

[23] *The Case for Cooperation*, *supra* note 13, at 345.

[24] This effect was anticipated. "[T]he right of free and unlimited discovery before trial . . . [will] probably result in the disposition of much litigation without the need of trial." Martin Conboy, *Depositions, Discovery and Summary Judgments, Address at the American Bar Association Annual Meeting* in 22 A.B.A.J. 881, 884 (1936); *see also* Zolla v. Grand Rapids Store Equip. Corp., 46 F.2d 319, 319-20 (S.D.N.Y. 1931) ("In view of several illuminating experiences which I have had in cases pending in the English courts, I feel hospitable to every form of interlocutory discovery . . . . The rationale of this attitude is, of course, not only that the court wants to know the truth, but also that it is good for both the parties to learn the truth far enough ahead of the trial, not only to enable them to prepare for trial, but also to enable them to decide whether or not it may be futile to proceed to trial.").

[25] Westhemeco Ltd. v. N.H. Ins. Co., 82 F.R.D. 702, 710 (S.D.N.Y. 1979) (citation omitted).

[26] Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 716 (May 1998) (citing Edson R. Sunderland, *Improving the Administration of Civil Justice*, *in* 167 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 60-83 (1933); GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL 17-18, 334 (1932)); *see also The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331, 332 (2009); *The Case for Cooperation*, *supra* note 13, at 345; Bergstrom, Inc. v. Glacier Bay, Inc., No. 08-50078, 2010 WL 257253, at *2 (N.D. Ill. Jan. 22, 2010) ("There is a strong public policy in favor of settlement. Frank discussion and exchange of information is required to facilitate settlement.").

[27] "A full exchange of the information . . . enabl[es] each party to form a more accurate, and generally therefore a more convergent, estimate of the likely [case] outcome." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 571 (6th ed. 2003); *see also* ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 203 (2003) (characterizing discovery similarly).

thus playing a vital role in the search for truth (and, not coincidentally, often inducing settlements as well).

> Many significant cases today are won or lost by email, text messages, and instant messages. These kind of informal, quick communications are a gold mine of useful information. They often reveal what people were really thinking and doing, and contradict what they later say they were thinking and doing.[28]

E-mail, written in the seeming isolation of one's office, continues to contain a shocking level of candor. To recount just a few examples:

- In a case against UBS, the defendant's own emails revealed that UBS employees denigrated the investment-grade securities (sold to the plaintiff) as "crap" and "vomit."[29]
- In a Massachusetts case concerning the dangers of the anti-obesity drug combination Phen-Fen, the court admitted into evidence an email from a corporate executive asking, "can I look forward to my waning years signing checks for fat people who are a little afraid of some silly lung problem?"[30]
- Credit Suisse First Boston (CSFB) investment banker, Frank Quattrone, was convicted of obstructing investigations of CSFB's stock offerings. One critical piece of evidence was an email that Quattrone forwarded to CSFB employees, after learning of the investigation, instructing them that it was "[t]ime to clean up those files."[31]

As these cases demonstrate, electronic discovery has enhanced parties' ability to uncover the facts of the case. Electronic discovery serves the fundamental tenet of American jurisprudence in that it permits cases to be resolved based on their merits.

E-discovery is not just a fact of life—it is an extraordinarily valuable tool for culling the masses of data held by litigants to find the relevant and

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[28] Ralph Losey, *Email Wins Cases*, E-Discovery Team Blog (Jan. 2, 2010), http://e-discoveryteam.com/?s=say+stupid+things (last visited Feb. 6, 2011).

[29] Pursuit Partners, LLC v. UBS AG, 48 Conn. L. Rptr. 557 (Conn. Super. Ct. 2009).

[30] Skibniewski v. Am. Home Prods. Corp., No. 99-0842, 2004 WL 5628157, at *2 (W.D. Mo. Apr. 1, 2004).

[31] United States v. Quattrone, 441 F.3d 153, 165 (2d Cir. 2006); *see also* In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 470 F. Supp. 2d 917, 925-26, *amended by* 470 F. Supp. 2d 931 (S.D. Ind. 2006) (noting "smoking gun" e-mail revealed evidence of judge tampering in Mexico); Siemens Solar Indus. v. Atl. Richfield Co., No. 93-1126, 1994 WL 86368, at *2 (S.D.N.Y. Mar. 16, 1994) (recounting the plaintiff's discovery of e-mails "reveal[ing] beyond peradventure" that the defendant praised its new product yet knew it "was not commercially viable").

significant needles buried in the haystack. Because ESI is different in nature from paper-based documents, e-discovery does raise new concerns and problems for which solutions need to be found. However, those problems can be solved without rule changes that would impose significant limits on discovery, and thereby, undermine the search for facts. The purpose of this paper is to highlight those solutions—some of which already exist and others of which are within reach—which, in conjunction with the present Rules, address the most serious problems attending e-discovery without sacrificing the quest for just resolution on the merits.

C. *The 2006 Amendments to the Federal Rules Were Designed to Address the Unique Issues Raised by Electronic Discovery*

In 2006, the Federal Rules were amended to address the unique aspects of electronic discovery, and "to assist courts and litigants in balancing the need for electronically stored information with the burdens that accompany obtaining it."[32] The amended Rules "recognize some fundamental differences between paper-based document discovery and the discovery of electronically stored information, and they continue a trend that has become quite pronounced since the 1980s of expanding the role of judges in actively managing discovery to sharpen its focus, relieve its burdens, and reduce costs on litigants and the judicial system."[33] However, it was widely recognized that the changes to the Rules were only one part of the solution; practitioners needed to evolve their thinking to keep abreast of the reality of ESI and electronic discovery. As authors George Paul and Jason Baron explain:

> For complex cases involving vast amounts of information, the new federal rules mandate a change in the practice of law. Clearly, parties will need to act in a more sophisticated and transparent fashion to disclose electronically stored information in their possession . . . . [A] new way of thinking about the process of discovery is in order.[34]

While the litigation process may always be viewed by some as an opportunity to hide the ball until trial, the Federal Rules, since their

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[32] Jason Fliegel, *Electronic Discovery in Large Organizations*, 15 RICH. J.L. & TECH. 1, 7 (2009).
[33] Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, ¶ 7 (2006), *available at* http://www.law.northwestern.edu/journals/njtip/v4/n2/3; *see also* COMM. ON CT. ADMIN. & CASE MGMT., JUDICIAL CONFERENCE OF THE U.S., CIVIL LITIGATION MANAGEMENT MANUAL 8 (2001), *available at* http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/814.
[34] George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, 21 (2007), *available at* http://law.richmond.edu/jolt/v13i3/article10.pdf.

inception, have been intended to deter that type of conduct and place a premium on a fair resolution on the merits. The 2006 amendments are no different, and we should not give in to obstreperous pleas to return to the days of limited discovery and trial by fire, particularly when the Rules have facilitated the litigation process and practitioners' *real* experiences attest to that. A brief overview of several of the 2006 amendments illustrates the steps the Committee has taken to resolve issues raised by electronic discovery.

Rule 34(a) was amended to confirm that "discovery of electronically stored information stands on equal footing with discovery of paper documents."[35] The broad language of Rule 34(a)(1) allows a party to request any type of information that is stored electronically. The rule establishes that unless requested in another form, the producing party must produce electronically stored information in a form or forms in which it is usually maintained or in a form or forms that are reasonably usable. The rule permits testing and sampling as well as inspection and copying of electronically stored information,[36] thus providing a mechanism for producing to limit the cost and burden of production.

Rule 26(f) was amended "to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference,"[37] including a discussion of the forms in which electronically stored information will be produced.[38] Like Rule 26(f), Rule 34(b) addresses the need to discuss the form in which electronically stored information will be produced.[39] Similarly, Rule 45 on subpoenas added several provisions directed at the form in which subpoenaed information must be produced.[40] These rules are directly responsive to the concerns of producing parties regarding the costs of production and the need to plan and budget appropriately.

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[35] FED. R. CIV. P. 34(a) advisory committee's notes.

[36] Rule 45 largely echoes Rule 34, applying its provisions related to electronically stored information to subpoenaed data.

[37] FED. R. CIV. P. 26(f) advisory committee's notes.

[38] FED. R. CIV. P. 26(f)(3)(C).

[39] FED. R. CIV. P. 34(b)(2)(D)-(E).

[40] *See, e.g.*, FED. R. CIV. P. 45(a)(1)(C) ("A subpoena may specify the form or forms in which electronically stored information is to be produced."); FED. R. CIV. P. 45(c)(2)(B) ("A person commanded to produce documents . . . may serve on the party or attorney designated in the subpoena a written objection to . . . producing electronically stored information in the form or forms requested."); FED. R. CIV. P. 45(d)(1)(B) ("*Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms."); FED. R. CIV. P. 45(d)(1)(C) ("*Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.").

Rule 26(b)(2), addressing limitations on the frequency and extent of discovery, was amended "to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information."[41] Accessing certain electronic data may be very efficient and cost-effective, but other electronic data may impose a large burden and cost to access.[42] In recognition of this potentially excessive burden, the Rule specifies that data not "reasonably accessible" need not be produced if doing so creates undue burden or cost.[43] This rule provides support to producing parties who have complained of the need to conduct endless searches and productions notwithstanding the associated costs, and the rule directly advises the requesting party of the potential limitations on anticipated production.

The parties also are directed in the 2006 amendment to Rule 26(f) to discuss issues of privilege or protection of trial preparation materials, which the Advisory Committee noted "often become more acute when discovery of electronically stored information is sought," due to the volume of electronically stored information, informality of email communications, and issues surrounding metadata.[44] Coupled with the recently-adopted Rule 502 of the Federal Rules of Evidence, the amended Rule 26(f) provides producing parties with additional security and opportunity to plan and manage e-discovery. Critics who continue to dramatize this issue would be well-served to better manage data protected by the attorney-client privilege and/or work product doctrine by properly tagging and/or segregating such data at the time of its creation.

Rule 37(e) provides a limited safe harbor for "the routine alteration and deletion of information that attends ordinary use" of computer systems.[45] The new rule makes clear that sanctions should not be imposed for "failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."[46] The Advisory Committee Notes provide guidance on the boundaries of "good faith" in this context.

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[41] FED. R. CIV. P. 26(b)(2) advisory committee's note.
[42] *Id.*
[43] FED. R. CIV. P. 26(b)(2)(B).
[44] FED. R. CIV. P. (26)(f) advisory committee's note.
[45] FED. R. CIV. P. 37 advisory committee's note.
[46] FED. R. CIV. P. 37(e).

III. THE CURRENT FEDERAL RULES ARE WORKING

A. Although The Amended Rules Have Been In Effect for Only Three Years, the Available Evidence Shows the Rules Are Working

The 2006 amendments are still relatively new, and they have not yet reached their full potential for effectiveness. In their short lifetime, however, the 2006 amendments—and the discovery tools they have spawned—have yielded considerable benefits. According to recent surveys, while there is some dissatisfaction with the current state of discovery and with the cost of e-discovery in particular, by no means is there a majority favoring additional amendments to the Federal Rules. Calls for radical reform are largely based on faulty or misinterpreted data[47] and the level of dissatisfaction among practitioners is often exaggerated.

> Although some of the criticisms of today's civil justice system certainly have merit, the picture generally portrayed is incomplete and probably skewed. It is distorted by a lack of definition and empirical data, which generates rhetoric that often reflects ideology or economic self-interest. As a result, reliance on these assertions may well impair the ability of rulemakers and courts to reach

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[47] *See, e.g.*, ACTL/IAALS Report. The survey of the ACTL Fellows that provided the basis for the ACTL/IAALS findings and recommendations was conducted in April-May, 2008, less than eighteen months after the 2006 e-discovery amendments became effective. *See* TASK FORCE ON DISCOVERY, THE AM. COLL. OF TRIAL LAWYERS & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2 (2008), *available at* http://www.actl.com/AM/Template.cfm?Section =Press_Releases&CONTENTID=3650&TEMPLATE=/CM/ContentDisplay.cfm. Perhaps even more significant, the survey respondents had an average of thirty-eight years of experience (not exactly the lawyers who serve in the trenches on the e-discovery issues and would be most informed about the effects of the 2006 rule amendments). *See id.* Then, because the respondents were determined to be younger and less experienced than the non-responders, 'certain responses'—presumably those of the older and more experienced respondents—were 'weighted' in the survey, thus casting serious doubt on the reliability of the reported results. *See id.* at app. A, at A-1. Finally, only about 40% of survey participants participated in complex commercial litigation, and fewer than 20% of them litigated primarily in federal courts. *Id.* at 2. In other words, if the ACTL and IAALS wanted to find out about the effectiveness of the 2006 rule amendments, they asked the wrong people for their views. Not surprisingly, when the Federal Judicial Center administered a similar survey to members of the Section of Litigation of the American Bar Association to obtain "a wider range of views than that provided by the ACTL survey," some of the results were radically different. For example, when asked whether the current Federal Rules "are conductive to meeting the three goals stated in Rule 1—'to secure the just, speedy, and inexpensive determination of every action and proceeding,'" only approximately 35% of the ACTL respondents answered "yes," compared to approximately 62% of ABA members. *See* EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE 3, 5 (2010), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf.

> dispassionate, reasoned conclusions as to what is needed. Moreover, the picture of how our federal civil system is functioning generally has been viewed in recent years through a lens trained on concerns voiced by defendants, with the other side of the litigation equation going largely ignored.[48]

Contrary to the claims of some critics, there is nothing close to a consensus about the need to amend the current Federal Rules, let alone *how* to amend them.

On December 11, 2009, the ABA Section of Litigation published its Member Survey on Civil Practice (the "ABA Survey"), in which approximately 3,300 respondents participated.[49] In May and June 2009, the Federal Judicial Center ("FJC") conducted a survey (the "FJC Survey") on discovery issues, including discovery activity related to ESI, case management, litigation costs, and more generally, the Federal Rules of Civil Procedure.[50] The FJC Survey generated responses from nearly 2,600 lawyers about their experiences in recently closed cases in federal court.[51] Both surveys show general recognition that the current Federal Rules are adequate to control the discovery excesses that occur in some cases.

In the ABA Survey, 63% of respondents agreed that the Federal Rules, as written, are "conducive to meeting the goal of reaching a 'just, speedy, and inexpensive determination of every action,'" and about 61% of respondents said the Rules are adequate as written.[52] In contrast, about 25% said the Rules should be reviewed in their entirety and rewritten to address the needs of today's litigation.[53] Just over half of respondents believe *minor* amendments are needed.[54]

Among all respondents, 82%, including 61% of plaintiffs' lawyers, believe that discovery is too expensive.[55] Respondents, especially defense lawyers, agree that e-discovery increases the costs of litigation, contributes disproportionately to the increased cost of discovery, and is overly

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[48] Arthur R. Miller, Pleading and Pretrial Motions—What Would Judge Clark Do?, 28 (Apr. 12, 2009) (unpublished essay written for the Duke Conference), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/B571D6B4A934F43F852576740057905C/$File/Arthur%20Miller,%20Pleading%20and%20Pretrial%20Motions,%20Revised%204.12.10.pdf?OpenElement.

[49] ABA SECTION OF LITIGATION, MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT (American Bar Ass'n. 2009), http://www.abanet.org/litigation/survey/docs/report-aba-report.pdf [hereinafter "ABA Survey"].

[50] EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY (2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf.

[51] *See id.* at 77, 81.

[52] ABA Survey, *supra* note 49, at 7.

[53] *Id.* at 8.

[54] *Id.*

[55] *Id.* at 2.

burdensome.[56] However, *"[d]espite claims of discovery abuse and cost, 61% of respondents believe that counsel do not typically request limitations on discovery under available mechanisms."*[57] So, again, the Rules provide certain sought-after protections, but in order to be effective, lawyers must be familiar with their applicability and use them where appropriate.

While the cost of discovery was identified as a problem, amending the Rules was *not* among the possible solutions on which the survey found general agreement. Those solutions included:

- Early case management by judges;
- Collaborative and professional conduct by lawyers;[58]
- Lawyers and judges could more often avail themselves of *existing means* to set limits on discovery that is unduly burdensome or costly; and
- Shorter times to disposition, perhaps by setting a trial date early in the case.

The ABA Survey further found that "[s]olutions that would cut back on e-discovery are likely to be controversial . . . . Respondents, especially plaintiff's lawyers, agree that e-discovery has enhanced their ability to discover all relevant information."[59]

In stark contrast to the alarmist rhetoric of some critics regarding exorbitant discovery costs,[60] the majority of attorneys in the FJC Survey responded that the costs of discovery were "just right" given the client's stake in the litigation.[61] The FJC Survey, which focused on federal litigation—the very landscape in which the Federal Rules apply—found

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[56] *Id.*
[57] *Id.*
[58] The ABA Section of Litigation has developed Guidelines for Conduct, also known as the Civility Standards.
See http://www.americanbar.org/groups/litigation/policy/conduct_guidelines.html
[59] ABASurvey, *supra* note 49, at 7.
[60] The Institute for the Advancement of the American Legal System's *Electronic Discovery: A View from the Front Lines* reported that "[n]ow, e-discovery has penetrated even 'midsize' cases, potentially generating an average of $3.5 million in litigation costs for a typical lawsuit." *Electronic Discovery: A View from the Front Lines*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. [hereinafter "IAALS"], 25, *available at* http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf. That figure surfaced again recently in testimony before the House Judiciary Committee. Gregory Katsas, Former Assistant Attorney General, Civil Division, Department of Justice, noted in written testimony about the effects of the federal pleading standard under *Twombly* and *Iqbal*. Federal Pleading Standards Under Twombly and Iqbal Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. (2009) (statement of Gregory G. Katsas, Partner Jones Day, Former Assistant Attorney General, Civil Division, Department of Justice), *available at* http://judiciary.house.gov/hearings/pdf/Katsas091027.pdf.
[61] FJC Survey at 28.

that the median cost, *including attorneys' fees*, was $15,000 for plaintiffs and $20,000 for defendants.[62] In the 5% of the cases where reported costs exceeded $300,000, the amount in controversy in the litigation was $5 million or higher.[63] These numbers reveal that even in the highest value cases, discovery costs still amounted to less than 10% of the damages sought.

The notion that e-discovery activities claim an increasing and disproportionate amount of an attorney's time is also misleading. Regardless of the amount of time consumed by discovery activities, the recent FJC Survey found that approximately 57% of plaintiff attorneys and 66.8% of defendant attorneys reported that discovery and disclosure had yielded "just the right amount" of information.[64]

In fact, much of the vociferous criticism reflects the state of e-discovery in state courts, where the evolution of good e-discovery practices and management lags behind the federal courts and the amended Rules do not govern. For example, fewer than 20% of respondents to the ACTL/IAALS survey litigate primarily in federal court.[65] Thus, any reliance on the ACTL/IAALS survey as somehow dispositive of whether the federal system is working effectively is completely misplaced.[66]

State court caseloads are considerably larger than federal court caseloads.[67] And, although states model their rules of civil procedure on the Federal Rules, there is significant variation that impedes effective and sensible e-discovery.[68] In New York, for example, a recent report noted that "[w]hile the Federal Rules of Civil Procedure . . . were amended in 2006 to address issues associated with ESI, New York law remains uncodified and largely undeveloped. The Legislature has not amended the Civil Practice Law and Rules (CPLR) and courts have issued a patchwork of not-always consistent ESI rulings."[69]

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[62] *Id.* at 2.
[63] *Id.*
[64] *Id.* at 27.
[65] ACTL/IAALS Interim Report at 2.
[66] *See also* ACTL/IAALS Interim Report, *supra* note 47.
[67] *E.g.*, Thomas H. Cohen, *Do Federal and State Courts Differ in How They Handle Civil Trial Litigation: A Portrait of Civil Trials in State and Federal District Courts*, Social Science Research Network, 25 (June 28, 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=912691.
[68] *See* Conrad J. Jacoby, *E-Discovery Update: A Contrarian Retrospective on E-Discovery in 2007*, LLRX (Dec. 29, 2007), http://www.llrx.com/columns/fios24.htm; Fios, *E-Discovery Rules—Interpreting ESI from Federal to State Courts* (Nov. 11, 2008), http://www.fiosinc.com/e-discovery-knowledge-center/electronic-discovery-article.aspx?id=451.
[69] JOINT COMM. ON ELECTRONIC DISCOVERY, ASS'N OF THE BAR OF THE CITY OF NEW YORK, EXPLOSION OF ELECTRONIC DISCOVERY IN ALL AREAS OF LITIG. NECESSITATES CHANGES IN CPLR, 2 (2009) (*footnote omitted*), *available at* http://www.nycbar.org/pdf/report/uploads/20071732-ExplosionofElectronicDiscovery.pdf. Even more recently, the New York state courts issued a report and recommendations on how the courts can "manage e-discovery in a more expert, efficient and cost-effective manner within the framework of existing law." The report

Many states have no rules governing ESI.[70] Judicial education poses a challenge as well; while the federal courts have created uniform programs for judges and offer direct education, the states continue to struggle in providing judges with the tools to ensure uniform electronic discovery practices.[71] These and other e-discovery problems in state courts have led some to decry the state of discovery in general without recognizing the great strides made under the uniform system of the Federal Rules.

Meanwhile, the "evidence" used to support calls for further amendment of the Federal Rules is exceedingly thin, and sometimes non-existent or outright misleading. For example, a recent article by J. Douglas Richards and John Vail in *Trial* magazine[72] observed that the radical changes proposed by the ACTL/IAALS Report, which include replacing notice pleading with fact-based pleading and sharply limiting discovery beyond a narrow set of "initial disclosures," are not supported in the least by the survey from which the proposals supposedly arose. "In fact, in basic ways the general rule changes that the report proposes run contrary to the responses."[73] After noting that the lack of objectivity in the ACTL/IAALS survey and report was telegraphed in the survey's statement of purpose—to "identify and quantify the causes of delay and cost that afflict our civil justice system"[74]—Richards and Vail concluded that "[t]he survey provides no genuine support for any of the revisions to the rules that the final report suggests. On the contrary, the report's distortion of the results underscores the absence of any compelling reason for the broad revisions to the federal rules that that IAALS and ACTL advocate."[75] Paul Saunders, Chairperson of the ACTL Task Force that issued the report, has acknowledged that some

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recommends *not* that e-discovery be limited, and *not* that access to the courts be curtailed by heightened pleading requirements, but advocates, *inter alia*, increased transparency and information exchange among the parties, increased judicial involvement in e-discovery early in the case, and improved education and training for practitioners, i.e., measures similar to those endorsed by this paper for the improvement of e-discovery in the federal courts. THE NEW YORK STATE UNIFIED COURT SYS., ELECTRONIC DISCOVERY IN THE NEW YORK STATE COURTS 2 (2010), *available at* http://www.courts.state.ny.us/courts/comdiv/PDFs/E-DiscoveryReport.pdf.

[70] *See* Jacoby, E-Discovery Update, *supra* note 68. As of September 2009, 25 states have adopted electronic discovery procedural rules that draw on the 2006 amendments, and many of the remaining states are considering the issue. Webcast, 25 and Counting; State E-Discovery Rules Taking Shape (Fios, Inc. 2009), http://www.fiosinc.com/e-discovery-knowledge-center/electronic-discovery-webcast.aspx?id=646.

[71] *See* Jacoby, *E-Discovery Update*, *supra* note 68.

[72] J. Douglas Richards & John Vail, *Reflections: A Misguided Mission to Revamp the Rules*, TRIAL, Nov. 2009, at 52.

[73] *Id.* at 54. Commenting on the validity of the ACTL/IAALS Report, Professor Arthur Miller observed: "Asking for impressions about whether litigation is 'too expensive' or 'takes too long' is of little value as few, if any, attorneys would say it is 'inexpensive' or 'not long enough.'" *See* Miller, Pleading and Pretrial Motions, *supra* note 48, at n.157.

[74] *Id.* at 52.

[75] *Id.* at 54.

of the changes advocated in the report are not supported by the survey results. In a recent interview, Saunders said:

> [T]he Task Force did not see itself as being limited in our proposals to the results of the survey; we wanted to bring our own experience and our own judgment and ideas to the table *even if they conflicted with some of the results of the survey*. And that happened in a few cases.[76]

Professor Paul D. Carrington, who served as Reporter to the Advisory Committee on Civil Rules from 1985 to 1992, agrees that "the case has not been made for radical departure from the scheme established in 1938."[77] Further, he writes, "the proposals [of the IAALS and ACTL], like the decisions of the [Supreme] Court in *Twombly* and *Iqbal* are derived not from observable reality but from a political ideology that is strongly favored by the Chamber of Commerce and is not in the longer term national interest."[78]

This is not the first time that parties calling for discovery reform have found "support" in misinterpreted or inaccurate data. In the early 1980s, the political winds blew strongly in favor of "deregulation" of business. One form of deregulation sought by business interests was the rollback of legal procedural reforms enabling private citizens to more effectively pursue claims against major corporations.

> It was said that the costs of litigation were disabling American businesses from competing in the global economy . . . . Complaints were heard about the delay and the excessive number of cases being filed. The latter protest was substantially dispelled by the available data on the growth in the civil dockets of the federal courts . . . . As Judge Jack Weinstein assessed the stated concerns of Business about case overload, they were a "weapon of perception, not substance."[79]

In the early 1990s, the Council on Competitiveness, led by Vice President Dan Quayle, recommended various changes to the civil justice system to counteract the supposedly rising costs and frequency of litigation at the time. It was later shown that the "litigation explosion" did not, in fact, exist

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[76] Albert W. Driver, *Reforming the Rules of Civil Procedure: The ACTL Final Report*, THE METROPOLITAN CORPORATE COUNSEL, (N.J.) Mar. 2, 2010 (emphasis added) *available at* http://www.metrocorpcounsel.com/current.php?artType=view&EntryNo=10725.

[77] Paul D. Carrington, Politics and Civil Procedure Rulemaking 58 (Mar. 17, 2010) (unpublished essay written for the Duke Conference).

[78] Paul D. Carrington, Politics and Civil Procedure Rulemaking 55 (Jan. 25, 2010) (unpublished draft essay written for the Duke Conference).

[79] Carrington, *supra* note 77, at 8.

and the President of the ABA criticized the Vice President for "using discredited statistics to advance ill-founded views."[80]

Learning from this history, we must be extremely cautious in responding to urgent calls for radical changes in the Federal Rules; the more urgent the calls and the more radical the changes, the more caution is due. There is no evidence at this time that significant amendments are needed, nor is there evidence of a consensus in favor of such amendments. Rather, the existing data suggests that the 2006 amendments are having their intended effects as litigants, lawyers, and judges learn how to use them effectively.

B. The Current Rules Protect Against Overbroad or Overly Burdensome E-Discovery: The Importance of Proportionality

Much of the current push to revise the Federal Rules is based on the faulty premise that the existing Rules permit virtually limitless discovery, unconstrained by the facts of the matter being litigated or the ability of the parties to bear the costs.[81] The reality is that the current Rules give the parties a framework in which to conduct controlled but effective e-discovery, and they give the courts explicit authority and direction to rein in e-discovery abuses when the parties are unable or unwilling to do so on their own. As Douglas Rogers explains, "Parties to litigation should not be hesitant to fight for reasonable restrictions on preservation and production. The Federal Rules of Civil Procedure allow for—and the intent behind them indeed call for—more restraints on discovery than many courts and parties recognize."[82]

Such was not always the case; for more than four decades after the adoption of the Federal Rules in 1938, the scope of discovery only broadened despite unprecedented increases in volume resulting from technological advances, such as the office copier, and the growth of document-intensive litigation, in areas such as securities, products liability and employment discrimination.[83] However, beginning in the 1970s, there was rising criticism that discovery was "out of control," that the process had become too expensive and burdensome. It has been observed that:

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[80] *Id.* at 29; *see also* Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 80-81, 87 n.42 (1993).

[81] *See, e.g.*, Driver, *supra* note 76, at 6 ("current discovery rules have enabled . . . claimants to engage in extensive and often limitless discovery.").

[82] Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since December 1, 2006*, 14 RICH. J.L. & TECH. 8, 81 (2008).

[83] Richard L. Marcus, *Introduction* to SHIRA A. SCHEINDLIN & DANIEL J. CAPRA, ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE 1, 2-3 (Thomson Reuters 2009).

> [T]his clamor from the 1970s to the 1990s … resembled much of the current clamor about electronic discovery, particularly in relation to paper discovery under Rule 34. Thus, lawyers that frequently had to respond to discovery requests (often representing defendants) asserted that their opponents were abusing discovery for tactical purposes. They said that dragnet discovery requests produced huge response costs but little or no actual evidence of importance; overbroad discovery could become a club to extract nuisance settlements. Lawyers that frequently sought information through discovery (often representing plaintiffs) reported that they had to make broad requests to obtain the information they really needed, and that responding parties often resisted proper discovery unjustifiably and/or resorted to "dump truck" practices, delivering enormous quantities of worthless material through which they had to sift to find the important information.[84]

In response to these grievances, amendments limiting the scope of discovery were adopted in 1980, 1983, 1993, and 2000. Several of these amendments are directly relevant to the handling of e-discovery: Rule 26(f), adopted in 1980, requires the parties to meet and confer early in the case to develop a discovery plan; [85] Rule 26(g), adopted in 1983, directs that an attorney signing a discovery request or response thereby certifies that it is proper under the Rules;[86] Rules 26(e)(1)(A) and 37(c)(1), amended in 1993, require timely supplementation of a discovery response or disclosure found to be incomplete or incorrect and provide for the availability of sanctions for failure to comply.[87]

Of the Federal Rules amendments limiting discovery, none was more important—or more relevant to the current e-discovery debate—than the adoption of the proportionality provisions now contained in Rule 26(b)(2)(C).[88] The former provision in Rule 26(a) stating that there should

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[84] *Id.* at 3-4.

[85] Note that when Fed. R. Civ. P. 26(f) was adopted in 1980, it allowed but did not require parties to meet and confer. The Rule was revised in 1993 to require litigants to meet in person and plan for discovery in all cases not exempted by local rule or special order. FED. R. CIV. P. 26(f) advisory committee's note to 1993 amendment.

[86] *See* Marcus, *supra* note 83, at 5 ("Rule 26(g) . . . attracted little attention until the advent of electronic discovery, which heightened attention to the responsibilities of counsel."); Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354 (D. Md. 2008) (providing a thorough analysis of Rule 26(g) and its application).

[87] Other limits placed on discovery since 1980 include, for example, presumptive limits on the number of interrogatories and the number and duration of depositions. *See* FED. R. CIV. P. 26(e)(1)(A); FED R. CIV. P. 37(c)(1).

[88] *See* Rogers, *supra* note 82, at 51 ("The Supreme Court adopted the proportionality rule to enable courts and parties to constrain excessive discovery. In light of the ESI explosion, Rule 26(b)(2)(C), used openly, is perhaps today, an even more important tool to restrain excessive discovery than it was in 1983.").

be no limitation on the frequency of discovery absent a protective order was deleted, and new provisions were added to promote judicial limitation of discovery to avoid overuse or abuse.[89] Since being added to the Rules in 1983, the proportionality provisions have undergone various amendments designed, in part, to address concerns that the "information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression."[90] In 2000, Rule 26(b)(1) was amended to explicitly state that all discovery is subject to the proportionality provisions of Rule 26(b)(2)(C).[91] The purpose of this change was to "emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery."[92]

Current Rule 26(b)(2)(C) provides that that "the court *must* limit the frequency or extent of discovery" if:

1. the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

2. the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

3. the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.[93]

The adoption of these provisions represented a significant retreat from the "high water mark" of broad discovery in the 1970s.[94] The Reporter to the Advisory Committee in 1983 described this change as a "180-degree shift" in the treatment of overbroad discovery.[95]

Rule 26(b)(2)(C) particularizes the factors courts must consider in determining whether to limit discovery to ensure that it is proportional to the needs of the case and the resources of the parties. The proportionality rule mandates that "[j]udicial supervision of discovery . . . seek[s] to minimize its costs and inconvenience and to prevent improper uses of

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[89] FED. R. CIV. P. 26(a)-(b)(1).
[90] FED. R. CIV. P. 26 advisory committee's note.
[91] FED. R. CIV. P. 26(b)(1), (2)(c).
[92] FED. R. CIV. P. 26 advisory committee's note.
[93] FED. R. CIV. P. 26(b)(2)(C)(i)-(iii) (emphasis added).
[94] Marcus, *supra* note 83, at 2.
[95] Arthur R. Miller, *The August 1983 Amendments to the Federal Rules of Civil Procedure* 33 (Federal Judicial Center 1984), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/1983amnds.pdf/$file/1983amnds.pdf.

discovery requests," while still allowing parties to obtain the discovery necessary to litigate the case.[96]

Although Rule 26(b)(2)(C) provides that a court may limit discovery *sua sponte*, as a practical matter, parties must generally resolve discovery disputes through the meet and confer process or, if such negotiation is unsuccessful, resort to motion practice. In this regard, the proportionality rule provides litigants with factors to consider in undertaking such negotiations.

Despite concerns about increasingly burdensome discovery, the proportionality rule has been underused.[97] According to the ABA Survey, lawyers do not typically request limitations on discovery under any of the mechanisms currently provided by the Federal Rules.[98] This may indicate that parties are indeed successfully negotiating discovery disputes rather than seeking judicial intervention.

The proportionality rule contained in Rule 26(b)(2)(C) provides courts and litigants a powerful tool to address concerns of unduly burdensome electronic discovery. This tool need not be used solely in the context of discovery disputes that become the subject of motion practice but, rather, can serve counsel as they meet and confer and seek to formulate a fair discovery plan.

C. There Has Been A Quantum Leap In The Development Of E-Discovery Law Since The 2006 Amendments

Groups advocating *now* for more restrictive discovery rules cite a lack of guidance from the courts on the application of existing provisions.[99] However, the current Rules, which only took effect in December 2006, have barely had an opportunity to gel, let alone demonstrate their effectiveness.

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[96] Metavante Corp. v. Emigrant Sav. Bank, No. 05-1221, 2008 U.S. Dist. LEXIS 89584, at *20 (E.D. Wis. Oct. 24, 2008) (quoting Societe Nationale Industrielle Aerospatiale v. United States D. Ct., 482 U.S. 522, 546 (1987)).

[97] FED. R. CIV. P. 26 advisory committee's notes ("The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated."); *see also* Ronald J. Hedges, *Case Management and E-Discovery: Perfect Together*, DIGITAL DISCOVERY & E-EVIDENCE, July 1, 2009 at 3 ("Unfortunately, proportionality does not appear to be utilized often enough either by courts or parties."); Lee Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 238 (2010) ("Since 1983, the Federal Rules have provided a wealth of opportunities for judges, on their own or on a party's motion, to supervise discovery in order to control toward proportionality. . . . Yet complaints of judicial disengagement persist and abound. Such disengagement is widely viewed as resulting in disproportionate discovery, with the unjustified costs and delays that it brings.")

[98] ABA Survey, *supra* note 49, at 2-3.

[99] IAALS, *Electronic Discovery: A View From The Front Lines*, 2, 7 (2008) (describing existing e-discovery case law as "thin, inconsistent and frequently outdated" and "[i]ndeed, there is very little case law interpreting the new rules and a near void of e-discovery case law in general.").

In contrast, additional rule changes would necessarily create new uncertainties.

In fact, judicial guidance has arrived and the body of e-discovery case law interpreting the current Rules is undergoing a natural and robust evolution. The Federal Judicial Center website includes a summary of more than 250 federal court decisions providing substantive guidance on e-discovery issued between December 1, 2006 and July 31, 2009.[100] Meanwhile, the law firm K&L Gates maintains a database containing over 1,000 state and federal electronic discovery cases.[101]

In a mid-year 2009 review of e-discovery cases, Gibson, Dunn & Crutcher noted that "[a] notable decrease in the number of cases involving disputes over the format of e-discovery productions suggests that standards and uniformity are developing and becoming commonly understood and utilized."[102] The survey further observed that many of the 2009 cases provide greater clarity regarding the duty to preserve relevant data, and the consequences of failing to do so. Collectively, these results demonstrate that the system is working—though perhaps too slowly for some critics.

Acceleration in the development of e-discovery case law since the 2006 Federal Rules amendments also can be observed statistically (if imperfectly) through Westlaw database searches. In a 2008 report, the Rand Institute for Civil Justice reported: "Despite all the concern expressed over e-discovery, there currently exist few legal standards to help provide benchmarks for litigants."[103] According to Rand, a Westlaw search in December 2006 for the phrase "*electronic discovery*" or the phrases "*electronically stored information, electronic document, computer data, electronic data, electronic record, electronic production* or *electronic format* within 100 words of *discover*" yielded only 92 federal court decisions.[104] Today, that same search yields 420 federal cases.[105]

A Westlaw search for cases discussing undue burden or expense in relation to electronically stored information[106] yields the following results

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[100] Kenneth J. Withers, THE SEDONA CONFERENCE, FEDERAL COURT DECISIONS INVOLVING ELECTRONIC DISCOVERY, DECEMBER 1, 2006-JULY 31, 2009 (2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/EDis0919.pdf/$file/EDis0919.pdf.

[101] K&L Gates, https://extranet1.klgates.com/ediscovery/ (last visited Feb. 22, 2011).

[102] Gibson Dunn, http://www.gibsondunn.com/publications/pages/2009Mid-YearUpdateonE-DiscoveryCases.aspx (last visited Feb. 5, 2011).

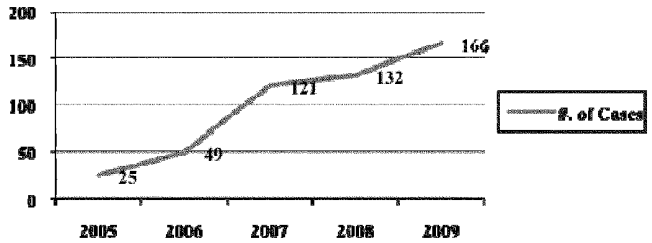
[103] Dertouzos, *et al.*, *supra* note 10, at 7.

[104] *Id.*

[105] As of March 23, 2010 (Westlaw).

[106] A search with the terms "electron! /2 stored data document" and "burden! /2 expense! undu!" retrieves any case containing the word "electronic" or "electronically" within two words of "stored" or "data" or "document" and also containing the word "burden" or "burdensome" within two words of "expense" or "expensive" or "undue" or "unduly."

by year:



These statistics indicate that the 2006 Federal Rule amendments are gaining traction, as the courts more frequently weigh the costs and burdens of e-discovery relative to the benefits of the requested discovery in each given case. While the reported cases, of course, highlight only situations in which the system of party-driven discovery has failed, the growing body of e-discovery jurisprudence reveals both the flexibility and efficacy of the courts in solving these disputes under the current Rules.[107] Meanwhile, the paucity of appellate opinions addressing e-discovery issues strongly suggests that parties and the district courts are getting it right.[108]

D. Use of Pretrial Conferences and Scheduling Orders is Increasing

Rule 16, governing pretrial conferences and scheduling orders, provides the court with an early opportunity to set the course of e-discovery. The rule was amended in 2006 "to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation."[109] Sanctions may be imposed on a party or attorney who is "substantially unprepared to participate—or does not participate in good faith—in the conference."[110] As a practical matter, Rule 16 emphasizes the importance of the parties' obligation under Rule 26(f) to meet and confer in good faith regarding e-discovery (among other subjects),

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[107] It is worth noting that, historically, few judicial opinions resolving discovery disputes were published since those opinions were generally not case outcome-determinative. Currently, the negligible cost of publishing opinions electronically (for example, via Westlaw or LexisNexis) results in much more efficient dissemination of opinions relating to e-discovery. Accordingly, the increase in the number of judicial opinions should not be interpreted to suggest that the system is failing, but rather that judges are publishing their opinions to give clarity to the rules.

[108] Since January 1, 2007, there have been only seventeen reported appellate cases reviewing e-discovery sanctions decisions. *See* Dan H. Willoughby, Jr., Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789 (2010). Of those, only five reversed the lower court's ruling.

[109] FED. R. CIV. P. 16 advisory committee's notes.

[110] FED. R. CIV. P. 16(f)(1)(B).

as the parties are required jointly to submit a discovery plan after the meet-and-confer and before the Rule 16 conference.

In the 2009 FJC Survey regarding recently closed civil cases, approximately 75% of respondents reported that the court had adopted a discovery plan.[111] In contrast, an IAALS study of federal cases terminated between October 1, 2005 and September 30, 2006 found that only 46% of the case dockets showed evidence of a scheduling order, notation of a scheduling conference, or both.[112] Although the cases in the IAALS survey predated the 2006 amendments, one of the notable findings was that early discussion and resolution of discovery issues was an important factor in reducing overall case length.[113] Among respondents to the ABA Survey, more than half believe that Rule 16 conferences help to identify and narrow issues in a case.[114]

The increased use of pretrial conferences since the 2006 amendments appears also to have resulted in fewer discovery-related sanctions being imposed by the courts:

> [P]rior to the [2006 amendments], judges granted sanctions in about 65% of the cases in which a party moved for sanctions. Since the amendments took effect, it appears that figure has dropped to about 50%. Based on his observations, Thomas Y. Allman, a member of the Sedona Conference Steering Committee, credited the early improvement to parties successfully engaging in pre-trial conferences.[115]

Thus, it appears that, in this regard, the 2006 amendments are having their intended effect. Litigants are meeting and conferring, and resolving discovery issues; courts are more frequently adopting discovery plans. These are surely signs of progress in the ongoing efforts to control e-discovery costs and reduce the frequency and scope of e-discovery-related disputes.

E. Courts Employ the Federal Rules to Protect Against Unduly Burdensome or Intrusive Searches

The Federal Rules, as currently written, provide both mechanisms and standards for parties and the courts to establish e-discovery boundaries

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[111] Lee, *supra* note 50, at 11-12.
[112] IAALS, *Civil Case Processing in the Federal District Courts: A 21st Century Analysis* at 2, 4 (2009) *available at* http://www.du.edu/legalinstitute/publications2009.html.
[113] *Id.* at 3.
[114] ABA Survey, *supra* note 49, at 11.
[115] Rachel Hytken, *Electronic Discovery: To What Extent do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875, 886 (2008).

appropriate to the case at hand. In general, where the issue is whether or not to order production of requested ESI—assuming that the requested discovery is relevant and not privileged—the court will weigh the cost and burden of the requested discovery against the likely benefit given the circumstances of the case (much as it would for non-ESI discovery) pursuant to the proportionality provisions of Rule 26(b)(2)(C) or other existing Rules.[116] As one court summarized, "the court should consider the totality of the circumstances, weighing the value of the material sought against the burden of providing it, and taking into account society's interest in furthering the truth seeking function in the particular case before the court."[117] A survey of recent cases illustrates the myriad approaches available to judges under the current Rules to control the scope of e-discovery while permitting the parties to obtain relevant evidence. Courts can parse and, if necessary, alter e-discovery requests to strike a fair balance.[118]

In assessing the burden on a producing party, courts also consider the intrusiveness of the proposed data collection and the confidentiality of the information sought. The Advisory Committee Notes to the 2006 amendments caution that while Rule 34(a) authorizes the copying, sampling, or testing of ESI, "issues of burden and intrusiveness . . . can be addressed under Rules 26(b)(2) and 26(c) . . . . Courts should guard against undue intrusiveness resulting from inspecting or testing" of electronic information systems.[119] Thus, courts are generally reluctant to allow a party direct access to its adversary's database.[120]

These and other opinions since the enactment of the 2006 amendments clearly demonstrate that courts have become attuned to the issues attendant to discovery of ESI and are increasingly attentive to monitoring the process.

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[116] *See supra* Part III.B.; *see also* FED. R. CIV. P. 26(b)(2)(B), 26(c); FED. R. CIV. P. 45.

[117] Patterson v. Avery Dennison Corp., 281 F.3d 676, 681 (7th Cir. 2002) (internal quotations omitted).

[118] For example, in *Major Tours, Inc. v. Colorel*, where the requested production from backup tapes would have cost $1.5 million, the court held that the documents were not reasonably accessible and the requesting party had not shown good cause to require the search. No. 05-3091, 2009 WL 3446761, at *6-7 (D.N.J. Oct. 20, 2009). However, the court struck a different balance with regard to two specific subsets of back-up tapes based on the dates of creation and the likelihood that the tapes might contain relevant, non-duplicative data. The court ordered that, for one subset, the costs of retrieval would be shared equally between the parties and for a second subset, plaintiffs would pay all retrieval costs including the cost of defendants' relevancy and privilege review. *Id.* In *FSP Stallion 1, LLC v. Luce*, the court, citing Rule 26(b)(2)(c), held that a request for production of ESI in native format with all metadata intact created an undue burden and instead ordered production of TIFF files with specified metadata fields. No. 08-1155, 2009 WL 2177107, at *4-5 (D. Nev. July 21, 2009).

[119] FED. R. CIV. P. 34 advisory committee's note.

[120] *See, e.g.*, SEC v. Strauss, No. 09-4150, 2009 WL 3459204 (S.D.N.Y. Oct. 28, 2009); *see also* Mirbeau of Geneva Lake LLC v. City of Lake Geneva, No. 08-693, 2009 WL 3347101 (E.D. Wis. Oct. 15, 2009).

F. Courts Utilize a Broad Array of Techniques Under the Current Rules to Manage and Resolve Discovery Disputes

When parties are unable to resolve e-discovery issues on their own, courts utilize an ever-widening variety of tools and techniques under the current Rules to reduce the costs and delays engendered by discovery disputes. Judge Paul Grimm has observed "[u]nder Rules 26(b)(2) and 26(c), a court is provided abundant resources to tailor discovery requests to avoid unfair burden or expense and yet assure fair disclosure of important information. The options available are limited only by the court's own imagination."[121]

Among other things, courts are demanding cooperation and early discussion of ESI issues to facilitate cost reductions. Reviewing only cases reported in 2009, one finds the following examples:

- Court orders further cooperation and disclosure;[122]
- Court propounds questions to parties on e-discovery details;[123]
- Cost-shifting;[124]
- Court orders hiring of independent expert;[125]
- Court limits custodians and/or search terms;[126]
- Court requires alternative procedures prior to parties filing motions;[127]

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[121] Thompson v. U.S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 98-99 (D. Md. 2003).

[122] *In re* Application of Operadora, Nos. 09-383, 08-136, 2009 WL 2435750 (M.D. Fla. May 28, 2009); *see also* Spieker v. Quest Cherokee, LLC, No. 07-1225, 2009 WL 2168892 (D. Kan. July 21, 2009); Dunkin' Donuts Franchised Rests., L.L.C. v. Grand Cent. Donuts, Inc., No. 07-4027, 2009 WL 1750348 (E.D.N.Y. June 19, 2009); Lapin v. Goldman, Sachs & Co., No. 04-2236, 2009 WL 222788 (S.D.N.Y. Jan. 23, 2009).

[123] Newman v. Borders, Inc., 257 F.R.D. 1 (D.D.C. 2009); *see also* Covad Commc'ns Co. v. Revonet, Inc., 258 F.R.D. 5 (D.D.C. 2009).

[124] Laethem Equip. Co. v. Deere & Co., 261 F.R.D. 127 (E.D. Mich. 2009); *see also* Surplus Source Group, LLC v. Mid Am. Engine, Inc., No. 08-049, 2009 WL 961207 (E.D. Tex. Apr. 8, 2009).

[125] Bank of Mongolia v. M & P Global Fin. Servs, Inc., 258 F.R.D. 514 (S.D. Fla. 2009); *see also* Maggette v. BL Dev. Corp., Nos. 07-181, 182, 2009 WL 4346062 (N.D. Miss. Nov. 24, 2009).

[126] *In re* Zurn Pex Plumbing Prods. Liab. Litig., MDL No. 08-1958, 2009 U.S. Dist. LEXIS 47636 (D. Minn. June 5, 2009).

[127] Sanders v. Kohler Co., No. 08-222, 2009 WL 4067265, at *3 (E.D. Ark. Nov. 20, 2009) ("If counsel have any further discovery problems, which they are unable to resolve among themselves, they *must not* file any more motions to compel. *Instead, they must immediately notify the Court,*

- Court orders Rule 30(b)(6) deposition;[128]
- Court limits privilege log requirements.[129]

Collectively, these cases demonstrate that the current Federal Rules provide the authority and flexibility for courts to effectively manage and resolve e-discovery disputes when the parties are unable to do so on their own. Moreover, there is widespread agreement that judicial involvement in discovery reduces the cost and burden of discovery. In the ABA Survey, 60% of plaintiffs' lawyers and 75% of defendants' and mixed-practice lawyers agreed that early judicial intervention helps to limit discovery.[130] Such an approach is consistent with that contemplated by the drafters of the Federal Rules.[131]

G. The Seventh Circuit Pilot Program

The Seventh Circuit Electronic Discovery Pilot Program (hereinafter "Pilot Program")[132] illustrates one approach to "fine-tuning" e-discovery within the framework of the current Federal Rules.[133] The Pilot Program, comprising a set of "Principles Relating to the Discovery of Electronically Stored Information" ("Principles") and a "Standing Order" designed to implement the Principles, "was developed as a result of (a) continuing comments by business leaders and practicing attorneys, regarding the need for reform of the civil justice pretrial discovery process in the United States, (b) the release of the [ACTL/IAALS Report], and (c) The Sedona Conference® Cooperation Proclamation."[134] According to its statement of

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by telephone, of the problem and the Court will resolve the matter, forthwith.") (emphasis in original).

[128] Starbucks Corp. v. ADT Sec. Servs., Inc., No. 08-900, 2009 WL 4730798 (W.D. Wash. Apr. 30, 2009).

[129] *In re* Motor Fuel Temperature Sales Practices Litig., No. 07-1840, 2009 WL 959491 (D. Kan. Apr. 3, 2009).

[130] *See* ABA Survey, *supra* note 49, at 11.

[131] *See, e.g.*, FED. R. CIV. P. 26 advisory committee's note ("The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis.").

[132] SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM—PHASE ONE (2010), *available at* http://www.ilcd.uscourts.gov/Statement%20-%20Phase%20One.pdf [hereinafter "7th Cir. E-Discovery Pilot Program"].

[133] Another approach is illustrated by D. Md., SUGGESTED PROTOCOL FOR DISCOVERY OF ELECTRONICALLY STORED INFORMATION 1 (2007), *available at* http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf ("The purpose of this Suggested Protocol for Discovery of Electronically Stored Information (the 'Protocol') is to facilitate the just, speedy, and inexpensive conduct of discovery involving ESI in civil cases, and to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without Court intervention.").

[134] 7th Cir. E-Discovery Pilot Program, *supra* note 132, at 7. The Pilot Program is scheduled to run in phases with the first phase completed on May 1, 2010. *Id.* Phase Two of the Pilot Program

purpose, the Pilot Program was created to address "the rising burden and cost of discovery in litigation in the United States brought on primarily by the use of electronically stored information ("ESI") in today's electronic world."[135]

The cornerstone of the Pilot Program is early and informal communication between parties regarding issues relating to the storage, preservation, and discovery of ESI, as well as paper discovery—already an existing requirement under FED. R. CIV. P. 26(f)(2).[136] The Pilot Program Principles closely track *The Sedona Conference® Cooperation Proclamation*, focusing in large part upon cooperation between the parties to resolve common issues related to e-discovery.[137]

The Principles address common issues such as the scope of preservation, including that counsel are to confer prior to engaging in information exchanges regarding preservation and collection efforts.[138] Additionally, the Principles include some practice tools to assist practitioners in navigating the e-discovery process, including designating certain categories of information as "generally . . . not discoverable," thus requiring counsel to confer before requesting those categories of information.[139] The Principles also require parties to identify ESI and "make a good faith effort to agree on the format(s) for production," as well as, "discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party."[140] Significantly, the principles of the Pilot Program provide for the imposition of sanctions for the failure to cooperate and participate in good faith in the "meet and confer" process.[141] In the event a dispute over discovery arises during the meet and confer process, the Pilot Program requires the appointment of an e-discovery liaison to handle the resolution.[142]

In sum, the Pilot Program is a guide for practitioners to *comply with* the 2006 amendments and meet the rising judicial expectations that practitioners will be knowledgeable both about the Federal Rules and the

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will then run from June 2010 to May 2011, when the E-Discovery Committee will formally present its findings and issue its final Principles. *Id.*

[135] *Id.* at 7.

[136] *Id.* at 9 (citing FED. R. CIV. P.). The principles of the Pilot Program include the application of Rule 26(b)(2)(C)'s proportionality principles when formulating a discovery plan. *Id.* at 11 (citing FED. R. CIV. P.).

[137] *Id.* at 9 (discussing Sedona Conference, *supra* note 26, at 332).

[138] *Id.* at 14, Principle 2.04 (Scope of Preservation).

[139] *Id.* at 14-15.

[140] *Id.* at 15-16, Principle 2.06 (Production Format).

[141] *Id.* at 11-12, Principle 2.01 (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution).

[142] *Id.* at 12-13, Principle 2.02 (E-Discovery Liaison(s)).

benefits of cooperative discovery.[143] This type of program may prove to be a valuable tool in fostering the "just, speedy and inexpensive" resolution of disputes intended by the Federal Rules.[144]

IV. CONTROLLING E-DISCOVERY COSTS UNDER THE CURRENT FEDERAL RULES

Under the current Federal Rules, litigating parties and counsel have a multitude of strategies and techniques available to reduce costs across all phases of e-discovery including preservation, collection, relevance review, privilege review, and production. Some of these mechanisms are embodied in the Rules themselves (e.g., clawback agreements under Rules 26(b)(5)(B) and 16(b)(3)(B)(iv)), some are natural outgrowths of the Rules (e.g., cooperative agreements limiting the scope of preservation or production), and others are outside of the Rules altogether (e.g., improved corporate records management).

A. Enhanced Cooperation Holds the Greatest Potential to Control Costs and Burdens of E-Discovery

1. The Cooperation Required by the Federal Rules and Rules of Professional Conduct is a Starting Point

Cooperation between litigants has been a foundation of the Federal Rules governing discovery since their adoption in 1938.[145] Rules 1, 26, and 37 are the primary Rules embodying the expectation of cooperation in discovery.[146] As Judge Grimm wrote in the *Mancia* case:

> It cannot seriously be disputed that compliance with the "spirit and purposes" of these discovery rules [FED. R. CIV. P. 26 through 37] requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionally large to what is at stake in the litigation. Counsel cannot "behave responsively" during discovery unless they do both, which requires cooperation rather than contrariety, communication rather than confrontation.[147]

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[143] *See infra* Parts IV(A), (F).
[144] FED. R. CIV. P. 1.
[145] "A careful analysis of the Federal Rules of Civil Procedure demonstrates that the Rules both promote and assume cooperation in discovery between litigating parties throughout the litigation." *The Case for Cooperation*, *supra* note 13, at 348-49.
[146] *Id.* For a detailed analysis of the cooperation component of these rules, see Steven S. Gensler, *A Bull's-Eye View of Cooperation in Discovery*, 10 SEDONA CONF. J. 363 (2009).
[147] *Mancia*, 253 F.R.D. at 357-58.

Rules of professional conduct, such as the duty to expedite litigation and the duties of candor to the court and fairness to the opposing party,[148] also require attorneys to cooperate in discovery.

The drafters of the 2006 e-discovery amendments built on this pre-existing obligation, amending Rule 26(f) to "direct the parties to discuss discovery of electronically stored information during their discovery-planning conference."[149] As The Sedona Conference® aptly points out, "the explosion of ESI has made the development of parameters to guide cooperation in discovery more essential than ever."[150] The importance of cooperation under the 2006 amendments has been expressly noted:

> [T]he ESI Rules tie the tools for restraints on discovery to increased disclosure between the opposing parties and increased judicial supervision of discovery. Parties to litigation proceed at their own risk if they disregard either branch of the "bargain:" (1) tools to enforce balanced preservation/discovery and (2) greater transparency in preservation/discovery.[151]

One often-overlooked aspect of e-discovery is that, while the written Rules set out the *minimum acceptable level* of cooperation among parties, they can also open the door for much broader and deeper collaborative efforts. By fully engaging in cooperative discovery, counsel can forge a better, faster, and cheaper e-discovery process, maximizing the benefits to all parties in the case. For example, the parties may agree on the sources of information to be preserved or searched; number and/or identities of custodians whose data will be preserved and/or collected; topics for discovery; time periods for which discovery will be sought; search terms and methodologies to be employed to identify responsive data; and the format(s) in which document production will be made.[152] The parties may further discuss and agree on protocols that unlock some of the massive efficiencies of e-discovery, such as methods for searching and sorting data, or the de-duplication of data sets.

It is important to remember that cooperation does not entail merely volunteering data or information, or disclosing the weaknesses of one's position. Nor does it make an attorney less of an advocate for his client's interests. Rather, it requires "early, candid, and ongoing exchanges between counsel."[153] The parties may not be able to reach agreement on everything, but they will educate each other through an iterative process

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[148] *See* MODEL RULES OF PROF'L CONDUCT R. 3.2, 3.4 (2009).
[149] FED. R. CIV. P. 26(f) advisory committee's note.
[150] The Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 342 (2009).
[151] Rogers, *supra* note 82, at 81.
[152] *See* 2006 Advisory Committee Notes.
[153] *Id.*

that will ultimately clarify what they do and do not know, and the issues on which they can and cannot agree. This process will isolate any genuine disputes that may exist between the parties, which can then be presented to the court for resolution, thus reducing the burden on the courts and the parties alike.

2. Tiered Discovery as an Example of Cooperation

One way in which parties can reduce the volume of information exchanged in discovery and the associated costs is to reach an agreement as to tiered discovery. This approach would incorporate a schedule whereby certain tranches of information would be produced in sequence, and, in some instances, subject to the satisfaction of certain thresholds. For example, counsel for the parties might agree to initiate discovery with the production of information from the files of a set number of custodians, departments, or both, with subsequent productions of other information from other custodians or departments to be permitted only if certain showings are made.

Of course, to reach such an agreement, counsel for the parties must be vested with sufficient information to enable counsel to negotiate such a compromise. This is particularly critical because each case is unique and thus specifics are important. In order to accrue such information, counsel for the parties must first gather information about their respective clients' information systems and the likely sources of information and then be willing to engage in open dialogue with the adversary to formulate an informed discovery plan. This is the intent of the Rule 26(f) meet and confer requirement, and it pushes the parties to consider the proportionality concerns associated with a particular request.

3. Courts Encourage And Assist Those Engaging in Enhanced Cooperation

As e-discovery law continues to evolve, the courts are encouraging parties to act "in a manner consistent with the spirit of cooperation, openness, and candor owed to fellow litigants and the court and called for in modern discovery."[154] Several courts, citing The *Sedona Conference® Cooperation Proclamation*, have recently restated that "the best solution in the entire area of electronic discovery is cooperation among counsel."[155]

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[154] Sentis Group, Inc. v. Shell Oil Co., 559 F.3d 888, 891 (8th Cir. 2009).

[155] William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 136 (S.D.N.Y. 2009); *see also* Technical Sales Assocs., Inc. v. Ohio Star Forge Co., No. 07-11745, 2009 WL 728520, at *4 (E.D. Mich. Mar. 19, 2009); SEC v. Collins & Aikman Corp., 256 F.R.D. 403, 415 (S.D.N.Y. 2009); *see generally* Ralph C. Losey, Mancia v. Mayflower *Begins a Pilgrimage to the New World of Cooperation*, 10 SEDONA CONF. J. 377 (2009).

Courts are ever more willing to assist lawyers who are not getting reciprocal cooperation from their adversaries. Judge Scheindlin described the attitude of judges in the Southern District of New York this way:

> In our court, for example, many judges don't even allow discovery motions. We just say, "Come in and tell us about it," or, "Write a three-page letter." If we catch this early—if a lawyer comes in early and says, "I'm not getting cooperation. I'm trying to work together to get a search-term protocol. I'm trying to get him to identify the sources on which data is maintained, and he's not doing it,"—if you come and tell me, I will take care of it quickly. It will be a quick ruling from the bench to make it happen.
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> . . . [I]f you would come in and say, "We need help. We need the court's intervention"—when we wrote these new rules, that was the hope, that we would have more court intervention in supervising the discovery process . . . . I think most of us would do it very rapidly and very informally.[156]

As practitioners become more confident that judges will respond in this manner, e-discovery problems will be addressed earlier and more effectively. No rule change is needed; prompt and informed action and communication are the keys.

Many judges recognize that costly and avoidable problems result when cooperation is not achieved, or in some cases, even attempted. Judges have repeatedly, and with mounting frustration, handled these situations by ordering litigants to cooperate, as contemplated by the Federal Rules. As Magistrate Judge John Facciola observed: "Counsel should become aware of the perceptible trend in the case law that insists that counsel genuinely attempt to resolve discovery disputes."[157]

In *S.E.C. v. Collins & Aikman Corp.*,[158] a defendant made a 54-category request to the SEC in a large securities case. The SEC responded by producing "1.7 million documents (10.6 million pages) maintained in thirty-six separate Concordance databases - many of which use different metadata protocols."[159] Judge Scheindlin ruled that the SEC's response amounted to avoidance of meaningful disclosure and admonished all parties to meet their obligations under the Federal Rules:

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[156] Panel Discussion, *Sanctions in Electronic Discovery Cases: Views from the Judges*, 78 FORDHAM L. REV. 1, 33 (2009).
[157] Newman v. Borders, Inc., 257 F.R.D. 1, 3 n. 3 (D.D.C. 2009).
[158] *Collins & Aikman Corp.*, 256 F.R.D. at 406-07.
[159] *Id.* at 407.

> With few exceptions, Rule 26(f) requires the parties to hold a conference and prepare a discovery plan . . . . Had this been accomplished, the Court might not now be required to intervene in this particular dispute. I also draw the parties' attention to the recently issued Sedona Conference Cooperation Proclamation, which urges parties to work in a cooperative rather than an adversarial manner to resolve discovery issues in order to stem the rising monetary costs of discovery disputes.[160]

The Court emphasized that even where a litigant feels burdened by a broad request, that litigant is still obliged to communicate and cooperate.

In *Mancia v. Mayflower Textile Services. Co.*,[161] the plaintiffs propounded overly broad discovery requests, and the defendants responded with boilerplate, non-substantive responses; neither side attempted to cooperate or communicate—resulting in a costly discovery dispute that could have been mitigated through cooperation. Judge Grimm noted that counsel for defendants likely violated Rule 26(g) by failing to make a "reasonable inquiry" before objecting to the discovery requests.[162] The Court directed the attorneys to meet and attempt to reach resolution by cooperation, including an agreement on a range of damages that were likely if the plaintiff were to prevail, in order to establish a budget for discovery in the case.[163]

Taken together, these cases demonstrate that enhanced cooperation among parties—beyond the level of cooperation mandated by the Federal Rules—is the most powerful tool available to reduce the costs and burdens of e-discovery. Those who hold fast to the outdated notion that adversarial discovery is the only way to litigate are clinging to the railing of a sinking ship.

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[160] *Id.* at 414-15 (internal quotations and citations omitted).
[161] Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354 (D. Md. 2008).
[162] *Id.* at 364.
[163] *Id.* at 364-65; *see also* Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep't. of Homeland Sec., 255 F.R.D. 350, 364 (S.D.N.Y. 2008) ("This lawsuit demonstrates why it is so important that parties fully discuss their ESI early in the evolution of a case. Had that been done . . . the parties might have been able to work out many, if not all, of their differences without court involvement or additional expense, thereby furthering the 'just, speedy, and inexpensive determination' of this case.") (citation omitted); Gipson v. Sw. Bell Tel. Co., No. 08-2017, slip op. at 1-2 (D. Kan. Dec. 23, 2008) ("As of the date of the discovery conference, more than 115 motions and 462 docket entries had been filed in this case, even though the case has been on file for less than a year. Many of the motions filed have addressed matters that the Court would have expected the parties to be able to resolve without judicial involvement . . . . To help the parties and counsel understand their discovery obligations, counsel are directed to read The Sedona Conference Cooperation Proclamation.").

B. Reducing the Cost of Document Review

According to a recent study, "as much as 75 to 90 percent of additional costs attributable to e-discovery are due to increases in attorney billings for 'eyes-on' review of electronic documents."[164] Clearly, reducing attorney review time—whether for initial relevance review or secondary privilege review—can have a huge impact on overall e-discovery costs. The 2006 amendments addressed this issue with the adoption of Rule 26(b)(5)(B), which establishes a procedure for a party to assert a claim of attorney-client privilege or work product protection after the allegedly protected information has been produced in discovery.[165] The Advisory Committee acknowledged:

> Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege . . . .
>
> These problems often become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming.[166]

Under Rule 26, the scope and cost of privilege review can be substantially reduced with the use of "clawback" or "quick peek" agreements or other mechanisms to which the parties agree.[167] However, while Rule 26(b)(5)(B) provided a procedural framework for such agreements, its utility was limited by the fact that these agreements could provide protection against waiver only as to the parties to that particular litigation.[168] In addition, a lack of uniformity in the federal courts as to the conditions giving rise to waiver, and the scope of any waiver, created additional risk to parties attempting to utilize cost-saving strategies under the new rule.[169]

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[164] Dertouzos, *et al.*, *The Legal and Economic Implications of Electronic Discovery*, *supra* note 10, at 3.
[165] FED. R. CIV. P. 26(b)(5)(B).
[166] FED. R. CIV. P. 26(b)(5)(B) advisory committee's notes.
[167] Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, *supra* note 33, at 201-02.
[168] *Id.* at 201.
[169] *Id.*

C. Using Federal Rule of Evidence 502 to Reduce Privilege Review Costs

The outcry concerning the large volume and costs of e-discovery had great resonance prior to the enactment of Federal Rule of Evidence 502 in September 2008. While advances in search technology had made document review for relevance simpler and cheaper,[170] at least at the "first pass" level, the risk of inadvertent waiver of attorney-client privilege and work product protection still impelled many attorneys to opt for "eyes-on" review of every document.[171] Senator Specter, co-sponsor of the rule change in the Senate, neatly summarized the effect of the prior law:

> Current law on attorney-client privilege and work product is responsible in large part for the rising costs of discovery—especially electronic discovery. Right now, it is far too easy to inadvertently lose—or "waive" the privilege. A single inadvertently disclosed document can result in waiving the privilege not only as to what was produced, but as to all documents on the same subject matter. In some courts, a waiver may be found even if the producing party took reasonable steps to avoid disclosure. Such waivers will not just affect the case in which the accidental disclosure is made, but will also impact other cases filed subsequently in State or Federal courts.[172]

The costs associated with conducting this manual review in a world of ever-growing documents were often astronomical. Senator Patrick Leahey, another co-sponsor of the rule change in the Senate, estimated that "[b]illions of dollars are spent each year in litigation to protect against the inadvertent disclosure of privilege materials."[173] Moreover, the lack of uniformity and predictability among the federal courts prevented parties from fashioning creative extrajudicial solutions to this problem, such as quick peek and clawback agreements.[174]

Federal Rule of Evidence 502 was designed expressly to address these problems, and it indeed created a sea-change in privilege and work product law.[175] For example, whereas federal courts previously applied different standards in deciding when a privilege disclosure constituted subject matter

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[170] *See* discussion *infra* Part IV.D.

[171] Patrick L. Oot, *The Protective Order Toolkit: Protecting Privilege with Federal Rule of Evidence 502*, 10 SEDONA CONF. J. 237, 237-38 (2009).

[172] S. REP. NO. 110-264, at 2 (2008), *reprinted in* 2008 U.S.C.C.A.N. 1305, 1306.

[173] *Id.*

[174] *See* Martin R. Lueck & Patrick M. Arenz, *Federal Rule of Evidence 502(d) and Compelled Quick Peek Productions*, 10 SEDONA CONF. J. 229, 229-30 (2009); *see also* Jessica Wang, *Nonwaiver Agreements After Federal Rule of Evidence 502: A Glance at Quick-Peek and Clawback Agreements*, 56 UCLA L. REV. 1835, 1842-44 (2009).

[175] *See* S. REP. NO. 110-264; Oot, *supra* note 171, at 239-41.

waiver, FRE 502 creates a uniform rule limiting subject matter waiver only to instances where "(1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together."[176] Similarly, FRE 502 creates a uniform approach to inadvertent waiver, providing that there is no waiver where (1) disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error."[177] Finally, FRE 502 ensures that a court's order regarding privilege is binding as to the entire world and authorizes the court to incorporate quick peek and claw-back agreements into its order.[178]

This important change in privilege law created by Rule 502 will, in time, benefit all litigants. With the protection against inadvertent waiver provided by the rule, search technology will reduce the cost of privilege review as it has for relevance review.[179] In fact, it has been estimated that the use of Fed. R. Evid. 502 could reduce the cost of privilege review by as much as 80% in some cases.[180] Moreover, there are several examples of creative protocols that, in additional to Fed. R. Evid. 502, may solve many of the vexing and costly problems associated with privilege review. For example, in a recent law review article, two of the leading commentators on electronic discovery issues suggest that in most cases, the parties can dispense with the traditional document-by-document privilege log in favor of a new approach that relies on the cooperation of counsel and active supervision by the court.[181] Through cooperation, counsel will seek to agree on categories of information that can be eliminated from any privilege review because the information is clearly privileged or clearly not privileged. Next, the parties will attempt to agree on categories of information that must be reviewed. Privilege claims will then be made and, if challenged, initially assessed based on a sample of documents from each category. Next, a detailed description of the withheld information

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[176] FED. R. EVID. 502(a)(1)-(3).
[177] FED. R. EVID. 502(b)(1)-(3).
[178] FED. R. EVID. 502(d).
[179] *See* discussion *infra* Part IV.D; *see also* MICHELE C.S. LANGE & KRISTIN M. NIMSGER, ELECTRONIC EVIDENCE AND DISCOVERY: WHAT EVERY LAWYER SHOULD KNOW *NOW* 193-205 (2d ed. 2009); Anne Kershaw, *Automated Document Review Proves Its Reliability*, 5 DIGITAL DISCOVERY & E-EVIDENCE 11, 10-11 (2005), *available at* http://www.ediscoveryinstitute.org/pubs/AutoDocumentReviewReliability.pdf; *see also* eDiscovery Institute, Inc., *Comparison of Auto-Categorization with Human Review*, http://www.ediscoveryinstitute.org/pubs/ComparisionAutoCategorization.pdf (last visited Aug. 27, 2010).
[180] Comments of Daniel Capra in *Managing Electronic Discovery: Views From The Judges*, 76 FORDHAM L. REV. 1, 28 (Oct. 2007).
[181] Hon. John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. CTS. L. REV. 19 (2010).

remaining in dispute would be provided so that the scope of *in camera* review is minimized. Finally, counsel would prepare a detailed privilege log reflecting only the documents ultimately withheld, greatly reducing the time and expense required.

The parties in a pending large antitrust case designed another protocol that greatly reduced the burden and delay associated with privilege review. In that case, counsel designed a privilege protocol utilizing search terms to identify documents that are likely to be privileged. For text-searchable documents containing the names of corporate or outside counsel and certain Boolean identifiers (such as (advice or advise) /5 (attorney* or counsel or lawyer*)), the protocol allows producing parties to avoid manual review, and instead, requires only that they prepare an automated privilege log (populated with agreed-upon metadata). The protocol allows the requesting party to challenge suspicious entries on the automated privilege log (thereby causing manual privilege review and logging). The protocol was successful in dramatically reducing the need for manual review.

Clearly, further rule change is not necessary so soon after the introduction of Rule 502. The effects of the rule have yet to be felt. Rather, what is needed is a change in attorney practices regarding the creation and protection of privileged communications and privilege review, and a willingness of courts to issue protective orders encouraging the use of new technologies as a counter-balance to the increased volume of documents in the digital age. Lawyers, of course, must protect the privilege from the outset and craft solutions to insure its ongoing protection.

D. Developing Technologies Are Reducing The Cost of Document Review

Those who complain about the high cost of electronic discovery often overlook the cost *savings* associated with e-discovery. Gone are the days (and travel expenses) when lawyers spent months in document warehouses reviewing and coding paper documents. Instead of the weeks or months (and associated expenses) it would take for lawyers and paralegals to objectively code a large set of documents, coding is now done instantly with the push of a button by utilizing metadata embedded within ESI. Thus, collection and review of electronic documents is a great deal more efficient than the processing of paper documents.[182] In minutes, millions of documents can be searched and organized using keywords or concepts, or sorted by custodian, recipient, date, or any of dozens of other metadata

[182] *See, e.g.*, FED. R. CIV. P. 26(b)(2) advisory committee's note, ("Electronic storage systems often make it easier to locate and retrieve information.").

fields.[183] The cost to process and review a production of 1.5 million pages of paper has been estimated at $3.3 million. The cost to process and review the same production, using a combination of electronic tools and human review, would be approximately $356,000, an 89% reduction.[184]

The cost of attorney review has always been the single most expensive component of discovery. By using e-discovery techniques, advanced work flows, and the power of modern computers to compile and manage very large data collections, the cost of attorney review can be greatly reduced. However, evidence shows that even current, proven tools for reducing document review costs are shockingly underutilized.

> A recent study published by the eDiscovery Institute . . . shows that, despite the technical ability to suppress or consolidate duplicates within an electronic document population, chances are about 50:50 that your outside counsel fails to take advantage of this technology, opting instead to doublebill for reviewing unnecessary duplicates for privilege, confidentiality and relevance. The study shows that, on average, law firms that do not consolidate duplicates across custodians are reviewing 27 percent more records than needed, and in some cases 60 percent or more, raising serious ethical issues involving conflicts of interest and technical competency.[185]

Cost-saving options abound in the current e-discovery environment. Documents can be loaded onto a review platform and hosted on a secured internet site that enables document review to be performed from any location and, thus, allows for the use of in-house or less expensive outsourced attorneys from alternative locations. Computer-assisted culling can eliminate huge groups of documents from the review process. For example, documents that do not meet keyword or date range criteria can be removed from the review set with a few keystrokes. No longer does every document need "eyes-on" attorney review.

More recently, next generation review tools are utilizing content analytics to group documents by topic, resulting in much more efficient and accurate attorney review. Other tools use small sets of human-coded

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[183] *See* The Sedona Conference, *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 18 SEDONA CONF. J. 1 (2007) (providing an in-depth review of search and retrieval tools and methodologies).

[184] Chris Paskach & Vince Walden, *Document Analytics Allow Attorneys to be Attorneys*, DIGITAL DISCOVERY & E-EVIDENCE Aug. 2005, at 10, *available at* http://www.scribd.com/doc/17862171/DDE-Document-Analytics-Allow-Attorneys-to-be-Attorneys.

[185] Patrick Oot, Joe Howie & Anne Kershaw, *Ethics and E-Discovery Review*, THE JOURNAL OF THE ASS'N OF CORP. COUNSEL, Jan./Feb. 2010, 46-47 (footnote omitted) (citing Report on Kershaw-Howie Survey of E-Discovery Providers Pertaining to Deduping Strategies, Electronic Discovery Institute (2009)).

documents as exemplars to code large document collections in seconds. Still other tools eliminate duplicate and near-duplicate documents from datasets, resulting in estimated savings of 30% to 40% of review costs.

> A number of legal service providers recently have begun offering various forms of automated tools that promise to significantly reduce the number of electronic documents to be manually reviewed by extracting the documents most likely to be responsive to a discovery request, and leaving the remainder unselected and unreviewed. Given the huge explosion in the cost of complying with e-discovery requests, tools that reasonably and appropriately enable a party to safely and substantially reduce the amount of ESI that must be reviewed by humans should be embraced by all interested parties—plaintiffs, defendants, the courts, and government agencies.[186]

The future promises even more advanced tools.[187]

While there is always resistance to new technologies displacing human effort, those objections will fade as the technologies become more familiar and are scientifically validated. For example, a 2009 study comparing the relative accuracy of human review against computerized review for relevance concluded that "[o]n every measure, the performance of the two computer systems was at least as accurate . . . as that of a human re-review."[188]

Increasingly sophisticated and defensible analytic tools enable litigants to identify unstructured, unmanaged data most likely to be relevant to a given matter. With this knowledge, parties can more accurately evaluate cases early in the litigation cycle and significantly reduce the volume of documents to be collected and reviewed.

> Litigators who plan to use keywords to initially limit the volume of ESI to be later searched and reviewed for relevant documents would be better served by considering utilizing early case assessment software to evaluate the efficacy of the keywords selected. These tools allow the user to process all of the data at a much lower cost and then run the keywords themselves as many times as necessary

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[186] *The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process* (May 2009) (footnote omitted).

[187] "[A] feature-rich set of new information retrieval methods are being discussed in the academic literature and employed in selected real-world contexts, and thus may soon be on the horizon for use in future litigation. Such techniques make exhaustive use of various forms of metadata, and are referred to by various umbrella terms, including social networking analysis, links analysis, visualization techniques, and cognitive information behavior." Paul & Baron, *supra* note 16, at n.115.

[188] Herbert L. Roitblat, Anne Kershaw & Patrick Oot, *Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review*, 61 J. AM. SOC. INFO. SCI. & TECH., (2010) at 70, 79.

> without additional cost to determine whether the keywords sufficiently removed irrelevant ESI. Moreover, this software allows a user who is negotiating with the other side regarding keywords to check whether the opponent's proposed keywords remove enough irrelevant ESI before agreeing to them. Arguably, if government counsel had utilized this type of software before agreeing to 400 keywords in the *In re Fannie Mae Litigation*, then counsel may have realized at an earlier date that such a large keyword search would require what became an impossible review of 660,000 documents by the previously stipulated to deadlines, ending in a contempt citation being affirmed on appeal.[189]

In a well-known study of discovery costs, Dupont released the following calculations:

> Findings for legal discovery for nine key cases:
>
> - Total # pages reviewed: 75,450,000
> - Total #pages responsive: 11,040,000
> - Total %pages past retention period: 50%
> - Unnecessary review fees: $11,961,000 USD at review cost of between 20-80 cents/page[190]

These findings did not take into consideration the non-litigation costs of over-retention, such as increased data storage expense and privacy/security risks.

Using these techniques, parties can drastically reduce the corpus of data requiring attorney review. Where once armies of contract attorneys were often utilized to review 100% of the collected documents, by using culling techniques and other tools available to law firms and corporations today, fewer attorneys need only review as little as 20% to 30% of the total documents initially collected. Huge cost-savings can be achieved—but only by parties who are up to speed on the use, and the limits, of developing technologies.

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[189] Ronni D. Solomon & Jason R. Baron, *Bake Offs, Demos & Kicking the Tires: A Practical Litigator's Brief Guide to Evaluating Early Case Assessment Software & Search & Review Tools*, The Sedona Conference Institute, 2009, at 4, *available at* http://www.umiacs.umd.edu/~oard/teaching/708x/spring09/Bakeoffs.FINAL.pdf.

[190] IBM Corp., *Building Blocks for Compliance—IBM FileNet*, at 38-39 (2007), *available at* ftp://ftp.software.ibm.com/software/data/ECM/Bro/IBM_Filenet_Building_Blocks_for_Compliance.pdf.

E. E-Discovery Cost and Risk Can Be Controlled With Improved Records Management and Litigation Preparedness

The volume and variety of ESI that organizations contend with is not created by opposing parties in litigation. The costs and risks of e-discovery in litigation are determined, in large part, by the amount of ESI created and maintained by the responding party and the effectiveness of the management system applied to the stored data. Organizations seeking to reduce the cost of e-discovery would be well-advised to define a legally defensible process to identify and preserve ESI subject to legal holds or regulatory requirements and delete all electronic data that need not be saved for any other legitimate purpose.

The United States Supreme Court has given its imprimatur to corporate document retention and destruction policies:

> Document retention policies, which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business . . . . It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.[191]

The 2006 amendments to the Federal Rules provide a "safe harbor" protecting organizations from sanctions resulting from the destruction of ESI "lost as a result of the routine, good-faith operation of an electronic information system."[192]

And yet, a 2009 survey found that 35% of responding organizations have no record retention schedules in place for electronic records of any kind.[193] Nearly half (47%) of the organizations have no formal email retention policy.[194] Nearly two-thirds (64%) have no formal procedures in place for the destruction of records.[195] Seventy-eight percent (78%) have no retention practices in place for emerging sources of ESI such as voicemail, instant messaging, blogs and web pages.[196] Not surprisingly, the following were among the survey findings:

- Most organizations are not prepared to meet many of their future compliance, legal and governance responsibilities because

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[191] Arthur Andersen, L.L.P. v. U.S., 544 U.S. 696, 704 (2005).
[192] FED. R. CIV. P. 37(e).
[193] Cohasset Associates & ARMA Int'l, *2009 Electronic Records Management Survey: Call for Sustainable Capabilities* at 23, *available at* http://www.rimeducation.com/survey.php.
[194] *Id.* at 26.
[195] *Id.* at 36.
[196] *Id.* at 27.

of deficiencies in the ways they retain and dispose of their electronically stored information and records.[197]

- A majority of organizations still do not have the capability or infrastructure in place to preserve their records for as long as they are needed and cannot ensure integrity and future accessibility to their electronic records.[198]

According to the IAALS, "[B]asic e-discovery preparation means that when the lawsuit is anticipated, (1) the litigant and its counsel should be able to identify and discuss the location and retrieval of all potentially relevant and 'reasonably accessible' ESI at the mandatory early meeting of the parties; and (2) all potentially relevant ESI can and will be preserved during the life of the lawsuit."[199] Various surveys in 2007 found that from 65% to 94% of responding organizations were unprepared for e-discovery.[200] And, a 2009 survey by Kroll Ontrack found that fewer than half of the responding companies have policies in place to facilitate ESI discovery readiness.[201] While most of the companies have instituted some form of document retention policy, they have not adopted the policies, procedures, and tools needed to locate, preserve, and produce ESI for threatened or actual litigation. Over 40% of the respondents either do not have a mechanism in place to suspend their document retention policy in response to a litigation hold or did not know whether they had such a procedure in place.[202]

This is simply unacceptable in the face of the 2006 amendments. Now, more than three years later, creators of information continue to gripe about the burdens of ESI in litigation but have taken few steps to ameliorate the problems and prepare for the future.

According to a 2008 Gartner Group report, companies that had not implemented formal e-discovery processes spent nearly twice as much to gather and produce documents as those that have adopted formal procedures.[203] By the end of 2012, enterprises that fully document their search processes in e-discovery will save 25% on their collection processes.[204] Enterprises of all sizes, and those facing any number of legal

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[197] *Id.* at 10.
[198] *Id.*
[199] IAALS, *supra* note 60, at 16.
[200] *Id.* at 11.
[201] Kroll Ontrack, *Third Annual ESI Trends Report* 3 (2009), *available at* http://www.krollontrack.com/library/esitrends3_krollontrack2009.pdf.
[202] *Id.* at 8.
[203] Gartner Research, *The Costs and Risks of E-Discovery in Litigation* 2 (Dec. 1, 2005).
[204] Press Release, Gartner Research, Gartner Says Enterprises That Fully Document Their Search Processes in E-Discovery by 2012 Will Save 25 Percent on Their Collection Processes (Sept. 17, 2009), *available at* http://www.gartner.com/it/page.jsp?id=1180688.

actions annually, should have a simple set of practices to follow anytime they need to embark on an e-discovery process.

According to Magistrate Judge Andrew Peck, "[m]any large companies are implementing email archiving and indexing systems, and ESI retention practices, as a general matter, separate and apart from any specific litigation. That preparation should bring down the cost of discovery of ESI when litigation arises."[205] The IAALS warns that "[t]he reactive approach toward e-discovery causes inefficiencies at both the front-end search and retrieval stage and the back-end attorney review stage. Both stages are responsible for high e-discovery costs."[206]

The courts are gradually coming to demand evidence of defensible records management systems when parties are accused of failing to produce relevant ESI in litigation. In *Phillip M. Adams & Associates, L.L.C. v. Dell, Inc.*, the court found the plaintiff guilty of spoliation due to its:

> [Q]uestionable information management practices. A court—and more importantly, a litigant—is not required to simply accept whatever information management practices a party may have. A practice may be unreasonable, given responsibilities to third parties. While a party may design its information management practices to suit its business purposes, one of those business purposes must be accountability to third parties.[207]

Citing *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age*, the court wrote: "'An organization should have reasonable policies and procedures for managing its information and records.' 'The absence of a coherent document retention policy' is a pertinent factor to consider when evaluating sanctions. Information management policies are not a dark or novel art."[208]

Clearly, lack of management controls over rapidly increasing amounts of electronically stored information—in some institutions exceeding exabytes (1 billion gigabytes) of content—multiplies the costs of e-discovery. Most companies maintain stores of outdated ESI including e-mail collections, data from legacy systems, and obsolete disaster recovery

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[205] Andrew J. Peck, *The Federal Rules Governing Electronic Discovery* 2 n.2 (June 4, 2009), *available at* http://www.abanet.org/labor/lel-annualcle/09/materials/data/papers/138.pdf.
[206] IAALS, *supra* note 60, at 19.
[207] 621 F. Supp. 2d 1173, 1193 (D. Utah 2009).
[208] *Id.* at 1193-94; *see also* Maggette v. BL Dev. Corp., Nos. 07-181, 182, 2009 WL 4346062, at *1 (N.D. Miss. Nov. 24, 2009) (court expresses doubt that "corporations as large and sophisticated as the defendants . . . do not have either paper files, electronic files or information or—even in light of Hurricane Katrina—backup measures and files for at least *some* of the information requested by plaintiffs."); Meeks v. Parsons, No. 03-6700, 2009 WL 3003718, at *6 (E.D. Cal. Sept. 18, 2009) ("A recipient that is a large or complex organization or that has received a lengthy or complex document request should be able to demonstrate a procedure for systematic compliance with the document request.").

tapes. Even companies with document destruction policies in place often fail to comply with those policies.

As Magistrate Judge John Facciola observed:

> Electronic data is difficult to destroy and storage capacity is increasing exponentially, leading to an unfortunate tendency to keep electronically stored information even when any need for it has long since disappeared. This phenomenon—the antithesis of a sound records management policy—leads to ever increasing expenses in finding the data and reviewing it for relevance or privilege.[209]

The situation was perhaps best summed up by the court in *Starbucks Corp. v. ADT Security Services, Inc.*: "The fact that a company as sophisticated as [defendant] chooses to continue to utilize [an obsolete data system] instead of migrating its data to its now-functional archival system should not work to plaintiff's disadvantage."[210] "'[*T*]*he Court cannot relieve Defendant of its duty to produce those documents merely because Defendant has chosen a means to preserve the evidence which makes ultimate production of relevant documents expensive.*'"[211]

F. Improved Attorney Education Will Mitigate E-Discovery Problems Going Forward

Too many attorneys who seek revisions to the Rules do not have a sufficient understanding of ESI or the 2006 amendments. Rather than revise the Rules, attorneys need to learn more about both the technical aspects of ESI and how the current Federal Rules can be used to make electronic discovery effective and efficient. "Each attorney is a perpetual student who must strive to keep abreast of the rapid inventions and progress of the unstoppable tidal wave of technological evolution."[212]

When the parties in *Covad Communications* complained to a magistrate judge that the producing party had produced image files when the requesting party wanted native files (but had not specified that request to the producing party), Judge Facciola reprimanded the parties for failing to understand the ramifications of production in different formats, adding "the courts have reached the limits of their patience with having to resolve electronic discovery controversies that are expensive, time consuming and so easily avoided by the lawyers' conferring with each other on such a

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[209] *Covad*, *supra* note 123, at 16.
[210] No. 08-900, 2009 WL 4730798, at *6 (W.D. Wash. Apr. 30, 2009).
[211] *Id.* (emphasis added; citation omitted).
[212] Ralph C. Losey, *Lawyers Behaving Badly: Understanding Unprofessional Conduct in E-Discovery*, 60 MERCER L. REV. 983, 1004 (2009).

fundamental question as the format of their productions of electronically stored information."[213]

Rather than learn the hard way, as some attorneys regrettably do, attorneys should take the time to educate themselves on ESI. Lawyers are accustomed to learning about new fields and expanding their expertise. As Megan Jones wrote in the *National Law Journal* last December:

> *If your case were about e-discovery, you would learn it.* A good antitrust lawyer with a case about polyester learns the economics of the textile industry, perhaps even hiring an industry expert. The same should be so for electronic discovery. Not every attorney on a case team needs to be conversant, but at least one does. And that attorney alone should, despite rank or prestige, be the advocate that speaks on behalf of the client on these matters. Only an attorney who understands what preserving "all metadata" means should be in the position to agree to it on behalf of a client. Only an attorney who knows what the current state of ESI common law decisions is should decide which motions should be filed (not every fight should be fought).[214]

The 2006 amendments to the Federal Rules will not reach their full utility if attorneys do not make any effort to utilize them properly and if courts do not require parties to do so.

V. MORE TIME IS NEEDED

Despite the clamor from segments of the bar that the 2006 amendments to the Federal Rules need to be immediately revised, a more rational and reasoned approach would allow the latest set of revisions to get their walking legs. The 2006 amendments have been in effect for less than four years. Most lawyers do not yet understand the full implications of the revised Rules, and the number of complex litigation cases in which they have been able to play out from start to finish is miniscule.

At this time, we have little reason to believe that the Rules are not or will not be effective in promoting the fair administration of justice in an efficient and effective manner. Indeed, when one compares the FJC Survey taken in 1997 (before the advent of e-discovery) with the responses to the 2009 survey conducted by the FJC, a similar percentage of respondents said that the amount of discovery is right, the cost of discovery is reasonable,

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[213] Covad Commc'ns Co. v. Revonet, Inc., 254 F.R.D. 147, 151 (D.D.C. 2008).

[214] Megan Jones, *Giving Electronic Discovery a Chance to Grow Up*, NAT'L L. J., Dec. 14, 2009, at 19 (emphasis added).

and the discovery process is fair.[215] The 2009 FJC Survey did not produce a consensus that the Rules need to be revised to *limit* electronic discovery;[216] instead, the majority of respondents supported revising the Rules to *enforce* discovery obligations more effectively.[217] More than two-thirds of survey respondents agreed that "the procedures employed in the federal courts are generally fair."[218]

Furthermore, as even Judge Lee Rosenthal has recognized, the 2006 amendments were never meant to solve all the issues raised by the increasing volumes of ESI and the evolving process of electronic discovery.[219] Litigators and judges alike need to confront the realities of a changing litigation environment head-on—for instance, by taking active steps to manage their data and engaging in increased cooperation in the discovery process. We are just beginning to obtain the kind of empirical data we need to understand the adequacy of the Rules, and perhaps more importantly, what changes to discovery outside of the Rules may be necessary to ensure that discovery in the digital age can succeed without unreasonable expense.

A. The Costs of E-Discovery Do Not Justify Reactionary Rule Changes

Those seeking to amend the Federal Rules often cite the cost of e-discovery as a principal justification for immediate change.[220] This is not the first time that premature rule changes have been called for in response to technological changes. Throughout the twentieth century, lawyers and judges expressed surprise every time discovery volume increased, never recognizing that the Rules, litigation strategy, and most importantly, technology, have always adapted, finding ways to make the new larger volume manageable. When volume has increased, technology has caught up; in 2001, processing, searching, and exporting one gigabyte of data cost around $2,000, now it costs about $400.[221] Backup tapes, which were almost always deemed inaccessible as recent as two years ago, are now routinely indexed and archived in a way that make them readily

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[215] FJC Survey, *supra* note 50; Hon. Lee H. Rosenthal, Keynote Address at the Georgetown University Law Center Advanced E-Discovery Institute: Is the E-Discovery Process Broken, And, If So, Can It Be Fixed? (Nov. 12, 2009) (recording available at the Continuing Legal Education Department of Georgetown University Law Center).
[216] FJC Survey, *supra* note 50, at 61.
[217] *Id.* at 63-64.
[218] *Id.* at 68-69.
[219] Rosenthal, *supra* note 215.
[220] *See, e.g.*, ALFRED W. CORTESE, JR., SKYROCKETING ELECTRONIC DISCOVERY COSTS REQUIRE NEW RULES, ALEC Policy Forum, at 9-12 (Mar. 2009), *available at* http://www.alec.org/am/pdf/apf/electronicdiscovery.pdf.
[221] Jones, *supra* note 214.

accessible.[222] Modern e-discovery tools have dramatically increased the rate of document review from approximately 25 documents per hour to nearly 200 documents per hour.[223] And, as discussed in Part IV.D above, new e-discovery tools are in constant development. Calls to amend the Federal Rules based on the current costs or burdens of e-discovery will be rendered obsolete by advancing technology before such amendments even take effect.[224] It would be foolhardy to base decisions about the Federal Rules on what is considered appropriate volume or usable technology in today's world.

Moreover, while the costs of e-discovery may be increasing due to the volume of information being created and retained, litigation of e-discovery issues has declined significantly since 2006. In a recent survey, 67% of responding companies reported *zero* instances of e-discovery issues becoming the subject of a motion, hearing, or ruling from a court in 2008, in contrast to 44% in 2007.[225] According to the survey findings, "this most likely reflects the efforts of the judiciary to update and clarify rules concerning e-discovery, as well as the desire by many litigants to resolve e-discovery issues through the 'meet and confer' process rather than in the courtroom."[226]

B. The Threat of Sanctions Does Not Justify Reactionary Rule Changes

Much has been made of the rising number of reported cases dealing with e-discovery sanctions and the burden that the resulting fear of sanctions places on corporations with large repositories of electronic data.[227] A review of the "evidence," however, reveals that the imposition of

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[222] Craig Ball, *The Lowdown on Backups*, LAW TECH. NEWS, Mar. 2010 at 30 ("[W]e may have reached the point where backups are not that much harder or costlier to deal with than dispersed active data, and they're occasionally the smarter first resort in e-discovery.").

[223] Montgomery N. Kosma & Paul H. McVoy, *Document Review with Attenex Patterns E-Discovery Platform*, 22 LEGAL TECH NEWSLETTER (Law Journal Newsletters, Philadelphia, PA), July 2004, at 1.

[224] *See* Comments of Hon. Lee H. Rosenthal in *Managing Electronic Discovery: Views From The Judges*, *supra* note 180, at 5 ("It takes about three years for a rule amendment to become effective through the Rules Enabling Act process.").

[225] Fulbright & Jaworski L.L.P., *Fifth Annual Litigation Trends Survey Findings*, http://www.fulbright.com/mediaroom/files/2008/Fulbright-FifthLitTrends.pdf.

[226] *Id.*

[227] *See, e.g.*, *Managing e-Discovery and Avoiding Sanctions Under the FRCP Amendments*, The Metro. Corp. Counsel, at 1 (Jan. 2008), *available at* http://www.metrocorpcounsel.com/pdf/2008/January/15.pdf ("Since the amendments to the Federal Rules of Civil Procedure (FRCP) went into effect in December 2006 (and even before), the number one change we have seen is the an increased level of uncertainty and the fear of what might happen if changes are not made to how companies respond to e-discovery. At best, companies can continue to satisfactorily respond to discovery, but with higher costs and unpredictable outcomes. . . . At worst, the company subjects itself to undue leverage and sanctions because it didn't do the right thing and can't defend its practices.").

sanctions is an exceedingly rare event and that serious sanctions are a realistic threat only to litigants engaging in the most extreme discovery misconduct.

"When It Comes to E-Discovery Sanctions, Be Afraid. Be Very, Very Afraid," trumpets one recent Internet headline.[228] Another article warns: "Today, corporations are facing an increased risk of sanctions if they do not have a consistent, auditable legal hold process."[229] A third recent web posting says: "Given the current economic condition, corporate clients are being forced to cut back legal and IT budgets, while the threat of sanctions due to improper ESI handling continues to rise."[230] What all of these websites have in common—aside from a gift for hyperbole—is that they belong to e-discovery vendors with services and products to sell to corporations and law firms who become very, very afraid of discovery sanctions.

Legal commentators have also weighed in about the "skyrocketing" number of discovery sanctions cases. An article by Dan H. Willoughby and Rose Hunter Jones, posted on the Duke Conference website, informs us: "There were more e-discovery sanctions cases and more sanctions awards in 2009 than in all years prior to 2005 combined."[231] "[S]anction awards for e-discovery violations have been trending ever-upward for the last ten years and are at historic highs."[232] According to a mid-year 2009 survey by law firm Gibson Dunn, the first half of that year saw "a dramatic increase in the frequency with which courts consider and apply sanctions."[233]

But how frequently are sanctions imposed in e-discovery cases? What are the real numbers? According to Willoughby and Jones, sanctions were awarded in forty-six cases in all of 2009.[234] Gibson Dunn reported sanctions were applied in twenty-two cases during the first five months of 2009.[235]

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[228] Legaltechtoday.com, When It Comes to E-Discovery Sanctions, Be Afraid. Be Very, Very Afraid, http://legaltechtoday.globaledd.com/2010/01/19/when-it-comes-to-e-discovery-sanctions-be-afraid-be-very-very-afraid.

[229] Press Release, Bridgeway, Bridgeway Puts In-House Corporate and Government Legal Departments in Control of Legal Hold Obligations (Jan. 27, 2010) *available at* http://www.bridgeway.com/news-events/press-releases/Bridgeway-Puts-In-House-Corporate-and-Government-Legal-Departments-In-Control-of-Legal-Hold-Obligations.cfm.

[230] *Case Law Update & E-Discovery News*, 9 KROLL ONTRACK NEWSLETTER 9, Sept. 2009, at 1, *available at* http://www.krollontrack.com/newsletters/clu_0909.html.

[231] Willoughby & Jones, *supra* note 101, at 4.

[232] *Id.* at 26.

[233] Gibson Dunn, *supra* note 95.

[234] Willoughby & Jones, *supra* note 101, at 4.

[235] Gibson Dunn, *supra* note 95.

Approximately 250,000 civil cases are filed each year in federal courts.[236] The 2009 Federal Judicial Center survey reported that production of ESI was requested in 36% of recently closed federal court cases, or approximately 90,000 cases per year.[237] According to these statistics, e-discovery-related sanctions are imposed in approximately one out of every 2,000 cases in which e-discovery is requested and one out of 5,435 cases overall. Willoughby and Jones report that there have been 231 reported e-discovery cases in which sanctions were awarded—ever.[238]

The sanction of dismissal or default judgment has been imposed in a total of thirty-six reported e-discovery cases in history.[239] In sixteen of the cases, the court reported that misrepresentations had been made to the court by the client, counsel, or both.[240] In nineteen of the cases, "the court emphasized a pattern of misconduct."[241] The number of dismissals has decreased recently, from seven in 2006 to five in 2009. Willoughby and Jones summarize: "In these terminated cases, the misconduct typically occurs after repeated warnings and after repeated willful failures that irreparably compromise the court's ability to adjudicate on the merits, leaving no alternative but dismissal."[242]

Adverse jury instructions have been granted in fifty-two e-discovery cases.[243] Thirty-four of these cases involved "intentional conduct and/or bad faith."[244] Since 2006, adverse jury instruction cases have reached a historic high—ten per year. Monetary sanctions exceeding $100,000 have been awarded in a total of twenty-eight reported cases in history.[245]

These numbers simply do not represent a threat to corporate America and certainly do not provide a rationale, as some would claim, to amend the Federal Rules. As the statistics clearly demonstrate, and recent cases confirm,[246] sanctions represent a significant threat only to those who fail to

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[236] U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2008 and 2009 (Table C), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicalCaseloadStatistics/2009/tables/C00Mar09.pdf.
[237] FJC Survey, *supra* note 50, at 26.
[238] Willoughby & Jones, *supra* note 108, at 9.
[239] *Id.* at 11.
[240] *Id.*
[241] *Id.* at 12.
[242] *Id.* at 14-15.
[243] *Id.* at 15.
[244] *Id.*
[245] *Id.* at 17.
[246] Dispositive sanctions and adverse inferences are generally reserved for those whose spoliation was either knowing and willful or in bad faith. *See, e.g.*, Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 658 F. Supp. 2d 456 (S.D.N.Y. 2010) (plaintiffs who, *inter alia*, failed to institute timely litigation holds, failed to preserve ESI when required, failed to request documents from "key players," and submitted misleading or inaccurate declarations to the court were found to have been grossly negligent and were subjected to monetary sanctions and an adverse inference instruction); Kvitka v. Puffin Co., No. 06-858, 2009 WL 385582, at *6 (M.D.

make reasonable and good faith efforts to comply with the Federal Rules and existing case law.

VI. SUMMARY

The drafters of the 2006 Federal Rules amendments recognized that electronic discovery was here to stay, and must be addressed in the Rules. While our present system of discovery may not be perfect, the answer does not lie in limiting litigants' access to the facts or to the courthouse. The Federal Rules were first adopted in 1938 to ensure that trials would be about the merits of a case rather than the gamesmanship that is a product of asymmetrical knowledge. More cooperation, more early planning and case management, and more knowledge of ESI, metadata, and the like, are necessary to truly understand whether the 2006 amendments have been—or have the ability to be—effective. Less discovery is not the answer.

Pa. Feb. 13, 2009) (case dismissed where plaintiff intentionally discarded laptop containing critical evidence despite instruction from lawyer to maintain the laptop and despite plaintiff's admission that she knew e-mails should have been preserved); Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494 (D. Md. 2009) (responding party was found to have acted willfully when it intentionally destroyed the computer of a relevant employee); Keithley v. Home Store.com Inc., No. 03-4447, 2008 WL 3833384, at *16 (N.D. Cal. Aug. 12, 2008) (imposing monetary sanctions of over $600,000 for defendants' spoliation and delayed production of documents where the court found defendants had engaged in a "pattern of deceptive conduct and malfeasance in connection with discovery and production of documents . . . and reckless and frivolous misrepresentations to the Court") . Even significant misconduct often results in the mildest of sanctions. *See, e.g.,* S.E. Mech. Servs., Inc. v. Brody, No. 08-1151, 2009 WL 2242395 (M.D. Fla. Jul. 24, 2009) (motions for preclusion of evidence or adverse inferences denied despite plaintiffs' failure to institute litigation hold to prevent destruction of e-mails of "key player"); Preferred Care Partners Holding Corp. v. Humana, Inc., No. 08-20424, 2009 WL 982460, at *7 (S.D. Fla. Apr. 9, 2009) (court declines to impose severe sanctions despite finding defendant's discovery conduct "clearly egregious").

APPENDIX 4

THE SEDONA CONFERENCE JOURNAL®

Volume 10 Supplement ❖ Fall 2009

ARTICLES

The Sedona Conference® Cooperation Proclamation . . . . *The Sedona Conference®*

The Case for Cooperation . . . . . *The Sedona Conference®*

A Bull's-Eye View of Cooperation in Discovery . . . . . *Steven S. Gensler*

***Mancia v. Mayflower* Begins a Pilgrimage to the New World of Cooperation** . . . . . *Ralph C. Losey*

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THE SEDONA CONFERENCE JOURNAL®

VOLUME 10 SUPPLEMENT

FALL 2009

The Sedona Conference Journal® (ISSN 1530-4981) is published on an annual basis, containing selections from the preceding year's Conferences and Working Groups. The *Journal* is available on a complementary basis to courthouses and public law libraries and by subscription to others ($95; $45 for Conference participants and Working Group members). Send us an email (tsc@sedona.net) or call (1-866-860-6600) to order or for further information. Complete Conference Notebooks for each of our Conferences are separately available. Check our website for further information about our Conferences, Working Groups, and publications: www.thesedonaconference.org.

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The Sedona Conference Journal® designed by
Margo Braman of Studio D: mbraman@sedona.net.

Cite items in this volume to "10 Sedona Conf. J. ____ (2009 Supp.)."

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THE CASE FOR COOPERATION

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EXECUTIVE SUMMARY

The Sedona Conference® issued its *Cooperation Proclamation* in 2008. The *Proclamation* initiated a comprehensive nationwide effort to promote the concept of cooperation in pretrial discovery. The *Proclamation* calls for information sharing, dialogue, training, and the development of tools to facilitate cooperative, collaborative, and efficient discovery. The *Proclamation* has been well received, especially by those judges who regularly confront discovery disputes that could be avoided by cooperative conduct among counsel. Indeed, nearly one hundred state and federal judges have already endorsed the *Proclamation* and the number continues to grow.

Cooperation in this context is best understood as a two-tiered concept. First, there is a level of cooperation as defined by the Federal Rules, ethical considerations and common law. At this level, cooperation requires honesty and good faith by the opposing parties. Parties must refrain from engaging in abusive discovery practices. The parties need not agree on issues, but must make a good faith effort to resolve their disagreements. If they cannot resolve their differences, they must take defensible positions.

Then, there is the second level. While not required, this enhanced cooperative level offers advantages to the parties. At this level, the parties work together to develop, test and agree upon the nature of the information being sought. They will jointly explore the best method of solving discovery problems, especially those involving electronically stored information ("ESI"). The parties jointly address questions of burden and proportionality, seeking to narrow discovery requests and preservation requirements as much as reasonable. At this level, cooperation allows the parties to save money, maintain greater control over the dispersal of information, maintain goodwill with courts, and generally get to the litigation's merits at the earliest practicable time.

* The *Case for Cooperation* was the subject of robust dialogue at two meetings of The Sedona Conference® Working Group on Electronic Document Retention and Production (WG1), and we thank all of the WG1 members who contributed to the dialogue vastly improving this paper. In addition, we wish to acknowledge editorial contributions from The Hon. Shira A. Scheindlin (SD NY), Hon. James M. Rosenbaum (D MN), and Prof. Steve Gensler (U of OK School of Law). We also want to thank Jeannine Kenney, an associate who works with William Butterfield, for her research and assistance in preparing this paper. Finally, we wish to acknowledge our Working Group Series Sustaining and Annual Sponsors, whose generous support enables us to pursue our Working Group Series activities (see www.thesedonaconference.org/content/sponsorship for a listing of our WGS Sponsors).

The line between the first and second level cooperation is, of necessity, difficult to draw. There is no precise definition of "cooperation," as there are no precise definitions of good faith or reasonableness. However, absent a more cooperative posture in the discovery process, the cost of litigation and the burden imposed as courts are forced to attempt to resolve more and more discovery disputes, will ultimately bring the system to a halt.

Discovery disputes have existed since discovery began. But ESI has vastly increased the quantities of available information and the way it can be accessed. With almost all information electronically created and stored, there has been an exponential increase in the amount of information litigants must preserve, search, review, and produce. ESI is often stored in multiple locations, and in forms difficult and expensive to retrieve. These reasons compel increased transparency, communication, and collaborative discovery. The alternative is that litigation will become too expensive and protracted in a way that denies the parties an opportunity to resolve their disputes on the merits. As a result, in order to preserve our legal system, cooperation has become imperative.

Such cooperation is not in conflict with the concept of zealous advocacy. Cooperation is not capitulation. Cooperation simply involves maintaining a certain level of candor and transparency in communications between counsel so that information flows as intended by the Rules. It allows the parties to identify those issues that truly require court intervention. The parties may not always agree, but with cooperation their real disputes can be addressed sooner and at lower cost. As discussed in this paper, the concept of discovery cooperation is not new. It finds support in the Federal Rules of Civil Procedure, ethical standards, court decisions, economic considerations, and common sense. In a survey of 2,690 attorneys recently involved in federal litigation, more than 90% of respondents, representing both plaintiffs and defendants, "agreed" or "strongly agreed" with the statement, "[a]ttorneys can cooperate in discovery while still being zealous advocates for their clients."

This Cooperation initiative is being implemented in stages. First came The Sedona Conference's® *Proclamation*, which alerted stakeholders to the need for cooperation and its advantages. The announcement was an expression of support for the concept. Now, in this paper, we offer arguments supporting cooperation. The final stage will provide practical examples to train and support lawyers, judges, and others in cooperative discovery techniques. Using these steps, The Sedona Conference® will offer solutions to many of the problems associated with contemporary discovery, and allow litigants to devote their resources toward a resolution of their disputes on the merits.

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VI. CONCLUSION

I. OVERVIEW

"If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes."
— Judge Wayne E. Alley in Krueger v. Pelican Products Corp.[1]

Although lawyers may be relieved that Judge Alley's authority does not extend beyond the mortal confines of the courtroom, his comments signal a shared and growing distaste, if not disdain, by judges for the cost, delay, and disruption resulting from unnecessary or abusive discovery disputes.[2] That *Krueger* was decided twenty years ago, prior to the explosion of routine electronic communications, demonstrates that the problem is not new. However, the advent of electronically stored information ("ESI") has dramatically exacerbated the problem, increasing the volume of potentially discoverable material, the complexity and cost of the discovery process, and the opportunities for not only unduly burdensome and overly broad discovery requests, but also responses and production that obfuscate and evade. "Hide the ball" has become "hide the byte."

As this paper argues, the growth in ESI has not changed the obligation of cooperation in discovery that attorneys owe to the court and opposing counsel under both the Federal Rules of Civil Procedure and the rules of professional conduct.[3] Those obligations have long existed and were reinforced with respect to electronic discovery by the 2006 Amendments to the Rules.[4] However, the explosion of ESI has made the development of parameters to guide cooperation in discovery more essential than ever. The complexity of ESI has created uncertainty over what constitutes cooperation and good faith regarding preservation, search, review, and production. Additionally, the magnitude of the ESI has dramatically increased costs to the judicial system generally, and clients, specifically. Cooperation can help mitigate both difficulties.

Cooperation in this context is best understood as a two-tiered concept. First, there is a level of cooperation as defined by the Federal Rules, ethical considerations, and common law. At this level, cooperation requires honesty and good faith by the opposing parties. Parties must refrain from engaging in abusive discovery practices. The parties need not agree on issues, but they must make a good faith effort to resolve their disagreements. If they cannot resolve their differences, they must take defensible positions.

Then, there is the second level of cooperation. While not required, this enhanced cooperative level offers advantages to the parties. At this level, the parties work together to develop, test, and agree upon the nature of the information being sought. They will jointly explore the best method of solving discovery problems, especially those involving ESI. The parties jointly address questions of burden and proportionality, in order to narrow discovery requests and preservation requirements as much as reasonable. At this level, cooperation allows the parties to save money, maintain greater control over the dispersal of information, maintain goodwill with courts, and address the litigation's merits at the earliest practicable time.

The line between first and second level cooperation is, of necessity, difficult to draw. There is no precise definition of "cooperation," as there are no precise definitions of good faith or reasonableness. However, counsel understand that absent a more cooperative posture in the discovery process, the cost of litigation and the burden imposed as courts are forced to attempt to resolve disputes, will ultimately bring the system to a halt.

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1 *Krueger v. Pelican Products. Corp.*, C/A No. 87-2385-A (W.D. Okla. 1989).

2 Judge Alley's opprobrium has been quoted in *Dahl v. City of Huntington Beach*, 84 F.3d 363, 364 (9th Cir. 1996), *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 361 n.3 (D. Md. 2008) and *Network Computing Servs. v. Cisco Sys., Inc.*, 223 F.R.D. 392, 395 (D.S.C. 2004). *See also* W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895, 895, 906 (1996) (noting courts are "imposing public duties upon lawyers in discovery that . . . have content and carry severe sanctions for their violation" and noting that discovery conduct is provoking judicial backlash).

3 As discussed more fully *infra* Part II, the Federal Rules presume cooperation in discovery. *See, e.g.*, Fed. R. Civ. P. 1, 1993 Advisory Committee Note (noting that Rule 1 imposes on attorneys a shared responsibility to ensure that civil litigation is resolved without undue cost or delay).

4 For example, Rule 26(f)(3) was amended to include in the 26(f) conference any issues relating to preservation, disclosure, or discovery of ESI and the form in which it should be produced. *See* Fed. R. Civ. P. 26 (f), 2006 Advisory Committee Note.

One commentator has visualized these tiers of cooperation as concentric circles forming a target with a "bull's eye" in the center. An outer ring is what the rules clearly require. An inner ring goes beyond the requirements to the level of cooperation that can be achieved with creative energy applied to mutual self-interest. The rules require that attorneys hit the target somewhere, but make it clear that attorneys should aim for the center.[5]

A. The Costs of Unnecessary Discovery Disputes

Unnecessary discovery battles affect not just judicial tempers, increasing the likelihood of sanctions, but also impair the functioning of the judicial system by overburdening already stretched courts,[6] preventing adjudication of meritorious claims or forcing settlement of meritless ones due to excessive costs,[7] and undermining the very purpose for which discovery obligations exist — to allow adjudication on the merits.[8] Clients ultimately bear the costs of responding to lengthy and often repetitive or overly broad interrogatories and document requests — and boilerplate objections to them — or of sifting through reams of unresponsive electronic and physical documents, followed, in many cases, by time-consuming motion practice and hearings.[9] Substantively, the client may be no better off upon resolution of the dispute by the court since parties often find themselves in the same position they would have been in had they cooperated at the outset.[10]

But client costs may extend beyond financial outlays from drawn-out disputes. For example, failure of counsel to evaluate whether a discovery request is reasonable and not unduly burdensome before making it, or objecting to requests with boilerplate rather than fact-based objections, can warrant sanctions that impair adjudication on the merits, such as deeming facts admitted or objections waived.[11] Where counsel has not cooperated to identify appropriate parameters for electronic discovery, courts may reject later claims that discovery is overbroad, forcing unnecessary discovery costs on the client.[12]

B. The Benefits of Cooperation for E-Discovery

The appropriate level of transparency and communication with opposing counsel on the thorny issues involved in e-discovery can provide some degree of protection from the costs and potential sanctions that may result from lack of cooperation. For example, transparency and cooperation in initial phases of discovery may help identify both what must be preserved and the routine destruction policies in place that may help establish good faith if destruction is later challenged,[13] avoiding costly delays and possible spoliation sanctions. Good faith efforts to identify the sources and custodians of relevant ESI early in discovery and communication of that information to opposing counsel may help to not only avoid subsequent duplicative and costly searches, but also may rebut inferences of bad faith in discovery planning or intentional suppression of information if additional relevant sources are later identified. Early, transparent discussions on data storage systems

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5 *See* Steven S. Gensler, *A Bull's-Eye View of Cooperation in Discovery*, 10 Sedona Conf. Journal at 370-372 (2009 Supp.).

6 *See* John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 508 (2000) (noting the number of opinions in which courts have addressed discovery disputes has risen significantly compared with the prior decade).

7 *See* Final Report, Joint Project of the American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System (2009), *available at* http://www.actl.com/AM/Template.cfm?Section=Advanced_Search&csection=PR_2009&template=/CM/ContentDisplay.cfm&ContentFileID=889.

8 *See* Wendel, *supra* note 2, at 906 n.41.

9 *See, e.g.*, Gary E. Hood, *Refuse to Play the Game: An Alternative Document Production Strategy in Intellectual Property Litigation*, 16 INTELL. PROP. & TECH. L. J. 1+, 1–2 (2004) (discussing the routine nature of lengthy discovery disputes in intellectual property litigation).

10 For example, in *Mancia v. Mayflower Textile Servs. Co.*, after several sets of interrogatory and document requests, four months of motions practice, and a court hearing on discovery violations, the court ordered parties to develop a discovery budget, determine whether additional discovery sought could be provided from less duplicative and expensive sources, attempt to reach agreement on additional discovery, including phased discovery, provide a status report to the court on any disputes, and if necessary return to the court for resolution. *See* 253 F.R.D. 354, 364-65 (D. Md. 2008). The outcome — an order for cooperation and communication — put the parties in nearly the same positions they would have been in had the disputes not ensued. *See id.*

11 *Id.* at 357 (noting Fed. R. Civ. P. 26 (g) requires counsel to certify that a discovery request, response, or objection is consistent with the rules of procedure, is not made to delay or increase the costs of litigation, is not unreasonably burdensome or expensive, and that violation is subject to sanction). The *Mancia* court noted that making boilerplate objections without identifying the specific basis for the objections is prima facie evidence of a Rule 26(g) violation and grounds for finding the objection waived. *Id.* at 358-59. *See also* Wendel, *supra* note 2, at 912-13 (discussing *Asea, Inc. v. S. Pac. Transp. Co.*, 669 F.2d 1242, 1246 (9th Cir. 1981) in which the court upheld the sanction of finding a fact admitted when defendants submitted a boilerplate response to admission requests and found such responses abused discovery and were not consistent with the requirement of good faith).

12 *See Kipperman v. Onex Corp.*, 2008 WL 4377205, at *8 (N.D. Ga. Sept. 19, 2008) (rejecting defendants objections that plaintiffs' requested e-mail search was burdensome where the court had previously offered defendants the opportunity to narrow the search terms).

13 Fed. R. Civ. P. 26(f) (parties must discuss issues regarding preserving discoverable information). *See also id.* 37(e) (absent exceptional circumstances, sanctions may not be imposed for failing to provide ESI lost due to routine, *good faith*, operation of an ESI system) (emphasis added).

employed by the parties puts each on notice as to what information may not be reasonably accessible, possibly avoiding the need for later motions to compel and post hoc explanations as to why documents were not produced.[14] Additionally, consultation about technical issues that arise in discovery can avoid later inferences of bad faith.[15] Further, transparency may establish the form in which a party normally maintains ESI, potentially avoiding disputes over whether data should have been produced in native format.[16]

Courts increasingly recognize that "electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI."[17] For instance, working cooperatively with opposing counsel to identify a reasonable search protocol, rather than making boilerplate objections to the breadth of a requested protocol or unilaterally selecting the keywords used without disclosure to opposing counsel,[18] may help avoid sanctions or allegations of intentional suppression. Indeed, because knowledge of the producing party's data is usually asymmetrical, it is possible that refusing to "aid" opposing counsel in designing an appropriate search protocol that the party holding the data knows will produce responsive documents could be tantamount to concealing relevant evidence.[19]

C. Cooperation in Discovery and Zealous Advocacy Are Not Conflicting Concepts

Still, from the perspective of many practitioners, abandoning a purely adversarial stance during discovery in favor of cooperation appears antithetical to the concept of zealous advocacy.[20] This paper demonstrates that cooperation — in the sense intended by the *Proclamation* — and zealous advocacy are not conflicting concepts under professional conduct rules. Cooperation requires neither conceding nor compromising the client's interests. Nor does it require foregoing court resolution of *legitimate* discovery disputes. Court criticism has centered on *unnecessary* disputes — those that could have been avoided by cooperating and communicating according to procedural and ethical obligations — rather than those arising from good faith disagreements about the parameters and progress of discovery that may require court intervention. Cooperation avoids unnecessary disputes and violation of ethical rules while preserving for court resolution of those disputes that cannot be resolved through good faith cooperation.

Cooperation, as envisioned by the *Proclamation*, requires, for example, that counsel adequately prepare *prior* to conferring with opposing counsel to identify custodians and likely sources of relevant ESI, and the steps and costs required to access that information. It requires disclosure and dialogue on the parameters of preservation. It also requires forgoing the short term tactical advantages afforded one party by information asymmetry so that, rather than evading their production obligations, parties communicate candidly enough to identify the appropriate boundaries of discovery. Last, it requires that opposing parties evaluate discovery demands relative to the amount in controversy. In short, it forbids making overbroad discovery requests for purely oppressive, tactical reasons, discovery objections for evasive rather than legitimate reasons, and "document dumps" for obstructionist reasons. In place of gamesmanship, cooperation substitutes transparency and communication about the nature and reasons for discovery requests and objections and the means of

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14 Fed. R. Civ. P. 26 (b)(2)(B) provides that parties need not provide discovery of ESI that is not reasonably accessible due to undue burden or cost.

15 *See In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 662 (M.D. Fla. 2007) (shielding technical staff from opposing party rather than cooperating by fostering consultation "is not an indicum of good faith").

16 Fed. R. Civ. P. 34 (b)(2)(E) (party must produce ESI in the form in which it is ordinarily maintained).

17 *William A. Gross Constr. Assocs. v Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009). *Accord Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 112 (2d Cir. 2002) ("as a discovery deadline or trial date draws near, discovery conduct that might have been considered 'merely' discourteous at an earlier point in the litigation may well breach a party's duties to its opponent and to the court"); *In re Seroquel*, 244 F.R.D. at 662 (party was obligated to cooperate with opposing counsel to identify key word protocol rather than unilaterally selecting limited terms); *Bush Ranch v. Du Pont*, 918 F. Supp. 1524, 1543 (M.D. Ga. 1995) ("It is the obligation of counsel under the rules, as officers of the court, to cooperate with one another so that in pursuit of truth, the judicial system operates as intended."); *Marion v. State Farm Fire and Cas. Co.*, 2008 WL 723976, at *3-4 (S.D. Miss. Mar. 17, 2008) ("This Court demands the mutual cooperation of the parties. It hopes that some agreement can be reached . . . this Court will [not] hesitate to impose sanctions on any one-party or counsel or both - who engages in any conduct that causes unnecessary delay or needless increase in the costs of litigation.").

18 *See In re Seroquel*, 244 F.R.D. at 662.

19 In a survey of 2,690 attorneys recently involved in federal litigation, more than 90% of respondents, representing both plaintiffs and defendants, "agreed" or "strongly agreed" with the statement, "[a]ttorneys can cooperate in discovery while still being zealous advocates for their clients." Emory G. Lee III & Thomas E. Willging, Federal Judicial Center National, Case-Based Civil Rules Survey, 62-63 (Federal Judicial Center October 2009), *available at* http://www.fjc.gov/library/fjc_catalog.nsf/autoframepage/openform&url=/library/fjc_catalog.nsf/DPublication/openform&parentunid=363B0DBDB7F2C35D8525764800/A18B7. At least one commentator, Jason R. Baron, has argued that in circumstances where a party is certain that opposing counsel's proposed search protocol would not capture documents it knows would be responsive violates Rule 3.4 of the Model Rules of Professional Responsibility by failing to suggest or use additional search terms that would result in production; such conduct is tantamount to suppression. *See* Symposium, *Ethics and Professionalism in the Digital Age: Ninth Annual Georgia Symposium on Ethics and Professionalism*, 60 Mercer L. Rev. 863, 877 (2009).

20 Model R. Prof'l Conduct Preamble Paragraph 2 (2006).

resolving disputes about them. In at least twelve recent decisions, jurists have recognized the need for discovery cooperation and cited with approval the *Cooperation Proclamation*.[21]

As noted in the Overview section of this paper, to understand what is meant by the word "cooperation" in this context, it is useful to think of a two-tiered approach. First, there is a level of cooperation required by the Federal Rules, ethical considerations and common law. This limited level of cooperation requires communication and good faith by parties.[22] It requires that parties refrain from engaging in abusive discovery practices. It does not require agreement on issues, but it requires that parties take defensible positions if agreement cannot be reached.[23] But there is also a second level of cooperation. While not specifically required, this enhanced level of cooperation is usually advantageous for parties. As noted by one commentator, this enhanced level of cooperation "urges [parties] to seek out new ways to work together, and it urges them to do so not in spite of their interests but in furtherance of them."[24] Thus, parties engaging in this level of cooperation will work together to develop and test search criteria. They will jointly explore the best method of solving difficult problems like data discovery. They will address burden and proportionality by seeking to narrow discovery requests and preservation requirements as much as is reasonable. Through such cooperation, parties save money, maintain more control over what information is disseminated, engender good will with courts, and generally get to the merits of litigation much sooner.

This paper lays out the legal and ethical foundations for the duty to cooperate in discovery and the economic case for cooperation independent of those foundations. It begins with a discussion of cooperation required, either expressly or impliedly, by the Federal Rules of Civil Procedure. Second, it presents professional conduct rules that embody the duty to cooperate and discusses illusory conflicts with other professional conduct rules. It argues that the concept of zealous advocacy, properly understood as bounded by an attorney's duties as an officer of the court and to follow the law, does not conflict with the duty to cooperate in discovery. Third, evolving legal authority for the duty to cooperate is presented through a discussion of recent case law that addresses, in particular, cooperation in electronic discovery and growing court frustration with bad faith litigation conduct. A discussion of the practical reasons for cooperation — economic and strategic benefits — concludes the analysis.

II. THE FEDERAL RULES OF CIVIL PROCEDURE ASSUME COOPERATION IN DISCOVERY

A. The Evolution of American Discovery Procedures

The Federal Rules of Civil Procedure do not explicitly require counsel to cooperate in discovery, but the duty is implicit in the structure and spirit of the Rules. Indeed, the liberalization of discovery beginning in 1938 with the adoption of the Rules was designed to promote the resolution of disputes. Such resolution was intended to be based on facts underlying the claims and defenses with a minimum of court intervention, rather than on gamesmanship that prevented those facts from coming to light entirely or at least far too late in the process to serve the fair and efficient administration of justice. A brief look at the history of the modern Federal Rules makes clear that cooperation has been an essential element of the logic underlying them.

The modern Federal Rules were adopted in reaction to the pre-1938 system. Prior to 1938, lawyers prepared for trial principally through a process of formal pleadings, with complex rules for

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21 *See Capitol Records, Inc. v. MP3tunes, LLC*, 2009 WL 2568431, at *2 (S.D.N.Y. Aug. 13, 2009); *In re Direct Sur., Inc., Fair Labor Standards Act (FLSA) Litig.*, 2009 WL 2461716, at *1, 2 (E.D. La. Aug. 7, 2009); *Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Ass'n*, No. 3:07-cv-449, 2009 WL 2243854, at *2 (S.D. Ohio July 24, 2009); *Dunkin' Donuts Franchised Rests. LLC v. Grand Cen. Donuts, Inc.*, 2009 WL 1750348, at *4 (E.D.N.Y. June 19, 2009); *Ford Motor Co. v. Edgewood Props., Inc.*, 257 F.R.D. 418, 424-25, 427 (D.N.J. May 19, 2009); *Newman v. Borders, Inc.*, 257 F.R.D. 1, 3 (D.D.C. Apr. 6, 2009); *William A. Gross Const. Associates, Inc. v. American Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. March 19, 2009); *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 415 (S.D.N.Y. Jan. 13, 2009); *Cowad Commc'ns. Co. v. Revonet, Inc.*, 254 F.R.D. 147, 148-49 (D.D.C. Dec. 24 2008); *Gipson v. Sw. Bell Tel. Co.*, Civ. No. 08-2017, 2008 U.S. Dist. LEXIS 103822, at *4 (D. Kan. Dec. 23, 2008); *Aguilar v. Immigration and Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, 255 F.R.D. 350, 353-56, 358-59, 362 (S.D.N.Y. Nov. 21, 2008); *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 359, 363 (D. Md. 2008).; *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 363 (D. Md. 2008).

22 See discussion *infra* Parts II, III, and IV. *See also* Steven S. Gensler, *Some Thoughts on the Lawyer's E-volving Duties in Discovery*, 36 N. KY. L. REV. 521, 550 (2009).

23 *See* Gensler, *supra* note 22, at 552.

24 *Id.* at 556.

replies and responses that put a premium on gamesmanship at the expense of concealing critical facts until trial.[25] Attorneys relied primarily on an opponent's pleadings for discovery, without much disclosure.[26] By contrast, the new Rules allowed counsel to discover information about the opponent's case before trial through the devices outlined in the Rules. As the Supreme Court has recognized, the more liberal approach to discovery made "trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[27]

The Court has also noted that these new instruments of discovery were designed to serve

> (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark.[28]

In the first set of amendments to Rule 26 in 1946, the Advisory Committee sought to clarify that the "purpose of discovery is to allow a broad *search* for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case."[29]

In *Hickman v. Taylor*, the Supreme Court identified the value of pre-trial discovery:

> The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial. . . . Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.[30]

The Court further cautioned that counsel may not hide "any material, non-privileged facts" from the opposing party.[31] Reflecting a core principle underlying the *Cooperation Proclamation*, the Court recognized that the inherent role of "a lawyer [as] an officer of the court" requires attorneys to "work for the advancement of justice while faithfully protecting the rightful interests of his clients."[32] By permitting disclosure of even privileged information in some circumstances, the Court struck a balance between the ostensibly competing duties of attorneys to the court and to their clients. It noted that a chief objection to liberal discovery — that it promotes a fishing expedition — had been rejected because of the mutual benefits of discovery.[33]

Discovery was further liberalized in 1970 when the requirement to show "good cause" to obtain discovery under Rule 34 was eliminated.[34] Other 1970 changes in the mechanics of discovery were designed "to encourage extrajudicial discovery with a minimum of court intervention,"[35] preserving, of course, the ultimate authority of the courts to "limit discovery in accordance with [the] rules" even as to matters within the scope of Rule 26(b).[36] The rules thus contemplated that while discovery was to be managed largely by the parties, courts may intervene to limit or otherwise manage discovery when necessary.

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25 *See Moore's Federal Practice*, Paragraph 26.02 at 26-31 (3d. ed. 2008).
26 *See* George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, 28 (2007), *available at* http://law.richmond.edu/jolt/v13i3/article10.pdf.
27 *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).
28 *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).
29 Fed. R. Civ. P. 26, 1946 Advisory Committee Note (emphasis added) (citing case law for the proposition that the Rules "permit 'fishing' for evidence as they should").
30 329 U.S. at 507.
31 *Id.* at 513.
32 *Id.* at 510.
33 *See id.* at 508 n.8.
34 *See* Fed. R. Civ. P. 34, 1970 Advisory Committee Note.
35 *Margel v. E.G.L. Gem Lab Ltd.*, 2008 U.S. Dist. LEXIS 41754, at *10 (S.D.N.Y. May, 29 2008) (citing Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* § 2288 at 655-56 (2d ed. 1994)).
36 Fed. R. Civ. P. 26, 1970 Advisory Committee Note.

In 1980, the Rules were amended to address growing concerns with discovery abuse. Despite the intent that liberalized discovery rules would advance the interests of fair administration of disputes, concern mounted that adversarial, rather than cooperative, conduct drove the process. In a landmark 1978 law review article, Magistrate Judge Wayne Brazil of California made an impassioned plea for substantial changes to both procedural and ethical standards. Such changes, he argued, were necessary and appropriate because:

> The adversary character of civil discovery, with substantial reinforcement from the economic structure of our legal system, promotes practices that systematically impede the attainment of the principal purposes for which discovery was designed. The adversary structure of the discovery machinery creates significant functional difficulties for, and imposes costly economic burdens on, our system of dispute resolution.[37]

Specifically, along with more far-reaching recommendations, Brazil proposed, "shifting counsel's principal obligation during the investigation and discovery stage away from partisan pursuit of clients' interests and toward the court [and] expanding the role of the court in monitoring the execution of discovery."[38]

Beginning in 1980, a series of amendments to Rule 26 addressed discovery abuses. The amendments encouraged cooperation by suggesting — and later requiring — parties to "meet and confer" to, *inter alia*, develop a discovery plan.[39] By 1993, parties were made *jointly* responsible for development of the discovery plan and "for attempting in good faith" to agree to one.[40] When good faith discussions failed to produce an agreement, the Rule contemplated that parties may seek court assistance.[41] However, court intervention should be invoked only after "counsel . . . has attempted without success to effect with opposing counsel a reasonable program or plan for discovery."[42] Narrow disputes were not to be resolved by resorting to requests for protective orders or conferences with the court.[43] The Advisory Committee observed that parties' discovery obligations are intertwined with the underlying goal of the Federal Rules to promote the administration of justice:

> Given our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay. As a result . . . the rules have not infrequently been exploited to the disadvantage of justice. These practices impose costs on an already overburdened system and impede the fundamental goal of the just, speedy, and inexpensive determination of every action.[44]

The amendments also provided courts with explicit authority to sanction parties who failed to meet their obligations to engage in "good faith" discovery planning.[45]

Acknowledging the reality that the discovery process "cannot always operate on a self-regulating basis," Rule 26(b)(1) was amended to address overbroad and unnecessary discovery, and introduce the notion of proportionality, intending "to encourage judges to be more aggressive in identifying and discouraging discovery overuse."[46] The amendments also recognized the duties of counsel to "reduce repetitiveness and *oblige lawyers to think through their discovery activities in advance*

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37 Wayne Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1296 (1978).
38 *Id.* at 1349.
39 Rule 26(f) was added to the Federal Rules in 1980 to provide parties with a means for judicial intervention when facing abusive discovery tactics. *See* Fed. R. Civ. P. 26(f), 1993 Advisory Committee Note. The Rule was initially designed as an elective procedure used only in special cases upon a party's request. *See id.* In 1993, the Rule was amended to require all parties to meet as soon as practicable and formulate a discovery plan for submission to the court. *See id.* A 2006 amendment explicitly required the Rule 26(f) conference to include discussion regarding discovery of ESI and assertion of privileges in cases where those topics apply. *See id.*, 2006 Advisory Committee Note.
40 Fed. R. Civ. P. 26 (f)(2).
41 *See id.*, 1993 Advisory Committee Note.
42 *Id.*, 1980 Advisory Committee Note.
43 *See id.*
44 *Id.*, 1983 Advisory Committee Note (citations and quotations omitted).
45 *Id.* 37(f).
46 *Id.* 26(b), 1983 Advisory Committee Note.

so that full utilization is made of each deposition, document request, or set of interrogatories."[47] Recognizing again that discovery is not to be used as an adversarial tool, but instead to ensure the administration of justice, the Advisory Committee noted that discovery was not to be used to "wage a war of attrition or as a device to coerce a party."[48] Finally, by imposing on counsel the duty to sign each discovery request, response, or objection and, thus certify the reasonableness of each, Rule 26(g) imposed "an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes" of the Rule.[49] With false certification subject to sanctions and a determination of reasonableness ultimately in the hands of the court, the amended Rule reflected the role of the courts as a backstop when parties failed to meet their obligations rather than to diminish those obligations: "If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse."[50]

In 1993, Rule 26(f) was amended to omit provisions requiring a court scheduling conference after the parties met and conferred, reserving judicial supervision of the timing, scope, and extent of discovery until after the parties had conferred.[51] Former subdivision (f) "envisioned the development of proposed discovery plans as an optional procedure,"[52] whereas the new Rule directed, with few exceptions, "in all cases . . . litigants must meet . . . and plan for discovery" prior to submitting proposals to the court.[53] The Rule requires parties to "attempt in good faith to agree on the contents of the proposed discovery plan."[54]

In 2000, the scope of Rule 26(a) disclosures was narrowed to information the party intended to use to support its claims or defenses.[55] While courts retained ultimate authority over the scope of discovery, the Advisory Committee Note makes clear that cooperation prior to court intervention was the expectation of the rule:

> The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. *In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention.* When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action.[56]

Principles of party cooperation were carried forward in the 2006 amendments to Rule 26(f), directing parties to discuss issues relating to ESI, including the form in which it should be produced.[57]

It can hardly be questioned that the amendments subsequent to Judge Brazil's 1978 critique did not fully mitigate adversarial, rather than cooperative, discovery conduct.[58] However, a failure of the parties to comply with their obligations to cooperate, and of courts to enforce those obligations, does not negate the inherent obligation to cooperate embodied in the Rules. As discussed below, courts faced with complex and confrontational e-discovery disputes have increasingly recognized that obligation. The following section discusses in more detail the specific Rules that impliedly assume cooperation.

B. The Federal Rules of Civil Procedure Assume Cooperation

Consistent with the history just described, a careful analysis of the Federal Rules of Civil Procedure demonstrates that the Rules both promote and assume cooperation in discovery between

47 *Id.* (emphasis added).
48 *Id.*
49 *Id.* 26(g), 1983 Advisory Committee Note.
50 *Id.*
51 *See id.* 26(f), 1993 Advisory Committee Note.
52 *Id.*
53 *Id.*
54 *Id.*
55 *See id.* 26(a)(1), (b)(1), 2000 Advisory Committee Note.
56 *Id.* 26(b)(1) (emphasis added).
57 *See id.* 26(f), 2006 Advisory Committee Note.
58 *See, e.g.*, Beckerman, *supra* note 6, at 523 (arguing that "civil discovery suffers from conceptual inconsistencies and structural flaws" requiring far-reaching changes to the rules).

litigating parties throughout the litigation. While the Rules do not always precisely define how and when cooperation is expected in the context of discovery, their framework identifies both how and why cooperation is assumed. The specific Federal Rules of Civil Procedure that provide a framework for the expectation of cooperation during discovery include Rules 1, 26, and 37.[59]

Rule 1 directs that all of the Rules be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[60] Thus, because cooperation in discovery can reduce both the duration of the discovery period and its costs, specific Rules governing discovery that require good faith discussions and conduct should be construed to promote cooperation. Moreover, Rule 1 reinforces the primacy of attorneys' obligations to ensure the objectives of the Rules are achieved — the Advisory Committee Note directs that attorneys, "as officers of the court," share responsibility with the court to ensure that "civil litigation is resolved not only fairly, but also without undue cost or delay."[61] Cooperation by counsel to conduct discovery, particularly electronic discovery, efficiently and in good faith to ensure information sought and produced is consistent with fair administration of the litigation is thus implicit in Rule 1's command. Conduct that uses discovery for illegitimate adversarial purposes — to oppress, coerce, delay or evade — contravenes attorneys' obligations under Rule 1.

More specifically, several subsections included in Rule 26 assume a certain level of cooperation regarding discovery in the earliest stages of a case. Rule 26(a) imposes obligations on parties and counsel to disclose certain information at the outset of litigation, including the categories of relevant ESI.[62] Pursuant to Rule 26(f), the parties must confer at an initial conference about the nature of the claims involved and certain other specifics relating to the scope of discovery.[63] These obligations extend to conferences regarding the production of ESI.[64] In both instances of early discussion, the opportunity exists for counsel to cooperate beyond simply disclosing plainly required information. Though cooperation is not explicitly mandated under Rule 26(f), Rule 26's command that counsel engage in "good faith" efforts to develop a joint discovery plan suggests that counsel must do more than meet to announce their absolute positions on contested discovery issues, without any attempt to resolve those disputes based on the *legitimate* needs of the parties. The requirement to "confer" mandates, at a minimum, a good faith basis for disagreements. If cooperation were not an element of the required conference, the requirement that parties "confer" would be surplusage.

The Rules also require that parties must have a legitimate basis for their discovery demands and disputes, based on some prior, reasonable factual inquiry. This type of augmented duty to cooperate, beyond the mandated initial disclosures and conferences, may under certain circumstances be imposed by the obligations contained in Rule 26(g). That rule requires that parties sign discovery requests, responses and objections certifying, *inter alia*, that each is "not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation" and is not "unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."[65] Whether parties can so certify without good faith communication and transparency with the opposing party to identify needs, costs, and other issues seems unlikely. Thus, the type of cooperation The Sedona Conference® advocates in this context goes beyond the mere disclosure of certain mandated facts, requiring, in addition, assistance and joint effort to achieve the very best discovery protocol. In *Mancia v. Mayflower Textile Services Co.*, the court held that Rule 26(g)'s obligation of certification, following a "reasonable inquiry," was "intended to impose an 'affirmative duty' on counsel to behave responsibly during discovery" — which requires cooperation and communication,

59 In a companion paper discussing how the Federal Rules address cooperation, Professor Steven Gensler organizes the Rules into clusters. *See* Gensler, *supra* note 5, at 366-368. First, he notes that several provisions of the Rules impose duties on parties to communicate and give consideration to positions held by opposing parties as they engage in discovery planning. *See id.* (citing Fed. R. Civ. P. 26(f)(1), 26(f)(2), 26(f)(3) and 37(f)). Next, Professor Gensler concludes that a second cluster of rules require communication and good faith conduct by parties after discovery disputes arise. *See id.* (citing Fed. R. Civ. P. 26(c), 37(a)(1), 26(c)(3) and 37(a)(5). Finally, Professor Gensler recognizes a third cluster of rules that demand good faith regarding the content and purpose of discovery requests and responses. *See id.* (citing Fed. R. Civ. P. 26(g)(1), 26(g)(2)(B)(i), 26(g)(1)(B)(ii) and 26(g)(1)(B)(iii)).
60 Fed. R. Civ. P. 1.
61 *Id.*, 1993 Advisory Committee Note.
62 *See id.* 26(a)(1)(A)(ii).
63 *See id.* 26(f).
64 *See id.* 26(f)(3)(c).
65 *Id.* 26(g)(1)(B).

particularly in the realm of e-discovery.[66] This construction of Rule 26(g) is supported by Rule 1 and the Advisory Committee Note to Rule 26(g), which provides in part:

> Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obligates each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term "response" includes answers to interrogatories and to requests to admit as well as responses to production requests.[67]

Any certification of discovery requests or responses that violates the requirements of Rule 26(g) is subject to sanction, absent "substantial justification."[68]

Finally, Rule 37 is entitled "Failure to Make Disclosures or to Cooperate in Discovery; Sanctions." Specifically, Rule 37(f) provides for sanctions for failure to "participate in good faith in developing and submitting a proposed discovery plan." The requirement of "good faith" requires an honesty of intent in discovery planning. That standard cannot be met by a party who has failed to confer with the opposing side about the scope of the claim and likely defenses in order to determine the appropriate scope of discovery; to conduct pre-meeting and ongoing due diligence regarding the availability, location and costs of discovering information and sharing that information with the opposing party; to seek agreement on the form of production and the means of searching and retrieving information; and to develop a reasonable discovery budget consistent with the nature of the claim.

In addition to the Federal Rules of Civil Procedure, 28 U.S.C. Section 1927 allows the imposition of costs and attorneys' fees when attorneys engage in dilatory conduct not justified by *legitimate* needs of the client, providing that:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.[69]

Consistent with the approach of the *Cooperation Proclamation*, sanctions envisioned by the statute focus on unjustified delay — delay legitimately based on a client's needs is not sanctionable under the statute.[70] The *Proclamation* requires cooperation to identify and flesh out legitimate disputes and to provide courts with a factual foundation on which to make a decision should the parties be unable to reach a resolution absent court intervention.

These mechanisms give the courts the broad discretionary authority to issue an array of sanctions against parties who fail to cooperate during discovery. Considered *in toto*, the Federal Rules impose on attorneys an obligation not to engage in conduct that delays, burdens or renders litigation unfair. The means by which parties can fulfill their obligations under Rule 1 can be found in the specific rules governing discovery conduct. The goal of the *Cooperation Proclamation* and associated resource materials is to provide parameters for what good faith, cooperative conduct in electronic discovery entails and what it does not.

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66 253 F.R.D. 354, 357-58 (D. Md. 2008).
67 Fed. R. Civ. P. 26 (g), 1983 Advisory Committee Note.
68 *Id.* 26(g)(3).
69 28 U.S.C. § 1927 (2000).
70 *See* H. CONF. REP. NO. 96-1234 (1980), as reprinted in 1980 U.S.C.C.A.N. 2781, 2782.

III. COMPLIANCE WITH PROFESSIONAL CONDUCT RULES REQUIRES COOPERATION IN DISCOVERY[71]

The duty to cooperate is likewise embodied in the professional conduct rules to which attorneys are bound. Though ethical rules discuss an attorney's obligation to act with zeal in asserting the client's interests,[72] that duty is not unqualified.[73] It is bounded by an attorney's ethical duties to opposing counsel, opposing parties, third parties, and importantly, the tribunal and the judicial system as a whole.[74] As the *Mancia* court recently noted:

> A lawyer who seeks excessive discovery given what is at stake in the litigation, or who makes boilerplate objections to discovery requests without particularizing their basis, or who is evasive or incomplete in responding to discovery, or pursues discovery in order to make the cost for his or her adversary so great that the case settles to avoid the transaction costs, or who delays the completion of discovery to prolong the litigation in order to achieve a tactical advantage, or who engages in any of the myriad forms of discovery abuse that are so commonplace is . . . hindering the adjudication process, and making the task of the "deciding tribunal not easier, but more difficult," and violating his or her duty of loyalty to the "procedures and institutions" the adversary system is intended to serve. Thus, rules of procedure, ethics and even statutes make clear that there are limits to how the adversary system may operate during discovery.[75]

Professional conduct rules require attorneys to simultaneously meet ethical duties to their clients and the tribunal and to conform their conduct to the requirements of the law.[76] Indeed the Preamble to the Model Rules of Professional Conduct ("MRPC") upon identifying zealous advocacy as the attorney's role immediately confines that duty — it is subject to the "rules of the adversary system."[77] Other limitations on zealous advocacy are replete throughout the Preamble,[78] and are reflected in specific rules.

The need for litigators to balance simultaneous ethical duties is nothing new.[79] Apart from the ethical duties implicated by discovery conduct, discussed below, the list of ethical obligations to ensure the fairness and integrity of the justice system that trump attorneys' duties to their client is lengthy and familiar. For example, counsel has a duty to inform unrepresented persons with interests potentially adverse to the client of that adversity and must refrain from giving them any legal advice,

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71 While professional conduct is governed by state-adopted ethical rules, the discussion in this section necessarily focuses on Model Rules. The Model Rules, and much of their commentary, however, have been adopted, in large part, by nearly every state. *See* Model Rules of Professional Conduct, Dates of Adoption, Am. Bar Ass'n, *available at* http://www.abanet.org/cpr/mrpc/alpha_states.html; State Adoption of Comments To Model Rules of Professional Conduct as of February 2009, Am. Bar Ass'n, *available at* http://www.abanet.org/cpr/jclr/comments.pdf. In addition to state conduct rules, other relevant state-issued guidelines, apart from ethical rules, may apply. *See, e.g.*, California Attorney Guidelines of Civility and Professionalism, Sec. 9, *available at* www.calbar.ca.gov/calbar/pdfs/reports/Atty-Civility-Guide.pdf; The Texas Lawyer's Creed, Sec. 3, Paragraphs 14-19, *available at* http://www.texasbar.com/Content/ContentGroups/Bar_Groups/Foundations1/Texas_Bar_Foundation/TX_Lawyers_Creed.htm.

72 *See* Model R. Prof'l Conduct Preamble Paragraph 2 ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); *Id.* 1.3 cmt. 1 (The obligation to serve a client diligently requires the attorney to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf").

73 See Sylvia Stevens, *Whither Zeal: Defining "Zealous Representation*," Oregon State Bar Bulletin, July 2005, *available at* http://www.osbar.org/publications/bulletin/05jul/barcounsel.html; Allen K. Harris, *Zealous Advocacy: Duty or Dicta: Have the 'Z' Words Become a Disservice to Lawyers?*, OKLAHOMA BAR JOURNAL , *available at* http://www.okbar.org/obj/articles_03/121303harris.htm. Both commentators note that when the ABA Model Rules replaced the Code of Professional Responsibility, the term "zeal" was not included in Rule 1.3. While the word "zeal" remains in the Preamble and Comment to Rule 1.3, the duty imposed by the Rule is "reasonable diligence and promptness." Model R. Prof'l Conduct, 1.3. This conclusion is consistent with the Restatement (Third) of the Law Governing Lawyers, which notes that a lawyer's obligation to act "zealously" on behalf of the client is not unlimited: "The Preamble to the ABA Model Rules of Professional Conduct (1983) and EC 7-1 of the ABA Model Code of Professional Responsibility (1969) refer to a lawyer's duty to act 'zealously' for a client. The term sets forth a traditional aspiration, but it should not be misunderstood to suggest that lawyers are legally required to function with a certain emotion or style of litigating, negotiating, or counseling. For legal purposes, the term encompasses the duties of competence and diligence." *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS Section 16 cmt. d.

74 Commentary to Model Rule 1.3 confines the obligation to act with zeal to "whatever lawful and ethical measures are required to vindicate a client's cause." Model R. Prof'l Conduct 1.3, cmt. 1.

75 *Mancia v. Mayflower Textile Serv. Co.*, 253 F.R.D. 354, 362-63 (D. Md. 2008).

76 *See* Model R. Prof'l Conduct Preamble Paragraph 1 (lawyer is both representative of clients and officer of the court); *id.* Paragraph 5 ("A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. . . . While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.").

77 *Id.* Paragraph 2.

78 *See id.* Paragraph 4 ("lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law"); *id.* Paragraph 9 (lawyer has an "obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.").

79 *See* Wendel, *supra* note 2, at 895.

though doing so may be beneficial to the client.[80] To fulfill their duties as officers of the court, attorneys must report adverse controlling authority to the court, even where opposing counsel has not done so, and correct even inadvertent misstatements of material fact or law, though doing so is contrary to the client's interest.[81] Moreover, counsel is bound by these duties to the tribunal even where compliance requires disclosure of confidential information.[82] Similarly, counsel must withdraw from representation, regardless of the impact on the client (subject, of course, to court approval) when continued representation would require a violation of ethical rules or other law.[83] The list of mandatory ethical obligations that may be contrary to the client's interest goes on.

Thus, lawyers' obligation of zealous advocacy is confined by, rather than in conflict with, their obligations to the court.[84] As discussed below, while there is a place for zealous advocacy in discovery, an attorney's ethical and procedural obligations to cooperate with opposing counsel are not subjugated to the concept of zealous advocacy. Meeting one's duty to a client does not excuse failure to identify sources of and produce basic evidence sought in discovery,[85] frivolous discovery requests, unfounded objections in discovery,[86] false representations or certifications to the court,[87] or discovery delay for delay's sake.[88]

A. The Duty to Expedite Litigation Requires Cooperation

First and fundamentally, an attorney's ethical duty to conform his or her conduct to the requirement of the law unquestionably requires, in the context of discovery, compliance with procedural rules of the court.[89] As discussed *supra* Part II.B, those rules include Rule 1 of the Federal Rules of Civil Procedure, noting an attorney has an obligation, as an officer of the court, to avoid undue delay and cost;[90] Rule 26(f), which assumes a certain degree of cooperation in discovery planning; and Rule 26(g), requiring an attorney to certify that discovery requests and responses are not made for an improper purpose. Consistent with those rules, Rule 3.2 of the MRPC requires attorneys to make reasonable efforts to expedite litigation. Refusal to cooperate in discovery by making overly broad or unnecessarily costly discovery requests or objecting to requests without legitimate foundation is inconsistent with the duty to expedite litigation. Cooperation in discovery planning is thus assumed not only by the Civil Rules, it is among the obligations of Rule 3.2 of the MRPC.

Cooperating to expedite discovery does not conflict with any notion of zealous advocacy. First, the duty to expedite must be "*consistent with the interests of the client*."[91] Thus, neither Rule 3.2 nor the cooperation envisioned by the *Proclamation* would require counsel to forego pursuing even time-consuming resolution of discovery disputes necessary to serve the legitimate interests of the client. For example, cooperation does not foreclose objections to expansive discovery requests after a thorough inquiry about the nature and sources of responsive information. Cooperation *does*, however, require communicating with opposing counsel about the basis for the objection and making a good faith effort to narrow discovery and achieve a mutually agreeable solution. Second, failure to make reasonable efforts to expedite can only be founded on the *legitimate* interests of the client. What Rule 3.2 and the procedural rules, as emphasized here and advanced in the *Proclamation, do* forbid is discovery delay for the purpose of delay only. Though delay for delay's sake

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80 *See* Model R. Prof'l Conduct 4.3, cmt. 1.
81 *See id.* 3.3(a), cmt. 11 (noting that the truth-seeking judicial process takes precedence over the client's interest in such cases).
82 *See id.* 3.3(c).
83 *See id.* 1.16(a)(1).
84 For an actual conflict to exist between rules regarding zealous advocacy and duties to the court, it must be impossible for an attorney to comply with both obligations. However, the MRPC, by making clear which rules are mandatory and which are aspirational, establishes that some duties will take precedence over others.
85 *See In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 663 (M.D. Fla. 2007) (failure to produce usable and reasonably accessible documents resulting from failure to cooperate was sanctionable conduct).
86 *See* Model R. Prof'l Conduct 3.1, 3.4(d).
87 *See id.* 3.3.
88 *See id.* 3.2, cmt. 1 ("The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.").
89 *See id.* 3.4(c) (an attorney may not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists"); *id.* Preamble Paragraph 5 ("Lawyer's conduct should conform to the requirements of the law"); *see also* Wendel, *supra* note 2, at 919 (Rules 3.4 (c) and 3.4(d) require attorneys to make good faith efforts to abide by civil discovery rules).
90 *See* Fed. R. Civ. P. 1, 1993 Advisory Committee Note.
91 Model R. Prof'l Conduct 3.2 (emphasis added).

may benefit the client, the rules do not recognize that benefit as a *legitimate* interest.[92] Consequently, good faith cooperation in discovery to meet the obligations of Rule 3.2 works in tandem with, not in opposition to, the concept of zealous advocacy.

B. The Duties of Candor to the Tribunal and Fairness to the Opposing Party Require Cooperation

The duty to cooperate in discovery is also embodied in Model Rule 3.4 which prohibits a party from obstructing another party's access to evidence or unlawfully altering, destroying, or concealing a document or other material having potential evidentiary value. When failure to cooperate in preservation, discovery planning, and production results in obstruction or destruction, attorneys violate not only procedural rules that risk court-imposed sanctions, they risk discipline by the state ethics enforcement authorities.[93] Where ESI is involved, obstruction or destruction does not require affirmative acts — it can result when counsel simply does nothing. For example, failure to engage opposing counsel in a meaningful dialogue about preservation obligations can result in destruction of relevant evidence from routine operation of document destruction and retention systems. Additionally, failure to cooperate in discussions regarding a meaningful electronic discovery plan based on information about each party's custodians and electronic storage systems may in itself be obstruction. As discussed more fully *supra* Part II, the Federal Rules require participation in a Rule 26(f) conference to discuss ESI issues. In addition to Model Rule 3.4's candor and fairness requirements, Model Rule 1.1 requires that counsel provide "competent representation," which is defined as requiring "legal knowledge, skill, thoroughness and preparation — reasonably necessary to the representation." To fulfill these corollary obligations to meet and confer — in candor and with competence, counsel must be sufficiently informed and knowledgeable about the client's existing sources of ESI and data management and storage systems, and prepared to discuss them, at the Rule 26(f) conference. That is because, as one commentator noted, in an age of electronic information, "it is, as a practical matter, impossible to get meaningful discovery if one side refuses to discuss the parameters of what constitutes a reasonable search, leading to unfair and oppressive results."[94] Likewise, a responding party engages in obstructionist conduct forbidden by ethical rules when it refuses to discuss means of narrowing the opposing side's proposed search protocol, though it has superior information about what methodology is likely to produce responsive documents, and then dumps a clearly unmanageable number of documents on the requesting party.[95]

A knowing failure to comply with civil discovery rules that assume cooperation could likewise violate Rule 3.4(d)'s admonition that an attorney may not knowingly disobey the rules of a tribunal except when based on a non-frivolous assertion that no valid obligation exists. Thus, attorneys who sign discovery requests, disclosures, or objections that were made with an improper purpose or that are unreasonable or unduly burdensome violate not only Rule 26(g), they also violate Model Rule 3.3 by making a false statement of fact to the tribunal. Rule 26(g) was intended to impose on counsel an affirmative duty to behave responsibly in discovery. That obligation, as the *Mancia* court noted, "requires cooperation by counsel to identify and fulfill legitimate discovery needs" while avoiding unduly costly and burdensome discovery.[96] In the context of electronic discovery, it will nearly always be preferable for counsel to certify the propriety of their discovery requests or objections after engaging in extensive cooperation prior to the commencement of discovery. For example, producing parties can, with more certainty, conclude requests are overly broad or unduly burdensome or that sources requested to be searched are unlikely to yield documents admissible in evidence after meeting with opposing counsel to discuss the opposing side's needs, investigating and evaluating the client's existing sources of ESI and the client's data

92 Commentary to Rule 3.2 recognizes that the benefits of "improper delay" — one without a "substantial purpose other than delay" or for the "purpose of "frustrating an opposing party's attempt to obtain rightful redress or repose" — are "not a legitimate interest of the client". Model R. Prof'l Conduct 3.2 cmt. 1.

93 *See Qualcomm Inc. v. Broadcomm Corp.*, 539 F. Supp. 2d 1214 (S.D. Cal. 2007). In a patent infringement action, the defendant alleged that the plaintiff had intentionally hidden the existence of certain patents from an international standard-setting consortium until the consortium had set standards and, to comply with those standards, the industry had developed products that necessarily infringed on the plaintiff's patents. The court found for the defendants on the merits and following trial entered an order detailing the plaintiff's actions to obstruct discovery and instructing plaintiff's counsel to show cause why they should not be sanctioned and face professional discipline. The court characterized plaintiff's counsel's actions as "gross litigation misconduct," the court detailed "constant stonewalling, concealment, and repeated misrepresentations," including the withholding of over 200,000 pages of relevant emails and electronic documents.

94 *Ethics and Professionalism in the Digital Age: Ninth Annual Georgia Symposium on Ethics and Professionalism*, *supra* note 19, at 874.

95 *See id.* at 875-877 (discussing *Kipperman*, *supra* note 12).

96 *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357-58 (D. Md. 2008).

management and storage systems, and communicating with the opposing side about those systems. Similarly, parties requesting discovery can more accurately certify that the request is neither "unreasonable nor unduly burdensome" that it is narrowly tailored after conferring with the opposing side to understand potential sources of information, the means by which that information will be retrieved, the costs of doing so, and potentially less burdensome sources of information.[97]

While neither Rule 3.2 nor Rule 3.4 explicitly require cooperation, attorneys will be hard pressed to meet their obligations under these provisions without cooperating on the scope, nature, and means of discovery both prior to discovery's initiation and throughout the litigation.

C. Ethical Rules Do Not Subordinate the Duty to Cooperate to the Duty of Confidentiality

The duty of confidentiality has long co-existed with discovery obligations and other ethical duties to the court. Though some have argued that seeking an informational advantage by minimizing documents provided to the opposing party is firmly grounded in the duty to preserve client secrets and protect privileged information,[98] that assertion does not answer whether an attorney violates his ethical duties to the court, not to mention his obligation to follow federal and local rules, when he withholds information requested by opposing counsel that is *not privileged*. At least one court has firmly rejected the argument that zealous advocacy obligates counsel to construe discovery requests narrowly to withhold documents harmful to the client.[99] The duty of attorneys to conform their conduct to the law prohibits them from withholding information that the Federal Rules require be produced upon good faith discovery requests or that would be produced if the parties engaged in good faith discussion about the nature and scope of discovery sought. While cooperation does not require attorneys to *volunteer* smoking gun documents that opposing counsel has not requested, it does require good faith efforts to produce information that the attorney reasonably understands is being sought.

In the context of electronic discovery, the duties of confidentiality, loyalty and zealous advocacy do not excuse failure to cooperate with opposing counsel in identifying likely sources of responsive ESI and developing appropriate search protocols that are likely to produce documents counsel knows the client possesses and the opposing party seeks. This does not mean that counsel must steer the opposing side to harmful documents. However, counsel may not use his superior information as to the location or nature of responsive documents to thwart good faith discovery requests by refusing to engage cooperatively to identify the sources likely to contain relevant information and the search terms likely to produce responsive documents.[100]

Thus, where the Federal Rules assume cooperation, the ethical duties discussed above will likewise require attorneys to adhere to the cooperation expected under the Federal Rules. Moreover, even under circumstances where the Federal Rules do not explicitly address discovery cooperation, an attorney's ethical obligations under Rules 3.3 and 3.4 might nonetheless require cooperation.

IV. COURTS RECOGNIZE BOTH THE NEED FOR COOPERATION AND THE OBLIGATION TO COOPERATE

Courts have long recognized the need for attorneys to work cooperatively to conduct discovery, a need that has grown with the volume of ESI now typically involved in litigation. More recently, this recognition is often expressed as frustration over having to decide an avoidable dispute or simply an exasperated call for cooperation among counsel. For example, faced with overreaching

97 *See id.* at 358 (noting that although overbroad discovery requests are served in part because parties do not have enough information to narrowly tailor them, that difficulty is avoided by cooperating prior to serving the request).

98 *See* Beckerman, *supra* note 6, at 526.

99 *See* Wendel, *supra* note 2, at 914-18 (discussing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054 (Wash. 1993)). In *Washington State Physicians*, defendant objected to plaintiff's request for documents for any drug other than the specific product at issue in the litigation where defendant knew documents relating to other drugs contained information about the toxicity of the active ingredient in the product in suit. The court rejected defendant's argument that its ethical duties to the client required it to both construe discovery requests narrowly and avoid turning over damaging documents, concluding that defendant's objections "did not comply with either the spirit or the letter of the discovery rules and thus were signed in violation of the certification requirement." 858 P.2d at 1083.

100 *See Ethics and Professionalism in the Digital Age: Ninth Annual Georgia Symposium on Ethics and Professionalism*, *supra* note 19, at 874-877.

discovery demands by one side and obstinate resistance to production by the other, one court observed that "the gravest error committed by the Magistrate was thinking that the parties could meet and confer to discuss any outstanding discovery requests" and concluded simply that "[t]his Court demands the mutual cooperation of the parties."[101] Courts further recognize that counsel's role as advocate in an adversarial system is not inconsistent with cooperating "to achieve orderly and cost effective discovery of the competing facts on which the system depends" and that the "rules of procedure, ethics, and even statutes make clear that there are limits to how the adversary system may operate during discovery."[102] As noted by the court in *In re Seroquel Products Liability Litigation*:

> [T]he posturing and petulance displayed by both sides on this issue shows a disturbing departure from the expected professionalism necessary to get this case ready for appropriate disposition. Identifying relevant records and working out technical methods for their production is a cooperative undertaking, not part of the adversarial give and take. This is not to say that the parties cannot have reasonable disputes regarding the scope of discovery. But such disputes should not entail endless wrangling about simply identifying what records exist and determining their format. This case includes a myriad of significant legal issues and complexities engendered by the number of plaintiffs. Dealing as effective advocates representing adverse interests on those matters is challenge enough. It is not appropriate to seek an advantage in the litigation by failing to cooperate in the identification of basic evidence. [103]

As discussed in Part II above, courts also recognize that the Federal Rules of Civil Procedure encourage and in many respects assume cooperation during discovery. "The overriding theme of [the 2006] amendments to the discovery rules has been open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable."[104] Thus, courts have held that counsel must confer and engage in good faith, meaningful discussions with the opposing party on discovery issues;[105] refrain from making discovery requests that are overly burdensome, costly, or disproportionate to the issue at stake;[106] make a reasonable inquiry into the factual basis for discovery objections and avoid boilerplate objections;[107] refrain from substantially unjustified discovery arguments;[108] perform a reasonable search for documents on a timely basis;[109] negotiate reasonable and workable search protocols;[110] provide accurate information to the court about steps taken in discovery;[111] provide a knowledgeable 30(b)(6) witness on IT issues;[112] and, in appropriate situations, either introduce expert testimony to support the suitability of search and review protocols, or avoid the need for expert testimony by cooperating with opposing counsel to create a mutually agreeable protocol.[113]

Even where courts decide discovery disputes without determining that the conduct of either side has violated procedural or ethical rules, courts are increasingly urging parties, often in frustrated or blunt language, to attempt to resolve or avoid such disputes by discussion and cooperation. Faced with a discovery dispute caused by the failure of the parties and a nonparty to provide "careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms" for the production of ESI, one court found itself "in the uncomfortable position of having to craft a keyword search methodology for the parties," and concluded simply that "the best solution in the entire area of electronic discovery is cooperation among counsel."[114] After a detailed but restrained

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101 *Marion v. State Farm Fire and Cas. Co.*, 2008 WL 723976, at *3-4 (S.D. Miss. Mar. 17, 2008) (internal quotations omitted). *See also In re Seroquel*, 244 F.R.D. 650, 660 (M.D. Fla. 2007).
102 *Mancia*, 253 F.R.D. at 361-62 (citing the *Cooperation Proclamation*).
103 244 F.R.D. at 660.
104 *Board of Regents of the Univ. of Nebraska v. BASF Corp*, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007).
105 *See Mancia*, 253 F.R.D. at 364–65. *See also CBT Flint Partners, LLC v. Return Path, Inc.*, 2008 WL 4441920, at *3 (N.D. Ga. Aug. 7, 2008); *Mikron Indus., Inc. v. Hurd Windows & Doors*, 2008 WL 1805727, at *1 (W.D. Wash. Apr. 21, 2008).
106 *See Mancia*, 253 F.R.D. at 358; *Marion*, 2008 WL 723976, at *2, *4.
107 *See Mancia*, 253 F.R.D. at 358–59, 364.
108 *See CBT Flint Partners*, 2008 WL 4441920, at *2–3.
109 *See Keithley v. The Home Store.com, Inc.*, 2008 WL 3833384, at *8, *12, *14–15 (N.D. Cal. Aug. 12, 2008).
110 *See SEC v. Collins & Aikman Corp.*, 256 F.R.D. at 414, 418 (S.D.N.Y. 2009) (citing the *Cooperation Proclamation*). *See also In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 662, 664 (M.D. Fla. 2007).
111 *See Keithley*, 2008 WL 3833384, at *1, 10, 13, 15–16.
112 *See Ideal Aerosmith v. Acutronic USA, Inc.*, 2008 WL 4693374, at *2–3 (W.D. Pa. Oct. 23, 2008).
113 *See Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260 n.10 (D. Md. 2008).
114 *Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (citing the *Cooperation Proclamation*).

discussion of a series of unnecessary disputes over the scope of document requests and interrogatories, the adequacy of responses to such, and claims of privilege, another court noted that "the costs associated with adversarial conduct in discovery have become a serious burden not only on the parties but on this Court as well."[115] The court went on to comment that "counsel's obligations to act as advocates for their clients and to use the discovery process for the fullest benefit of their clients . . . must be balanced against counsel's duty not to abuse legal procedure," and "reiterate[] its advice to counsel to communicate and cooperate in the discovery process."[116] Indeed, courts faced with protracted discovery disputes often lament the conduct of both sides and initially decline to make a decision, instead instructing the parties to confer and attempt to resolve the issues.[117] Other courts, having decided some or all pending discovery disputes, urge (if not plead with) the parties to meet and confer as to future disputes rather than repeat the process.[118]

V. THE BENEFITS OF COOPERATION

As these cases suggest, attorneys can expect courts to increasingly enforce cooperation obligations imposed by procedural and ethical rules and to urge parties in increasingly strong terms to cooperate in ways that may go beyond what such rules and ethical requirements require.[119] Given this pressure from the bench, the unrelenting growth in the volume of electronic data, the economics of modern litigation, the financial and strategic benefits of cooperation, and the costs and risks of obstructionist conduct, cooperation in discovery is no longer merely desirable or laudatory, but rather is imperative to advance a client's interests.

A. The Economic Imperative to Cooperate in Discovery

The most straightforward reason for parties to cooperate throughout the discovery process is simple economics — unnecessarily combative discovery wastes time and money. While this has always been the case, the increased volume and complexity of discoverable ESI in modern litigation has increased the costs of combative approaches to discovery as well as the potential savings of a more cooperative approach. While a 1983 study found "relatively little discovery occurs in the ordinary lawsuit" and "no evidence of discovery in over half our cases,"[120] a lawsuit between corporations may now involve "more than one hundred million pages of discovery documents, requiring over twenty terabytes of server storage space."[121] Obviously, this increase in the volume of documents and other information potentially responsive to discovery requests directly increases discovery costs. Moreover, the inherent complexity of ESI (such as multiple storage locations, varying formats, obsolete technology, metadata, and dynamic information) further increases the costs of preservation, review, and production. As a result, an adversarial approach to discovery, which might once have resulted in a minor but tolerable increase in litigation costs, could today substantially multiply such costs, potentially changing litigant behavior and often making discovery costs case-determinative.

Evidence increasingly indicates "that the sheer volume and complexity of electronically stored information (ESI) can increase litigation costs, impose new risks on lawyers and their clients, and alter expectations about likely court outcomes."[122] Where such expansive discovery may once have been the exception to the rule,[123] it can now account for as much as ninety percent of total litigation expenses.[124] Increased volume is a primary culprit, as modern discovery "may encompass hundreds of thousands, if not millions, of electronic records."[125] For example, the amount of ESI is estimated to have increased thirty

115 *Gipson v. Sw. Bell Tel. Co.*, 2009 WL 790203, at *21 (D. Kan. Mar. 24, 2009) (citing Rule 26(g) and *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 359 (D. Md. 2008)).
116 *Id.*
117 *See, e.g.*, *Dunkin' Donuts Franchised Rests. LLC v. Grand Cent. Donuts, Inc.*, 2009 WL 1750348, at *4 (E.D.N.Y. June 19, 2009) (citing the *Cooperation Proclamation*).
118 *See, e.g.*, *Marion v. State Farm Fire and Cas. Co.*, 2008 WL 723976, at *4 (S.D. Miss. Mar. 17, 2008).
119 *See Newman v. Borders, Inc.*, 257 F.R.D. 1, 3 n.3 (D.D.C. 2009) (noting "the perceptible trend in the case law that insists that counsel genuinely attempt to resolve discovery disputes" and citing the *Cooperation Proclamation*).
120 David M. Trubek, et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89–90 (Oct. 1983).
121 Robert Douglas Brownstone, *Collaborative Navigation of the Stormy E-Discovery Seas*, 10 RICH. J.L. & TECH. 53, at *21 (2004).
122 James N. Dertouzos, Nicholas M. Pace & Robert H. Anderson, *The Legal and Economic Implications of Electronic Discovery: Options for Future Research*, RAND Institute for Civil Justice, 2008, at ix, *available at* http://rand.org/pubs/occasional_papers/2008/RAND_OP183.pdf (hereinafter "Dertouzos, et al.").
123 *See, e.g.*, Trubek, *supra* note 120, at 91.
124 *See* Mike Dolan & John Thickett, *Unbundling and Offshoring*, 71 TEX. B. J. 730, 730 (Oct. 2008).
125 *Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D. Md. 2005).

percent annually from 1999 through 2002 alone.[125] Businesses in North America alone send and store an estimated 2.5 trillion new e-mails per year.[127] Consequently, larger corporate parties have expansive amounts of discoverable ESI,[128] while even individuals and small businesses often have quantities of data "substantially out of proportion to their ability to bear" the resulting costs of discovery.[129]

The inherent complexity of ESI also creates new and potentially costly issues in discovery. Deleted information is often not actually destroyed.[130] ESI often changes dynamically and can even change merely by being accessed.[131] Hidden metadata can include responsive information but can be difficult for the unprepared to preserve and produce.[132] Difficult to manage backup data may be responsive and need to be preserved, even if not searched and produced.[133] In addition, ESI typically resides in many locations, including hard drives, network servers, floppy disks, backup tapes, PDAs, thumb drives, smart cards, and cell phones.[134] It includes voice recordings as well as text documents, and instant messaging. And, emerging social media promise to increase the complexity and cost of e-discovery.[135] These complications magnify the cost issues raised by the sheer quantity of electronic documents. In addition, they can expose unprepared parties to spoliation claims for failure to preserve and produce.[136]

This increase in the volume and complexity of documents in today's digital world has not, however, altered the basic rules of discovery.[137] Documents must still be preserved, collected and produced, often at great cost. In one case, restoration of data from two hundred backup tapes was estimated to cost $9.75 million even before the recovered documents were reviewed.[138] Beyond the cost of preservation and collection, ESI is still generally reviewed by attorneys for relevance and privilege — an activity that some now estimate may account for as much as 75-90 percent of the costs of e-discovery.[139] Production and review, even in smaller cases, can cost hundreds of thousands of dollars.[140] Businesses now frequently spend more money to prepare for electronic discovery through technology upgrades and revised IT processes — an expenditure that smaller companies may be

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126 *See* Dertouzos, et al., *supra* note 122, at 1 (citing School of Information, University of California at Berkeley, *How Much Information?* (2003)).

127 Daniel Hedgman, *A Port in the Storm?: The Problematic and Shallow Safe Harbor for Electronic Discovery*, 10 NW. U. L. REV. 259, 276 (2007) (citing David Narkiewicz, *Electronic Discovery and Evidence*, 75 PENNSYLVANIA LAWYER 57 (2003)).

128 *See* Brownstone, *supra* note 121, at 53.

129 Hon. Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. REV. 327, 349 (2000).

130 *See, e.g.*, *United States v. Crim. Triumph Capital Group, Inc.*, 211 F.R.D. 31, 46 n.8 (D. Conn. 2002) ("When a user deletes a file, the data in the file is not erased, but remains intact . . . where it was stored until the operating system places other data over it.").

131 *See* Hedgman, *supra* note 127, at 275 (citing THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (2007)).

132 "Courts generally have ordered the production of metadata when it is sought in the initial document request and the producing party has not yet produced the documents in any form." *Aguilar v. Immigration and Customs Enforcement Div. of the U.S. Dept. of Homeland Sec.*, 255 F.R.D. 350, 357 (S.D.N.Y. 2008); *In re Priceline.com Inc. Sec. Litig.*, 233 F.R.D. 88, 91 (D. Conn. 2005) (production ordered in TIFF format with corresponding searchable metadata databases); *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 654 (D. Kan. 2005) (ordering production of Excel spreadsheets with metadata even though no request had been made initially because producing party should reasonably have known that metadata was relevant). *But see Wyeth v. Impax Lab., Inc.*, 248 F.R.D. 169, 171 (D. Del. 2006) ("reviewing [metadata] can waste litigation resources"); *Williams*, 230 F.R.D. at 651 ("Emerging standards of electronic discovery appear to articulate a general presumption against the production of metadata"); *Michigan First Credit Union v. Cumis Ins. Soc., Inc.*, 2007 WL 4098213 (E.D. Mich. Nov. 16, 2007) (declining to require production of documents in native format due to burden concerns).

133 *See, e.g.*, *Wells v. Xpedx*, 2007 WL 1200955 (M.D. Fla. Apr 23, 2007) (producing party has duty to search hard drives, servers, and backup tapes for responsive deleted emails and files); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (requiring recovery and production of all deleted emails relevant to discrimination and retaliation claims); *Rembi Marine, Inc. v. United States*, 58 Fed. Cl. 57 (2003) (requiring production of backup tapes after finding that numerous relevant emails were deleted); *Samide v. Roman Catholic Diocese of Brooklyn*, 5 A.D.3d 463 (N.Y. App. Div. 2d Dept 2004) (requiring recovery and production of all relevant deleted emails). *See also* Thomas Y. Allman, et al., *Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible*, The Sedona Conference Working Group on Electronic Document Retaliation & Production (2008) *available at* http://www.thesedonaconference.org. *But see Scott Co. LLC v. Liberty Mut. Ins. Co.*, 2007 WL 1723509 (S.D. Ohio June 12, 2007) (upon objection, requesting party may have to establish that requested deleted information is both relevant and retrievable); *Oxford House, Inc. v. City of Topeka*, 2007 WL 1246200 (D. Kan. Apr. 27, 2007) (deleted files not required to be produced due to undue burden).

134 *See* Dertouzos, et al., *supra* note 122, at 2; THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (2007).

135 *See Covad Commc'ns Co. v. Revonet, Inc.*, 258 F.R.D. 5, 16 (D.D.C. 2009) ("[T]he universe of items to be considered for production is ever expanding with the ubiquity of e-mail and other forms of electronic communication, such as instant messaging and the recording of voice messages. Electronic data is difficult to destroy and storage capacity is increasing exponentially, leading to an unfortunate tendency to keep ESI even when any need for it has long since disappeared. This phenomenon - the antithesis of a sound records management policy - leads to ever increasing expenses in finding the data and reviewing it for relevance or privilege.").

136 *See, e.g.*, *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, 2005 WL 674885, at *1 (Fla. Cir. Ct. Mar. 23, 2005) (failure to use good faith in production and preservation of e-mails exposed company to liability for spoliation); *In re Telxon Corp. Sec. Litig.*, 2004 WL 3192729, at *23 (N.D. Ohio July 16, 2004) (sanctions imposed for bad faith modification of electronic records, loss of electronic files, and failure to produce relevant e-mails).

137 *See* Gensler, *supra* n. 22, at 581.

138 *See* Richard Van Duizend, *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information*, Conference of Chief Justices, at vi (2006) *available at* http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf.

139 *See* Dertouzos, et al., *supra* note 122, at 3. *See also Covad Commc'ns*, 258 F.R.D. at 14 ("Experience shows" that review for relevance and privilege "may dwarf the cost of the search").

140 *See, e.g.*, *Oxford House, Inc. v. City of Topeka*, 2007 WL 1246200, at *4 (D. Kan. Apr. 27, 2007) (production of deleted files estimated to cost more than $100,000); *Ex parte Cooper Tire & Rubber Co.*, 987 So. 2d 1090, 1104 (Ala. 2007) (acknowledging producing party's evidence that discovery burden would "entail thousands of hours and will cost hundreds of thousands of dollars").

unable to make.[141] Ultimately, these discovery cost increases "could dominate the underlying stakes in dispute" and even lead parties to decide against litigating meritorious claims or defenses.[142]

Against this backdrop of increasing volume and complexity of ESI magnifying the costs of discovery, antagonistic discovery strategies can be even more expensive and problematic than in the past. Such strategies "lead to delay as well as expenditures of much time and money on repetitive scope-of-discovery issues."[143] With the smaller scope and complexity of paper-based document discovery in litigation in prior years, these delays and cost increases could be minimal, or at least more tolerable. However, given the already substantially increased cost of discovery in light of the increased volume and complexity of ESI, the incremental costs imposed by combative approaches to discovery and unnecessary discovery disputes can be even more problematic.

This additional burden on parties and the judicial system is, in large part, avoidable. Commentators note that electronic discovery's complications and expense can be most problematic when the information is "not managed properly."[144] While the proliferation of ESI and its particular attributes have increased discovery costs in many ways, ESI by its very nature is particularly susceptible of being properly managed so as to limit costs. For example, ESI can be more accessible than paper records. Once identified and collected, ESI is generally easier to de-duplicate, sort, search and otherwise process in bulk. It can also be easier to actually handle and produce.[145]

Agreement between parties on key parameters such as the identity of custodians whose data will be preserved and/or collected; the date ranges, search terms, and methodologies to be employed by the parties to identify responsive data; and the format(s) in which document production will occur has the potential to unlock ESI's more useful attributes to reduce discovery expenditures for all parties. Early agreement on such key parameters makes it much less likely that a party will be ordered to supplement its production (and thus incur the expense of repeating searches, reviews, and production) because its opponent convinces a court that the producing party's unilateral choices were too narrow or otherwise inappropriate. In a survey of 2,690 attorneys recently involved in federal litigation, more than 60% of respondents, representing both plaintiffs and defendants, "agreed" or :strongly agreed" with the statement, "[t]he parties ... were able to reduce the cost and burden of the ... case by cooperating in discovery." Lee ET AL., *supra* note 19, at 30-31.

In this regard, cooperation does not mean simply volunteering data or information. Rather, cooperation suggests early, candid, and ongoing exchanges between counsel. For each side, these exchanges must address both the potentially discoverable information which that side possesses and its needs for information in the possession of the other side. Such dialogue can facilitate reciprocal agreements regarding preservation and production obligations that can enable each party to fulfill its own discovery obligations at lower cost and with less risk and to obtain the information it needs from the other side without undue expense or tribulation.

Indeed, cooperation in discovery is not an "all or nothing" matter. The parties can mutually reduce costs and risks by agreeing on many or most issues even if they cannot resolve all potential discovery disputes. Even in cases where both parties follow a good faith, cooperative approach, there may still be issues on which the parties legitimately disagree. Nonetheless, when that occurs, both sides should consider whether a cooperative, negotiated approach may be preferable to a judicial determination. Most cases settle because the parties elect not to face the expense of litigating to a conclusion on the merits and the risk of an unfavorable result. Similarly, parties who follow a cooperative approach to discovery can often resolve quite legitimate differences regarding discovery through negotiated resolutions by, for example, finding a livable middle ground between two fully defensible positions, or trading "wins" on multiple issues to create an overall resolution. Indeed, early cooperation on basic discovery parameters not only directly prevents or limits the additional litigation expense which might otherwise be imposed by discovery disputes on those matters, but it may also

141 *See* Dertouzos, et al., *supra* note 122, at ix.
142 *Id.* at 3 (noting, however, a lack of empirical research on "[t]he extent to which costs have increased"). *See also id.* at 23 ("[S]everal interviewees claimed that the significant burdens of e-discovery outweighed the benefits of going to trial, especially in low-stakes cases.").
143 Brownstone, *supra* note 121, at 53.
144 Dertouzos, et al., *supra* note 122, at ix.
145 *See id.* at 15.

foster a less confrontational approach in which the parties are able to resolve downstream differences without involving the court.

Overreaching discovery demands, obstructionist responses to legitimate discovery and unproductive discovery disputes all unnecessarily drain the resources of litigants and slow, or even prevent, adjudication on the merits. In contrast, when parties conduct discovery in a diligent but cooperative and candid manner, each can obtain the discovery it needs to adjudicate the dispute on the merits (or to reach a mutually agreeable settlement) while minimizing discovery expense. In any given case, it is thus in the interest of both sides to embrace a mutually cooperative approach to the exchange of discoverable documents and data. While either party could upset this balance by pursuing overreaching discovery, responding to legitimate discovery in an obstructionist manner, or forcing unnecessary discovery disputes, courts may use the rules of civil procedure and professional conduct to encourage compliance with a cooperative approach.[146] Aware of the already large cost of discovery of ESI and of the significant but unnecessary cost of discovery disputes, encouraged or pushed toward cooperation rather than gamesmanship by the courts and the rules of procedural and professional responsibility, and armed with better tools to effectuate such cooperation, it is in the self-interest of all parties to pursue a cooperative approach to discovery.

B. The Strategic Benefits of Cooperation

One potential difficulty in attempting to follow such a cooperative approach is that, particularly at the outset of a dispute, tensions are high, clients are unhappy if not angry, and the suggestion by counsel that a case may be resolved more efficiently and effectively by taking a cooperative approach to discovery may be interpreted by the client as weakness. Model Rule 2.1 states that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." At the same time, as discussed in Part III, other professional responsibility rules, guidelines for civility and professionalism, and court rules instruct lawyers that civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation are essential to the fair administration of justice and conflict resolution. When a client understands these professional responsibilities of an attorney, the mandate of Rule 2.1 is consistent with a cooperative, reasonable approach to discovery. However, a client driven by distrust, fear, or a desire for retribution or to win at any cost may perceive discovery as just another opportunity to penalize the opponent and cooperation as a weakness. Such client motivations and perceptions can put the attorney in the middle and create a fundamental impediment to the reasonable cooperation in discovery so essential in the age of ESI.

Cooperation, however, is in the interest of even an aggressive client, and an attorney who persuasively explains this to the client serves both the client and his or her own professional obligations. Such a client must first understand what cooperation is and is not. Cooperation in the discovery context does not mean giving up vigorous advocacy; it does not mean volunteering legal theories or suggesting paths along which discovery might take place; and it does not mean forgoing meritorious procedural or substantive issues. Cooperation does mean working with the opposing party and counsel in defining and focusing discovery requests and in selecting and implementing electronic searching protocols. It includes facilitating rather than obstructing the production and review of information being exchanged, interpreting and responding to discovery requests reasonably and in good faith, and being responsive to communications from the opposing party and counsel regarding discovery issues. It is characterized by communication rather than stonewalling, reciprocal candor rather than "hiding the ball," and responsiveness rather than obscuration and delay.

Cooperation defined in this manner is not only largely compelled by the attorney's obligation to comply with legal rules, ethical obligations and the professional rules of conduct, but it also offers the client the benefits of creating and maintaining credibility with the court and the opposition, enhancing the effectiveness of advocacy, and minimizing client costs and risks. A client

146 *See* discussion *supra* at Parts II and III.

should be informed and understand that the attorney's duties to the client[147] are not unlimited[148] but are circumscribed both by court rules[149] and obligations of civility and professionalism.[150] Statements of civility and professionalism published by many courts and bar associations are particularly informative in explaining to a client the limits of representation and the obligations of an attorney to the administration of justice. These statements discuss conduct that may not be unethical but would be considered unprofessional and hence unacceptable.[151] The California Guidelines provide, for example, that an attorney has obligations of "civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and *cooperation*, all of which are essential to the fair administration of justice and conflict resolution."[152] Statements of professionalism and civility such as these provide important foundational justifications that can be brought to bear when persuading clients bent on being overly aggressive and resistant to take a more cooperative approach to dispute resolution.

Moreover, both counsel and clients should recognize that an obstructionist, overreaching, or simply non-cooperative approach to discovery invites adverse consequences for the non-cooperative party itself. This can take the form of non-cooperative conduct in return from the other side, leading the parties to conduct discovery "the hard way," with each party incurring unnecessary expense as a result of the other side's non-cooperative approach, but neither gaining a strategic or tactical upper hand. It can also take the form of an adverse decision or even sanctions on the discovery dispute in question. Non-cooperative conduct early in the discovery process can lead a court to view that party's position less favorably when discovery disputes ripen and come before the court.

In addition, a cooperative approach that actively engages the other side on search methodologies and other e-discovery parameters and which incorporates the opposing party's legitimate needs into the production process makes it more likely that the court will accept the producing party's efforts as reasonable when a dispute later arises. That reduces the likelihood that the court will require the client to engage in costly repeat searches, reviews, and other discovery tasks.[153]

Similarly, non-cooperative conduct by a requesting party early in discovery can make the court reluctant to require further discovery from an opponent that has tried to cooperate. Thus, one court has recently recognized that, where the producing party asked opposing counsel "repeatedly to suggest search terms" but was rebuffed, "it is unfair to allow [the requesting party] to fail to participate in the process and then argue that the search terms were inadequate. This is not the kind of collaboration and cooperation that underlies the hope that the courts can, with the sincere assistance of the parties, manage e-discovery efficiently and with the least expense possible."[154]

Moreover, both counsel and the client should understand the desirability if not necessity of creating and maintaining credibility with the court, court staff, and opposing counsel. The most effective advocate is one who is believed and one who can be trusted. Indeed, the credibility of the attorney transcends a particular case or a particular client. A client must understand that an attorney's obligations to other clients mandates candor with both the court and with opposing counsel. The attorney's word must be trusted and that attorney's professional credibility cannot be compromised for one case or one client. The benefits of being represented by an attorney with a reputation of trustworthiness and candor is that the court and opposing parties will be more willing to accept representations and the need to prepare and present "proof" (and thus briefing, hearings and other formal proceedings) may be lessened. Furthermore, an attorney who has a reputation for being

147 *See* Model. R. Prof. Conduct 1.2 ("a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued").

148 For example, abiding by the client's decisions does not extend to counseling or assisting in criminal or fraudulent conduct, asserting frivolous positions, making false statements or presenting false evidence to a court or other tribunal, or unlawfully obstructing access to evidence or concealing or destroying evidence. *See id.* 2.1(d), 3.1, 3.3, 3.4.

149 The Federal Rules of Civil Procedure and analogous state rules define the substantive duties with which attorneys must comply. For example, Rule 26(a) mandates that the parties make certain initial disclosures; Rule 26(b) limits the scope of permitted discovery; and Rule 26(f) requires meeting for the exchange of initial information.

150 *See* Van Duizend, *supra* note 138.

151 *See id.*

152 California Attorney Guidelines, *supra* note 71, at 3 (emphasis added).

153 *See, e.g.*, *Kipperman*, *supra* note 12, at *8 (defendant's failure to cooperate as to search terms led to rejection of argument that plaintiff's requested search was overbroad).

154 *Covad Commc'ns. Co. v. Revonet, Inc.*, 254 F.R.D. 5, 14 (D.D.C. 2009) (citing the *Cooperation Proclamation*). *Accord Wells Fargo Bank v. LaSalle Bank Nat'l Ass'n.* 2009 WL 2243854, at *2-3 (S.D. Ohio July 24, 2009) (refusing to require defendant to restore and search back-up tapes after close of discovery where the parties could have avoided the dispute "by conferring appropriately early in the case about ESI," citing the *Cooperation Proclamation*, describing parties' conduct as filing "one paragraph boilerplate statements about ESI" in the Rule 26(f) report and "waiting for the explosion later" rather than "deal[ing] systematically with ESI problems at the outset of the litigation").

credible will likely have the adversarial advantage over the course of the dispute resolution process, particularly over an attorney who has below par credibility. Success in advocacy and persuasiveness on substantive issues is enhanced by the cooperative approach to discovery. Cooperatively working through procedural issues can have the effect of building a reservoir of goodwill and trust that can be drawn upon in advocating for the client's position on important substantive issues. Likewise, reasonableness, civility and flexibility begets a like response.

In short, a cooperative approach is more likely to speed up the time for reaching a resolution, to enhance the possibility of settlement, enhance the likelihood of an optimum result and lower the overall cost of the dispute resolution process.

C. Avoiding the Prisoner's Dilemma

When both sides to litigation pursue a cooperative approach to discovery, each party benefits by reducing its discovery expense while it still obtaining necessary information to which it is entitled. However, the phenomenon which game theory refers to as the "Prisoner's Dilemma" suggests that the fear of being disadvantaged if the other side were to take a non-cooperative approach to discovery could lead both sides to reject cooperation, thus raising litigation expenses for both sides while giving neither any advantage as a result of this additional cost. Either party in a particular case may perceive that one could gain an advantage over the other by employing obstructionist, overreaching or combative tactics, potentially preventing its opponent from obtaining needed and discoverable data, but itself reaping the benefits of receiving full discovery from its more cooperative opponent. In the classic Prisoner's Dilemma, the prospect that an opponent might seek such an advantage could lead both sides to defensively pursue a non-cooperative approach, so that, in the end, neither gains a unilateral advantage over the other and both are actually worse off than if both had cooperated.[155] In discovery, this would result in each spending more on discovery than would have been the case if both sides had taken a cooperative approach, but with neither party gaining the benefits of mutual cooperation much less an upper hand over the other side.

However, the Prisoner's Dilemma phenomenon breaks down where the actors involved must repeatedly face the same or similar decisions with the same or similar costs, benefits and risks. Under these circumstances, a party considering taking a non-cooperative approach in an attempt to gain an advantage over the other side must evaluate the risk of the other side responding with similar conduct during a subsequent "round."[156] In the discovery setting, for example, an obstructionist approach regarding e-discovery parameters during a Rule 26(f) conference may lead to non-cooperative conduct by the other side in subsequent meet-and-confer situations where the first party would itself benefit from mutually cooperative resolutions. Indeed, even in a single Rule 26(f) conference or other individual meet-and-confer situation, there are often multiple issues to address, each of which can be viewed as a "round" in which non-cooperative conduct by one side could induce non-cooperative conduct by the other side in subsequent rounds.

Thus, a party's non-cooperative conduct in each round potentially has later adverse consequences for that very party, and the threat of such can lead both sides to a cooperative approach.[157] This leads the parties, each following its own self-interest, to pursue a cooperative approach that leads both to the mutually beneficial result here, lowering discovery expenses. The opportunity (indeed, the requirement) imposed by the civil rules and many local rules to address and attempt to agree upon key discovery parameters early in each case, coupled with the high likelihood that there will be many additional downstream steps in each case can induce both sides to behave in a cooperative manner.

The Prisoner's Dilemma phenomenon further breaks down where the actors involved can communicate with each other to develop and exchange enforceable, reciprocal commitments; where each actor can learn about the other's reputation for trustworthiness as to such commitments from the

155 *See* Robert Axelrod, THE EVOLUTION OF COOPERATION, at 7-10, 125 (Rev. Ed., Perseus Books Group 2006); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 514-15 (1994).
156 *See* Axelrod, *id.* at 22, 20-21, 125; *see also* G. Paul & J. Baron, *supra* note 26, at 56 note. 134.
157 *See* Axelrod, *id.* at 131-32.

other's prior interactions with third parties; and where each actor must be concerned with the impact of its own present conduct on its reputation and thus its ability to elicit conduct that it may seek from others in the future.[158] Unlike the two isolated hypothetical individuals in the Prisoner's Dilemma who *cannot* communicate with each other, attorneys and parties in litigation can cooperatively bargain for interdependent commitments on specific issues before actually performing and conveying benefits on the other side. They can also enforce such commitments through court involvement, consider the reputation of the opposing counsel and party in deciding whether to enter such agreements, and consider the consequences of their actions on their own reputation, all of which permits and encourages cooperative solutions.[159]

Finally, the circumstances of litigation introduce a variable not present in the classic Prisoner's Dilemma: the possibility of an intervening enforcement authority. In litigation, the attorneys and parties conducting discovery must also consider how a court will view and potentially reward or penalize their actions. As discussed in Section B above, an obstructionist or overreaching approach by a party in discovery may lead to unfavorable decisions by the court as to that very issue or as to other discovery disputes in the same case. Moreover, forcing the court to address an unnecessary discovery dispute or taking an inappropriately aggressive or unsupported position may undermine the credibility of counsel and the party on subsequent procedural or substantive issues. This threat can provide incentives for each party to pursue a cooperative approach. Of course, judicial willingness to support reasonable discovery approaches and to penalize overreaching and obstructionist positioning will increase the effectiveness of this incentive. Indeed, that attorneys will again appear before the courts, and their clients may as well, creates a dynamic in which the threat of future obstructionist conduct by opponents, or risk of gaining a reputation among the judiciary as unduly combative during discovery, encourages cooperative behavior.

Thus, while there may remain cases in which a party opts for a contentious, non-cooperative approach to discovery, potentially forcing onto the opponent disputes not of its choosing and their attendant costs, in most cases, mutual self-interest should lead both sides to a cooperative approach. Indeed, as the explosion in electronic data and the economics of litigation, and pressure from the courts induce more attorneys and parties to conduct discovery in a cooperative manner, those who continue to pursue unduly combative approaches may find that their conduct increasingly stands out as inappropriate to both courts and other counsel, rendering such conduct increasingly counter-productive.

VI. CONCLUSION

If parties are expected to continue to manage discovery in the manner envisioned by the Federal Rules of Civil Procedure, cooperation will be necessary. Without such cooperation, discovery will become too expensive and time consuming for parties to effectively litigate their disputes.

158 *See id.* at 11-12.
159 *See* Gilson & Mnookin, *supra* note 155, at 564 (counsel's concern about reputation may facilitate cooperative solutions).

APPENDIX 5

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Cite items in this volume to "11 Sedona Conf. J. ____ (2010)."

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THE SEDONA CONFERENCE® COMMENTARY ON LEGAL HOLDS: THE TRIGGER & THE PROCESS

*A Project of The Sedona Conference® Working Group on Electronic Document Retention & Production (WG1)**

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Preface

Welcome to the 2010 final post-public comment version of *The Sedona Conference® Commentary on Legal Holds: The Trigger & The Process.* This document contains numerous changes from the 2007 public comment version. The changes reflect the informal and formal suggestions and comments we received in the past 2+ years since initial publication.

In a nutshell, the edits take into consideration the continued evolution of law and best practices in the area over the past few years. Just as the awareness and consideration of issues involved in implementing legal holds evolved significantly since the founding of the Working Group in 2002 to the initial publication of this document, so too has the legal world evolved since 2007. The guidelines and accompanying text have been revised to harmonize the enhanced understanding of the technical, process, and legal issues that have emerged since we first issued this Commentary. Notably, our treatment of the issues in this revised edition expressly addresses the recent *Pension Committee* and *Rimkus* cases that have been widely disseminated and discussed in 2010, as well as recent cases addressing the application of Rule 37(e) of the Federal Rules of Civil Procedure that was added in 2006.

While we have no doubt this area will continue to evolve, we believe this document represents an accurate view of reasonable and defensible practices that organizations should consider in 2010 and going forward when addressing the issue of legal hold triggers and process.

While all Working Group members, as well as public commentators, played a role in the revisions and enhancements to this document, I would like to especially thank Thomas Y. Allman, Conor R. Crowley, Jonathan M. Redgrave, and Kenneth J. Withers for their efforts in shepherding the final review and editing process for this document.

Finally, although this document is now in its post-public comment version, we welcome additional input and involvement in this and other publications of The Sedona Conference.® Please reach out to us at our website at www.thesedonaconference.org or email me at rgb@sedonaconference.org.

Richard G. Braman
Executive Director
The Sedona Conference®
August 2010

PRESERVATION OBLIGATIONS AND LEGAL HOLDS

Information is the lifeblood of the modern world, a fact that is at the core of our civil discovery system. Accordingly, the law has developed rules regarding the manner in which information is to be treated in connection with litigation. One of the principal rules is that whenever litigation[1] is reasonably anticipated, threatened, or pending against an organization,[2] that organization has a duty to undertake reasonable and good faith actions to preserve relevant and discoverable information and tangible evidence. This duty arises at the point in time when litigation is reasonably anticipated whether the organization is the initiator or the target of litigation.

The duty to preserve requires a party to identify, locate, and maintain information and tangible evidence that is relevant to specific and identifiable litigation. It typically arises from the common law duty to avoid spoliation of relevant evidence for use at trial and is not explicitly defined in the Federal Rules of Civil Procedure. *See, e.g., Silvestri v. General Motors,* 271 F.3d 583 (4th Cir. 2001) (applying the "federal common law of spoliation"); *Chambers v. NASCO, Inc.,* 501 U.S. 32 (1991).

The concept of "legal holds" or "litigation holds"[3] has gained momentum in the last 10 years as part of common process by which organizations can begin to meet their preservation obligations. The use of a "litigation hold" as a means to satisfy preservation obligations was popularized by the 2003 decision in *Zubulake v. UBS Warburg* ("*Zubulake IV*").[4] The court suggested that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold.'"[5] In a subsequent decision in 2010 in *Pension Committee v. Bank of America Securities, LLC*,[6] the same court held that "the failure to issue a written litigation hold constitutes gross negligence." However, not all courts require a written legal hold. For example, in *Kinnally v. Rogers Corporation*,[7] a district court held that sanctions do not lie merely because of the "absence of a *written* litigation hold"[8] when a party has taken "the appropriate actions to preserve evidence."[9]

The 2006 Amendments

The 2006 Amendments to the Federal Rules of Civil Procedure ("the 2006 Amendments" or "the Amendments") did not define preservation obligations given the difficulty in drafting an appropriate Rule.[10] The use of a "litigation hold" as a method of implementation was referenced, however, in the Note to Rule 37(f), which was subsequently renumbered as Rule 37(e).[11]

1 Throughout this Commentary, the term "litigation" is used to refer primarily to civil litigation. However, the principles apply with equal force to regulatory investigations and proceedings.
2 Where appropriate, the term "organization" should be understood to include natural persons.
3 Throughout this Commentary we use the term "legal hold" rather than "litigation hold" to reflect that the duties and processes may apply in circumstances where there is no litigation. (e.g., pre-litigation or investigation).
4 220 F.R.D. 212 (S.D.N.Y. 2003).
5 *Id.* at 218.
6 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010). The opinion was subtitled "*Zubulake* Revisited: Six Years Later."
7 2008 WL 4850116, at *7 (D. Ariz. Nov. 7, 2008).
8 *Id.* *6 ("the absence of a written litigation hold . . . does not in itself establish [a violation]" (emphasis in original).
9 *Id.* at *7 (noting use of a verbal litigation hold).
10 ADVISORY COMMITTEE MINUTES, Apr. 14-15, 2005, at p. 39-40 ("the Committee has concluded that the difficulties of drafting a good rule would be so great that there is no occasion even to consider the question whether a preservation rule would be an authorized or wise exercise of Enabling Act authority."); copy available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC0405.pdf.
11 FED R. CIV. P. 37(f). Committee Note observes that "[w]hen a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a 'litigation hold.'" (2006).

The primary focus in the Amendments was on process improvements designed to encourage early party agreements while providing guidance for courts facing losses due to preservation failures. Thus, Rule 26(f) now requires discussion of "issues about preserving discoverable information" at the "meet and confer" held prior to the Scheduling Conference required by Rule 16(b). The Committee hoped that by encouraging early discussion, parties would reach agreement on "reasonable preservation steps." However, the requirement to discuss preservation "does not imply" that courts should routinely enter preservation orders.[12] In addition, Rule 37(e) provides that "[a]bsent 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."

The Duty to Preserve

In enforcing the duty to preserve through spoliation sanctions, courts primarily rely upon their inherent powers, although Rule 37 also plays a limited role where a court order has been violated. A party that violates a preservation order or an order to compel production, or otherwise fails to preserve and produce information, may be exposed to a range of sanctions.[13]

Preservation obligations may also be acknowledged and enforced because of statutes or regulations that are deemed to apply under the circumstances at issue.[14] *See Byrnie v. Town of Cromwell Board of Education*[15] ("Several courts have held that the destruction of evidence in violation of a regulation that requires its retention can give rise to an inference of spoliation."). Criminal penalties at the federal and state level may also be invoked in specific cases within the coverage of those laws. *See, e.g.,* 18 U.S.C. § 1519 (Sarbanes-Oxley Act § 802).

A duty to preserve may arise or be "triggered" before commencement of litigation. The duty "arise[s] not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation."[16] Once it arises, a party must take reasonable steps to preserve "what it knows, or reasonably should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request."[17] In some states, including federal courts sitting in diversity, an independent action in tort may lie for violation of a duty to preserve.[18]

The basic principle that an organization has a duty to preserve relevant information in anticipation of litigation is easy to articulate. However, the precise application of that duty can be elusive. Every day, organizations apply the basic principle to real-world circumstances, confronting the issue of when the obligation is triggered and,

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12 FED. R. CIV. P. 26, Committee Note, Subdivision (f) (2006).

13 The preservation obligation typically applies only to parties, although service of a subpoena can trigger a duty as to non-parties. *See, e.g., Caston v. Hoaglin*, 2009 WL 1687927 (S.D. Ohio June 12, 2009) (subpoenas issued for the purposes of requiring preservation of relevant information).

14 Some record retention regulations that create preservation obligations are not necessarily enforceable for the benefit of private parties. *See* 17 C.F.R. § 240.17a-4 (SEC rule mandating retention of communications by members, brokers, or dealers), as discussed in *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322 n.70 (S.D.N.Y. 2003) (plaintiff was not an intended beneficiary of the records retention regulation at issue).

15 243 F.3d 93, 108-09 (2d Cir. 2001).

16 *Silvestri v. General Motors*, 271 F.3d 583, 591 (4th Cir. 2001).

17 *Wm T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443 (C.D. Cal. 1984).

18 *See, e.g., Kearney v. Foley & Lardner*, 582 F.3d 396 (9th Cir. 2009) (dismissing state claim because of other viable remedies).

once triggered, what is the scope of the obligation. Principle 5 of *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* ("*The Sedona Principles*") (2d ed. 2007), suggests that preservation obligations require "reasonable and good faith efforts," but that it is "unreasonable to expect parties to take every conceivable step to preserve potentially relevant data."

This Commentary is intended to provide pragmatic suggestions and guidance in carrying out preservation obligations. For ease of analysis, the Commentary is divided into two parts: The "trigger" and the "legal hold." Part I addresses the "trigger" issue and provides practical guidelines for determining when the duty to preserve relevant information arises. What should be preserved and how the preservation process should be undertaken, including the implementation of "legal holds," are addressed in Part II.

The keys to addressing these issues, as with all discovery issues, are reasonableness and good faith. Where ESI is involved, there are also practical limitations due to the inaccessibility of sources[19] as well as the volume, complexity and nature of electronic information, which necessarily implicates the proportionality principles, found in Rule 26(b)(2)(C)(iii).[20]

The Guidelines in this Commentary are intended to facilitate compliance by providing a framework an organization can use to create its own preservation procedures. *The Guidelines are not intended and should not be used as an all-encompassing "checklist" or set of rules that are followed mechanically.* Instead, they should guide organizations in articulating a policy for implementing legal holds that is tailored to their individual needs. In addition to the Guidelines, suggestions and illustrations are included under hypothetical factual situations. These illustrations are not to be taken as "right answers" for the circumstances posed. Indeed, there may be other circumstances or facts that could well result in a different analysis and result. As such, the illustrations are intended to impart understanding of the analytical framework to be applied and not to be considered as reasons for reaching a particular result.

Guideline 1
A reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation.

Guideline 2
Adopting and consistently following a policy or practice governing an organization's preservation obligations are factors that may demonstrate reasonableness and good faith.

Guideline 3
Adopting a process for reporting information relating to a probable threat of litigation to a responsible decision maker may assist in demonstrating reasonableness and good faith.

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19 FED. R. CIV. P. 26(b)(2)(B) provides that information stored in sources that are not reasonable accessible because of undue burden or cost are not initially discoverable, but the fact that they may become so if "good cause" is shown prompts them to be a subject of consideration for possible preservation.

20 The Hon. Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV 381, 388 (2008) (it would be "anomalous to sanction a party" for failure to preserve information that is later determined by the court not to be discoverable under FED. R. CIV. P. 26(b)(2)(C)).

Guideline 4
Determining whether litigation is or should be reasonably anticipated should be based on a good faith and reasonable evaluation of relevant facts and circumstances.

Guideline 5
Evaluating an organization's preservation decisions should be based on the good faith and reasonableness of the decisions undertaken (including whether a legal hold is necessary and how it should be executed) at the time they are made.

Guideline 6
The duty to preserve involves reasonable and good faith efforts, taken as soon as is practicable and applied proportionately, to identify and, as necessary, notify persons likely to have relevant information to preserve the information.

Guideline 7
Factors that may be considered in determining the scope of information that should be preserved include the nature of the issues raised in the matter, the accessibility of the information, the probative value of the information, and the relative burdens and costs of the preservation effort.

Guideline 8
In circumstances where issuing a legal hold notice is appropriate, such a notice is most effective when the organization identifies the custodians and data stewards most likely to have relevant information, and when the notice:

(a) Communicates in a manner that assists persons in taking actions that are, in good faith, intended to be effective
(b) Is in an appropriate form, which may be written
(c) Provides information on how preservation is to be undertaken
(d) Is periodically reviewed and, when necessary, reissued in either its original or an amended form, and
(e) Addresses features of relevant information systems that may prevent retention of potentially discoverable information.

Guideline 9
An organization should consider documenting the legal hold policy, and, when appropriate, the process of implementing the hold in a specific case, considering that both the policy and the process may be subject to scrutiny by opposing parties and review by the court.

Guideline 10
Compliance with a legal hold should be regularly monitored.

Guideline 11
Any legal hold policy, procedure, or practice should include provisions for releasing the hold upon the termination of the matter at issue so that the organization can adhere to policies for managing information through its useful lifecycle in the absence of a legal hold.

PART 1: TRIGGERING THE DUTY OF PRESERVATION

The duty to preserve relevant information arises when litigation is "reasonably anticipated." The duty to preserve relevant information is certainly triggered when a complaint is served, a governmental proceeding is initiated, or a subpoena is received. However, the duty to preserve could well arise before a complaint is served or a subpoena is received and regardless of whether the organization is bringing the action, is the target of the action, or is a third party possessing relevant evidence. The touchstone is "reasonable anticipation."

Determining whether a duty to preserve is triggered is fact-intensive and is not amenable to a one-size-fits-all or a checklist approach. An organization will likely not be able to resolve the question the same way each time it arises. In general, determining whether the duty to preserve attaches will require an approach that considers a number of factors, including the level of knowledge within the organization about the claim, and the risk to the organization of the claim. Weighing these factors will enable an organization to decide when litigation is reasonably anticipated and when a duty to take affirmative steps to preserve relevant information has arisen.

Guideline 1. A reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation.

When the duty to preserve arises is often unambiguous. For example, the receipt of a summons or complaint, receipt of a subpoena, or formal notice that an organization is the target of a governmental investigation puts an organization on notice that it has a duty to preserve relevant information. However, other events may trigger a duty to preserve only when considered in the context of the entity's history and experience, or the particular facts of the case. For instance, an insurer's receipt of a claim from an insured often will not indicate the probability of litigation, as the insurer is in the business of paying claims often without litigation. On the other hand, the filing of an EEOC charge by a current or former employee may or may not, in the experience of the employer, indicate a probability of litigation. Similarly, the receipt of a preservation notice letter from an opposing party may or may not give rise to a credible probability of litigation, depending on the circumstances.

On the plaintiff's side, seeking advice of counsel, sending a cease and desist letter or taking specific steps to commence litigation may trigger the duty to preserve. In both *Pension Committee*[21] and *Rimkus Consulting v. Cammarata*,[22] the activities of the plaintiffs prior to litigation came under close examination. The test of the timing of the trigger is often based on when the party "determine[d] [that] legal action is appropriate."[23]

On the defendant's side, credible information that it is the target of legal action may be sufficient to trigger the duty to preserve. The degree to which anticipated litigation must be clear and certain is debatable. In *Goodman v. Praxair Services*,[24] the court refused to require an unequivocal notice of impending litigation. In *Phillip M. Adams & Associates v.*

21 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).
22 2010 WL 645353 (S.D. Tex. Feb. 19, 2010).
23 *Milenkamp v. Davisco Foods Int'l*, 562 F.3d 971, 981 (9th Cir. 2009) (no duty to preserve since destruction of evidence occurred "by the time" that plaintiffs determined legal action was appropriate).
24 632 F. Supp. 2d 494, 494 at n. 7 (D. Md. 2009).

Dell, Inc.,[25] the duty to preserve was held to have been triggered many years before suit was filed because of mere awareness of the dispute by others in the industry. However, there are circumstances when the threat of litigation is not credible and it would be unreasonable to anticipate litigation based on that threat. In *Cache LaPoudre Fees v. Land O'Lakes*,[26] for example, a letter referencing potential "exposure" did not trigger the obligation to preserve since a mere possibility of litigation does not necessarily make it likely and the letter referred to the possibility of amicable resolution.

This Guideline suggests that a duty to preserve is triggered *only* when an organization concludes (or should have concluded), based on credible facts and circumstances, that litigation or a government inquiry is probable. Whether litigation can be reasonably anticipated should be based on a good faith and reasonable evaluation of the facts and circumstances as they are known at the time. Of course, later information may require an organization to reevaluate its determination and may result in a conclusion that litigation that previously had not been reasonably anticipated (and consequently did not trigger a preservation obligation) is then reasonably anticipated. Conversely, new information may enable an organization to determine that it should no longer reasonably anticipate a particular litigation, and that it is consequently no longer subject to a preservation obligation. A party that obtains new information, after the initial decision is made, should reevaluate the situation as soon as practicable. *See, e.g., Stevenson v. Union Pacific RR Co.*, 354 F.3d 739 (8th Cir. 2004).

Consequently, to help understand when the duty to preserve arises, one should consider when the duty does *not* arise. For example, a vague rumor or indefinite threat of litigation does not trigger the duty; nor does a threat of litigation that is not credible or not made in good faith. A lack of credibility may arise from the nature of the threat itself or from past expetience regarding the type of threat, the person who made the threat, the legal bases upon which the threat is purportedly founded, or any of a number of similar facts. In addition, the trigger point for a small dispute, where the stakes are minor, might occur at a later point than for a dispute that is significant in terms of business risk or financial consequences.[27]

A reasoned analysis of the available facts and circumstances is necessary to conclude whether litigation or a government inquiry is or is not "reasonably anticipated." That determination is fact-intensive and should be made by an experienced petson who can make a reasoned judgment.

Another issue to be considered is what constitutes notice to the organization. For corporations this can be a complicated issue. If one employee or agent of the organization learns of facts that might lead one to reasonably believe litigation will be forthcoming, should that knowledge be imputed to the organization as a whole, thereby triggering its preservation obligations? Often, the answer will depend on the nature of the knowledge, the potential litigation, and the agent. Generally, "[a]n agent's knowledge is imputed to the corporation where the agent is acting within the scope of his authority and where the knowledge relates to matters within the scope of that authority."[28]

25 621 F. Supp. 2d 1173 (D. Utah 2009).
26 244 F.R.D. 614, 623, 623 (D. Colo. 2007).
27 A dispute that may have significant consequences will be more likely to result in litigation because the entity potentially asserting the claim is more likely to be willing to bear the costs of litigation. Thus, such a dispute is more likely to result in a reasonable anticipation of litigation.
28 *In re Hellenic, Inc.*, 252 F.3d 391, 395 (5th Cir. 2002).

Organizations that become aware of a credible threat from which litigation might arise may have a duty to make reasonable inquiry or possibly undertake a more detailed investigation regarding the facts related to that "threat." Whether an inquiry or detailed investigation is warranted will be fact-driven and based on reasonableness and good faith. Thus, while there may be no duty to affirmatively disprove allegations associated with a threat before concluding that a threat lacks credibility, the facts and circumstances may suggest the prudence of making an inquiry before reaching such a conclusion.

The case law as to when an organization should reasonably anticipate litigation varies widely from jurisdiction to jurisdiction. In *Zubulake IV*,[29] the court stated that UBS should have reasonably anticipated litigation *at the latest* when Ms. Zubulake filed a charge with the EEOC. However, the court found that UBS reasonably anticipated litigation—thereby triggering the duty to preserve—five months before the filing of the EEOC charge, based on the emails of several employees revealing that they knew that plaintiff intended to sue.[30]

In *Willard v. Caterpillar, Inc.*,[31] the court rejected a claim that the defendant tractor manufacturer should have preserved documents related to the design of the tractor, where the model at issue had been out of production for 20 years. The court noted that:

> There is a tendency to impose greater responsibility on the defendant when spoliation will clearly interfere with the plaintiff's prospective lawsuit and to impose less responsibility when the interference is less predictable. Therefore, if Caterpillar destroyed documents which were routinely requested in ongoing or clearly foreseeable products liability lawsuits involving the D7-C tractor and claims similar to Willard's, its conduct might be characterized as unfair to foreseeable future plaintiffs. However, the document destruction at issue began more than ten years before Willard was injured, and the evidence disclosed only one other accident involving on-track starting and none involving the wet clutch. In our opinion, such remote pre-litigation document destruction would not be commonly understood by society as unfair or immoral.

ILLUSTRATIONS

Illustration i: An organization receives a letter that contains a vague threat of a trade secret misappropriation claim. The letter does not specifically identify the trade secret. Based on readily available information, it appears that the information claimed to be the misappropriated trade secret had actually been publicly known for many years. Furthermore, the person making the threat had made previous threats without initiating litigation. Given these facts, the recipient of the threat could reasonably conclude that there was no credible threat of litigation, and the entity had no duty to initiate preservation efforts.

Illustration ii: An organization receives a demand letter from an attorney that contains a specific threat of a trade secret misappropriation claim. Futthermore, the organization is aware that others have been sued by this same plaintiff on similar claims. Given these facts,

29 220 F.R.D. 212, 216-17 (S.D.N.Y. 2003).
30 The scope of that duty to preserve seems to have been quite limited encompassing a small number of emails over a limited period of time suggesting that even though the duty to preserve had arisen, the scope of the preservation obligations may have been quite modest.
31 40 Cal. App. 4th 892 (1995).

there is a credible threat of litigation, and the organization has a duty to preserve relevant information. The duty to preserve on the part of the potential plaintiff arises no later than the date of the decision to send the letter, and, in some circumstances, may arise earlier.

Illustration iii: An organization learns of a report in a reputable news media source that includes sufficient facts, consistent with information known to the organization, of an impending government investigation of a possible violation of law by the organization stemming from the backdating of stock options given to executives. Under these circumstances, a government investigation (and possibly litigation) can reasonably be anticipated and a preservation obligation has arisen.

Illustration iv: An event occurs which, in the experience of the organization, typically results in litigation. Examples of such events may include a plant explosion with severe injuries, an airplane crash, or an employment discrimination claim. The experience of the organization when these claims arose in the past would be sufficient to give rise to a reasonable anticipation of litigation.

Illustration v: A cease-and-desist letter for misuse of a trademark is received by a business. The recipient replies with an agreement to comply with the demand and, in fact, does comply with the demand. The recipient does not have a reasonable basis to anticipate litigation and does not have an obligation to preserve relevant information. However, the duty to preserve on the part of the sender arises no later than the date of the decision to send the letter.

Guideline 2. Adopting and consistently following a policy or practice governing an organization's preservation obligations is one factor that may demonstrate reasonableness and good faith.

A policy or practice setting forth a process for determining whether the duty to preserve information has attached can help ensure that the decision is made in a defensible manner. As stated in *The Sedona Principles*,[32] "[b]y following an objective, preexisting policy, an organization can formulate its responses to electronic discovery not by expediency, but by reasoned consideration."[33] Thus, any policies that provide for management of ESI should include provisions for implementing procedures to preserve documents and electronically stored information related to ongoing or reasonably anticipated litigation, government investigations or audits. *Id.* However, "[t]he nomenclature (e.g., 'litigation hold') is not important; the important factor is that the organization has a means to comply with its legal obligations to preserve relevant information in the event of actual or reasonably anticipated litigation or investigation." [34]

While the particulars of the policy or practice will necessarily be driven by the structure and culture of the organization, the key is to have a process that is followed. In cases where the preservation efforts are likely to be challenged, it can be helpful to memorialize the steps taken to follow that process so the organization can demonstrate its compliance with the process. A defined policy and memorialized evidence of compliance should provide strong support if the organization is called upon to prove the reasonableness of the decision-making process.

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32 The Sedona Conference,® THE SEDONA PRINCIPLES (2d ed. 2007) at Comment 1.b.
33 Principle 1 of *The Sedona Principles* provides, in relevant part, that "[o]rganizations must properly preserve electronically stored information that can reasonably be anticipated to be relevant to litigation."
34 *Id.* at n. 36.

ILLUSTRATION

Illustration i: Upon receipt of an anonymous threat sent to a corporation's ombudsman, the ombudsman consults the legal hold policy. That policy provides criteria for an assessment of the threat and whether the issues raised by information, including the circumstances surrounding its receipt, indicate the potential for litigation or governmental investigation. It also provides for a preliminary evaluation of the allegations before determining whether a hold should be implemented. Based on the policy, the ombudsman concludes that the corporation does not reasonably anticipate litigation and memorializes that decision in a memorandum to the file. In a subsequent challenge, the corporation is able to demonstrate that it exercised reasonableness and good faith.

Guideline 3. Adopting a process for reporting information relating to a probable threat of litigation to a responsible decision maker may assist in demonstrating reasonableness and good faith.

In any organization—but particularly in large organizations—individuals within the organization may have information that indicates a threat of litigation that the decision makers for the organization do not have. An organization formulating a legal hold policy should consider how to enable that information to be communicated to persons charged with evaluating the threat and, if warranted, instituting legal holds. The particulars of how this process is implemented will vary from organization to organization, based on the way the business is conducted and the culture of the organization. However, to be effective, the procedure should be simple and practical, and individuals within the organization should be trained on how to follow the procedure.

ILLUSTRATIONS

Illustration i: Westerberg Products is a large corporation with tens of thousands of employees and offices throughout the United States. Westerberg Products establishes an internal compliance "help line" or Web site that allows employees to submit information they have regarding matters of concern, including potential claims against the company. The information received is forwarded to the legal department of Westerberg Products, which is charged with determining whether and when to implement a legal hold. Each employee is trained on how to use the help line or Web site and instructed that they should use it to report any relevant information. Westerberg Products can use these procedures to demonstrate its good faith efforts to ensure it is aware of information indicating a threat of litigation.

Illustration ii: Stinson Software is a small software developer with eight employees. Every month, all eight employees attend a staff meeting and a regular topic of discussion is whether any employee is aware of any ongoing threats to the company, including possible claims or demands that might result in litigation against the company. Stinson Software's Chief Operations Officer follows up on any tips with Stinson Software's outside counsel. Stinson Software can use these practices to demonstrate its good faith effort to ensure it is aware of information indicating a threat of litigation.

Guideline 4. Determining whether litigation is or should be reasonably anticipated should be based on a good faith and reasonable evaluation of relevant facts and circumstances.

Determining whether litigation is or should be reasonably anticipated requires considering many different factors. Depending on the nature of the organization and the nature of the litigation, factors that might be pertinent to consider could include:

- The nature and specificity of the complaint or threat;
- The party making the claim
- The business relationship between the accused and accusing parties;
- Whether the threat is direct, implied, or inferred
- Whether the party making the claim is known to be aggressive or litigious
- Whether a party who could assert a claim is aware of the claim
- The strength, scope, or value of a known or reasonably anticipated claim
- Whether the company has learned of similar claims
- The experience of the industry, and
- Reputable press and/or industry coverage of the issue either directly pertaining to the client or of complaints brought against someone similarly situated in the industry.

These factors are not exhaustive. They and other considerations must be weighed reasonably and in good faith in the context of what steps are reasonable and practicable.

ILLUSTRATIONS

Illustration i: A musician writes a song that sounds very similar to a famous song. Immediately there are critical reviews and radio DJs calling the song a "blatant rip-off." Although the copyright owners of the original song have not yet made any claim, the high profile nature of the criticism is a consideration that may lead a determination by the music publisher that a preservation obligation has arisen.

Illustration ii: A restaurant chain's central management office receives a series of anonymous emails purporting to be from customers claiming food poisoning after the much-publicized introduction of a new dish. In the absence of any corroborating reports from the restaurants and with no specific details on which to act, the chain's counsel reasonably concludes that litigation is not reasonably anticipated.

Guideline 5. Evaluating an organization's preservation decisions should be based on the good faith and reasonableness of the decisions (including whether a legal hold is necessary and how it should be executed) at the time they were made.[35]

The reasonableness of an organization's preservation decisions, such as whether to implement a legal hold, can only be made in light of the facts and circumstances reasonably known to it at the time of its decision, and not on the basis of hindsight or information acquired after the decisions are made. An organization seeking to determine whether a preservation obligation has arisen has no choice but to rely on the information available to it; consequently, whether decisions made were reasonable should turn on that knowledge, and not other circumstances of which the organization was unaware.

35 Similarly, judicial evaluation of an organization's legal hold implementation should be based on the good faith and reasonableness of the implementation at the time the hold was implemented. In doing so, proportionality considerations may become relevant.

ILLUSTRATION

Illustration i: Joey Music Co. manufactures music compact discs using a state-of-the-art process it licenses from D.D. Electronics. D.D. Electronics also licenses the process to Johnny Computing, which uses the process to manufacture CD-ROMs. In January, Johnny Computing receives reports that many of the compact discs it has sold are defective. After investigating, Johnny Computing determines that the defect is caused by the process it licenses from D.D. Electronics. The news of this discovery is kept out of the media, and the class action case brought by Johnny Computing's customers is quickly settled out of court by March. In April, Joey Music, who had no knowledge of the suit against Johnny Computing or the subsequent settlements, disposes of certain documents relating to its use of the D.D. Electronics process. In May, Joey Music begins receiving complaints from its customers. Because Joey Music had no knowledge of the concerns with the process it licenses from D.D. Electronics, its decision to dispose of documents in April was reasonable, particularly if done in compliance with an existing records and information management policy.

PART 2: IMPLEMENTING THE LEGAL HOLD

Once the duty to preserve information arises, an organization must decide what to preserve and how to do it. In some circumstances, the duty to preserve requires only locating and preserving a limited number of documents. In other circumstances, the scope of the information is larger and the sources of the information may not be known to counsel.

The typical legal hold process focuses on key custodians and data stewards,[36] who are asked to take steps to preserve relevant information and help prevent losses due to routine business operations. The effort involves discoverable material, i.e., usually that "relevant to a claim or defense.[37] As noted by one court, there is no broad requirement to preserve information that is not relevant: "[m]ust a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every email or electronic document, and every backup tape? The answer is clearly, 'no.' Such a rule would cripple large corporations."[38]

Identifying and preserving potentially relevant information can be complex and may require trained people, processes, and technology, particularly when ESI is at issue. This may include creating teams to identify the sources, custodians, and data stewards of potentially relevant information within the organization, and to define what needs to be preserved and to coordinate with outside counsel. It is often advisable to maintain sources of ESI in their native formats with metadata[39] to preserve the ability to make production in some variant of a native file format, if necessary. In the case of *In re Priceline.Com Inc. Securities Litigation*,[40] a court approved an agreement that the original data would be maintained in its original file format for the duration of the litigation. The need to produce metadata is also recognized in Principle

36 Of course, while the focus is on key custodians and data stewards, sometimes referred to as "key players," there may be other individuals who are asked to take preservation steps. Notably, the efforts undertaken for key custodians may be different from other custodians.

37 FED. R. CIV. P. 26(b)(1). In some cases, the rule states, "for good cause" the court may order discovery of any matter relevant to the subject matter involved in the action. Logically, the duty to preserve information relevant to the broader scope would not attach until at least the motion or order to expand the scope: before that, discovery under the broader scope would not be reasonably likely.

38 *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

39 *Compare U.S. v. O'Keefe*, 2008 WL 449729 (D.D.C. Feb. 18, 2008) (court applying amended Rule 34(b) as persuasive authority in the criminal discovery context ordered preservation of ESI in its native format with metadata until ruling regarding production).

40 233 F.R.D. 88 (D. Conn. 2005).

12 of *The Sedona Principles* which recognizes "the need to produce reasonably accessible metadata that will enable the receiving party to have the have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case."

For large preservation efforts, a process that is planned, systemized, and scalable is useful, although *ad hoc* manual processes are often appropriate for cases involving relatively small numbers of key custodians and identifiable issues. It is usually inefficient to collect information from every custodian, server, or other source of active data without making any initial effort to identify relevant information. With no means to triage the information and to filter out irrelevant ESI, the collection may be overbroad, with a great deal of irrelevant information aggregated into a central repository where it is then further processed and searched.

There is a growing consensus that the proportionality principle must be applied in assessing preservation issues. In *Rimkus Consulting*, the court noted that "[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable,* and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards."[41] (emphasis in original). Similarly, the Seventh Circuit Pilot Program on E-Discovery (2009)[42] provides, in Principle 2.04 (Scope of Preservation), that "every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control."

To develop an appropriate process for a large organization, the responsible business and functional units, including legal, IT, and records management personnel, should be trained on the organization's legal hold policies and practices and their responsibilities. Plans and protocols appropriate to the type of data and the manner in which it is maintained should be developed. Consultants and vendors can also play a valuable role by helping to design efficient and systemized processes that are executed by IT personnel and/or consultants. For smaller cases, or for entities without internal resources, outside counsel may provide the services on a case-by -case basis and may be deeply involved in drafting the initial preservation notices and in collecting documents and ESI.

While the traditional role of counsel is to "inform the client of its duty to preserve potentially relevant documents in the client's custody or control and of the possible consequences of failing to do so,"[43] some decisions hold that counsel also owes an independent duty to actively supervise a party's compliance with the duty to preserve.[44] In *Zubulake V*,[45] the court went further and suggested that "counsel must issue a 'litigation hold' at the outset of litigation or whenever litigation is reasonably anticipated, communicate directly with the 'key players,' instruct all employees to produce electronic copies of their relevant active files," and secure unique backup media that should be retained.[46]

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41 2010 WL 645353 at *6 (S.D. Tex. Feb. 19, 2010).

42 SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM (Oct. 2009) at 21, *available at* http://www.ilcd.uscourts.gov/Statement%20-%20Phase%20One.pdf.

43 Standard 10, ABA CIVIL DISCOVERY STANDARDS (Aug. 2004) ("This Standard is . . . an admonition to counsel that it is counsel's responsibility to advise the client as to whatever duty exists, to avoid spoliation issues.") *See Turner v. Hudson Transit Lines*, 142 F.R.D. 68, 73 (S.D.N.Y. 1991) (the preservation obligation runs first to counsel, who has a duty to advise, with "corporate managers" having the responsibility to convey that information to the relevant employees).

44 *Phoenix Four, Inc. v. Strategic Resources Corp.*, 2006 WL 1409413 (S.D.N.Y. May 23, 2006).

45 229 F.R.D. 422 (S.D.N.Y. 2004).

46 Counsel was not sanctioned for their preservation failures in *Zubulake* since a party on notice of its obligations "acts at its own peril." *Id.* at 434; *cf. Green v. McClendon*, 262 F.R.D. 284, 290 (S.D.N.Y. 2009) (monetary sanctions imposed on *both* counsel and client for failure to institute a timely legal hold).

The following Guidelines are intended to help organizations create legal hold procedures that are effective in preserving necessary information in a manner consistent with the requirements of the situation at hand. As with the triggers of the legal hold, there is no one-size-fits-all answer to implementing a legal hold. Rather, organizations must approach implementing a legal hold in light of the particular documents and information in their possession, the nature of the matter, and the culture of the organization.

Guideline 6. The duty to preserve involves reasonable and good faith efforts, taken as soon as is practicable and applied proportionately, to identify and, as necessary, notify persons likely to have relevant information to preserve the information.

After determining it has a duty to preserve, the organization should begin to identify information to be preserved. The obligation to preserve ESI requires reasonableness and good faith efforts, but it is "unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data."[47] The organization should consider the sources of information within its "possession, custody, and control"[48] that are likely to include relevant, unique information. The most obvious of these sources are those that the organization physically has in its possession or custody—for example, the file cabinets of documents in its office, the emails that reside on its servers located in its corporate headquarters — but also may include sources such as thumb drives, company furnished laptops, and PDAs used by employees for business purposes.

Some sources of information under the control of third parties may also be deemed to be within the control of the organization because of contractual or other relationships. Examples include information held by outsourced service providers, storage facilities operators, and application service providers (ASPs).[49] With respect to those sources, the organization should consider providing appropriate notice concerning the need to preserve material that is likely to be relevant.

In executing preservation obligations, special attention should be paid, where necessary, to information that is held outside of the United States. Many such locations have laws that potentially conflict with United Sates discovery requirements. Such laws include those that limit the retention of certain types of information and those that limit the processing or transfer of information to the United States for discovery purposes.[50]

It must be noted that a mere delay in implementing a legal hold is not necessarily fatal. In *Rahman v. The Smith & Wollensky Restaurant Group*,[51] the court concluded that "even assuming there was, in fact, no litigation hold" until late in the litigation, the plaintiff had failed to establish that there was "any gap" in production which was "attributable to the

47 *See* Principle 5, THE SEDONA PRINCIPLES (2d ed. 2007).

48 *See* FED. R. CIV. P. 34 and its state equivalents; *see also In re NTL, Inc., Sec. Litig.*, 244 F.R.D. 179 (S.D.N.Y. 2007) (party had access to records held by third party).

49 Notably, the advent of "cloud computing" will, over time, likely increase the number of organizations using third parties to host, manage, store, and retrieve electronic information in the course of business.

50 *See, e.g.*, The European Directive 95/46/EC (the "Directive"), effective October 1998. The Directive governs the processing and use of personal data for all EU Member States, and identifies eight data protection principles. These include the principle that personal data shall not be kept for longer than is necessary for the purposes for which it is processed and the principle that personal data shall not be transferred to a country or territory outside the EU, unless that country or territory ensures an "adequate" level of protection for the rights and freedom of data subjects in relation to the processing of personal data. At this time, the United States is not considered by the EU to ensure an "adequate" level of protection and data may be transferred only if the transfer meets a particular exception found in the Directive or if certain steps are taken to qualify for the European Commission's Safe Harbor status or to adopt the European Commission's model contractual clauses for Data Transfer and Data Processing or Binding Corporate Rules. One exception to the Directive that may apply in certain cases is when the transfer is required for the exercise or defense of legal claims.

51 2009 WL 773344 (S.D.N.Y. Mar. 18, 2009).

failure to institute [a] litigation hold at an earlier date."[52] The test is what was reasonable under the circumstances, with an eye towards the ultimate end goal (e.g., whether relevant information was preserved). Thus, there is no per se negligence rule and if the organization otherwise preserved the information then there is no violation of the duty to preserve.[53]

ILLUSTRATION

Illustration i: Strummer Holdings is a large corporation that sends many of its historic documents to an offsite storage facility managed by Jones Storage. Typically, documents older than five years are sent to Jones Storage. At all times, Strummer Holdings retains all legal rights with respect to the documents, and has the right to require their return from Jones Storage at any time. Jones Storage has standing instructions from Strummer Holdings to automatically destroy certain documents when they are 10 years old. Strummer Holdings reasonably anticipates litigation relating to events that occurred nine years ago such that its preservation obligations are triggered. If Strummer Holdings does not take steps to ensure that the relevant documents it has stored at Jones Storage (if any) are preserved, Strummer Holdings may be subject to sanctions for spoliation if any relevant documents are destroyed.

Guideline 7. Factors that may be considered in determining the scope of information that should be preserved include the nature of the issues raised in the matter, the accessibility of the information, the probative value of the information, and the relative burdens and costs of the preservation effort.

Executing preservation obligations typically involves an initial focus on documents and ESI available in accessible or "active" sources. Rule 26(f) provides parties in litigation with the opportunity at the "meet and confer" stage to discuss and evaluate potential discovery and agree on a reasonable preservation scope. The emphasis in the Rules is on cooperative action, as promoted by The Sedona Conference' *Cooperation Proclamation*.[54] Parties are admonished to pay particular attention "to [maintaining] the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities."[55]

Unfortunately, it is not always feasible to secure prior agreement on preservation steps to be undertaken.[56] This is particularly true when preservation decisions must be made in the pre-litigation context, but it also is a problem after commencement of litigation. Parties are often in the position of having to make unilateral preservation decisions based on their best judgment.

There are numerous factors to be weighed in determining the scope of a particular hold. Some factors include the cost to preserve and potentially restore information; the number of individual custodians involved in the matter; the type of information involved; and whether the hold is on active data, historical data, or future data because the litigation

52 *Id.* at *6 & n. 9 (emphasizing that the proof is directed at the destruction of relevant evidence, not, per se, institution of a legal hold).

53 *Rimkus Consulting Grp. v. Cammarata*, 2010 U.S. Dist. LEXIS 14573 (S.D. Tex. Feb. 19, 2010); *cf. Pension Comm. v. Banc of Am. Sec., LLC*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).

54 *See* The Sedona Conference,® THE SEDONA CONFERENCE JOURNAL® SUPPLEMENT, 10 SEDONA CONF. J. 331 (Fall 2009) (calling for cooperative action by participants in relation to the discovery process).

55 FED. R. CIV. P. 26, Committee Note, Subdivision (f) (2006).

56 Kenneth J. Withers, *"Ephemeral Data" and the Duty To Preserve Discoverable Electronically Stored Information*, 37 U. BALT. L. REV. 349, 377 (Spring 2008) ("By the time the parties sit down at the Rule 26(f) conference, the preservation issues surrounding ephemeral data may be moot and the fate of the responding party may already be sealed, if sanctions are later found to be warranted.")

involves future or ongoing business activities. The court in *Zubulake IV* indicated that a "party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter."[57] The court also explained that "[i]n recognition of the fact that there are many ways to manage electronic data, litigants are free to choose how this task is accomplished."[58]

Another key factor involves the accessibility of the information, especially when ESI is involved. While "[a] party's identification of sources of ESI as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence,"[59] this observation should be read in conjunction with Rule 37(e), which provides that where data is lost as a result of good-faith, routine operations of electronic systems, no sanctions under the Federal Rules may be levied.[60] The Sedona Conference® *Commentary on Preservation, Management and Identification of Sources of Information That Are Not Reasonably Accessible*[61] suggests that in the absence of agreement, it is often "reasonable to decline to preserve" inaccessible sources if the party concludes that the "burdens and costs of preservation are disproportionate to the potential value of the source of data."[62]

For example, *Zubulake IV*, also concluded that "as a general rule,"[63] a "litigation hold does not apply to inaccessible backup tapes" which "may continue to be recycled." It also established an exception when the producing party could identify "the tapes storing the documents of 'key players'."[64] *The Sedona Principles* are in accord with this view.[65] Principle 8[66] also cautions against the assumption that there is an automatic need to preserve backup media. Thus, in *Escobar v. City of Houston*,[67] the fact that other relevant information had been preserved and was available mitigated concern about the failure to preserve audio tapes. Notably, the reasoning behind the general rule excluding inaccessible data (such as back up tapes) from preservation is not based simply on costs as the expense of saving a tape in isolation is relatively slight, but instead it is based upon a broader view of the need for preservation in the context of other sources of evidence and also balanced against the ultimate cost of later restoring data sources and culling them for particular content.

Likewise, transient or ephemeral data that is not kept in the ordinary course of business and that the organization may have no means to preserve may not need to be preserved. In *Columbia Pictures v. Bunnell*,[68] a court refused to find a duty to preserve information temporarily stored in RAM where the producing party had no reason to

57 220 F.R.D. 212, 218 (S.D.N.Y. 2003).
58 The court gave as an example, the retention of "all then-existing backup tapes for the relevant personnel (if such tapes store data by individual or the contents can be identified in good faith and through reasonable effort)," and noted that the party could "catalog any later-created documents in a separate electronic file." *Id.* at 218.
59 FED. R. CIV. P. 26, Committee Note, Subdivision (b)(2) (2006).
60 *Olson v. Sax*, 2010 WL 2639853 at *2 (E.D. Wis. June 25, 2010).
61 10 SEDONA CONF. J. 281 (2009) (in determining accessibility, a combination of "media based factors" and "data complexity factors" should be used); copy also available at http://www.thesedonaconference.org.
62 *Id.* (proposing a "decision tree" form of analysis under which the burdens and costs of accessing and preserving are balanced against the "reasonably anticipated need and significance of the information").
63 220 F.R.D. 212 at 217, n. 22.
64 220 F.R.D. 212 at 218, 220, n. 17 ("Litigants are now on notice, at least in this court, that [key player] backup tapes "must be preserved"). *See also Pension Comm. v. Bank of Am. Sec., LLC*, 2010 WL 184312 at *27 (S.D.N.Y. Jan. 15, 2010) ("I am not requiring that *all* backup tapes must be preserved. Rather, if such tapes are the *sole* source of relevant information (e.g., the active files of key players are no longer available), then such backup tapes should be segregated and preserved. When accessible data satisfies the requirement to search for and produce relevant information, there is no need to save or search backup tapes."); *Forest v. Caraco*, 2009 WL 998402 (E.D. Mich. Apr. 14, 2009) (announcing proceedings limited to assessing *Zubulake* exception on delayed decision to cease recycling backup media).
65 Comment 5.h., THE SEDONA PRINCIPLES (2d ed. 2007) ("[a]bsent specific circumstances, preservation obligations should not extend to disaster recovery backup tapes created in the ordinary course of business.")
66 Comment 8.a., THE SEDONA PRINCIPLES (2d ed. 2007) ("The mere suspicion that a source may contain potentially relevant information is not sufficient to demand [its] preservation.")
67 2007 WL 2900581 (S.D. Tex. Sept. 29, 2007).
68 2007 WL 2080419 at *3-6 (C.D. Cal. May 29, 2007), *motion to review denied*, 245 F.R.D. 443 (2007).

anticipate that it would be sought and the requesting party first asserted a duty to preserve in a motion for sanctions.[69] Absent a special showing of need, Principle 9 of *The Sedona Principles* suggests that it is not ordinarily required to "preserve, review, or produce deleted, shadowed, fragmented, or residual [ESI]." Similarly, many organizations have made a good faith decision to not retain information such as instant messaging, chats, or voicemail messages in the ordinary course of business so that, absent compelling circumstance or an order of the court, there should be no expectation of preserving and producing information from such sources.

Parties sometimes seek to compel creation of a "mirror image" of hard drives to preserve data pending forensic examinations.[70] As part of the 2006 Amendments, the right to "test or sample" with refetence to ESI was added to Rule 34(a). That amendment does not, however, create a "routine right of direct access" for such purposes.[71] Instead, such access is granted on a proper showing and perhaps with certain defined conditions.[72]

In some cases, parties may wish to affirmatively create "snapshots" of data as a defensive measure.[73] For example, the ability to access the hard drives of laptops issued to key employees upon their departure may be useful if it is the sole source of deleted information.[74]

If there are many custodians or if there is ongoing business information subject to the legal hold, *collecting* data at the outset of the legal hold may not be feasible. Sequestering the data can be disruptive to the business or technically unworkable in such circumstances. As a result, it is important to distinguish between preserving information and collecting and sequestering it.

If collecting data at an initial stage is not warranted, reasonable, or feasible, communications and monitoting processes become mote important. It is critical that recipients of hold notices understand their duty to preserve information and how to meet that duty. Training sessions on legal hold compliance can be a useful tool to foster the effectiveness of legal holds.

Guideline 8. In circumstances where issuing a legal hold notice is appropriate, such a notice is most effective when the organization identifies the custodians and data stewards most likely to have relevant information, and when the notice:

- **(a) Communicates in a manner that assists persons in taking actions that are, in good faith, intended to be effective**
- **(b) Is in an appropriate form, which may be written**

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69 The magistrate judge held that "the defendants failure to retain the server log data in RAM was based on a good faith belief that preservation of data temporarily stored only in RAM was not legally required" because, *inter alia*, there had been "no specific request by the defendants to preserve server log data present solely in RAM." *Id.* at *14.

70 *Bank of Mongolia v. M&P Global Fin. Servs.*, 258 F.R.D. 514 (S.D. Fla. 2009) (expert appointed to "retrieve any deleted responsive files" in light of production of responsive documents from third party sources).

71 FED. R. CIV. P. 34, Committee Note, Subdivision (a) (2006).

72 *See id.*, *and Covad Communications v. Revonet, Inc.*, 258 F.R.D. 5 (D.D.C. 2009) where the court ordered forensic imaging of email servers for purposes of "preserving information as it currently exists."

73 It should be noted that forensic collection is not, nor should it be, the default method of collection and preservation. Instead, the duty to collect and preserve forensically only arises if: 1) the facts known to the preserving party or which the party should reasonably know would establish the need; or, 2) the requesting party has specifically requested it and the producing party has either agreed or notified the requesting party upon receiving the request that it will not comply, at which point the requesting party seeks judicial intervention an obtains an order compelling such preservation and collection. *See* Comment 8.c., THE SEDONA PRINCIPLES (2d ed. 2007) ("While [forensic data acquisition] is clearly appropriate in some circumstances, it should not be required unless exceptional circumstances warrant the extraordinary cost and burden;" also noting the need for careful protocols to address such collections).

74 *See, e.g., Cache La Poudre Feeds v. Land O'Lakes, supra*, 244 F.R.D. 614 (D. Colo. 2007) (failure to refrain from "expunging" hard drives of former key employees sanctioned where backup tapes were no longer available for use in seeking deleted email).

(c) Provides information on how preservation is to be undertaken
(d) Is periodically reviewed and, when necessary, reissued in either its original or an amended form, and
(e) Addresses features of relevant information systems that may prevent retention of potentially discoverable information.

When designing a legal hold it is particularly important that it be understandable by different groups within an organization. Counsel should review relevant pleadings or other documents and then describe the litigation in a way that will be understood by those with responsibility for preserving documents.

The initial and subsequent hold notices and reminders should describe the matter at issue, provide specific examples of the types of information at issue, identify potential sources of information, and inform recipients of their legal obligations to preserve information, and include reference to the potential consequences to the individual and the organization of noncompliance.[75] It should be in a form, which may include email, written hard copy or, in some cases, oral notice, which is appropriate to the circumstances. The notice should also inform recipients whom they should contact if they have questions or need additional information. Again, each case must be evaluated based on its own individual facts and a preservation notice adapted to conform to the facts and circumstances unique to that case.

Because of the distributed nature of ESI, it may be appropriate to communicate a legal hold notice not only to relevant data-generating or –receiving custodians, but also to appropriate data stewards, records management personnel, information technology (IT) personnel, and other potentially knowledgeable personnel.

Organizations should consider requiring confirmations of compliance with such hold notices as a means of verifying that recipients understand their preservation duties and obligations. *See* Guideline 10. Appropriate responses to hold notices and the organization's expectations for compliance with them should be included in organization's compliance programs.

Importantly, while the use of a written legal hold is often appropriate, it is simply one method of executing preservation obligations, not the only one. An organization should consider whether a written notice is necessary to effectively implement the hold and preserve the requisite information. In many instances, a written notice may not be necessary and, in fact, may be an encumbrance or source of confusion. Examples include situations in which sources of likely relevant information are subject to retention for sufficiently long periods pursuant to the organization's information management or record retention policy such that they will be held without a formal legal hold for the duration of the litigation. In addition, there may be situations in which sources of relevant information can be immediately secured without requiring preservation actions by employees. A read-only system of record for all pertinent research-and-development and product-quality information harnessed by a document management system would be one such example. There are other circumstances where the collection of information prior to any notice may be prudent in light of the risk that a custodian is the subject of the investigation or litigation and there is reason to believe that he or she might take steps to delete or destroy relevant information if aware of the circumstances.

75 The organization "must inform its officers and employees of the actual or anticipated litigation, and identify for them the kinds of documents that are thought to be relevant to it." *Samsung Electronics Co., Ltd., v. Rambus, Inc.*, 439 F. Supp. 2d 524, 565 (E.D. Va. 2006).

ILLUSTRATIONS

Illustration i: Lydon Enterprises obtains information that makes it reasonably anticipate litigation. Lydon Enterprises issues a written legal hold notice to certain of its employees. The document clearly identifies the recipients of the notice and explains in easily understandable terms which documents fall within the scope of the employees' preservation duties. The notice also explains how employees are expected to gather and preserve relevant documents. Whenever new information is obtained regarding the litigation that could affect the scope of the legal hold, in-house counsel for Lydon Enterprises reviews the notice. The notice is revised and reissued as necessary, and a periodic reminder is issued to all employees with preservation obligations. Compliance with the notice is regularly evaluated. This legal hold is likely to be considered effective or reasonable.

Illustration ii: Jones, Inc., obtains information that makes it reasonably anticipate litigation. In-house counsel for Jones identifies 40 people who she thinks might have relevant documents and instructs her secretary to call them and tell them to hold onto any documents relevant to the potential litigation, which she describes in general terms. The secretary calls the employees, but is unable to answer many of their questions. In-house counsel does not follow up on any of the employee questions. No written hold notice is ever issued. Litigation does not actually occur until 18 months later; at that point, in-house counsel begins collecting the relevant documents. This approach may or may not be effective, depending upon the circumstances, including the prejudice, if any, caused by the failure to issue a legal hold.

Illustration iii: Qualum Industries owns various properties, completes its financial accounting for 2008, and files its tax returns. Under its record retention policy and supporting schedules, tax-related papers are held for five years or until that tax year's audit is complete (whichever occurs later), and documentation supporting its financial reports are held for eight years. In 2010, Qualum was audited by the IRS, and questions were raised about Qualum's valuation of certain of its properties, but no litigation was filed. If Qualum reasonably concludes that the information needed to respond to questions during the audit are being retained pursuant to the company's information management and retention policy, Qualum need not issue a formal legal hold. If, however, litigation is later filed – either by the government or by Qualum for a refund after an adverse agency determination, and it is reasonably likely that information beyond the parameters of the retained records may be necessary to address claims or defenses in the action, Qualum would then be well-advised to issue a legal hold.

Guideline 9. An organization should consider documenting the legal hold policy and, when appropriate, the process of implementing the hold in a specific case, considering that both the policy and the process may be subject to scrutiny by opposing parties and review by the court.

An organization should consider documenting both the legal hold policy and, when appropriate, the steps taken to ensure the effective implementation of specific holds. Considering issues regarding work product and attorney-client privilege, the documentation need not disclose strategy or legal analysis. However, sufficient documentation should be included to demonstrate to opposing parties and the court that the legal hold was implemented in a reasonable, consistent, and good faith manner should there be a need to defend the process. In most cases, the process of issuing and implementing the legal hold

and following up to preserve the data will provide sufficient documentation. If documentation of the legal hold process is deemed appropriate, it may include:

- The date and by whom the hold was initiated and possibly the triggering event
- The initial scope of information, custodians, sources, and systems involved
- Subsequent scope changes as new custodians or data are identified or initial sources are eliminated, and
- Notices and reminders sent, confirmations of compliance received (if any), and handling of exceptions.

In addition, in certain cases it may be appropriate to further document the process of how a specific legal hold was implemented. Examples may include:

- Description as to the collection protocol, persons contacted, and the date information was collected
- Notes (at least as to procedural matters) from any interviews conducted with employees to determine additional sources of information, and
- Master list of custodians, data stewards, and systems involved in the preservation effort.

While it may never be necessary to disclose this information, or disclosure may be made only to the court *in camera* to preserve privileged legal advice and work product information, the availability of documentation will preserve the option of the party to disclose the information in the event a challenge to the preservation efforts is raised and may provide a valuable resource when responding to discovery requests.

One reason to document the legal hold process and the implementation of it is to help avoid possible sanctions for the loss of relevant information. It can be very difficult for organizations to implement the legal hold and suspend or terminate routine operations of their large information systems to preserve relevant information before that information is deleted or overwritten in the normal course of operations.

Sanctions may be avoided under the Federal Rules if an organization can show that the information was lost by the routine operation of the information systems before a legal hold was instituted. Rule 37(e) provides that "absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide ESI lost as a result of routine, good-faith operation of an electronic information system." Thus, while the Rule "does not set preservation obligations," it does tell judges that a spoliation claim involving ESI "cannot be analyzed in the same way as similar claims involving static information."[76]

Effective invocation of Rule 37(e) will require parties, as part of their legal hold implementation, to take good faith steps to suspend ordinary destruction processes or auto-

76 Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 YALE L. J. 167, 174 (Supp. 2006).

delete functionality of systems.[77] There is a split in authority, however, on the issue of whether the existence of a preservation obligation per se excludes the application of Rule 37(e).

Accordingly, effective use of Rule 37(e) places a premium on the use of the legal hold process, which may include the ability to communicate such holds promptly and repeatedly and to monitor compliance with them. Without a defined process, the safe harbor will be difficult to invoke and may offer little safety at all.

Guideline 10. Compliance with a legal hold should be regularly monitored.

Organizations should develop ways to regularly monitor a legal hold to ensure compliance. Some tools to accomplish this may include requiring ongoing certifications from custodians and data stewards, negative consequences for noncompliance, and audit and sampling procedures. Organizations may also consider employing technological tools, such as automated solutions and dedicated "legal hold" servers to facilitate and track employee compliance.

Organizations could also consider designating one or more individuals within the legal department to be responsible for issuing the legal hold notice, answering employee questions, and ensuring ongoing compliance with the notice. For smaller companies, outside counsel may be retained to perform this oversight function.

The effort to ensure compliance by affected employees is an ongoing process throughout litigation. This may include distributing periodic reminders of the legal hold and requiring employee confirmations, as well as issuing updated legal hold notices reflecting developments in the litigation itself or changes in the scope of the legal hold. As the number of custodians or other recommended recipients of the legal hold notice changes, it is important that the organization ensure that the expanded list of recommended recipients receives proper notification. Additional or revised notices should be promptly issued to persons who are added to the distribution.[78]

The argument is sometimes made that reliance on individuals to comply with preservation notices is unreasonable.[79] For example, a special master in a case involving a massive legal hold questioned the efficacy of preservation requirements that relied on recipients to move emails to avoid automatic deletion.[80] Another court expressed the view that "it is *not* sufficient to notify all employees of legal hold and expect that the party will then retain and produce all relevant information."[81] In *Pension Committee,*[82] the same court noted that "not every employee will require hands-on supervision from an attorney [but] attorney oversight of the process, including the ability to review, sample, or spot-check the collection efforts is important."[83]

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77 *Compare, e.g., KCH Servs. v. Vanaire*, 2009 WL 2216601 at *1 (W.D. Ky. July 22, 2009) (oral instruction to delete software that might evidence violation of law "falls beyond the scope of 'routine, good faith operation'" of Rule 37(e)) *with Southeastern Mechanical Servs. v. Brody*, 2009 WL 2242395 at *3 (M.D. Fla. July 24, 2009) (declining to impose sanctions where losses covered were not intentionally caused in bad faith). *Cf.* remarks of Judge Shira Scheindlin, Panel Discussion, *Sanctions in Electronic Discovery Cases: Views from the Judges*, 78 FORDHAM L. REV.1, 30-31 (Oct. 2009) ("[Rule 37(e)] says if you don't put in a litigation hold when you should there's going to be no excuse if you lose information.").

78 This parallels Guideline 8, Illustration i, on communicating changes in the scope of the legal hold.

79 *Treppel v. Biovail ("Treppel V")*, 249 F.R.D. 111, 115-118 (S.D.N.Y. 2008) (noting inadequacies of mere notification to employees of a legal hold).

80 *In re Intel*, 258 F.R.D. 280 (D. Del. 2008).

81 *Zubulake V, supra*, 229 F.R.D. 422 at 432 (S.D.N.Y. 2004).

82 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).

83 *Id.* at n. 68.

However, in most cases, a careful combination of notification, collection, and individual action should enable parties to rely on the good faith actions of their employees. In an analogous context in *Concord Boat v. Brunswick*,[84] the court held that "[t]he fact that Defendant allowed individual employees to use discretion whether to retain e-mail is simply not indicative of bad faith."

If the legal hold applies to information created on a going-forward basis and pertains to a matter that represents substantial benefits or risks to an organization, the organization may wish to consider alternative means of auditing compliance. For example, the process could include a certification requirement that must be signed by the person responding to the legal hold. For holds involving ongoing business activities and future data, organizations may consider a periodic certification program to ensure ongoing compliance.

Guideline 11. Any legal hold policy, procedure, or practice should include provisions for releasing the hold upon the termination of the matter at issue so that the organization can adhere to policies for managing information through its useful lifecycle in the absence of a legal hold.

An organization creating a legal hold process should include procedures for releasing the holds once that organization is no longer obligated to preserve the information that was subject to a legal hold. These release procedures should include a process for conducting a custodian and data cross check so the organization can determine whether the information to be released is subject to any other ongoing preservation obligations. Organizations may consider using automation software that can perform custodian, system, and data cross checking and provide for efficient legal hold management.

When the organization is satisfied that the information is not subject to other preservation obligations, notice that the hold has been terminated should be provided to the recipients of the original notice (and any modifications or updated notices), and to records management, IT, and other relevant personnel, as well as any third parties notified of their obligation to preserve. Organizations may wish to conduct periodic audits to ensure that information no longer subject to preservation obligations is not unnecessarily retained and is being appropriately disposed of in accordance with the organization's records and information management policy.

84 1997 WL 33352759 at *6 (E.D. Ark. Aug. 29, 1997).

APPENDIX 6

New York Law Journal

A NEW YORK LAW JOURNAL SPECIAL SECTION

An ALM Publication

E-Discovery

WWW.NYLJ.COM

MONDAY, OCTOBER 3, 2011

Working Toward **Normalcy** In E-Discovery

Programs focus on proportionality and cooperation.

BY ARIANA J. TADLER AND HENRY J. KELSTON

FOR YEARS, practitioners and judges alike have been struggling with the complexities, burdens and costs associated with electronic discovery. The "e-discovery amendments" to the Federal Rules of Civil Procedure (Federal Rules) took effect in December 2006. Since then, 27 states have incorporated some form of the federal e-discovery rules into their civil court procedures. While some practitioners and courts are effectively using the rules—in conjunction with the rapidly-evolving body of case law applying them—to control the cost and burden of e-discovery, many others are failing to realize the full potential of the new provisions. As a result, in some cases, even compliant parties and counsel continue to struggle with titanic volumes of information created by continuously-evolving technologies. The resulting frustration has given rise in some quarters to calls for yet more amendments to the Federal Rules, particularly in the areas of preservation, production and sanctions.

For example, the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System have recommended radical limitations on discovery. These suggestions include curbs to limit the scope, type, source, and timetable of the discovery process, limits on the number of interrogatories or deposition hours and other major changes. The Discovery Subcommittee of the Civil Rules Advisory Committee is actively considering these issues but has "reached no conclusion on whether rule amendments would be a productive way" of dealing with current concerns.[1]

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These calls for fundamental rules changes are coming at a time when federal and state courts have instituted a broad range of programs and measures to reduce the cost and burden of electronic discovery through more effective use of the *current* rules. Some courts have issued recommended e-discovery protocols, while others have instituted mandatory procedures; some judicial approaches include court supervision from the outset, others only when the parties request the court's involvement. Notably, certain jurisdictions have also instituted special e-discovery pilot programs.

Two basic principles underlie all of these approaches. First, the key to controlling e-discovery costs and minimizing disputes is cooperation and transparency between the parties early in the discovery process. Second, the current rules, including the Federal Rules, provide a sound framework in which cooperation and transparency can and should be achieved. In fact, some courts are utilizing the current rules to move from a position of "encouraging" early information exchange to requiring it under threat of sanctions for failure to cooperate in discovery.[2] Though some of these court initiatives have proven successful, others are too recently enacted to have yielded results, and others are still in the development or proposal phase. Until more of these programs are implemented and their results systematically evaluated, any significant rule change would be premature and quite possibly counter-productive.[3]

Pilot Program Principles

The most closely-watched e-discovery program is the Seventh Circuit Electronic Discovery Pilot Program (Pilot Program), which places great emphasis on early and cooperative exchange of information. Recognizing cooperation as a desired outcome for litigants and judges, the goal of the Pilot Program was "not just to call for cooperation but also to *incentivize* the cooperative exchange of information on evidence preservation and discovery."

The principles adopted by the Pilot Program (Principles) first articulate the overriding importance of cooperation and proportionality in all phases of discovery, and then establish specific procedures for the implementation of these goals. The Principles provide specific guidance in the form of examples or "default positions," the use of "preservation letters," proposed methodologies to identify and cull electronically-stored information

(ESI) for review and production, and the required scope of preservation.

For example, Principle 2.04 sets a very specific "default position" with regard to metadata and other difficult-to-preserve data: In most cases, data requiring extraordinary preservation measures not used in the ordinary course of business (e.g., deleted data, ephemeral data, and data in metadata fields that are frequently updated automatically) are presumptively not discoverable and any party intending to seek such data is required to raise the issue as soon as practicable.

The Principles further require any dispute regarding the adequacy of preservation be discussed first by the parties and, if not resolved, raised "promptly" with the court. Potential consequences for non-compliance provide meaningful incentives; under the Pilot Program, if a party fails to abide by this preservation dispute framework, it risks waiver of all claims or defenses concerning production of that data. Finally, the Principles emphasize pedagogy, stating that judges, attorneys and parties, in addition to knowing the relevant rules and the Principles of the Program, should consult educational publications offered by The Sedona Conference and other organizations in regarding e-discovery issues.

Importantly, the Principles contemplate sanctions against a party that fails to participate and cooperate in good faith in the meet and confer process. When disputes arise, each party is required to appoint an e-discovery liaison to attend meetings, conferences and court hearings on the issue.

The Results So Far

In Phase One of the Pilot Program, the Principles were implemented over a six-month period. Surveyed after the completion of Phase One, participating judges overwhelmingly found the Principles promoted cooperation between adversaries and increased attorney knowledge of e-discovery issues and procedures.[4] Over 80 percent of the judges said the Principles reduced the number of discovery disputes brought before the court. The judges unanimously found the involvement of e-discovery liaisons resulted in a more efficient discovery process.

Taking an iterative approach, feedback for Phase One provided the basis for Phase Two of the Pilot Program.[5] Notably, certain suggestion items in the Principles were changed to requirements in Phase Two. Principle 2.01, governing the meet and confer process, initially listed issues "to be considered for discussion," and now provides the enumerated subjects are "[a]mong the issues to be discussed." Formerly, the Principles stated that disputes "will be resolved more efficiently" if counsel understands a client's data storage and retrieval systems prior to the meet and confer; they now require that "attorneys for each party shall review and understand" their client's systems prior to the initial meeting. The Principles also have been revised to require parties to confer on the method of production of certain types of ESI. These revisions, among others, are intended to further incentivize the parties to focus on difficult ESI issues early in discovery. The Final Report on Phase Two of the Pilot Program is due in May 2012.

> The most closely watched e-discovery program is the Seventh Circuit **Electronic Discovery Pilot Program**, which places **great emphasis** on early and **cooperative exchange of information**.

E-Discovery in the Southern District

Another noteworthy and promising initiative has been launched by the Southern District of New York, where the Judicial Improvements Committee has unanimously approved and adopted a set of best practices for the management of complex civil cases, including special discovery guidelines and a proposed form for a joint electronic discovery submission by the parties.[6] The joint submission would describe any agreements the parties may have reached in areas such as preservation measures, methodologies to be used for search and review of ESI, sources of production, limitations on production (such as the number or identity of custodians, dates or locations of data, or phased discovery), privilege logs, clawback agreements and the allocation of production costs. The proposed joint submission, as ultimately modified and entered as an order by the court, would create a framework to govern discovery in the litigation. The proposed form explicitly recognizes that "the electronic discovery process is iterative" and modifications to the order may become necessary as discovery proceeds.

The Committee's recommendation also requires that each party submit a "proportionality assessment" to the court prior to the initial pretrial conference. Thus, the Committee's approach emphasizes proportionality, early information exchange between the parties and prompt identification of potentially troublesome discovery disputes while allowing the parties and the court flexibility to adapt to the surprises that inevitably arise in complex cases. The Committee's recommendations, currently pending approval by the Board of Judges of the Southern District, are proposed for use in an 18-month pilot project—again limited to complex civil cases.

At the State Level

State courts are also formulating rules and guidelines. North Carolina recently adopted e-discovery rules that largely track the 2006 amendments to the Federal Rules and the Seventh Circuit Pilot Program, emphasizing proportionality in e-discovery and encouraging the early discussion and possible resolution of discovery issues without the need for court intervention. Whereas North Carolina rules formerly included no "meet and confer" requirement, the amended rules give each party the right to require a meeting to discuss the possibility of settlement and the preparation of a discovery plan, after which the parties must submit to the court either a proposed joint discovery plan or a report explaining why they cannot agree on a plan.

Mirroring the Seventh Circuit Pilot Program's requirement that the parties discuss specific subjects in the meet and confer session, the North Carolina rules provide that the discovery plan must include, if appropriate to the case, provisions addressing discovery of ESI, including production formats, preservation, possible allocation of costs, possible use of focused or phased discovery, and methods of preserving claims of privilege or confidentiality.

Like the Seventh Circuit Pilot Program, the North Carolina amendments also adopt a "default position" on the production of metadata: "reasonably accessible metadata," such as date sent, date received, author and recipient, are discoverable. "Other" metadata is not discoverable absent an agreement by the parties or a court order. The North Carolina rules are expected to take effect on Oct. 1, 2011.

In Massachusetts, an Advisory Committee recently proposed amendments to the Rules of Civil Procedure to create a process "by which the parties, and the court if necessary, deal with electronic discovery early in litigation." (Draft Reporters' Notes at 2). The new rules add e-discovery to the list of subjects to be considered at a pretrial conference, specifically

"[t]he preservation and discovery" of ESI. In this regard, the Massachusetts proposal goes beyond the Federal Rules, which do not currently directly address preservation.[7]

The proposed rules also empower a party to demand a discovery conference with opposing counsel by serving a written request within 90 days of service of the first responsive pleading in the case. Within 30 days after service of the request, the parties must confer on e-discovery, specifically including issues related to the preservation production formats, production schedules, clawback or other provisions relating to privilege claims, and the possible allocation of e-discovery costs among the parties.

After the expiration of the 90-day period, any party may request an e-discovery conference. If an agreement to confer is not reached within 30 days, the requesting party can move for a discovery conference. Within 14 days after an e-discovery conference—whether as of right, by agreement, or by court order—the parties must file a discovery plan and a statement describing the issues on which they cannot agree. The proposed Massachusetts amendments also allow the court to limit e-discovery "in the interests of justice," taking into account factors similar to those in the proportionality language of Federal Rule 26(b)(2)(C), including "whether the likely burden or expense of the proposed discovery outweighs the likely benefit."

The New York state courts are also aggressively addressing the challenges of e-discovery. In 2008, New York's Uniform Trial Court Rules were amended to include certain e-discovery issues (e.g., the programs in which ESI is maintained, the implementation of a preservation plan, and the identification of the individuals responsible for data preservation) among the matters "to be considered at [a] preliminary conference." The goal of the amendment was "to get the parties to meet and confer on ESI-related issues before the preliminary conference."[8] However, the amendment lacked certain provisions that, since 2008, have come to be regarded as important elements of effective e-discovery programs:

(i) discussion of e-discovery issues at the preliminary conference was not mandatory, but was required only "[w]here the court deem[ed] appropriate;"

(ii) the parties were not directed to meet and confer concerning e-discovery in advance of the preliminary conference; and

(iii) there was no requirement that counsel appearing at the preliminary conference be sufficiently knowledgeable about their client's data systems to be able to constructively discuss e-discovery issues.

Consequently, a February 2010 report to the Chief Judge and Chief Administrative Judge on the state of e-discovery in New York[9] concluded the goals of the new e-discovery rules were "not being met." According to the report, "with a few exceptions involving seasoned lawyers who routinely litigate ESI-heavy cases, counsel generally ignore or seek to avoid dealing with [pre-preliminary conference] obligations related to ESI."[10] The report emphasized the need for continuing education of practitioners, judges and other court personnel, and recommended increased use of specially-trained, court-appointed referees to supervise e-discovery and resolve protracted disputes.

The report recommended two initiatives for immediate implementation to improve the handling of ESI issues at the preliminary conference. First, it suggested amendments to the court rules to require that counsel appearing at the preliminary conference either be sufficiently knowledgeable to discuss their clients' technology systems or bring a client representative or outside expert to participate in the conference. Both the Uniform Rules and the Commercial Division rules were amended in July 2010 to implement this requirement.[11] The report recommended that counsel in all cases be required to submit, at the preliminary conference, a form detailing the pre-conference efforts to meet and confer to address potential e-discovery issues in the case. This form is currently being tested in a pilot program.

The report posited two longer-term proposals to be tested in pilot programs as well. The first requires each party to make "initial disclosures" concerning ESI before the preliminary conference, including, among other things, the identity of the party's key IT personnel, efforts undertaken to preserve potentially relevant ESI, substantive witnesses likely to possess relevant ESI, and potential claims that relevant ESI is not reasonably accessible. The second requires the parties to jointly sign and certify a report to the court detailing the parties' meet-and-confer efforts, including agreements reached and areas of continuing disagreement.

Conclusion

As demonstrated by the examples above, which are a mere few among many,[12] courts around the country are recognizing that early attention to e-discovery issues, including a cooperative exchange of information between the parties, is key to reducing the costs and delays of e-discovery.[13] The Seventh Circuit Pilot Program demonstrates clearly that best practices can be achieved under the current Federal Rules by using well-drawn, illustrative protocols to incentivize cooperation and transparency. Other programs are just getting underway and deserve time to reach their full potential. Perhaps after further time has elapsed, allowing for greater education of litigants and judges, and we have the benefit of assessing the various solutions, further modifications to the rules might be in order. But at this juncture, any significant rule change appears to be premature.[14]

1. As recently as September, the Rules Committee convened a mini-conference of judges, practitioners and technologists to discuss the issues of preservation of e-discovery and sanctions.

2. See, e.g., the Seventh Circuit Pilot Program discussed below.

3. Minutes of the Civil Rules Advisory Committee, Nov. 15-16, 2010, I. 542 ("Adopting express rules may create more discovery disputes than they eliminate"); see also Milberg LLP and Hausfeld LLP, "E-Discovery Today: The Fault Lies Not in Our Rules....," 2011 Fed. Cts. L. Rev. 4 (February 2011).

4. Seventh Circuit Electronic Discovery Pilot Program, Report on Phase One (2010).

5. Seventh Circuit Electronic Discovery Pilot Program, Interim Report on Phase Two (2011).

6. This article touches only upon the Committee's recommendations regarding discovery. However, unlike the Seventh Circuit Pilot Program, the Southern District of New York's proposed Program is intended to address all procedural aspects of complex litigation.

7. In the process leading to the 2006 amendments to the Federal Rules, the Civil Rules Advisory Committee considered, but did not include, a preservation rule, in part due to concerns that a rule covering pre-litigation conduct would violate the Rules Enabling Act.

8. "A Report to the Chief Judge and Chief Administrative Judge: Electronic Discovery in the New York State Courts," (February 2010) at 1, http://www.nycourts.gov/courts/comdiv/PDFs/E-DiscoveryReport.pdf.

9. Id.

10. Id. at 8. Although special rules applying to cases in the Commercial Division of the New York courts required discussion of e-discovery issues at the preliminary conference, and required counsel to "confer with regard to anticipated electronic discovery issues" prior to the conference, the Report concluded both the Commercial Division and Uniform Trial Court Rules needed "fine-tuning to fulfill their intended purposes."

11. Uniform Trial Court Rule 202.12(b); Uniform Commercial Division Rule 1(k).

12. Numerous other jurisdictions have gone to great lengths to facilitate efficiency and a reduction in burden and cost, through a variety of similar and even enhanced measures. They include but are not limited to the federal district courts in Maryland (http://www.mdd.uscourts.gov/news/news/esiprotocol.pdf) and Kansas (http://www.ksd.uscourts.gov/guidelines/electronicdiscoveryguidelines.pdf). See also Thomas Y. Allman's update on state e-discovery rules at http://www.ediupdate.com/2011/08/tom-allman-update-html.

13. A notable exception to the trend of the courts to emphasize cooperation and early communication between the parties in discovery is the proposal for rule changes issued by the Civil Procedure Rules Committee in Pennsylvania. The Pennsylvania amendments contain no provision requiring the parties to communicate about discovery issues or to attempt to resolve disputes outside of court; instead, they focus solely on limiting the scope of e-discovery.

14. See also Milberg and Hausfeld, "E-Discovery Today," supra note 3.

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APPENDIX 7

Federal Judicial Center National, Case-Based Civil Rules Survey

Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules

Emery G. Lee III & Thomas E. Willging

Federal Judicial Center

October 2009

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the content as responsible and valuable, it does not reflect policy or recommendations of the Board of the Federal Judicial Center.

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Executive Summary

This report presents preliminary findings from a survey of attorneys in recently closed civil cases which the Federal Judicial Center conducted in May and June of 2009. Nearly half of the attorneys invited to participate responded. The report covers discovery activities and case management in the closed cases; electronic discovery activity in the closed cases; attorney evaluations of discovery in the closed cases; the costs of litigation and discovery; and attorney attitudes toward specific reform proposals and, more generally, the Federal Rules of Civil Procedure.

Discovery activity and case management

The parties conferred to plan discovery in more than 80 percent of cases in which respondents reported at least one type of discovery out of 12 types queried. Most commonly reported were interrogatories and requests for production of documents, followed by initial disclosures and informal exchanges of documents. The median number of types of discovery per case was 5.

The court adopted a discovery plan in more than 70 percent of respondents' cases. The most common case management activities reported by respondents were conferring to plan discovery and limiting the time for completion of discovery. The median time imposed for completion of discovery was 6 months.

Courts ruled on at least one summary judgment motion in more than a quarter of respondents' cases. Rule 12(b)(6) motions were ruled on in more than 10 percent.

Electronic discovery

Issues related to electronically stored information ("ESI") were discussed by the parties in more than 30 percent of the discovery planning conferences. The most common issues discussed were the parties' routine practices regarding retention of ESI and the format of production of ESI. Approximately 50 percent of parties eventually producing ESI instituted a litigation "freeze."

Respondents reported a request for production of ESI in 30 to 40 percent of cases with any discovery. In the ESI cases, plaintiffs tended to be requesting parties and defendants tended to be producing parties, but more than 40 percent of plaintiff attorneys and more than 50 percent of defendant attorneys reported representing both a producing and requesting party in the closed cases.

Problems relating to ESI occurred in about a quarter of the cases with a request for production of ESI. The most common problem was a dispute that could not be resolved without court action over the burden of production of ESI.

The most common uses of ESI produced in discovery in the closed cases were in preparing and deposing witnesses, in interviewing clients or clients' employees, and in evaluating cases for settlement. The ESI was reportedly not used in approximately 1 in 5 cases.

Attorney evaluation of discovery in the closed cases

More than 60 percent of respondents (and 2 out of 3 defendant attorneys) reported that the disclosure and discovery in the closed cases generated the "right amount" of information. More than half reported that the costs of discovery were the "right amount" in proportion to their client's stakes in the closed cases.

A majority of respondents reported that the parties were able to reduce the cost and burden of discovery by cooperating. A majority also reported that the costs of discovery had "no effect" on the likelihood of settlement in the closed cases.

Costs of litigation

For the closed cases included in the sample, the median cost, including attorney fees, was $15,000 for plaintiffs and $20,000 for defendants. For plaintiffs, reported costs ranged from $1,600 at the 10th percentile to $280,000 at the 95th percentile; for defendants, the range was from $5,000 at the 10th percentile to $300,000 at the 95th percentile. Median costs were higher in cases with electronic discovery (especially if the client was both a producing and requesting party) and in cases with more reported types of discovery.

The median estimate of the percentage of litigation costs incurred in discovery was 20 percent for plaintiffs and 27 percent for defendants. Electronic discovery costs accounted for 5 percent of the costs of discovery, at the median, in plaintiff attorneys' cases with discovery of ESI, and 10 percent, at the median, in defendant attorneys' cases with discovery of ESI.

The median estimate of the stakes in the litigation for plaintiffs was $160,000; estimates ranged from less than $15,000 at the 10th percentile to almost $4 million at the 95th percentile. The median estimate of the stakes for defendant attorneys was $200,000; estimates ranged from $15,000 at the 10th percentile to $5 million at the 95th percentile.

Reported expenditures for discovery, including attorney fees, amounted to, at the median, 1.6 percent of the reported stakes for plaintiff attorneys and 3.3 percent of the reported stakes for defendant attorneys.

Reform proposals

When asked at what point in litigation the central issues are narrowed and framed for resolution in the typical case, respondents most commonly identified "after fact discovery." In the closed case itself, over half of the respondents reported that the central issues were narrowed and framed for resolution after initial disclosure of non-expert documents. For plaintiff attorneys, the most common response in the closed case was at the initial complaint.

Respondents representing primarily defendants tended to favor raising pleading standards, and those representing primarily plaintiffs tended to disfavor raising pleading standards. Respondents representing plaintiffs and defendants about equally were divided on the issue.

Respondents were somewhat open to the general idea of testing simplified procedures, with all parties' consent, in a limited number of districts.

The Rules in general

Respondents were asked several questions about the operation of the Rules and potential changes to the Rules. When respondents were asked to compare the costs of litigation and discovery in the federal and state courts, the responses were mixed; a narrow plurality tended to disagree that litigation and discovery are more expensive in the federal courts than in the state courts.

When asked whether the Rules should be revised to limit electronic discovery specifically, respondents representing primarily plaintiffs tended to disagree and those representing primarily defendants tended to agree. On the other hand, those representing plaintiffs and defendants about equally were opposed to limiting discovery in general but divided about evenly on the specific question of limiting electronic discovery.

A majority of respondents in all three groups supported revising the Rules to enforce discovery obligations more effectively.

More than two-thirds of respondents agreed with the statement that "the procedures employed in the federal courts are generally fair," and a majority disagreed with the statement that "discovery is abused in almost every case in federal court."

Respondents seemed relatively satisfied with current levels of judicial case management in the federal courts.

APPENDIX 8

Motions for Sanctions Based Upon Spoliation of Evidence in Civil Cases

Report to the Judicial Conference Advisory Committee on Civil Rules

Emery G. Lee III

Federal Judicial Center

2011

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the content as responsible and valuable, it does not reflect policy or recommendations of the Board of the Federal Judicial Center.

Executive Summary

In 2010, the Judicial Conference Advisory Committee on Civil Rules requested a study of motions for sanctions based on an allegation that the nonmoving party had destroyed evidence, especially electronically stored information (ESI). The study examined the electronic docket records of civil cases filed in 2007–2008 in 19 districts, including at least one district in every circuit except the District of Columbia Circuit.

This report summarizes the findings of that study and, where appropriate, compares those findings to other studies. The study found the following:

- A motion related to spoliation of evidence was identified in 209 total cases in the 19 districts, which was 0.15% of civil cases filed in the study districts in 2007–2008.
- The allegedly spoliated evidence included ESI in 53% of these 209 cases. It was exclusively ESI in 40%. In 9% of cases, the nature of the spoliated evidence could not be determined.
- For all spoliation motions, the most common nature-of-suit categories were torts (31%), contracts (30%), and civil rights (22%).
- For spoliation motions involving ESI, the most common nature-of-suit categories were contracts (36%), civil rights (26%), torts (14%), and intellectual property (11%).
- The moving party was a plaintiff in 64% of the cases and a defendant in 32%. Both sides moved for sanctions based on spoliation in 2% of cases.
- The typical plaintiff moving for sanctions was an individual, but in 31% of cases the plaintiff–movant was a business entity.
- Plaintiffs generally filed motions for sanctions against business entities (74%) or a government (21%).
- The typical defendant moving for sanctions was a business entity, accounting for almost 90% of defendant–movant cases.
- Defendants generally filed sanctions motions against individuals, but in 41% of defendant–movant cases the nonmoving party was a business entity.
- Motions for sanctions were granted in 18% of all cases and denied in 44% of all cases. Considering only cases with an order on the motion, motions were granted 28% of the time and denied 72% of the time.

- In ESI cases, motions for sanctions were granted 23% of the time and denied 44% of the time. Considering only cases with an order on the motion, motions were granted 34% of the time and denied 66% of the time.
- The most common type of sanction granted was an adverse inference jury instruction, which was granted in 44% of all cases in which a sanction was imposed and in 57% of comparable ESI cases. A dismissal or default judgment was only imposed in one case, which involved tangible evidence.

Findings

At the request of the Honorable Mark R. Kravitz, then chair of the Judicial Conference's Advisory Committee on Civil Rules ("Committee"), the Federal Judicial Center (FJC) conducted a study of motions filed in federal court alleging spoliation of evidence in civil cases. This report summarizes the findings of that study. The report consists of three parts. The first part attempts to answer the threshold question, how often is spoliation raised by motion? The second part describes the cases in which spoliation is alleged. The third part provides some information on how courts rule on motions for sanctions.

How often is spoliation raised?

The threshold question is, how often is spoliation raised by motion? The text-based search of the CM/ECF database employed in this study identified every case in the study districts filed in either 2007 or 2008 and in which the search terms[1] appeared in a docket entry. Clearly, this search cannot identify every motion for sanctions based on an allegation of spoliation, but I am generally satisfied that the search found most of these motions.[2]

I personally reviewed the docket records in every case in which the search terms appeared. After that review, I determined that the issue of spoliation had been raised in a motion (of some type) in 209 cases in the 19 study districts.[3] In 153 of those cases, the issue was raised in a motion for sanctions. In 29 cases, the issue was raised in a pretrial motion in limine. In 23 cases, the issue was raised in a motion related to jury instructions. And in four cases, the issue was raised in a motion for summary judgment.

1. The relevant search terms were "spoliation," "spoilation," "37(e)," "37e," "adverse inference," "violation" and "preservation" in same docket entry, and "destruction of evidence." My FJC colleague George Cort performed the searches of the relevant databases.

2. In a few districts, an alternate search strategy, using other information in the database identifying sanctions motions, was employed to validate the text-based search. The results of the alternate strategy suggested that the text-based search was not missing many cases. Moreover, the text-based search almost certainly identified cases that the alternate strategy would have missed, such as cases in which the spoliation issue was raised in a motion in limine. The search for sanctions motions was inefficient, in that it identified all sanctions motions, regardless of basis—including Federal Rule of Civil Procedure 11 motions, which are unrelated to evidence, and all motions for discovery sanctions, not limited to those based on spoliation.

3. The 19 study districts were Northern District of California, Colorado, Southern District of Florida, Northern District of Georgia, Northern District of Illinois, Northern District of Iowa, Eastern District of Louisiana, Massachusetts, Maryland, Minnesota, New Jersey, Eastern District of New York, Southern District of New York, Northern District of Ohio, Southern District of Ohio, Western District of Oklahoma, Eastern District of Pennsylvania, Southern District of Texas, and Western District of Wisconsin.

To determine the rate at which spoliation is raised by motion, the most direct method is to treat these 209 cases as the numerator and to treat the total number of (comparable) civil cases filed in the study districts in 2007–2008 as the denominator. The latter figure is 131,992 cases,[4] yielding a rate of 0.0015. In other words, a motion alleging spoliation was found in 0.15% of cases filed in 2007–2008 in the study districts.

This estimate compares favorably to other studies. I am not aware of any study that indicates that such motions are relatively common. An Institute for the Advancement of the American Legal System (IAALS) study of case processing in eight districts found that motions for discovery sanctions, not limited to spoliation motions, were filed in 3.2% of cases.[5] The present study's estimate is approximately 5% of that figure, which probably reflects that spoliation motions are not a very common form of sanctions motion. A study of published orders, prepared for the Civil Litigation Review Conference by Willoughby, Jones, and Antine ("Willoughby study"), found 401 total ESI cases in which sanctions were moved for in federal court, without time restriction.[6] The Willoughby study identified approximately 170 ESI cases with a sanctions motion in all federal districts in 2008–2009.[7] That estimate is not limited to spoliation motions. The Willoughby study identified only 136 cases over an almost 30-year period in which sanctions were granted for destruction of ESI.[8]

One other previous study warrants mention. The 2009 FJC closed-case survey asked attorneys in cases involving ESI whether any party raised a claim of spoliation of ESI. Fully 7.7% of plaintiff attorneys and 5% of defendant attorneys answered that, in the closed case, one or more claims of spoliation had been raised.[9] That figure was in ESI cases only. Those percentages would be about 3% of all plaintiffs' cases and 2% of all defendants' cases. Those percentages are much larger than the 0.15% reported here. The 2009 question, however, was not limited to mo-

4. This figure does not include prisoner cases, pro se cases, and MDL transfer cases; such cases were excluded from the study.

5. Civil Case Processing in the Federal District Courts: A 21st Century Analysis (Institute for the Advancement of the American Legal System 2009), at 46. The eight study districts were Arizona, Colorado, Delaware, Idaho, Eastern District of Missouri, Oregon, Eastern District of Washington, and Western District of Wisconsin.

6. Dan H. Willoughby, Jr., et al., *Sanctions for E-Discovery Violations: By the Numbers,* 60 Duke L. Rev. 789, 790 (2010) [hereinafter *Numbers*].

7. *Id.* at 795, fig. 1. This is the author's own approximation from the figure, which appears to show 70-plus cases decided in 2008 and 97 in 2009.

8. *Id.* at 803 ("[F]ailure to preserve ESI . . . was the sole basis for sanctions in ninety cases. It was also cited as one of the types of misconduct in forty-six cases . . . .").

9. Emery G. Lee III & Thomas E. Willging, Federal Judicial Center National Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules (Federal Judicial Center 2009), at 23–24, fig. 10.

tions. It is very likely that spoliation is raised in many cases in which it never becomes the basis for a motion.

The spoliation cases are different from civil cases in general in at least two noteworthy ways. First, spoliation usually becomes an issue relatively late in a case—indeed, spoliation motions tend to occur after the typical case would have already ended. Part of the explanation for this is that spoliation cases have much longer processing times than civil cases in general. The average disposition time was about 1.8 years (649 days) for the 152 spoliation cases that had terminated at the time of data collection. The average disposition time for civil cases, in general, was about 0.7 years (253 days). The first reference to one of the search terms in the study cases occurred, on average, 513 days after filing—or about twice the time that the average civil case would have taken to reach disposition.

Second, the spoliation cases terminated at trial 16.5% of the time, compared to just 0.6% of civil cases in general. Given that the spoliation trial cases are included in the civil cases in general, the frequency of trial in the spoliation cases is even more remarkable.

These two differences indicate that the spoliation cases can be accurately described as ones in which the parties found it extremely difficult to reach a settlement. These are often cases in which there is "bad blood" between the parties.

To conclude this section, it is important to note a few caveats. First, this study is not able to provide a hard estimate of the frequency of spoliation as an issue. It did not cover every district, and there is no doubt that the study has missed some motions activity in the study districts. But even if this study is off by a factor of ten, then spoliation motions would be filed in about 1.5% of civil cases. Given that spoliation may be raised much more often than it becomes the basis for a motion, it is probably safe to consider the 2009 closed-case survey's findings as an estimate of the frequency with which spoliation is raised, in any way, in ESI cases. Even then, it is raised as an issue in less than 10% of ESI cases.

Second, this study cannot account for trends, as it is limited to a particular filing cohort. The Willoughby study addresses trends.[10] The trend identified in that article, however, is limited to sanctions for ESI violations. It is not surprising that such claims have increased in recent years. But it would be interesting to know the overall trends in spoliation claims. If spoliation motions represent a kind of strategy by parties, especially late in cases, then it is possible that, in years past, parties raised spoliation just as often, but not with respect to ESI. As discussed in the next section, parties still raise spoliation of paper records and tangible evidence in civil cases.

Third, nothing in this section should be taken as denying that the fear of spoliation motions might motivate parties to over-preserve ESI for fear of being subject to a motion in the future. Moreover, this study does not provide any reasonable grounds for concluding that these fears are irrational. As discussed below, rela-

10. Willoughby et al., *Numbers*, *supra* note 6, at 793–94.

tively severe sanctions may be imposed in the event that a court finds that a party destroyed evidence. Even a relatively small probability of sanctions might rationally drive behavior if the potential sanctions are severe enough. It is also important to remember that, even without sanctions being imposed, a dispute over spoliation may cost a party a great deal. A 2010 report to the Committee found that a party's litigation costs increased by approximately 10% for each type of dispute over ESI, including spoliation.[11]

Description of the cases

This section details elements of the cases in which spoliation was raised by motion: the nature of the allegedly spoliated evidence, the types of cases in which the motions were made, and the parties involved.

Nature of evidence. As discussed in the previous section, the text-based search identified 209 cases in which spoliation of evidence was raised in a motion. In 40% of the spoliation cases, the evidence was ESI only; in an additional 13%, the evidence was ESI and some other kind of evidence (e.g., paper records or tangible evidence). In short, the allegedly spoliated evidence included ESI in slightly more than half the cases. Tangible objects accounted for 21% of the spoliation cases. These included "destructive testing" cases and insurance cases in which the insurer, as plaintiff suing as subrogee, was unable to produce damaged property for the defendant's expert. Somewhat surprisingly, there were a number of purely paper spoliation cases (18%).

In 18 cases, or 9% of the total, I could not determine the nature of the allegedly destroyed evidence. In many of these cases, the motion papers themselves described the evidence in question merely as "documents," which could mean either paper or electronic records (or both). In addition, in a number of these cases, the evidence in question was described merely as "photographs." If the records clearly indicated that the photographs were digital, the case was coded as ESI. In one case, for example, the evidence included photographs taken with a cellphone.

It is possible, then, that as many as 62% of spoliation cases identified in the study involved ESI. Still, that means that four in ten spoliation cases involved paper records or tangible objects.

Types of cases. In all spoliation cases, there were slightly more torts cases (31%) than contracts cases (30%). Civil rights cases made up 22% of all cases, intellectual property cases 6%, and labor 4%. Fifteen cases (7%) were in other nature-of-suit categories.

In the ESI spoliation cases, the largest nature-of-suit category was contracts (36%), then civil rights (26%), torts (14%), intellectual property (11%), labor

11. Emery G. Lee III & Thomas E. Willging, Litigation Costs in Civil Cases: Multivariate Analysis, Report to the Judicial Conference Advisory Committee on Civil Rules (Federal Judicial Center 2010), at 5, 7.

(4%), and other (9%). It is worth noting that the contracts category includes both insurance cases and cases involving noncompetition clauses in employment contracts, as well as some complex commercial transactions.

The parties. Given that plaintiffs will more likely be requesting than producing parties, it is not surprising that in more than six cases in ten (134 cases, or 64%), the moving party was a plaintiff. In 66 cases (32%), the moving party was a defendant. These figures include cases in which a party raised the spoliation issue in a motion in limine to prevent the other side from raising the spoliation issue at trial.

Both sides made a spoliation-based motion in four cases (2%). If the assessment that the spoliation cases are "bad blood" cases is correct, then these are cases in which the parties really did not like each other. Finally, five cases (2%) involved a motion by a party not easily classified as plaintiff or defendant, such as a third-party defendant.

When the plaintiff was the moving party, the plaintiff tended to be an individual—this was found in 94 of 138 cases (68%). This includes three cases in which the individual was a putative class representative. Interestingly, the moving plaintiff was a business entity in 43 cases (31%). This includes one case in which the plaintiff was a law firm. In one other case, the plaintiff was a municipality suing the federal government over Medicaid reimbursements.

Of the 138 cases in which the plaintiff was the moving party, the nonmoving party was a business entity in 102 cases (74%) and a government in 29 cases (21%). Plaintiffs moved against individuals in five cases (4%) and against private schools in two cases (1%).

Of the 70 cases in which the defendant was the moving party, the defendant was a business entity in 62 of these cases (89%). In an additional five cases (7%), the defendant was a government, and in three additional cases the defendant was "other." The "other" cases were diverse: one involved an individual defendant, one a labor union, and one a religious institution (a Hindu ashram).

In 39 of 70 cases (56%) in which the defendant was the moving party, the nonmoving party was an individual. However, in 29 of those cases (41%), the nonmoving party was a business entity. Two nonmoving parties (3%) were "other."

In terms of parties, these findings suggest that spoliation cases tend toward two poles. At one end, there is the stereotypical asymmetrical case, which pits an individual plaintiff with expansive discovery requests against an information-rich business entity. In such a case, the individual plaintiff charges that the information-rich business entity has spoliated evidence. But, of course, defendant business entities can also move for sanctions against individual plaintiffs based on spoliation, as the evidence shows. At the other end, there are business-to-business disputes, often involving intellectual property and complex commercial transactions. In short, both relatively unsophisticated and relatively sophisticated parties are affected by the rules related to spoliation of evidence.

Rulings on motions

This section is limited to the 153 cases in which a motion for sanctions based on spoliation was filed and excludes motions related to jury instructions and motions in limine. It covers both rulings on motions and the nature of the sanctions imposed.

Rulings. Considering all spoliation cases, a motion for sanctions was granted in 27 of 153 cases (18%) and denied in 68 cases (44%). Twelve motions (8%) were pending as of the data collection. There was no court action on 30% of the motions, often because the case settled before the motion could be ruled upon. Indeed, in several cases, the motion for sanctions was filed very shortly before settlement, which may signal that the motion was being used in bargaining.

In terms of only those motions on which an order was issued, in all spoliation cases the motion was granted in 27 of 95 cases (28%) and denied in 68 cases (72%).

Considering only spoliation cases involving ESI, the motion was granted in 20 of 87 cases (23%) and denied in 38 cases (44%). Five such motions (6%) were pending as of data collection, and the court took no action on a further 24 cases (28%). Again, these cases tended to be ones that settled prior to a ruling on the motion, although it is possible for the motion to be withdrawn as well.

In terms of only those motions on which an order was issued in ESI cases, the motion was granted in 20 of 65 cases (34%) and denied in 38 cases (66%).

The number of rulings, especially in ESI cases (58), is small enough that I am uncomfortable making any generalizations about how courts decide motions. It is interesting, however, that very few motions (seven) involving types of evidence other than ESI were granted. In addition, it should be noted that the grant rates observed in the present study are much lower than that in the Willoughby study, which found that 230 out of 401 (57%) of motions for sanctions ruled on were granted. It is not, however, surprising that a study relying on published orders (the Willoughby study) would yield a higher grant rate than one relying upon docket records (the present study).

Types of sanctions. Courts have a number of options in imposing sanctions for spoliation, ranging in severity from a default judgment against a party or dismissal of a plaintiff's claims to simply ordering more discovery on an issue. In what follows, sanctions are defined in a nominal sense—i.e., any time a court granted a motion *and* imposed some burden on the nonmoving party, it was captured as a sanction. In addition, more than one sanction may be imposed in a single order. The court, for example, might preclude certain testimony as a sanction for destruction of evidence *and* reopen discovery for limited purposes. For this reason, the percentages in what follows do not sum to 100%.

In all cases in which a sanction was imposed, the most common sanction imposed was an adverse inference instruction to the jury, which was imposed in 14 of 32 cases, or 44% of the sanctions cases. Precluded evidence or testimony and costs only were both imposed in 6 cases (19%). The count for costs only includes cases

in which the motion was actually denied but in which costs were granted under Rule 37.[12] The court ordered that discovery be reopened in five cases (16%), monetary sanctions only in two cases (6%), and struck part of a pleading in one case (3%). The most severe sanction observed, default judgment on a claim, was entered in one case involving tangible evidence.

In ESI cases in which a sanction was imposed, an adverse inference instruction to the jury was again the most common sanction, imposed in 13 of 23 cases, or 57%. In four cases each (17%), the court granted costs only (this includes cases in which the motion was actually denied but the court awarded costs)[13] or reopened discovery as a sanction. Precluded evidence or testimony was imposed in three cases (13%). Monetary sanctions were imposed in two additional cases (9%), and part of a pleading was struck in one case (4%).

Given that the study only identified 23 ESI cases in which a sanction was imposed, I would caution against drawing any firm conclusions from these findings. It is interesting to note, however, that the Willoughby study found 20 reported cases in which some kind of case-terminating sanction was imposed for spoliation of ESI.[14] Some case-terminating sanctions may be imposed in unreported cases, of course, but it is likely that Willoughby and co-authors have identified most of such orders in ESI cases in federal court. In short, it is probably safe to conclude that case-terminating sanctions are rarely imposed.

One final note: There was some interest in learning whether sanctions were being imposed under Rule 37, for violation of a discovery order, or using the court's inherent authority. In truth, it is not always clear in reading the orders what the basis is for imposition of sanctions.[15] In many cases, the court cites both bases. It might be helpful to look to the Willoughby study on this point. That study found that Rule 37 and inherent authority are the most common bases for imposition of sanctions, with Rule 37 cited in 136 of the 230 cases (59%) in which sanctions were imposed.[16] In cases in which case-terminating sanctions were imposed, Rule 37 was invoked, because a discovery order had been violated, in 23 of 36 cases, or 64%.[17]

12. The denominator for this paragraph is 32 cases, because of the inclusion of these cases.

13. The denominator for this paragraph is 23, because of the inclusion of these cases.

14. Willoughby et al., *Numbers*, *supra* note 6, at 805 n.65. Here, "case-terminating" means dismissal or default judgment.

15. *Cf. id.* at 800 ("Courts are not always precise in identifying the rule or statute upon which their sanction decisions are based. In some instances, no basis is identified.").

16. *Id.* at 801.

17. *Id.* at 810.

Mr. FRANKS. We will now recognize Mr. Hill.

TESTIMONY OF THOMAS H. HILL, ASSOCIATE GENERAL COUNSEL, ENVIRONMENTAL LITIGATION & LEGAL POLICY, GENERAL ELECTRIC COMPANY

Mr. HILL. Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to appear here today. My name is Thomas Hill, and I am the associate general counsel responsible in part for Environmental Litigation and Legal Policy for GE. We at GE are pleased to assist the Subcommittee as it examines the important issues related to the cost of discovery and, in particular, the costs associated with preservation that burdens potential litigants in the United States.

Today, American companies incur litigation-related costs that provide minimal discovery benefit to the courts, the litigants or the jury. In this tough economic environment, the current Federal Rules of Civil Procedure result in parties, primarily American companies, wasting billions of dollars on unnecessary document preservation and production.

I was a trial attorney in Michigan before joining GE in 1991. I witnessed the explosion of electronically stored information, or ESI, and its impact on litigation and dispute resolution. Because preservation rules are unclear, American companies are forced to guess what claims might be brought, do their best to preserve an unspecified amount of information for an indefinite period of time and at great cost. Much of this information will never be reviewed, never be produced and never see the inside of a courtroom.

Let me discuss two real-world examples of the costs imposed by the current rules and describe how the economy will benefit without harm to the judicial process if there is some increased clarity in these rules.

First, it's the cost of preservation without litigation. Under the current standard, GE preserves documents whenever it reasonably anticipates litigation, even though no case may ever be filed. The rules apply, but there's no litigation. Because no court has jurisdiction, there's no opposing counsel, GE cannot negotiate or seek direction to confirm or otherwise adjust the scope of what we preserve.

This example, which is explained in greater detail in my written statement, is relatively simple. It's a narrow case. It involves only 96 custodians, I would point out in a company the size of General Electric, it wouldn't be out of the ordinary for hundreds or even thousands of people to be involved in a subject matter.

But in spite of this relatively narrow scope, over time, these 96 people have created over 3.8 million documents, which total 16 million pages of data. Simply collecting, storing, coding these documents to comply with a potential discovery request, has cost $5.4 million. It costs another $100,000 a month just to store the data.

We haven't spent any money actually looking at the information. We're just saving it.

Additionally, these individuals will create another million documents every year, adding to the cost. So let me repeat. Although no case has been filed, and no case may ever be filed, the rules re-

quired GE to save these documents, and we've spent $5.4 million in fees.

This preservation problem is exacerbated once litigation is filed. Storing ESI creates a disproportionate increase in discovery costs. I have a case where the amount in dispute is less than $4 million. However, in order to comply with preservation and discovery applications, we've collected, preserved and produced over 3 million documents generated by 57 people. Each of those documents had to be reviewed BY lawyers and produced in accordance with the rules.

So that $4 million claim has resulted to date in about $6 million in discovery costs. As a result, opposing counsel has little incentive to meet and confer to reduce this burden.

As a practical matter, courts typically assume that we will bear the burdens of the cost of production. Once produced, many individuals fail to actually review the vast majority of documents that have been produced. Rarely do courts consider cost shifting, which can incentivize an efficient focus on information necessary to prove a case.

This creates a perverse incentive which becomes leverage to skew dispute resolution, not on the merits, but on the economics. This is money wasted. These two examples unfortunately are closer to the norm and not really the exception to the rule.

With clearer rules, including a narrower scope to avoid this waste, the discovery process will be faster, more fair. Litigants can have disputes resolved on the merits, and the savings can be used to create jobs, invest in the future and benefit the U.S. economy.

We will continue to work with the Judicial Conference Rules Committee in its efforts to develop amendments to the rules that will help solve some of these preservation problems, as well as others. We agree with the diverse spectrum of stakeholders who feel reform should be implemented now, and we applaud the efforts of the Subcommittee in exercising its oversight role over the Rules Enabling Act. Thank you.

Mr. FRANKS. Thank you, Mr. Hill, and I would thank all of the witnesses for their testimony.

[The prepared statement of Mr. Hill follows:]

HOUSE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION
HEARING: THE COSTS AND BURDENS OF CIVIL DISCOVERY

WRITTEN TESTIMONY OF

THOMAS H. HILL

ASSOCIATE GENERAL COUNSEL
ENVIRONMENTAL LITIGATION & LEGAL POLICY

GENERAL ELECTRIC COMPANY

DECEMBER 13, 2011

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to appear here today. My name is Thomas Hill, and I am the Associate General Counsel responsible for Environmental Litigation and Legal Policy for General Electric Company. We at GE are pleased to assist the Subcommittee as it examines the important issues related to the costs of discovery -- and in particular the costs associated with preservation -- that burden potential litigants in the United States courts.

I practiced law in Michigan before joining GE and I am a member of the State Bar of Michigan, the United States Supreme Court Bar, and the American Bar Association. I have appeared before several of the Federal Circuit and District Courts. I also serve as a member of several state and national committees and boards, including the Civil Justice Reform Group, the George Mason University Law and Economics Institute, and Lawyers for Civil Justice. I have served as Co-chair of the ABA Committee on Litigation Management, and I was an Editor of the ABA report on Litigation Management, entitled "Radical Solutions to Litigation Management."

In my two decades at GE, I have managed a number of GE's most complex cases in the areas of product liability, toxic tort, environmental law, and insurance, throughout the United States and

internationally. Over the past ten years in particular, I have observed GE's embrace of modern technology and the corresponding explosion of electronically stored information, or ESI. I have also experienced the adverse impact that these developments have had on discovery, litigation and dispute resolution and the costs associated with each.

Many stakeholders in the federal civil litigation process feel the need to reform the Federal Rules of Civil Procedure to address these and other challenges. Many issues need to be addressed, including the inter-relationship and scope of pleadings and discovery, developing standards for preserving documents to ensure a fair, just and balanced legal system, which I will address today, and addressing costs with a view toward how these issues impact our civil justice system. In short, I agree with the diverse spectrum of stakeholders who feel reform should be implemented now.

The Judicial Conference Rules Committee has chosen to begin its examination with the law governing the preservation of information in litigation. It's a good start.

American Companies Must Significantly "Over-Preserve" Documents At Great Cost Because Their Discovery Obligations are Vague and They Face the Threat of Sanctions

I would like to speak with you today about tremendous costs that are affecting U.S. global competitiveness and job creation at this critical time. Because the Rules Committee has chosen to start with the issue of preservation of information, the costs I will be addressing today are litigation-related costs incurred by American companies with minimal discovery benefit to the courts or to either plaintiffs or defendants engaged in civil litigation — the costs of over-preservation of information in anticipation of litigation. Let me explain what I mean by the over-preservation of information. You may intuitively think that the costs of litigation begin when GE is served with a complaint in a new action, engages counsel, and begins the process of preparing for and moving towards trial. Under the current rules, the vast majority of the time, that assumption would be wrong. Instead, GE incurs considerable costs well before then.

GE, like all potential litigants, must preserve information in *anticipation* of litigation. But there are no clear rules or even consistent guidance regarding when we must preserve information or what should be preserved -- or for how long. This uncertainty forces GE to make case-by-case determinations about when litigation may be anticipated and the potential scope of litigation that a plaintiff might bring someday. Essentially, GE must guess whether a case will ever be filed, guess as to what claims may ever be brought, and then do its best to preserve an unspecified amount of information for an indefinite period of time.

This uncertainty is created because the current discovery rules do not provide parties with adequate guidance as to when their obligations to preserve ESI begin (or even what ESI to preserve) in anticipation of litigation. Court decisions interpreting these obligations are inconsistent, and judges often evaluate whether a company adequately preserved ESI with 20/20 hindsight. As a result, parties who seek to comply with these rules must cast a wide -- and very expensive -- net. American companies, like GE, that face the potential for litigation are forced to preserve vast amounts of ESI that may never actually be required in the case. Certainly much of it will never be reviewed, never be produced, and never see the inside of a courtroom.

For example, let's say that it is conceivable that a particular act or decision by management might possibly lead to a shareholder derivative suit against GE. GE must decide how likely it is that such a suit could be filed. If litigation may be "reasonably anticipated," GE must begin preserving potentially relevant information. Because no suit has been filed, however, GE has literally no one -- no opposing counsel, no plaintiff, no judge -- with whom to negotiate to determine what "potentially relevant" ESI might reasonably be needed or what claims might be asserted. In the face of this uncertainty, GE must *over-preserve* — that is, GE must preserve vast amounts of information without any guidance from the other side, even though a case may never be filed, to avoid the risk of sanctions.

Even in the event that a case were to be filed, however, GE's situation may not improve much and the tremendous costs of over-preservation continue to compound. The plaintiff's counsel has no incentive to narrow or to minimize GE's obligation to preserve ESI. Rather, the opposite is often true -- that is to say, because the preservation of ESI is expensive and the costs of preservation are seldom shifted from the preserving party to the requesting party, the plaintiff's counsel may well use those costs as leverage to encourage the defendant to settle the case or as a weapon in his arsenal during pre-trial negotiations. This is not what our system of justice should be about. There is certainly no incentive for the plaintiff's counsel to narrow the categories of ESI that must be stored or to minimize the disproportionate burden on GE that is created by the uncertainty of the rules.

Without more clarity, companies have no choice but to over-preserve ESI to protect their reputations in light of the possibility of sanctions. GE and most companies take this obligation seriously. GE has been in business for over 130 years and is the only original company on the New York Stock Exchange. We are consistently ranked by Fortune Magazine as one of the world's most admired companies and have been ranked by Ethisphere Magazine as one of the world's most ethical companies four years in a row. GE's reputation is its most valued asset, and the key to protecting that asset is maintaining the highest standards of integrity and compliance. The threat of sanctions -- the risk that a court would impose sanctions on GE for failure to preserve documents -- poses a disproportionate reputational risk too great for most companies to bear. Uncertainty forces companies like GE to incur exorbitant costs to protect their reputations by preserving ESI that only rarely benefits either plaintiffs or defendants. With clearer rules defining our obligations, we could substantially reduce these wasteful litigation costs without impacting the actual merits of the litigation. This is an important issue — in this difficult economic period, the significant resources currently wasted on over-preservation would be better allocated to creating jobs and growing our economy.

GE, Like Other Large American Companies, Creates An Astounding Amount Of ESI

At GE, I have observed many of the changes that have occurred as the company transitioned from what was largely a paper communication world to one that relies on instantaneous communication over a variety of media. The volume of information created today exponentially exceeds that which was created even four years ago and the challenges for determining what and how to preserve such information are daunting, even in a company as large and sophisticated as GE. These challenges are even greater for smaller companies. It is quite common in today's electronic age for small businesses to use an iPhone, iPad and/or a lap top computer. These devices can store the equivalent of millions of pages of material. As the number of employees of a small business grows, the data created can increase exponentially. The current rules require that such a party make sure that all entries and information are properly preserved, not overwritten or otherwise altered. In addition, the smaller the company the greater the likelihood that *all* employees' data may be subject to holds, production and review. This impacts their ability even to function and in the event that they become the subject of preservation and production, the effort may impose costs that dwarf the financial resources of the small business.

Rules that made sense when discovery involved boxes of documents that measured in the thousands of pages are not helpful in determining our obligations regarding the preservation and production of terabytes[1] worth of documents. A single terabyte is the equivalent of about 500 million pages. If GE preserved and produced only a single terabyte of data, the production would be equivalent to roughly 24,666 banker boxes full of documents or 11,000 copies of the United States Code or 22,727 copies of the Oxford English Dictionary. That is an astounding amount of data to preserve at great expense.

[1] 1 terabyte is 1,000,000,000,000 bytes, or 1 trillion (short scale) bytes, or 1024 gigabytes. The U.S. Library of Congress Web Capture team claims that "[a]s of September 2011, the Library has collected about 254 terabytes of data . . . The archives grow at a rate of about 5 terabytes a month." See Library of Congress, Web Archiving FAQs (2011), http://www.loc.gov/webarchiving/faq.html#faqs_05.

GE has approximately 290,000 employees. We have normal turnover, retirements and transfer of nearly 35,000 employees each year. In addition, GE is involved in the acquisition or divestiture of approximately 1,000 smaller entities each year. These routine personnel changes create the need to keep track of close to 500,000 individual data sources who could be subject to preservation obligations depending on the nature and breadth of any claim. The amount of data that our employees create on any given day is beyond comprehension.

The complexity of this obligation to preserve data is daunting. Recently we have begun to create a database of preservation and litigation holds. While this database is still under construction, currently, we have about 10,000 employees who are on litigation holds, which means those employees have been sent communications prohibiting the destruction of information on their computers or other electronic devices or in their files. Many employees have multiple holds. For example, I have no reason to disagree with Microsoft's estimate that for preservation purposes alone, it collects 17.5 GB from each custodian in litigation (the equivalent of over 430 banker boxes of documents per custodian), which is up from an average of 7 GB per custodian just three years ago. From what I have seen, I believe Microsoft's experience is consistent with that of many other companies. It is inconceivable that any litigator could review, select, and use as evidence at trial even a small fraction of the information that GE preserves. We are engaged in preservation for the sake of preservation.

Magnifying this problem is the complexity created when you consider the number of different media and communication systems and back-up systems in use today. Companies preserve duplicative information and preserve meta-data and other forms of ESI which are rarely the best or only sources of information that the court, juries, or the parties will use to resolve a dispute. Companies preserve astronomically more data than is ever reviewed, let alone used, by the parties in litigation.

Examples Of Over-Preservation At GE

I would now like to go beyond hypotheticals and provide the Subcommittee with real-world examples of these exorbitant costs and describe how American business interests will benefit from increased clarity in this area. We have shared these examples with the Judicial Conference in Dallas. The costs expressed here are very conservative and do not quantify additional costs incurred from business interruption, legal expense, and other stressors.

Case Number One: How Long Does "Pre-Litigation" Last When No Claim is Brought?

Under the current ill-defined preservation standards, GE must preserve documents when it "reasonably anticipates" litigation. This vague standard has no meaningful scope or time limits. To comply with an amorphous "reasonably anticipates" standard, GE has been preserving documents for several years in a specific matter where no litigation is pending. Indeed, no case may ever be filed. Because no court has jurisdiction, and there is no opposing counsel, GE cannot negotiate or seek direction to confirm or otherwise adjust the scope of the documents it is preserving. Thus, GE is incurring significant costs for extended periods preserving data that no one may ever even ask to see. Unfortunately, this example is far from unique.

The example I just described involves a single business at GE and is confined to GE's U.S. operations. Thus, the breadth of the hold in this example is relatively narrow -- there are 96 custodians. In a company the size of GE, it would not be out of the ordinary for hundreds or even thousands of individuals to be involved in a subject matter that becomes the subject of litigation that lasts for many years (which is typical for most of our matters). Even in this relatively narrow example, however, 3,800,000 documents have been identified to date, which total 16,000,000 pages of data. This data only has been coded and scanned for preservation. There has been no substantive review involved. We are simply "preserving" this data. However, the custodians generate approximately 500,000 new documents every six months which must also be

preserved, coded and scanned. This ever growing amount of material costs approximately $100,000 per month to preserve in just this one case. To date, excluding legal review, GE has incurred $5.4 million in fees for preserving this data. And because the rules do not define an "end point," the meter is still running.

Case Number Two: The Status Quo Does Not Incentivize Proportionality

I would also like to discuss a second impact of "over-preservation," which is the disproportionate nature of discovery costs once litigation is filed. GE is involved in a smaller matter where we valued the liquidated damages at less than $4 million. In order to comply with its preservation and discovery obligations, GE has collected, preserved and produced material generated by 57 custodians. These individuals have created approximately 3,100,000 documents, requiring review and production at significant and disproportionate expense. In this matter, GE has incurred $1.5 million in fees for coding and quality control review of its production and $4 million in fees for document review, the creation of privilege logs, and the subsequent production of the material. In a case valued at less than $4 million dollars, GE has spent, to date, $5.9 million simply organizing and producing documents to be reviewed. Few of these documents will ever be used in the actual discovery process.

Because the current rules impose obligations on us in the absence of any agreement, often opposing counsel is not interested in "meet and confer" negotiations to reduce this burden. Indeed, many even fail to actually review the vast majority of the documents produced. Rather, the norm is to have the party who created the data be responsible for all expenses associated with locating, preserving, collecting and producing the material. Only after that expense do the recipients engage in some sort of winnowing process. Rarely do courts consider cost-allocation, which can incentivize an efficient focus on information necessary to prove the case. Without such economic issues fairly addressed, ESI production becomes leverage to skew resolution of matters not on the merits but rather on the economics of the case.

The outcome in this example was typical. When faced with the decision between reducing the scope of production over the plaintiff's objection and/or shifting costs to the requesting party, the court simply defaulted to a determination that GE was better able to bear the cost of the production and had the resources to do so. Under that test, costs are never shifted.

What is most important is that it is money wasted. Resources that could be put to better, more productive economic uses to create new products are forever lost.

We Need Clearer Rules As To Our Discovery Obligations

As the above examples demonstrate, American companies are incurring significant, needless costs because they lack clear guidance as to their discovery obligations. I appreciate this opportunity to illustrate for this Subcommittee the real-life challenges faced by an American company burdened with the uncertainty of data preservation under the current rules. With clearer guidance and rules, companies can expend the resources necessary to comply fully with the document preservation rules and use the savings to create jobs and invest in their future and the U.S. economy. We will continue to work with the Judicial Conference Rules Committee in its effort to develop amendments to the Rules of Civil Procedure that will help solve some of these "preservation" problems as well as other systemic problems. We applaud the efforts of this Subcommittee in exercising its oversight role under the Rules Enabling Act.

Mr. FRANKS. I will now begin the questioning by recognizing myself for 5 minutes.

Professor Hubbard, I'll begin with you, sir. You estimate that rules clarifying a trigger and scope of preservation obligations would save billions of dollars for American businesses. Now while

these savings would be most apparent in the largest cases that make up the long tail of discovery costs, wouldn't it be—wouldn't clearer rules save at least some money in even the other cases, in all cases?

Mr. HUBBARD. I certainly would expect that to be the case, particularly with respect to preservation, because there are many situations in which, as I mentioned before, preservation costs are incurred, but litigation and discovery costs are not incurred. And judging from the fact that for many large companies, there have been statements to the effect that somewhere between perhaps 40, 60, or 70 percent of their matters involving preservation are not—do not correspond to an active, filed lawsuit, a rule clearly establishing the boundary time in which the obligation to preserve is triggered would reduce, essentially, by 100 percent, the preservation costs associated with those cases no matter how large or how small they are.

Mr. FRANKS. Well, thank you, sir.

Justice Kourlis, some have argued that any savings realized by clarifying discovery and preservations rules would come at cost to the quality of evidence produced in litigation and the court's ability to find facts and to do justice.

Do you agree with this analysis, or do you believe that we can better define discovery obligations without sacrificing courts' core mission?

Ms. KOURLIS. Mr. Chairman, the latter. I clearly believe that we can better define and manage cases, including discovery, without sacrificing justice. Furthermore, I believe that the failure to do so sacrifices justice every day because of the cases that can't be filed and the cases that are settled on the basis of the costs of litigation.

Mr. FRANKS. Well, thank you. Mr. Hill, as far as the challenges faced by GE, are they the same as those faced by small businesses?

Mr. HILL. Not really. Companies our size produce a significant amount of electronically stored information. I mean, it stands to reason that the larger the company, the more the employees, the more complex the organization, the more data you produce.

So the burden on us is really in the preservation prelitigation. We probably can handle it a little bit better than a smaller company, it doesn't mean that we should have to or that it's a benefit. I think the impact on smaller businesses though, under the current rules, is once discovery has been filed. You take a small company that has a limited amount of staff, limited resource, but still have computers. Once litigation is filed, they have the same obligations that anyone does; they have to collect that information, sort it, review it and produce it.

For a small company, reviewing the kind of data that even 10 people can produce would be inordinately expensive, and I would suggest the burden on them is even greater than on us.

Mr. FRANKS. Well, that seems to be a pretty compelling point that goes to Justice Kourlis' points. You know, the interest of courts should ultimately be justice and if, indeed, it is just too expensive for some of the smaller entities to access that justice, then justice is denied.

And I, again, appreciate all of your testimony. And I am now going to recognize the Ranking Member for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman.

Justice Kourlis, you testified about the burden of discovery and so forth, as have everybody, and obviously that's a concern to us. You say in your testimony the Standing Committee is the appropriate forum for the discussion, both immediate and the long-term discussion, but it is a discussion which all of us have legitimate and significant stake. So do you think that that's the proper place for resolution of this, or do you see any role for Congress at this point in terms of any legislation?

Ms. KOURLIS. I don't see a role for Congress in terms of legislation. Congressman, I do, however, see a role in terms of level of attention and focus and interest. This clearly is a very significant problem. I welcome the opportunity to have all of you be made aware of the nature of the problem and aware of the efforts that are being undertaken to address it.

Mr. NADLER. You think that the best forum for addressing it is the standing committee?

Ms. KOURLIS. Yes, at present I do.

Mr. CONYERS. Would the gentleman yield?

Mr. NADLER. I'll yield.

Mr. CONYERS. Have you written or contacted the Judicial Conference about this subject?

Ms. KOURLIS. Oh, yes, indeed, Congressman, yes.

Mr. CONYERS. Well, do you——

Ms. KOURLIS. I think, actually, I can say that all of us have appeared——

Mr. CONYERS. Well, no, I don't think all of you have.

Ms. KOURLIS [continuing]. Have appeared in that forum for purposes of addressing these issues.

Mr. CONYERS. No, I don't think so. I didn't hear anybody else say. Tell me about your——

Mr. FRANKS. Perhaps you could clarify that. Have others been to testify in that forum? Perhaps you could——

Mr. CONYERS. Yes. Let's let everybody testify for themselves.

Ms. KOURLIS. Okay.

Mr. CONYERS. But tell me what it is that you recommended.

Ms. KOURLIS. Congressman, our recommendations in my little corner of the world, the Institute at the University of Denver, where I live and work, is a streamlining and a reworking of the pretrial process in the civil justice system in an effort to try to assure that the process, is indeed, more streamlined, more efficient, more case-specific so that more cases get to jury trial, so that more cases can be resolved on the merits and fewer cases suffer from what former Chief Justice of the State of New Hampshire, John Broderick, calls trial by attrition as distinguished from trial by jury.

Mr. NADLER. Thank you. I assume we can get a copy of some of that?

Ms. KOURLIS. You bet.

Mr. NADLER. Mr. Butterfield, some proponents of reform seek amendment of Rule 37 to revise rules for sanctions with particular focus on sanctions with regard to the duty to preserve.

How, if at all, has the 2006 amendment to Rule 37(e) to provide a safe harbor for loss of electronically stored information help with this concern?

Mr. BUTTERFIELD. Congressman Nadler, those are those who criticize Rule 37(e), have said that the safe harbor is rather shallow. The safe harbor applies to sanctions for spoiliation, where the rules apply, so they are usually sanctions where there's been a violation of the preservation order.

But, if you take a look at the case law out there, and the case law goes far beyond Rule 37(e), the case law makes it pretty clear that people and companies are not getting sanctioned for conduct that is not egregious. That's the key component.

You know, there's lots——

Mr. NADLER. And obviously they shouldn't be sanctioned if their conduct is not egregious?

Mr. BUTTERFIELD. They're not getting sanctioned for good faith conduct. They're getting sanctioned for conduct that's clearly in bad faith, clearly egregious. So a lot of the concern here, in my opinion, is overblown.

Mr. NADLER. Thank you. Mr. Hill, your focus is on the need to preserve in order to defend against a lawsuit. Businesses, however, also have an interest in preserving information because they might, after all, be the party bringing a lawsuit, or because otherwise required by law.

How do you accurately separate, within your overall practices, for retaining requisite information, costs related solely to anticipation of litigation presumably where you might be a defendant, as I presume you're not complaining about costs where you want to sue someone else. And how do you respond to the DOJ's concerns that specific preservation rules might conflict with other existing obligations to retain records?

Mr. HILL. Actually, the preservation rules impose costs whether you are a plaintiff or a defendant, and that raises the issue that there is a difference between the cost of preservation for litigation purposes, and the cost of preservation in the ordinary course of business, and I think that's an issue that——

Mr. NADLER. Excuse me, why would that be?

Mr. HILL. Because a company generates data for its normal business operations. For example, we manufacture jet engines. There are engineering diagrams. There's all kinds of data that are used by that organization while we continue in that product line, and that information will exist under our normal document preservation rules for, in many instances, decades, certain kinds of data.

Mr. NADLER. You figure out how to make a better jet engine.

Mr. HILL. The Federal rules, however, impose a separate, distinct and duplicative obligation in that once we believe that there is a reasonable chance of litigation, we have to take that electronic information and remove it from our normal course of business, create a separate platform to store it and save it and incur those costs so that we can demonstrate in a courtroom, and only in a courtroom, that that information has not been, in any way, altered.

That doesn't, in any way, help the business model. It's not something that we would do normally, and it is simply a cost. And as I indicated in my earlier testimony, we do that time and time again

when litigation is never filed, and we also do it in times where litigation is filed and then it's not requested.

Mr. NADLER. And the second part of my question, which is, how do you respond to the DOJ's concerns that specific preservation rules that we might try to write might conflict with other existing obligations to retain records?

Mr. HILL. It's not clear to me that that's accurate. We have obligations to preserve documents from regulatory reasons, for example. And I just believe that the courts and the Congress should sit down and determine what is the most efficient way to protect information to allow people to have a fair trial and not have the cost of litigation drive the outcome of that trial.

The Justice Department is entitled to its opinion. I have seen the growth and cost of this, and it is impacting the system.

Mr. NADLER. Thank you, my time has expired.

Mr. FRANKS. I thank the gentleman. Just for point of clarification, Justice Kourlis indicated that some of the rest of you may have had input at some point to the Judicial Conference; is that correct?

Mr. Hill?

Mr. HILL. Yes, that's correct, I have.

Mr. FRANKS. Mr. Butterfield.

Mr. BUTTERFIELD. I have.

Mr. FRANKS. Mr. Hubbard.

Mr. HUBBARD. Yes, I have.

Mr. FRANKS. So that Justice Kourlis was correct and I just wanted to give everybody a chance to answer for themselves in that regard.

We are hopeful that the Judicial Conference will come forward with some ideas of their own which the Congress, maybe even optimistic that they might do that, and the conference might bring some things that the Congress would deem worthwhile.

So with that, I would yield to the distinguished Ranking Member of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you very much, Chairman.

Now, I notice that the Justice didn't mention other problems that are raising the expenses of court litigation, like shortage of judges, the expense of counsel and a variety of other reasons.

Was there any reason for those not being included in this? Because it gives you—it could give one the impression that this is the main problem of diminished, great, legal services in this country. Justice?

Ms. KOURLIS. Congressman, you are absolutely right, it is a multi-faceted problem, including budgets for courts, and judicial vacancies, and a host of other components. What I also believe is that the courts themselves, the way that the civil litigation process is structured, have a duty to reorganize, rethink how they present their services, and recalibrate them to the needs of the users. I tell an anecdote, Congressman.

Mr. CONYERS. Well, wait a minute.

Ms. KOURLIS. It is really short, I promise.

Mr. CONYERS. I believe you, but spare me. Now, here is the problem. We don't know what the Judicial Conference is going to do. Maybe they got your report and were so impressed with it that

they are going to begin to deal with the questions of proportionality that you raised. And maybe they haven't considered these things. And maybe they will.

Ms. KOURLIS. Oh, indeed, I think they are. I think they are giving it great thought and deliberation.

Mr. CONYERS. I am happy to hear your confidence about it. Now, Mr. Hubbard, we have a little problem here. Your report was based on four major companies, right?

Mr. HUBBARD. The preliminary report, yes.

Mr. CONYERS. All right. Which four?

Mr. HUBBARD. Congressman, respectfully, I have kept those identities confidential. That was the basis upon which the data was shared with me.

Mr. CONYERS. And because of what reason did you keep them confidential?

Mr. HUBBARD. Concerns that information about the costs of preservation, which can be, in some cases, but not all, very high, could be used perhaps for strategic advantage against them.

Mr. CONYERS. Sure. All right. I understand. Now, does that mean that your final report is going to be confidential, too?

Mr. HUBBARD. The identities of specific companies will be kept confidential in the report.

Mr. CONYERS. Can I ask you this? Were they large corporations?

Mr. HUBBARD. Yes.

Mr. CONYERS. How large?

Mr. HUBBARD. These are, I guess, you would say very large corporations, in the order of Fortune 500 companies.

Mr. CONYERS. Well, you were candid enough to let us know that your report was preliminary, and that we should not take any congressional—make any congressional decisions based upon it because it was a preliminary report. Is that right?

Mr. HUBBARD. I think it is fair to say that we should not——

Mr. CONYERS. Is that right?

Mr. HUBBARD. I think that is right, yes.

Mr. CONYERS. Okay. All right. Thanks so much. Then in other words, all of us, including all of you, who I think you have all said that you have communicated with the conference, are going to be waiting, like the Subcommittee, to find out how much of your advice was taken by the conference. Is that correct?

Mr. HUBBARD. To an extent, yes. I think that is fair.

Mr. CONYERS. All right. Mr. Hill? Is that right?

Mr. HILL. We certainly will see what they do.

Mr. CONYERS. Of course. So I am heartened by the fact that Madam Justice seems to feel that there may be some encouraging—that they may be taking at least some of her recommendations seriously. And I hope that they are taking all of your recommendations seriously. So I guess I will be waiting, just like you. Maybe we should have another hearing after the report comes out, and see how our opinions and estimations of what was being done and had been done came out. I would recommend that to the Chairman. I hope that all of you will as well. Thank you, sir.

Mr. FRANKS. Thank you. Is it your thought that you will ratify whatever the Judicial Commission comes out with?

Mr. CONYERS. No, not me. I will be critically waiting the results of the final report.

Mr. FRANKS. Waiting with bated breath. Listen, I want to thank all of the Members, and I especially want to thank the witnesses. Forgive me, Mr. Scott. You snuck up on me, sir. I will recognize Mr. Scott for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman. I just had a couple of questions. Mr. Hubbard, what are some of the costs involved in preservation? Preserving electronic data shouldn't be that expensive. What are some of the costs in preserving other data?

Mr. HUBBARD. Thank you, Congressman. Of course the costs that we all think of initially with respect to preservation is the cost of simply housing the data on a computer drive. And that cost, as I think we are all aware of, has decreased exponentially over time. However, the costs that I have in mind when I talk about the costs associated with preservation are not limited merely to the costs of storage of data, but the fact that in the process of implementing what is usually referred to as a litigation hold, sometimes dozens, maybe even hundreds or more of employees are called upon to review the documentation for which they are responsible, their emails, their computer files, in order to ensure compliance with the litigation hold. And it is that employee time, which can run into the hundreds or thousands of hours, that can become a very significant cost.

Mr. SCOTT. Okay. Now, why shouldn't the present rules of proportionality and common sense and letting the judge determine what is reasonable and not reasonable based on the issues, the facts at issue, the size of the case, that kind of thing, proportionality, why shouldn't that be enough?

Mr. HUBBARD. Well, Congressman, certainly proportionality should be the touchstone to approaching questions of discovery and preservation. The question is whether it is under the current rules. The rules envision active judicial oversight of the proportionality balance. But in reality, that doesn't occur. The most obvious reason being that the decisions with respect to preservation often have to occur before litigation is even filed, and therefore a judge cannot be involved. Parties are then are forced to make judgments on their own given the risk that depending upon which jurisdiction they end up in and who the plaintiffs on the other side are, how broad the preservation obligation will be. And that is where I think the uneven and inconsistent case law that currently exists creates this tendency toward overpreservation.

Mr. SCOTT. I think we have heard from some of the witnesses the idea that congressional action is not needed. I suppose that means congressional action might make matters actually worse. Do we have any recommendations to make it better? I mean, litigation is expensive. I am not sure that there is a lot we can do about that. Do you have any recommendations?

Mr. HUBBARD. Well, litigation certainly will always be expensive. The question is whether we can make it more efficient. Certainly, because the Judicial Conference's attention is directed to these issues right now, I think we all agree that the proper process is to participate and contribute to that process in the capacity that we can.

Mr. SCOTT. Do we have any recommendations?

Mr. HUBBARD. Any recommendations for specific rules?

Mr. SCOTT. Right.

Mr. HUBBARD. I certainly have made recommendations. First of all——

Mr. SCOTT. We are here listening to the complaints, but what can be done about it?

Mr. HUBBARD. What can be done is for one, by implementing Federal rules that directly address preservation, there can be uniform treatment of the preservation obligation.

Mr. SCOTT. But proportionality kind of works the other way, because some may be reasonable in some cases and others not. Does anybody have any specific recommendations as to what we can do to make the situation better?

Mr. HILL. Congressman, I think an important role for the Subcommittee is to provide its oversight to the Committee. Because the Federal Rules Conference considers the way—my concern is that the Federal Rules Conference will consider the way litigation will operate once it is in a courtroom so that it appears fair and efficient, and they will draft rules that solve the problem that they focus on most. I think this Committee's obligation is to make sure that those rules work in an economic environment, that there are other issues involved in litigation, as we have pointed out. Preservation costs before litigation is filed imposes a burden. I think that is something that Congress could bring to the attention of the Committee.

Mr. SCOTT. I am not hearing any recommendations.

Ms. KOURLIS. Congressman, I am not entirely sure whether your question is narrowly focused on recommendations for a preservation rule, or broader recommendations, or whether you are asking whether any of us have recommendations for action that we would ask Congress to be taking.

Mr. SCOTT. I think we have heard that there are no recommendations for Congress to do anything yet.

Ms. KOURLIS. That is correct, from my perspective.

Mr. BUTTERFIELD. Congressman, I wrote a paper about a year ago, along with my colleague behind me, Ariana Tadler, and the subject of our paper was give the rules a chance. The 2006 rule amendments, the ink was barely dry when some of these surveys were started and people started criticizing the rules. The rules are abundantly flexible. They have the mechanisms in place to curb the costs of litigation if people simply use them.

Mr. SCOTT. Thank you. Well, Mr. Chairman, I thank you for the hearing, but I think what we are hearing from people is it is not timely for Congress do anything about it at this point.

Mr. FRANKS. And I thank the gentleman. And I thank all of you again for being here, and the audience for being so attentive. And without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as possible so that their answers may be made part of the record.

Without objection, all Members will have 5 legislative days within which to submit any additional materials for inclusion in the

record. With that, again, I thank the witnesses, and I thank the Members and observers, and the hearing is now adjourned.

[Whereupon, at 2:48 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

December 9, 2011

Honorable Trent Franks
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

We understand that the Subcommittee on the Constitution is holding a hearing on December 13 to address "The Costs and Burdens of Civil Discovery." On behalf of the Judicial Conference's Committee on Rules of Practice and Procedure (the "Standing Rules Committee") and the Advisory Committee on Civil Rules (the "Advisory Committee"), we write to provide you an update on the Advisory Committee's work on reducing the costs, burdens, and delays of discovery in civil cases and request that it be made part of the record of your hearing. The Rules Committees understand that discovery is an important issue to all litigants, whether plaintiffs or defendants, and are closely examining ways to improve the current system. Thus, we understand the impetus for this hearing and look forward to learning additional facts it may develop on this important subject.

As the discussion below demonstrates, the Rules Enabling Act process for examining and addressing these concerns is already well underway. The Advisory Committee is taking a close look at discovery and other aspects of civil litigation to explore ways to reduce costs, burdens, and delays. We urge you to allow the Rules Committees to continue their consideration of these issues through the thorough, deliberate, and time-tested procedure Congress created in the Rules Enabling Act.

Preservation and Sanctions

The Advisory Committee is engaged in an extensive study of the difficulties facing litigants, courts, and third parties in dealing with issues related to preserving documents and information for litigation and the related issue of the sanctions imposed when preservation obligations are not met. In May 2010, the Committee hosted a conference on civil litigation at Duke University (the "2010 Conference") to examine ways to address costs and delays in the federal civil justice system. The Conference gathered over 200 judges, lawyers, in-house counsel, state judges, and nonprofit organizations to consider the state of the civil justice system. The Conference had numerous panels devoted to particular topics. The panelists, as well as many other organizations, submitted empirical data and papers on a variety of topics relating to the civil justice system.[1] A significant amount of the work of the 2010 Conference was devoted to electronic discovery. The Conference resulted in a strong recommendation that the Advisory Committee consider ways to provide more clarity and guidance on preservation obligations and spoliation sanctions through changes to the Federal Rules of Civil Procedure. As a result, the Committee and its Discovery Subcommittee have been closely examining potential rule amendments. The Discovery Subcommittee began work on preservation immediately after the 2010 Conference and has met repeatedly over the past year and a half to focus its work on this issue.

The Subcommittee commissioned research into how federal courts throughout the country are addressing triggers for the preservation of electronic information, the scope of the preservation obligation, and sanctions for the failure to preserve such information.[2] The Subcommittee asked the Federal Judicial Center ("FJC") to conduct empirical research on motions for federal court sanctions based on allegations of spoliation of evidence.[3] The Subcommittee also commissioned research on statutes, regulations, and rules requiring preservation at the national, state, and local level, to assist in its examination of how other preservation obligations might interact with obligations imposed by courts and potential rule amendments.[4]

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[1]The empirical data and papers submitted for the 2010 Conference are available at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DukeWebsiteMsg.aspx.

[2]The research is summarized in a long memorandum available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Case_Law_on_Potential_Preservation_2011-11.pdf.

[3]The results of the FJC study are available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Empirical_Data/Federal%20Judicial%20Center.pdf.

[4]The results of the research are summarized in a memorandum available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Laws%20Imposing%20Preservation%20Obligations.pdf.

In September of this year, the Subcommittee hosted a one-day conference in Dallas, Texas, to further examine possible rulemaking responses to preservation and spoliation sanction issues. The Subcommittee invited about 25 participants, including in-house counsel, plaintiff and defense lawyers, academics, judges, and technology experts, to provide their views on these issues. The Subcommittee circulated ideas for possible rule amendments in advance of the conference to focus the conversation on possible solutions to current preservation burdens. The Subcommittee received very valuable input at the Dallas conference. The Subcommittee also received, and continues to receive, written commentary and proposals from participants and other organizations interested in these issues.[5]

At the Advisory Committee's recent meeting on November 7 and 8, 2011, the Subcommittee solicited the views of the full Committee on whether and how to proceed with rulemaking efforts to address preservation issues. The agenda materials included a 31-page report from the Subcommittee, charts summarizing case law from around the country on relevant issues, minutes of the Dallas conference and discussions of the Subcommittee, and 13 submissions from corporations and organizations on the issues being addressed by the Subcommittee.[6] A large number of observers, including some congressional staff, attended the Committee meeting. The discussion was robust. The Subcommittee will continue to consider both providing detailed guidance on preservation obligations and providing more clarity on sanctions, as well as other rulemaking possibilities for addressing preservation concerns. The Subcommittee plans to present a recommendation on how to proceed at the next Advisory Committee meeting, scheduled for March 22 and 23, 2012.

Committee Work on Litigation Costs

Another subcommittee formed after the 2010 Duke Conference (the "2010 Conference Subcommittee") is addressing other proposals for reducing costs in civil litigation. This Subcommittee is considering possible rulemaking approaches, as well as other means for addressing costs and efficiency concerns, such as judicial education, lawyer education, revisions to the *Benchbook for U.S. District Court Judges*, and guides to "best practices." The FJC has already undertaken several projects to emphasize the advantages of active case management in reducing litigation time and expense.

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[5]All of the written materials that were prepared by the Subcommittee and considered at the September conference, as well as submissions received by the Advisory Committee, are posted on the federal rulemaking website at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx.

[6]The full agenda materials are available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf. The materials considered by the Committee in connection with its discussion of preservation issues can be found at pages 53–469 of the pdf file.

Empirical work also continues to be done to build on the work undertaken for the 2010 Conference. The FJC has concluded the first phase of work on the impact of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), on federal pleading practice,[7] and is continuing work on a second phase of that project.[8] The FJC is also examining the frequency and timing of initial case-management orders.[9] Another project on discovery conferences conducted under Civil Rule 26(f) is expected to begin early next year. Other organizations are also conducting empirical research on the costs of discovery, and the Subcommittee will be considering the results of their work.

The 2010 Conference Subcommittee, together with the FJC, is also gathering information on pilot projects being conducted in federal courts around the country. These include a pilot project in the Southern District of New York on managing complex cases more efficiently, a project in the Seventh Circuit on reducing the complexity of electronic discovery, and an expedited trial program adopted in the Northern District of California.

The 2010 Conference Subcommittee has worked with a group of plaintiffs' and defense lawyers to develop a set of standard discovery requests that should significantly streamline the discovery process in employment cases. Such cases are a significant part of federal district court dockets.[10] The protocols were presented at the Advisory Committee's meeting and will be offered as a model for adoption by individual judges around the country. Experience in those courts may encourage more general adoption and may inspire other groups to develop similar discovery protocols to simplify and reduce the cost of discovery in federal civil litigation.

The 2010 Conference Subcommittee is examining the possibility of several rulemaking responses to concerns about costs and delays in civil litigation. Many proposals are currently being considered, including reducing the amount of time before a scheduling order is entered; emphasizing cooperation among the parties in the rules; giving even greater emphasis to proportionality limits on discovery; implementing methods to avoid evasion in responding to discovery; setting presumptive limits on certain types of discovery; and implementing a pre-motion conference with the court before discovery motions are filed. The Subcommittee has

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[7]The FJC's first report on motions to dismiss after *Iqbal* is available at http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf.

[8]The FJC's report with an update on its study of motions to dismiss after *Iqbal* is available at http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/$file/motioniqbal2.pdf.

[9]The FJC's report on the timing of scheduling orders and discovery cut-off dates is available at http://www.fjc.gov/public/pdf.nsf/lookup/leetiming.pdf/$file/leetiming.pdf.

[10]*See* SEAN FARHANG, THE LITIGATION STATE 3 (2010) ("Next to petitions by prisoners to be set free, job discrimination lawsuits are the *single largest category* of litigation in federal courts.").

asked the Advisory Committee's reporters to draft rule language so the Subcommittee can consider concrete approaches. The Subcommittee continues to actively solicit suggestions for other innovative ways to make pretrial litigation more efficient and effective.

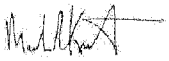
The Advisory Committee discussed these efforts at its recent meeting.[11]

Conclusion

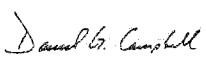
The Advisory Committee is examining the issue of cost reduction in civil litigation in great detail. Any rulemaking proposals will go through the full Rules Enabling Act process, including publication for public comment and review by the Standing Rules Committee, the Judicial Conference, the Supreme Court, and Congress. This multi-layered process ensures the thorough evaluation of proposals to address problems in litigation, while reducing the possibility of unintended consequences.

We appreciate your consideration of the Rules Committees' current work in this area. We will continue to pursue the goal, as stated in Rule 1 of the Federal Rules of Civil Procedure, of securing the just, speedy, and inexpensive determination of every action in federal court. If you or your staff have any questions, please contact Jonathan Rose, Rules Committee Officer, Administrative Office of the United States Courts, at 202-502-1820.

Sincerely,



Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Committee on Rules
of Practice and Procedure



David G. Campbell
United States District Judge
District of Arizona
Chair, Advisory Committee
on Civil Rules

Identical letter sent to: Honorable Jerrold Nadler

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[11]The portion of the November 2011 Committee agenda materials that relate to the 2010 Conference Subcommittee's work can be found at page 567–622 of the materials located at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf. An addendum to the materials is available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/Tab%20VI%20Appendix%20F%20SDNY%20Pilot%20Project%20for%20Complex%20Litigation.pdf.

STATEMENT OF LAWYERS FOR CIVIL JUSTICE

SUBMITTED TO THE

US HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION
HEARING: THE COSTS AND BURDENS OF CIVIL DISCOVERY

DECEMBER 13, 2011

Overview

Lawyers for Civil Justice respectfully submits this statement on behalf of its membership to the U.S. House Judiciary Subcommittee on the Constitution for inclusion in the record of the December 13, 2011 hearing on "The Costs and Burdens of Civil Discovery." LCJ is a national coalition of counsel for major American corporations; associate member law firms; and the leadership of DRI – The Voice of the Defense Bar, the Federation of Defense & Corporate Counsel, and the International Association of Defense Counsel, which collectively represent more than 20,000 civil defense attorneys nationwide. Our mission is to promote excellence and fairness in the civil justice system and to ensure the just, speedy, and inexpensive determination of civil cases.

We commend Chairman Trent Franks, the members of the Constitution Subcommittee and the full Judiciary Committee for holding this hearing. The important issues raised by this hearing are currently being debated by the U.S. Judicial Conference Committee on Rules of Practice and Procedure, and we trust that this Committee will meaningfully address the adverse impact that the costs, burdens and inefficiencies of the current federal legal system have on our economy. We respectfully submit that the Rules Committee should take bold action to address the many problems that currently plague the civil justice system and to broadly reexamine the system of justice that the American College of Trial Lawyers (ACTL) and the University of Denver Institute for the Advancement of the American Legal System (IAALS) have characterized as fundamentally flawed and "in serious need of repair." We know from these studies and many others that society's goals and objectives are not being served by the current civil justice system. In fact, the system's perverse effects are weakening our economy, our social structure and the global competitiveness of American companies.

From our perspective, quite simply, the current litigation paradigm of imprecise pleadings; overbroad and inefficient discovery; unclear and inconsistent preservation requirements; and unbalanced allocation of costs undermines the "just, speedy and inexpensive" determination of actions. As we have explained in a series of formal comments submitted to the Advisory Committee on Civil Rules, which are incorporated throughout this statement as hyperlinks, cases are being settled, discontinued, or not brought at all because of inadequate pleading standards, an almost unlimited scope of discovery, catastrophically high costs and burdens of discovery and preservation of information, and inappropriate cost allocation rules.

The Need for the Rules Committee to Reexamine Key Provisions of the Federal Rules of Civil Procedure

The costs, burdens, and inefficiencies of the federal civil litigation system are varied, complex and far reaching. In May 2010, LCJ submitted its White Paper: Reshaping the Rules of Civil Procedure for the 21st Century, Submitted to the 2010 Conference on Civil Litigation, Duke Law School on behalf of Lawyers for Civil Justice, FRI – The Voice of the Defense Bar, Federation of Defense & Corporate Counsel, International Association of Defense Counsel, 050210 to the 2010 Duke Law School Litigation Review Conference sponsored by the Judicial Conference Rules Committee.

The White Paper summarizes the consensus of LCJ's corporate members, the defense bar, and its more than 35 drafters (all experienced trial lawyers) regarding the systemic problems presented by litigation in the federal courts and proposes meaningful Rule amendments to help solve these problems. The White Paper calls for a comprehensive reevaluation of the existing Rules governing litigation in the 21st century to include: (1) the redefinition and rebalancing of the interrelationship between pleading and discovery, (2) reevaluation of the premises and focus of all discovery and further refinement of the treatment of e-discovery, (3) development of clear document preservation and spoliation standards, and (4), deterrence of runaway litigation costs with reasonable cost allocation rules.

More specifically, The *White Paper* is bold in its recommendations in four areas:

- **Pleadings** - It recommends implementation of the *Twombly* and *Iqbal* pleading standard, demonstrating from a historical perspective the need for pleading standards appropriate to modern litigation in the information age. See Martin H. Redish, Pleading, Discovery and the Federal Rules: Exploring the Foundations of Modern Procedure, Northwestern University School of Law, Working Paper (2010) (The "plausibility standard" of *Iqbal* and *Twombly* is fully consistent with the text and intent of Rule 8(a)'s pleading standard and an amendment expressly adopting the language of the plausibility standard should be adopted, in order to put an end to the doctrinal confusion that has often plagued lower court decisions interpreting the rule.)

- **Limited Discovery** - The White Paper proposes a rule that refocuses the scope of discovery on the claims and defenses in the action. It also requires that discovery requests be in proportion to the stakes and needs of the litigation and that specific categories of electronically stored information should be presumed non-discoverable in most cases. By emphasizing proportionality in discovery and placing limits on the extent of E-discovery, the paper strikes at the heart of current practices, which fuel runaway discovery costs. See Martin H. Redish & Colleen McNamara, Back to the Future: Discovery Cost Allocation and Modern Procedural Theory, George Washington Law Review, Forthcoming (2011) (The Federal Rules' strategies to control discovery abuse are inadequate because of their inability to put an end to the problems of abusive and excessive discovery. The most effective means to do so would be to recognize that the costs of discovery are, in the first instance, appropriately to be attributed to the requesting party, rather than to the responding party. The current practice concerning discovery cost allocation should be rejected as it finds no grounding in the text of the Federal Rules.); Richard Esenberg, A Modest Proposal for Human Limitations on Cyberdiscovery, (Florida Law Review, Forthcoming, 2011), (As ESI multiplies, organizations will have to find ways to retain and have access to that information which is necessary to conduct business, i.e., to sell and design things, to hire and fire people and to do all the other things that happen in the real world and become the subject of litigation. There ought to be, at minimum, a strong presumption that the retention and retrieval policies created to manage this information outside the litigation process are likely to catch almost all the information that is relevant within it.)

- **Preservation/Spoliation** – Rules should be amended to permit spoliation sanctions only when willful conduct was carried out for the purpose of depriving another party of the use of the destroyed evidence and when the destruction results in actual prejudice to the other party. The Rules should also be amended to include clear standards for spoliation of information prior to commencement of litigation, and preservation of information thereafter, in order to alleviate the enormous costs and burdens of unnecessary over preservation. See William H. J. Hubbard, "Preservation under the Federal Rules: Accounting for the Fog, the Pyramid, and the Sombrero." Unpublished working paper (Dec. 2, 2011) (Attached as Appendix C to Prof. Hubbard's Written Statement), (Rules amendments defining reasonable preservation obligations are needed in light of the unique place that preservation occupies in the discovery process. Because preservation occurs at the earliest stages of litigation, often before a lawsuit is even filed, parties must make preservation decisions in an environment of great uncertainty and sparse information. It identifies how the Federal Rules can better address trigger, scope, and sanctions taking into account the fog of litigation. Reliance on evolving case law will not fully address the problems facing parties.)

- **Cost Allocation** - The purpose of discovery is to permit parties to access information that will enable fact finders to determine the outcome of civil litigation. Having rules that encourage the parties to police themselves and to focus on the most efficient means of obtaining the truly critical evidence is the best way to achieve that purpose. The Rules should, therefore, be amended to require that each party pay the costs of the discovery it seeks. This will shift the cost-benefit decision onto the requesting party and therein encourage each party to manage its own discovery expenses responsibly. See Ronald Allen, How to Think About Judicial System Errors, Costs and their Allocation, 071211 (Florida Law Rev, Forthcoming (2011), ("Asymmetric costs, by contrast, cause skewed cost allocation and provide the opportunity for strategic exploitation. By contrast, placing the costs of discovery provisionally on the person asking for it, but allowing for judicial involvement to make adjustments, may both generally give incentives for the optimal production of information and permit a safety valve in the unusual case."); Martin H. Redish, Electronic Discovery and the Litigation Matrix, 51 Duke L.J. 561 (2001), ("[F]ashioning procedures without any serious concern for the avoidance of economic waste and the attainment of economic efficiency inexcusably drains society's resources and violates the dignity of the litigants whose personal resources are unduly affected." *** "...the fact that a party's opponent will have to bear the financial burden of preparing the discovery response actually gives litigants an incentive to make discovery requests, and the bigger expense to be borne by the opponent, the bigger the incentive to make the request."); **Martin H. Redish & Colleen McNamara,** ***op. cit. supra*** (When discovery costs are imposed on the producing party, an externality is created for the requesting party, who lacks any incentive to make economically efficient discovery choices. Principles of constitutional due process dictate that the discovering party, rather than the responding party, pay for discovery costs, at least where the defendant is the responding party. Otherwise, a defendant will be required to pay a benefit to the plaintiff on the basis of nothing more than plaintiff's unilateral, unproven allegations of liability.)

Adverse Economic Impact of Civil Litigation

The adverse impact of civil litigation costs on the nation's economy is acute. Some of these costs are highlighted and explained in LCJ's Comment to Standing Committee Supplementing the Duke White Paper 060810. U.S. Companies, seen by many as "deep pocket defendants," cannot absorb litigation expenses as readily as some would assume without placing themselves at a severe economic disadvantage. More importantly, corporate defendants are not the only ones on which the burden of these excessive litigation costs falls; inevitably, many of these costs will be passed on to consumers and taxpayers in the form of higher prices, decisions to forego promising areas of research, the withdrawal of products and services from the market, and the relocation of jobs and other corporate investments to jurisdictions with more efficient, cost-effective civil justice systems.

This important finding of the White Paper is supported by findings later submitted to the 2010 Duke Conference on Civil Litigation by LCJ, CJRG and the Chamber ILR in the FRCP Litigation Cost Survey of Major Companies as well as other studies such as the Letter from Professor Henry Butler to The Honorable Lee H. Rosenthal, *et al.*, (June 2, 2010), ("...for each $1 of profit earned, on average survey respondents spent between $0.18 and $0.31 on litigation costs."), and Professor William H. J. Hubbard: *Preliminary Report on the Preservation Costs Survey of Major Companies* (Civil Justice Reform Group Sept. 8, 2011); and Professor William H. J. Hubbard: Letter to the Hon. David G. Campbell (Nov. 3, 2011) ("Given the thousands of large companies that face significant preservation costs, one can extrapolate from this number to estimate that the savings for all companies would be in the billions of dollars.")

The Need for Fundamental Revision of the Discovery Rules

LCJ's White Paper demonstrates that, notwithstanding the history of many amendments to the Rules of Civil Procedure, the current patchwork of rules is simply not working. As history has shown, numerous modest amendments to the Rules governing discovery have achieved little in addressing the problems that have long plagued the discovery process. The system needs fundamental reforms, more than just "tinkering at the edges," in order to improve the administration of justice in the federal courts.

There has been ongoing debate surrounding the discovery rules for more than a generation. Federal Rule of Civil Procedure 26 has been amended no less than four times. Although each amendment attempted to address the ongoing problems of discovery costs, burdens, misuse and abuse, these remain major culprits in the dissatisfaction with our nation's civil justice system. Accordingly, bold action is required to address this problem that has long-haunted rule makers, litigants, practitioners and judges. LCJ submits that now is the time for the Rules Committee to prescribe stronger medicine – meaning primarily the narrowing of the scope of discovery to the claims and defenses in the case.

On September 2, 2010, LCJ reinforced its position that the current extremely broad discovery rules undermine the system's ability to bring about the just, speedy and inexpensive resolution of

cases by submitting to the Civil Rules Advisory Committee the Comment A Prescription for Stronger Medicine: Narrow the Scope of Discovery (September 1, 2010).

That Comment was followed by another titled A Prescription for Stronger Discovery Medicine:The Danger of Tinkering Change and the Need for Meaningful Action (August 18, 2011), in which we pointed out that the problems of discovery will continue to grow and expand until they are addressed head on and once more urged the Rules Committee to adopt meaningful Rule Amendments such as the following:

First, Rule 26 should be amended to narrow the scope of discovery by limiting discovery to "any non-privileged matter that would support proof of a claim or defense" subject to a "proportionality assessment" as required by Rule 26(b)(2)(C).

Second, Rule 26(b)(2)(B) should be amended to specifically identify categories, types or sources of electronically stored information that are presumptively exempted from discovery absent a showing of "substantial need and good cause" which, in turn, could be used to inform determinations of what constitutes "not reasonably accessible data" where the rule does not specifically address a particular type or category of electronically stored information.

Third, the so called "proportionality rule", Rule 26(b)(2)(C), should be amended to explicitly include its requirements to limit the scope of discovery.

And finally, Rule 34 should be amended to limit the number of requests for production, absent stipulation of the parties or court order, to no more than 25, covering a time period of no more than two years prior to the date of the complaint, and limited to no more than 10 custodians.

These steps would serve to address a myriad of discovery problems by reducing the volume of information subject to discovery (a major contributor to cost), providing a clearer standard of relevance, and lessening the likelihood of satellite litigation on discovery issues.

The need for revision of the discovery provisions of the rules is urgent and immediate. In particular, parties need clear rule-based guidance to responsibly comply with unnecessarily broad and inconsistent preservation, collection, and production obligations. In the LCJ Comment The Time is Now: The Urgent Need for Discovery Rule Reforms (October 31, 2011), we explain how the premier legal system for the administration of civil justice has witnessed the complete erosion of Rule 1. Hundreds of millions of dollars are being spent by corporate litigants in America on unnecessary discovery and preservation because that is the only rational response to the uncertainty created by unnecessarily broad and inconsistent discovery, preservation, and spoliation standards that provide sparse guidance.

Preservation, Spoliation, and Other Challenges in the Changing Information Age

LCJ submitted the LCJ Comment Preservation: Moving the Paradigm, (November 10, 2010) to the Civil Rules Advisory Committee to reemphasize the ways in which the proliferation of data in the 21st Century has forced litigants to spend millions of dollars to address an unquantifiable

risk in computing systems that were not designed for litigation holds. It is clear that the costs and burdens of unnecessary over preservation of information for potential litigation are much too high, the risk of spoliation sanctions is too great, and the impact of ancillary litigation proceedings on discovery disputes is too debilitating. High profile sanctions decisions continue to force litigants to spend millions of dollars to address an unquantifiable risk in computing systems that are designed for a myriad of business purposes, but not for litigation holds.

Furthermore, LCJ's members recognize that technology has dramatically changed the way individual litigants and companies create, store and dispose of business and personal records. Unfortunately, in this new information age, complying with the preservation standards that are developing piecemeal around the country is extremely difficult for most and impossible for others. Meaningful rule amendments would, however, supply the guidance necessary to help solve the increasingly serious and costly preservation problems that our members encounter in everyday litigation.

These increasingly costly and serious problems exist not only for defendants, but for plaintiffs and third parties. There are, however, meaningful rule amendments that can supply the guidance necessary to help solve these problems consistent with the Rules Enabling Act.

Realistic Elements of a Preservation Rule

Currently, the duty to preserve is extremely broad and extends to all potentially relevant documents. As a result, the expense and burden to preserve are enormous. On April 1, 2011 LCJ offered consensus views on suggested rule language that incorporates the necessary elements of a preservation rule and spoliation standards in the LCJ Comment Preservation – Moving the Paradigm to Rule Text, to Civil Rules Advisory Committee, (April 1, 2011). We believe it is necessary to consider developing rules and standards that more clearly and pragmatically articulate the events and time at which the duty to preserve information is triggered. A rule that addresses the scope of preservation while acknowledging the overarching considerations of reasonableness and proportionality should provide clear and specific guidelines to parties regarding the types and sources of information subject to preservation. Finally, sanctions placed on a party for failing to preserve or produce relevant and material information (spoliation) should be determined by intent to prevent use of the information in litigation, not by the inadvertent failure to follow some procedural step.

There are many recent examples that demonstrate the near impossibility of fully complying with inconsistent, common law preservation duties to which multinational businesses in particular are subjected and which adversely impact the competitiveness of American companies; the pressure that excessive costs and burdens exert on businesses to settle, rather than take their cases to court; and the ways in which the legal system's costs and burdens are restricting justice for all.

Meaningful Rule Reform is Needed Now!

We, therefore, submit that the Federal Judicial Conference Rules Committee should exercise its appropriate authority and responsibility under the Rules Enabling Act to enact straightforward

procedural rules that enable cost-efficient civil justice – clear, direct rules that will help curb systemic excesses and that will reduce costs and eliminate unnecessary litigation burdens.

Respectfully submitted,

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