

Testimony of

**William P. Butterfield
Partner, Hausfeld LLP**

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

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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

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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 truth⁴—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 case⁷ or an antitrust case alleging a price-fixing conspiracy or attempted

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 litigation¹⁴ 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](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 *midsized* 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

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 “midsized” 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

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 protocols³¹ also cause unnecessary and additional expenses for their clients.³²

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

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](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

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

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_1=/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 wake⁴⁷—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

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.thosedonaconference.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 factors⁵² 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

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.

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.

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 letter⁷⁵).

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

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).