

**ADVISORY COMMITTEE
ON
CIVIL RULES**

**WASHINGTON, DC
NOVEMBER 7-8, 2011**

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TAB 1

Agenda for November 2011 Meeting
Civil Rules Advisory Committee

1. Welcome by the Chair
 - a. New Members
 - b. Standing Committee meeting and Judicial Conference
2. Minutes for April meeting – ACTION ITEM
3. Legislative Activity
4. Discovery

Subcommittee Report: Preservation and Spoliation
Rule 45 Comments: An Update
5. Pleading

FJC Report
6. Eastern District of Virginia Expedited Procedures Panel
7. Duke Subcommittee
 - a. Report
 - b. FJC report
 - c. Rule 33(e) proposal – ACTION ITEM
8. Inter-Committee Forms Subcommittee

Report
9. Appellate-Civil Subcommittee
10. Rule 23: Should class actions be brought back to the agenda?
11. "Mailbox" Docket
12. Next Meeting: March 22-23, 2012 (Probably Ann Arbor)

ADVISORY COMMITTEE ON CIVIL RULES

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| <p>Chair: Honorable David G. Campbell United States District Judge United States District Court 623 Sandra Day O'Connor U.S. Courthouse 401 West Washington Street Phoenix, AZ 85003-2146</p> | <p>Reporter: Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215</p> <hr/> <p>Professor Richard L. Marcus University of California Hastings College of the Law 200 McAllister Street San Francisco, CA 94102-4978</p> |
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| Honorable Gene E. K. Pratter United States District Court James A. Byrne United States Courthouse 601 Market Street, Room 7614 Philadelphia, PA 19106-1797 | Honorable Randall T. Shepard Indiana Supreme Court 200 West Washington Street State House, Room 304 Indianapolis, IN 46204 |
| Anton R. Valukas, Esq. Jenner & Block LLP One IBM Plaza Chicago, IL 60611 | Honorable Tony West Assistant AG, Civil Division (ex officio) U.S. Dept. of Justice 950 Pennsylvania Ave., NW – Room 3141 Washington, DC 20530 |
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| Criminal | Judge Marilyn Huff (Standing Committee) |
| Evidence | Judge Judith H. Wizmur (Bankruptcy Rules Committee) Judge Paul S. Diamond (Civil Rules Committee) Judge John F. Keenan (Criminal Rules Committee) Judge Richard C. Wesley (Standing Committee) |

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TAB 2

DRAFT MINUTES (JUNE 8 VERSION)

CIVIL RULES ADVISORY COMMITTEE

APRIL 4-5, 2011

1 The Civil Rules Advisory Committee met at the University of Texas Law School on April
2 4 and 5, 2011. The meeting was attended by Judge Mark R. Kravitz, Chair; Elizabeth Cabraser,
3 Esq.; Judge David G. Campbell; Judge Steven M. Colloton; Judge Paul S. Diamond; Professor
4 Steven S. Gensler; Daniel C. Girard, Esq.; Judge Paul W. Grimm; Peter D. Keisler, Esq.; Judge John
5 G. Koeltl; Judge Michael W. Mosman; Judge Gene E.K. Pratter; Chief Justice Randall T. Shepard;
6 Anton R. Valukas, Esq.; Chilton D. Varner, Esq.; and Hon. Tony West. Professor Edward H.
7 Cooper was present as Reporter, and Professor Richard L. Marcus was present as Associate
8 Reporter. Judge Lee H. Rosenthal, Chair, Judge Diane P. Wood, Chief Justice Wallace Jefferson,
9 and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur
10 I. Harris attended as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., was the
11 court-clerk representative. Peter G. McCabe, James Ishida, Jeffrey Barr, Holly Sellers, and Andrea
12 Kuperman, Chief Counsel to the Rules Committees, represented the Administrative Office. Judge
13 Barbara Rothstein, Joe Cecil, and Emery Lee represented the Federal Judicial Center. Ted Hirt,
14 Esq., Department of Justice, was present. Observers included Alfred W. Cortese, Jr., Esq.; Joseph
15 Garrison, Esq. (National Employment Lawyers Association liaison); John Barkett, Esq. (ABA
16 Litigation Section liaison); David Ackerman, Esq. (American College of Trial Lawyers); Kenneth
17 Lazarus, Esq.; John Vail, Esq. (American Association for Justice); Thomas Y. Allman, Esq.; Robert
18 Levy, Esq.; Jerry Scanlon (EEOC liaison); Professor Lonny Hoffman; Andrew Bradt, Esq.; and
19 Professor Robert Bone.

20 Judge Kravitz expressed thanks to the University of Texas Law School for hosting the event,
21 They have been gracious hosts throughout the planning process. He came early to attend a clerkship
22 extravaganza, a gathering of judges that included many current participants in the rulemaking
23 process. Real thanks are due to Dean Sager.

24 Judge Kravitz introduced Judge Mosman as a new Committee member. Judge Mosman is
25 a graduate of Brigham Young, and clerked for Judge Wilkie and then Justice Powell. He was an
26 Assistant United States Attorney up to 2001, and then became the United States Attorney for the
27 District of Oregon. He was confirmed as a District Judge in 2003 by a 93-0 vote of the Senate.

28 Judge Kravitz also welcomed Elizabeth Cabraser to the Committee. She has appeared before
29 the Committee many times, and has helped its work by responding to other outreaches. The rest of
30 the day could be filled by reciting the many accolades and awards she has received. She is a Super
31 Lawyer, and has been named as one of the 50 most influential lawyers in the country. And she has
32 written many articles, including a wonderful contribution to the Duke Conference last May. She
33 already has taken hold in the work of the Discovery Subcommittee. She will be an outstanding
34 member.

35 Judge Vaughn Walker was unable to attend this meeting because he is teaching, but sends
36 his regards. It would have been nice to have him present to hear a renewed salute for his many
37 contributions to the Committee.

38 During the introductions of all those present Judge Kravitz expressed particular appreciation
39 to Tony West, noting that it is particularly important to have the Assistant Attorney General for the
40 Civil Division with the Committee to reflect the experience and judgment of the Department of
41 Justice.

42 Judge Kravitz lauded Chilton Varner's service as a member, and presented a certificate of
43 the Judicial Conference's appreciation for her distinguished service and commitment to the federal
44 judiciary.

45 Judge Kravitz then reported that Greg Joseph, Tom Allman, John Barkett, Dan Girard, Paul
46 Grimm, and Emery Lee presented a panel discussion of preservation of electronically stored
47 information to the Standing Committee in January. The panel elaborated on the importance of the
48 problems and the difficulties of crafting a useful rule to address them. The Standing Committee also
49 discussed pleading standards, and the work of the Duke Conference Subcommittee.

50 Bills affecting the Federal Rules of Civil Procedure continue to be introduced in Congress.
51 Andrea Kuperman said that the Administrative Office is monitoring the Sunshine in Litigation bills
52 that have been introduced in the House and Senate. The bills are similar to those that have been
53 introduced in many past Congresses, but there are differences. They apply only when the pleadings
54 in an action show facts relevant to the public health and safety. In such actions, a discovery
55 protective order can enter only if supported by findings of fact that the order will not restrict
56 disclosure of information affecting the public health or safety, or that the order is narrowly tailored
57 to protect a specific and substantial interest in confidentiality. Similar findings are required to
58 approve a settlement agreement that would restrict disclosure of such information. The Senate bill
59 includes a provision that it does not constitute grounds for withholding information in discovery that
60 is otherwise discoverable; it is not clear what this provision may mean. The central problems
61 presented by earlier bills in this series remain: it is not feasible to make the required findings before
62 knowing what information may be involved in discovery, and the process will add greatly to the
63 contentiousness, cost, and delays of discovery.

64 Another bill would enact a Lawsuit Abuse Reduction Act. The bill would unwind the 1993
65 amendments of Rule 11, returning to the 1983 version. Sanctions for violations would be made
66 mandatory, including attorney fees. The safe-harbor provision would be deleted. The House has
67 held a hearing on the bill. Judge Kravitz, the American Bar Association, and the American College
68 of Trial Lawyers sent letters in opposition. The motivation for this bill, and similar predecessors,
69 is unclear; it may be viewed as a part of "tort reform." Research shows that the 1983 version of Rule
70 11 was counterproductive; it increased delay and costs. Whatever share of the federal civil docket
71 is made up of frivolous cases, all the evidence is that the proportion did not increase in the wake of
72 the 1993 amendments, and that the amendments greatly curtailed the satellite litigation of Rule 11
73 motions that was compounded by Rule 11 motions claiming that Rule 11 motions violated Rule 11.
74 All the empirical work by the Federal Judicial Center is being ignored. Professor Hoffman testified
75 against the bill; Victor Schwartz testified in support, along with a representative of small businesses.

76 *November 2010 Minutes*

77 The draft minutes of the November 2010 Committee meeting were approved without dissent,
78 subject to correction of typographical and similar errors.

79 *Rule 45*

80 Judge Kravitz prefaced the report of the Discovery Subcommittee by expressing thanks to
81 Judge Campbell and Profesor Marcus for all their hard work on Rule 45. They and the
82 Subcommittee were so devoted that they sacrificed President's Day to hold a meeting in Dallas. He
83 noted that leaders of the American Bar Association Section of Litigation had provided comments
84 on the current drafts, and that defense interests also had commented.

85 Judge Campbell introduced the Subcommittee report by stating the goal: To conclude work,
86 and send to the Standing Committee a draft recommended for publication.

87 The drafts present four issues:

88 First, to move, emphasize, and improve the notice requirement. It has been widely
89 disregarded. The basic proposal has been approved already, relocating the requirement to a more
90 prominent position in Rule 45 and adding a requirement that a copy of the subpoena be served with
91 the notice. Questions remain: some observers believe that the person serving the subpoena also
92 should be required to notify other parties as things are produced in response. And some language
93 changes have been suggested by the American Bar Association.

94 Second is the provision that would allow the court for the place of performance to transfer
95 enforcement disputes to the court where the action is pending. Issues to be resolved include the
96 standard for transfer, and — if transfer is made — which court should enforce the order issued by
97 the court where the action is pending.

98 Third are the “Vioxx” issues: should there be a provision to compel a party or a party’s
99 officer to attend trial beyond the limits established by present Rule 45(b) provisions for serving a
100 subpoena? The Subcommittee recommends that the Vioxx reading of Rule 45 be overruled, but also
101 has prepared a draft that would restore some part of it. The alternative draft is not an alternative
102 recommendation. Nonetheless it may be wise to publish it to ensure full comment, paving the way
103 for adoption without republication if the testimony and comments persuade the Committee that it
104 is better to establish some provision for compelling attendance at trial beyond the limits established
105 for depositions.

106 Fourth is the proposal to simplify the “3-ring circus” aspect of Rule 45 created by the
107 complex interplay of provisions that identify the court that issues the subpoena, provide for place
108 of service, and, in a scattered fashion, address the place of performance. This proposal would
109 provide nationwide service, and separately specify the place of performance.

110 The Subcommittee unanimously recommends the simplification of Rule 45, but has
111 recognized that this departure from what has become familiar may encounter resistance. Alternative
112 drafts have been prepared to show what Rule 45 would look like if it included only the provisions
113 for notice, transfer, and overruling Vioxx. The agenda book thus contains four sets of Rule 45
114 materials: I is the Subcommittee’s recommendation. II supplements I by showing a provision that
115 would preserve some part of Vioxx. III parallels I, but without the simplification. IV supplements
116 III by adapting the provisions that would preserve part of Vioxx in the rule as it would stand without
117 simplification. One of the questions to be addressed is whether this four-part presentation generates
118 too much confusion, whether it will be better to go forward to the Standing Committee with only
119 Parts I and II.

120 Judge Kravitz said it is important that the Committee choose its preferred version and explain
121 the choice. It may be useful to send Alternatives III and IV to the Standing Committee if this
122 Committee concludes that it is better to go ahead to publication now without attempting any
123 simplification of Rule 45 if the Standing Committee rejects whatever version of a simplified Rule
124 45 that may be approved at this meeting. The Standing Committee will be able to understand the
125 role of the alternatives.

126 Judge Campbell stated that the Subcommittee clearly favors version I — rejecting the Vioxx
127 decision, and simplifying Rule 45 by providing nationwide service of discovery subpoenas,
128 separately regulating the place of performance. But it recommends publication in a subordinate

129 posture of the alternative that would preserve some authority to command testimony at trial of a
130 party or a party's officer beyond the limits established for depositions. It does not recommend
131 publication of versions III and IV; they are intended, at most, as illustrations of an alternative for
132 the Standing Committee to consider if it rejects the Subcommittee's preferences.

133 Judge Rosenthal said that the Standing Committee would readily understand the role of
134 versions III and IV if the Committee decides to present them. They are a clear road map.

135 A question was raised about the practice of publishing alternatives. How does it work? One
136 practice, followed with some frequency, is to publish rule text with alternatives when the Committee
137 itself is uncertain which is better. Another practice is to publish a preferred version, clearly
138 identified as preferred, but also to focus comment on a competing version by presenting a clear text
139 that responds to weighty countervailing positions. So with the Vioxx alternatives, the proposal is
140 to publish the recommended version and to explain why it is recommended. The alternative would
141 be published, perhaps as an appendix, with a clear statement that it is not recommended but with a
142 request for comments both on the possible advantages of the alternative and on possible
143 improvements on the alternative. Publication has great virtues. Time and again the Committees
144 have been educated by comments and testimony that show how to improve initial proposals or show
145 that a proposal does not deserve adoption.

146 Further discussion agreed that the mode of presenting versions I, II, III, and IV was clear.
147 The value of publishing an alternative that carries forward some part of the Vioxx rule, albeit in a
148 subordinate posture, was recognized. The risk that republication will be required is much reduced
149 if there is an opportunity for public comment on a carefully developed draft. As for simplification,
150 the question may be "yes" or "no"; in that case, it can be useful to carry forward versions III and IV
151 at least as far as the Standing Committee. The question is a familiar severability question: the
152 Standing Committee will readily understand the alternatives that present all the recommendations
153 other than simplification. But it was asked whether it would be better to submit only versions I and
154 II if the Committee decides that simplification is clearly desirable.

155 Publication of a Vioxx-preserving alternative was further supported on the ground that the
156 district courts are divided. Several have adopted the Vioxx ruling. Some of the courts that reject
157 it as inconsistent with the plain language of Rule 45 seem to regret that result. The Committee must
158 be sensitive to a view that has attracted this much support.

159 The question whether to send forward a version that includes notice, overruling Vioxx, and
160 transfer, but that does not include simplification, was postponed with the observation that the
161 decision will depend on the course of deliberations on the merits. If simplification is clearly
162 preferred, it may make sense to go forward with the simplified version alone. This course will be
163 further supported if the Committee concludes that failure of the present simplification approach
164 leaves the possibility of an intermediate simplification that would remain to be drafted and debated.

165 A preliminary question was noted: if a discovery motion is transferred by the court for the
166 place of performance to the court where the action is pending, is there a problem with enforcing the
167 order? It was noted that the absence of any present provision for transfer deprives us of the
168 opportunity for any extensive experience. The Subcommittee has looked for published opinions,
169 but the prospect of finding much help seems slender. Professor Marcus has been looking, without
170 finding anything useful. A law clerk looked for contempt cases without success. And
171 Administrative Office data are not likely to provide reliable information.

172 Professor Marcus began the detailed presentation of the Rule 45 proposals with Version I,
173 Alternative A. Initially, he noted that a contemporary commentator reacted to the 1991 revisions

174 of Rule 45 when they were created by finding them highly complicated and difficult to follow.
175 These sentiments have echoed through the following two decades.

176 *Rule 45: Notice*

177 The changes in the notice requirements are familiar from earlier Committee meetings. It is
178 often lamented that many lawyers fail to heed the direction that before a subpoena to produce is
179 served on the witness it must be served on each party. This problem is addressed by moving the
180 direction from the last sentence of present Rule 45(b)(1) to become a new paragraph (a)(4). The
181 notice requirement also is bolstered by requiring that the notice include a copy of the subpoena.
182 Finally, the requirement is extended to include trial subpoenas by deleting the words that limit the
183 notice requirement to subpoenas to produce “before trial.” The Subcommittee concluded that prior
184 notice may be even more important with respect to trial subpoenas than it is for discovery
185 subpoenas.

186 The notice provision could be expanded. Several experienced lawyers urge that notice
187 should be required when materials are produced in response to a subpoena. They complain that it
188 is difficult to gain access to the materials. Leading figures in the ABA Litigation Section have
189 recommended that after notice that the subpoena will be served, notice also should be given of any
190 modification of the subpoena, and that things produced in response should be made available to all
191 parties in a timely fashion. The Subcommittee has considered this question several times, and
192 reconsidered it after it was raised at the Standing Committee last January. Each time it has
193 concluded that these additional notices should not be required. There is a real concern that requiring
194 subsequent notices could impose significant burdens, particularly when materials are produced in
195 a rolling fashion — how many notices are required, and when? And there is concern that the
196 requirement could become a source of “gotcha” disputes about compliance, particularly with respect
197 to how many notices must be given, and how soon, when production spreads out over time. And
198 the disputes may be deliberately deferred to motions made on the eve of trial, requesting exclusion
199 of materials produced under the subpoena. Lawyers should bear the responsibility of following up
200 on the notice that the subpoena will be served by making periodic inquiries about compliance, with
201 requests for access to the materials produced. The draft Committee Note says, at pages 104-105 of
202 the agenda materials, that parties desiring access should follow up to obtain access, and that the
203 party serving the subpoena should respond by making reasonable provision for prompt access. This
204 sort of advice does not seem appropriate for rule text.

205 Discussion began with observations that a lawyer who has notice that a subpoena is in play
206 becomes responsible to follow up by inquiring about the response, and that it could be complicated
207 to apply a notice requirement to rolling production — and phased discovery is often directed in the
208 quest for proportionality. In addition, it was suggested that it is better to avoid anything that
209 increases the length and complexity of Rule 45. This problem is a good example of the need to
210 foster cooperation in litigation.

211 John Barkett, who participated in drafting the ABA letter, reported that it came out of
212 exhaustive, robust discussions. The conclusion was unanimous. The participants included lawyers
213 who engage in very complex litigation and others who engage in less complex litigation. Their
214 experience is that no matter how often they call or ask, they do not get the documents produced
215 under a subpoena. It is not enough to say it becomes the responsibility of other parties to pursue
216 production by the party who served the subpoena. The suggestion that notice also should be
217 required when the party who serves a subpoena negotiates modification of its terms with the person
218 served may prove complicated in practice. But the problem is created by people who do not practice
219 cooperatively. The prospect that a Committee Note can solve this behavior is not good.

220 It was suggested that there is no need for notice of modification if the breadth of the
221 subpoena is cut back. Does it happen that modifications expand the reach, so other parties need
222 notice that enables them to assert needs for protection?

223 An alternative was suggested: lawyers could agree in the Rule 26(f) plan to require the
224 subsequent notices of modification and production, and the requirements could be included in the
225 ensuing discovery order. Doubts were expressed in a different direction: “Rules are not always
226 obeyed or enforced.” Behavior will not be changed by adding new rule requirements. A similar
227 doubt was expressed: “You cannot do all lawyering in the rules.” Other parties should be
228 responsible for calling the party who served the subpoena, or the nonparty who was served. If
229 problems arise, the court can resolve them. “This is a ‘gotcha’ provision” that would cause lawyers
230 to avoid doing what they should do to keep abreast of subpoena responses. A lawyer who
231 encounters problems can issue an independent subpoena to the same nonparty.

232 The proposed notice provision, new Rule 45(a)(4), lines 62-65 on page 94 of the agenda
233 materials, was approved without dissent.

234 *Rule 45: Transfer*

235 Earlier drafts had two transfer provisions that addressed motions to quash and motions to
236 enforce, but not a motion to determine whether privilege or work-product protection apply to
237 material covered by a notice given after initial production. It has seemed more efficient to redraft
238 a single transfer provision, proposed Rule 45(f) at lines 257-263, pages 100-101 of the agenda
239 materials. The transfer, at least at the first step, is from the court where compliance is required to
240 the court where the action is pending. Three aspects of transfer should be discussed: the standard
241 for transfer; enforcement issues that may arise if an order is entered by the court where the action
242 is pending rather than by the court where performance is required; and potential choice-of-law
243 issues. A minor drafting issue will be considered by the Subcommittee — whether the text should
244 refer to a motion “in a court other than the issuing court,” or instead to “in the court where
245 compliance is required.”

246 Earlier drafts began with the language of 28 U.S.C. § 1404(a) as a standard for transfer. But
247 it seemed inappropriate to invoke the standard that governs transfer of an entire action, a more
248 momentous event. A series of alternatives led to the current version: “considering the convenience
249 of the person subject to the subpoena, the interests of the parties, and the interests of effective case
250 management.” The Committee Note attempts to make it clear that this standard is not easily met.
251 Alternative approaches should be discussed. It may be that transfer should be readily made, or that
252 it should be seldom made, or that some more-or-less-neutral midpoint should be preferred. The Note
253 comes close to the “really hard” end of the spectrum if the local nonparty addressed by the subpoena
254 prefers local resolution without transfer. If that is the preferred approach, is the Note sufficient to
255 overcome the fear that transfers will be ordered too often?

256 The ABA letter recommends that transfer should be ordered only on consent of the parties
257 and the person subpoenaed, “or in exceptional circumstances.” There may be little need to address
258 the unanimous consent possibility in rule text — courts generally will honor such a request, and it
259 may be better to recognize that in some circumstances the court may have good reason to refuse
260 transfer in the face of unanimous consent. The “exceptional circumstances” term appears in other
261 rules — 26(b)(4)(D)(ii) limiting discovery of consulting experts, and 37(e) on sanctions for failing
262 to produce electronically stored information that has been lost. “[E]xceptional condition” appears
263 in 53(a)(1)(B)(i) on appointing a special master. At the same time, the ABA provides examples of
264 exceptional circumstances that do not seem all that exceptional — a risk of inconsistent rulings by
265 different courts when performance is required in different places, the prospect that resolution of the

266 objections would materially affect the merits of the action, or the court for the place of performance
267 cannot timely address the matter.

268 Judge Campbell noted that the proposed draft reflected a Subcommittee expectation that
269 transfer will not happen very often, but that he has come to fear that the language may allow transfer
270 too often. Busy judges in the place of performance may find justification in one phrase or another
271 to justify transfer. It is not likely that a judge ruling on a discovery dispute will have time to consult
272 a Committee Note. The ABA request for stricter language seems attractive.

273 The factor addressing the “interests of effective case management” was questioned. “A
274 concept doesn’t have interests. The draft permits too many arguments for transfer.”

275 One possibility would be to provide that a person seeking transfer has the burden of
276 justification. But it was thought sufficient to state a standard; the burden falls naturally on a party
277 seeking transfer.

278 As usual, invoking a term found in other rules risks comparison to different problems that
279 require different approaches. But a phrase like “exceptional circumstances” resonates more to
280 general terms such as “good cause.” There is little reason to fear that “good cause” provisions will
281 be read to require the same threshold of justification in every rule where they appear. So a generic
282 reference to “exceptional circumstances” will be read to set the tone for transfer in light of all the
283 interests that bear on choosing the court to rule on the motion.

284 It was urged that “exceptional circumstances is demanding.” The ABA list of examples
285 “does not capture the situation where enforcement is integrally related to management of the case
286 by the court where the action is pending.” The draft reference to effective case management does
287 capture this situation, although it might also be read to enable the court where discovery is pending
288 to manage its cases by transferring a problem away. The standard should be drafted in a way that
289 invokes the burdens on the nonparty subject to a subpoena, the interests of the parties, and the
290 relation of the discovery dispute to the underlying litigation.

291 Another member suggested that transfer is not necessarily a bad thing. Concern for local
292 interests and the nonparty subject to the subpoena may be relatively rare in comparison to concern
293 about the impact of the issues on the whole case. “Making transfer easier is not a bad thing.”

294 The Subcommittee, however, has been worried that a nonparty should have access to a local
295 judge. It has believed that most issues relate to the nonparty, that relation to the central issues in the
296 case is less common.

297 Another suggestion was that it could be useful to put the ABA examples in the Committee
298 Note, and perhaps to refer to the local interests as well as the convenience of the local nonparty. An
299 example was given. Enterprises such as Google and Facebook are frequently served with nonparty
300 subpoenas. It often takes a few days for the subpoena to come to the attention of the appropriate
301 people. The time to respond is, as a practical matter, very short. It can be very helpful to locate the
302 dispute in the court local to the place where compliance is required.

303 A preference was expressed for “exceptional circumstances” as a way to avoid making it too
304 easy to transfer. “The focus should be on the nonparty, who has no interest in the case.”

305 John Barkett noted that the ABA wants transfer really to be the exception, not the rule. If
306 there are words better than “exceptional circumstances” to achieve this end, that’s fine. Another

307 observer said that Lawyers for Civil Justice also favors the “exceptional circumstances” wording.
308 The Committee Note could provide examples in addition to those suggested by the ABA.

309 Still further support was offered for “exceptional circumstances.” As drafted, Rule 45(f)
310 reads as if the court can act on its own, without a motion. Do we want that? (No answer was given.)

311 The question was framed again: suppose, under the nationwide subpoena proposal, a
312 subpoena issues from the Western District of Washington, addressed to a nonparty in Connecticut.
313 Should we generally prefer that the parties deal with objections — particularly those made by the
314 nonparty — in Connecticut? The provision for nationwide service intersects the provision for
315 transfer, although transfer can be provided for in a rule that carries forward the present practice of
316 issuing the subpoena from the court where performance is required.

317 In response to a question about actual experience with nonparty discovery disputes relating
318 to a distant action, a judge described that he had encountered these problems twice. Once involved
319 discovery in his court incident to an action elsewhere, while the other involved discovery elsewhere
320 incident to an action in his court. These problems arise only in exceptional circumstances, and are
321 likely to involve large, high-stakes commercial litigation. The nonparty is more likely to be a
322 corporation than an individual. It is not a bad thing to have the dispute resolved in the court where
323 the action is pending. But it would be better to provide that the party seeking transfer has the burden
324 of showing justification.

325 After support was expressed for the “exceptional circumstances” test, a proposal to adopt it
326 was approved unanimously. The Committee Note will be modified accordingly. Either in rule text
327 or Note, account will be taken of the situation in which the parties and the person subject to the
328 subpoena join in requesting transfer.

329 Rule 45(f) also includes a sentence authorizing an attorney for the party subject to a
330 subpoena to appear in the court where the action is pending if a motion is transferred. An invitation
331 to discuss the provision drew no response.

332 *Rule 45: Enforcement After Transfer*

333 Three draft provisions bear on the enforcement questions that may arise after a Rule 45
334 motion is transferred to the court where the action is pending. Two alternatives are proposed for
335 Rule 45(f). The first: “If [appropriate]{necessary} to enforce its order on the motion, the issuing
336 court may retransfer [the motion]{its order} after entering its order.” The alternative: “If the issuing
337 court orders discovery from a nonparty [not subject to its jurisdiction], it may retransfer [the
338 motion]{its order}for enforcement after entering its order.” The first alternative looks toward
339 transfer back after problems arise; the second looks toward transfer back as a precautionary measure.

340 Proposed Rule 45(g), with an addition over the version that appears in the agenda materials,
341 would provide: “The court for the district where compliance is required — or, after transfer of the
342 motion, the issuing court — may hold in contempt a person who, having been served, fails without
343 adequate excuse to obey the subpoena or an order relating to the subpoena.”

344 Rule 37(b)(1), as presented, would allow “either court” to treat as contempt a deponent’s
345 failure to obey an order to be sworn or to answer a question if the court where the discovery is taken
346 transfers the motion to the court where the action is pending. The draft could be read to allow the
347 court where the action is pending to impose contempt sanctions even without transfer from the court
348 where the motion is made. That will be corrected by further drafting.

349 There is a faint analogy for holding a nonparty witness in contempt of a court at a distance
350 from the witness in Criminal Rule 17, which authorizes nationwide service of trial-witness
351 subpoenas. There is not a lot of law on the enforcement aspects of these subpoenas.

352 Turning first to Rule 45(f), the basic question is whether the court where the action is
353 pending should want to remit enforcement to the court where the discovery is to occur before there
354 are any concrete reasons to anticipate failures to comply with the order.

355 A judge asked whether the standard for contempt is the same nationwide? And whether the
356 practice also is uniform. He holds a person in contempt only after an in-person appearance. Would
357 it be right to allow the Western District of Washington to hold a person in the Southern District of
358 Florida in contempt without a personal appearance in Washington? Would it be reasonable to drag
359 a nonparty charged with contempt across the country for this purpose? This is in part a subset of
360 the choice-of-law problem, as well as the decision to provide nationwide service of all nonparty
361 subpoenas from the court where the action is pending. “How far should we upset local-court
362 expectations in civil actions”? It also invokes the distinction between civil and criminal contempt
363 — and criminal contempt raises rights to jury trial and proof beyond a reasonable doubt.

364 The purpose of providing for transfer back to the court where compliance is required is to
365 ensure personal appearance in a convenient tribunal. Transfer seems less complicated than the
366 alternative of proceeding by motion in the court where compliance is required to enforce the order
367 of the court where the action is pending.

368 It also was noted that pro se parties will be a problem, assuming they manage to pursue
369 proceedings to the point of participating in a motion, transfer, and subsequent enforcement
370 proceedings. “It is the party trying to enforce the subpoena who will have to figure it out.”

371 A further distinction may be drawn between enforcement of orders that restrict requested
372 discovery and enforcement of orders that compel discovery. Problems are more likely to arise from
373 orders that compel discovery.

374 The relationship between proposed 45(f) and proposed 45(g) was addressed by asking
375 whether 45(g) authorizes the court where compliance is required to enforce an order of the court
376 where the action is pending without transfer back. With the proposed revision, it would allow the
377 compliance court to enforce an order relating to the subpoena made by the court where the action
378 is pending. There may be real advantages in enforcement by the court where compliance is required.
379 Disputes about compliance may focus on whether what in fact has been done does in fact comply
380 with the order, raising essentially local issues.

381 A separate problem was noted. Civil contempt may be courted by a party that wants a basis
382 to appeal a discovery order. Selection of the court that enters the contempt order will determine the
383 circuit in which appeal is available, and that may affect the law that governs the dispute. Rule 45(g),
384 indeed, identifies only contempt as the enforcement sanction, although a minority of courts have
385 recognized the use of other sanctions.

386 The question was reframed: is there a clear answer to the place-of-enforcement question?
387 The reasons for preferring enforcement where the nonparty is required to comply might lead to a
388 rule that automatically calls for enforcement by that court. The court where the action is pending
389 could achieve most of the case-management advantages, and could satisfy any need for uniform
390 rulings on issues arising in different places of compliance, by issuing the order. Confiding
391 enforcement to the court for the place of compliance would seize the advantages of locally resolving
392 local issues as to compliance or no. There might be some awkwardness about interpreting the order,

393 or about motions to modify it, but they need not be great. And this approach would provide a clean,
394 simple rule.

395 This suggestion was resisted. One difficulty would arise if the court where the action is
396 pending is directed to rely for enforcement on several courts in several different places where
397 compliance is required. Those courts might interpret and enforce the same order differently. And
398 enforcement often will be ordered because it is a party that is causing the problem — one example
399 was a case in which a defendant directed a nonparty witness to refuse to produce the documents.
400 Compare Rule 26(c), which directs a nonparty from whom discovery is sought to move for a
401 protective order in the court where the action is pending, and provides an alternative only for matters
402 relating to a deposition by allowing a motion in the court where the deposition will be taken.
403 Flexibility seems better than a simple requirement that enforcement always be in the court where
404 compliance is required.

405 A preference was expressed for Alternative 1, providing for transfer back when a problem
406 arises. That might make it wise to adopt “necessary” as the standard for transferring back, and to
407 transfer back the order, not the motion. Style changes were also suggested. The sentence might be
408 shortened like this: “To enforce its order on the motion, the issuing court may transfer the order.”
409 But it was asked whether drafting in this fashion would suggest that the court where the action is
410 pending (the issuing court) lacks authority to enforce its order. That led to the question whether the
411 court for the place of compliance can enforce an order of the court where the action is pending
412 without transfer back; Rule 45(g), as proposed, may not clearly answer that question. It was
413 observed that “We do not want two courts to be able to enforce the same order simultaneously —
414 different parties may go to different courts.” A rule that says “either” does not mean that both can
415 do it. Another suggested edit would have the rule allow the court where the action is pending to
416 “retransfer the matter,” understanding “matter” to include both the motion and the order. Or: “To
417 enforce its order, the issuing court may transfer the order to the court where [the motion was
418 filed]{compliance is required}.”

419 This discussion concluded with unanimous approval of “alternative 1,” to provide — in
420 language to be worked out — for retransfer to the court where the motion was filed.

421 The Committee unanimously approved the suggested addition to Rule 45(g), described
422 above, adding at line 272, page 102, these words: “may hold in contempt a person who, having been
423 served, fails without adequate excuse to obey the subpoena or an order relating to the subpoena.”

424 Turning to Rule 37(b)(1), the drafting problem described above came on for discussion. The
425 Subcommittee does not want to establish power for the court where the action is pending to enforce
426 an order entered by the court where compliance is required if there has not been a transfer. A
427 relatively lengthy drafting fix is readily accomplished. Perhaps a shorter version can be managed.
428 It is useful to amend Rule 37 because it is the only place that covers nonparty deposition testimony,
429 as compared to the production subpoenas covered at length in Rule 45.

430 *Rule 45: Choice of Law With Transfer*

431 Choice-of-law problems can arise in the present structure of Rule 45, even absent a transfer
432 provision. An illustration is provided by *Jimenez v. City of Chicago*, 733 F.Supp.2d 1268
433 (W.D.Wash.2010). A nonparty witness was subpoenaed in the Western District of Washington to
434 give testimony for an action pending in the Northern District of Illinois. The question was whether
435 to rely on Ninth Circuit journalist privilege law, or to invoke the Seventh Circuit’s rejection of the
436 privilege. The court chose Ninth Circuit law, as the precedent binding it as the court that issued the
437 subpoena. This example is particularly useful because it serves as a reminder that not only may the

438 rules of evidence and discovery vary among the circuits, but state law also may become relevant,
439 as when Evidence Rule 501 invokes state privilege law. In a transfer regime, the question would
440 be sharpened if the subpoena issued from the court in Illinois and the court in Washington decided
441 to transfer the issue to Illinois.

442 The agenda materials include only one entry on this question, a possible Committee Note
443 sentence: "If the transfer might alter the legal standards governing the motion, this factor might
444 affect the desirability of transfer." Would adding this to the Note help? Create confusion or even
445 suggest undesirable practices? It was concluded that these questions should not be addressed, either
446 in rule text or in the Committee Note.

447 *Rule 45: Party as Trial Witness*

448 The Vioxx decision, discussed at length in earlier meetings, interpreted Rule 45 to authorize
449 a subpoena commanding a party or a party's officer to appear as a trial witness without regard to the
450 place-of-service limits in Rule 45(b). It has been followed by other courts. It also has been rejected
451 by other courts.

452 The Subcommittee proposes to reject the Vioxx ruling. It misreads the present rule. More
453 importantly, it reaches a wrong result. Proposed Rule 45(c)(1)(A) expressly overrules the Vioxx
454 result by providing that a subpoena may require a party or a party's officer to appear at a trial only
455 within the state where the party or its officer resides, is employed, or regularly transacts business
456 in person, or within 100 miles of where the party or its officer does such things. This proposal has
457 been discussed and approved in earlier meetings. The Committee confirmed it again as a
458 recommendation to the Standing Committee for publication.

459 At the same time, the Subcommittee recognizes the support that Vioxx has commanded. It
460 may be that public comments supporting Vioxx will prove persuasive. To encourage and focus
461 comments, the Subcommittee has prepared an alternative that would go part way to preserving the
462 Vioxx result. But only part way. The alternative does not authorize a party to issue a subpoena to
463 another party. It requires a court order, and requires good cause to issue the order. The order can
464 be directed only to the party; if it seeks testimony of the party's officer, it is the party that is directed
465 to produce the officer to appear and testify at trial. Before issuing the order the court must consider
466 the alternative of audiovisual deposition, or securing testimony by contemporaneous transmission
467 under Rule 43(a). The court may order reasonable compensation for expenses incurred to attend the
468 trial. The Committee Note emphasizes the good-cause requirement. Vioxx does not include any
469 of these limits.

470 The Subcommittee recommends that the alternative preserving some part of Vioxx be
471 published along with the Rule 45 proposal, but in a subordinate posture that clearly marks it as
472 something the Committee does not recommend.

473 The Committee approved the language of the alternative, as it appears on page 111 of the
474 agenda materials.

475 Discussion turned to the question whether the alternative should be published. It was noted
476 that Vioxx does not stand alone, but has gathered support. And some of the cases that reject Vioxx
477 rely only on the language of present Rule 45, at times seeming to indicate a preference for the Vioxx
478 rule if it could be squared with the rule language. And plaintiff's lawyers at the Dallas meeting in
479 February thought it is good to be able to command trial testimony when it can be shown that a
480 party's officer has important knowledge about the events in suit.

481 The efficacy of publishing an alternative for comment was also noted. There is a risk that
482 when an alternative is published as something the Committees do not favor, subsequent adoption
483 of the alternative will lead to protests that people who supported the Committees' primary
484 recommendation did not bother to express their support because they assumed the Committees
485 would not be moved from their initial preference. But a clear invitation to comment now on both
486 alternatives will reduce the force of any such protests. Various forms of alternative publication have
487 been used in the past. What is important is to be careful to actively solicit comment, without
488 presenting the disfavored alternative as if it were co-equal with the preferred version. The
489 solicitation for comment will be worked out carefully, for the purpose of enhancing the prospect that
490 if the Committees eventually decide to go part way toward embracing Vioxx there will be no need
491 to republish.

492 *Rule 45: Simplification*

493 Alternative I simplifies Rule 45 by providing that subpoenas issue from the court where the
494 action is pending and may be served anywhere in the United States. The place of compliance is
495 separated from the place of service. These changes are reflected in Rules 45(a)(2), (b)(2), and (c).

496 The subdivision (c) provisions for place of compliance are drawn from present Rule 45, but
497 are not entirely the same. Exact similarity would complicate the rule. The changes remove any
498 reliance on state law. They also end the possibility of compelling appearance for a deposition or
499 trial by serving a witness as a transient. On the other hand, nationwide service means there is no
500 need to serve the witness where the discovery is to occur; that issue is addressed directly by the
501 provisions designating the place of compliance. It seems likely that these changes will not matter
502 in most cases.

503 As a separate matter, the provision that would restore some part of the Vioxx rule will be
504 relocated from the position shown in the agenda materials to become part of subdivision (c). That
505 will put all of the provisions on place of compliance in the same subdivision.

506 The draft identifies many possible questions in footnotes. None of them were raised for
507 further discussion.

508 The Committee unanimously approved the recommendation to advance the simplified Rule
509 45 for publication.

510 The Committee then returned to the question whether to send on to the Standing Committee
511 the versions that omit simplification but incorporate the provisions for notice, transfer, and
512 overruling Vioxx. One concern is that there are many alternative means of simplifying Rule 45 in
513 some measure. If the Standing Committee concludes that full simplification goes too far, it may be
514 better to ask for a remand to consider alternative approaches. An invitation to publish Rule 45 now,
515 without any attempt to simplify, may be unduly defeatist. Deferring publication of Rule 45
516 proposals for another year is not a matter for great concern; we have been living with its present
517 form since 1991. And it would be unwise to publish one set of Rule 45 proposals now and then
518 publish a second set in another year or two.

519 The question whether to send Versions III and IV to the Standing Committee as a fallback
520 for publication if the simplification proposals are rejected was deferred for consideration on the
521 second day of the meeting. The Subcommittee then recommended that only the simplified version,
522 including the Vioxx alternative, be sent to the Standing Committee. If full simplification is rejected,
523 the Subcommittee will want to develop alternative versions in light of the discussion in the Standing
524 Committee. The no-simplification alternative presents questions different from going forward to

525 publish the alternative that partially restores Vioxx. Publishing the Vioxx alternative will enhance
526 the prospect that a final rule can be adopted without republication if public comments show that
527 Vioxx should be restored in part or in full. The comments will be more useful if they focus on a
528 specific model; criticisms of the model can suggest variations, or complete restoration of Vioxx.
529 Publication also will show respect for the courts that have adopted the Vioxx rule.

530 Concern was expressed that publishing an alternative that expands the reach of orders for
531 trial testimony by a party or a party's officer may appear as a recommendation to codify Vioxx. But
532 the publication will not be framed as one asking "which do you like." The alternative likely will be
533 framed as an appendix. The letter transmitting Rule 45 for publication will clearly recommend that
534 Vioxx be overruled. This approach will ensure active comments. At the Dallas meeting in February
535 plaintiffs lawyers who work in multidistrict cases thought the MDL panel should adopt the Vioxx
536 rule for MDL cases. A like approach has been taken in the past, asking for comment on alternatives
537 that are designated as disfavored. The resulting comments may cause the Committees to rethink the
538 question, and support adoption of a revised rule without the need to republish. The concern about
539 sending confused signals remains important, however, as a reminder of the need to be very careful
540 about how the proposal is published.

541 The concluding comments observed that "When we publish we are not necessarily trying to
542 persuade. We are seeking input." Putting the alternative out for comment will stimulate a more
543 complete spectrum of views. It seems particularly important to enhance the comment process by
544 these means when the courts have divided on a question addressed by a proposal.

545 The Committee agreed unanimously that the nonsimplified versions, III and IV, should not
546 be sent to the Standing Committee.

547 *Discovery: Preservation and Sanctions*

548 Prompted by the strong recommendations made at the Duke Conference by the panel chaired
549 by Greg Joseph, the Discovery Subcommittee began work last fall on possible rules governing
550 preservation of discoverable information and sanctions for failing to preserve. The task is
551 challenging. The case law is clear that a duty to preserve can arise before an action is filed. But
552 when? What must be preserved? How long must it be preserved? Wrong guesses can lead to
553 sanctions for spoliation. The uncertainties are reported to cause great anguish.

554 The anguish over exposure to sanctions could be alleviated by highly specific preservation
555 rules. But the more specific the rule, the greater the prospect there will be important omissions. A
556 more general rule designed flexibly to cover all important preservation duties, on the other hand,
557 may be of little use for want of concrete guidance.

558 After wrestling with illustrative drafts similar to those in the agenda materials, the
559 Subcommittee concluded that it needs more information. It hopes to hold a miniconference in
560 September, to hear from people versed in the technology of storing, searching, and retrieving
561 electronically stored information; from plaintiffs' counsel, defense counsel, and in-house counsel.
562 The miniconference will be focused by providing drafts similar to those presented in the agenda
563 materials for initial discussion. Suggestions about people who should be invited to the conference
564 are eagerly requested.

565 An immediate suggestion for a conference participant was made, pointing out that many
566 lawyers are poorly informed about the realities of preservation. In many circumstances it does not
567 cost much to preserve electronically stored information, whatever the cost may be to preserve other
568 forms of information. And the dreaded costs of searching huge accumulations of electronically

569 stored information may be reduced dramatically by electronic searching and screening. Beyond
570 word-search terms, concept searching is being developed. Comparisons to human searches show
571 that computer searching can produce far better results at dramatically lower costs.

572 The Committee agreed that the miniconference should be held.

573 The agenda materials illustrate three approaches. The first states a duty to preserve and
574 attempts to provide detailed provisions; the second states a duty to preserve but elaborates the duty
575 only in general terms; the third avoids any direct statement of a duty to preserve, but instead
576 describes appropriate responses and sanctions for failure to preserve. The thought behind the
577 sanctions-only rule is that it will give retrospective guidance on what should be preserved.

578 These models are presented for reactions at a conceptual level. The details are useful only
579 to illustrate the characteristics of each approach. And the Subcommittee is open to suggestions for
580 still different approaches that depart from any of these three models.

581 Models I and II present alternative forms of a new Rule 26.1 creating a duty to preserve. The
582 first model, full of specifics, provides the best model for discussion because the specifics identify
583 the problems encountered with preservation. The details have been borrowed from various sources,
584 beginning with the elements agreed upon by the Joseph panel at Duke. Additional sources continue
585 to emerge, including a lengthy comment by the Lawyers for Civil Justice received three days ago.

586 The very first part of the first subdivision, Rule 26.1(a), seeks to disclaim any intent to
587 supersede preservation duties “provided by other law.” Katherine David, interim Rules Law Clerk,
588 provided a memorandum sketching the wide variety of other laws that establish duties to preserve.
589 A discovery preservation rule should not attempt to displace any of them; they exist for independent
590 purposes.

591 The draft imposes a duty to preserve on “every person who reasonably expects [is reasonably
592 certain] to be a party to an action cognizable in a United States Court.” These few words address
593 several issues. The duty is established at a time before any action is filed. It reaches anyone who
594 reasonably expects to be a party — but should the standard be raised to “reasonably certain,” higher
595 than the case law seems to be? Should the duty extend to a person who does not reasonably expect
596 to be a party, but who should reasonably understand that it has information that may be important
597 to litigation among others? The duty extends only to an expectation of litigation in a federal court
598 — it would not do to attempt to write a rule for state courts — but how is a prospective party (or
599 nonparty) to know whether anticipated litigation may be cognizable in a federal court? And
600 bracketed language identifies the question whether a preservation rule should be limited to
601 electronically stored information, the source of most current anxieties, or should extend to all
602 discoverable information. It may be useful to recall that many of the cases identified by Emery
603 Lee’s FJC study involve tangible items — things, not simply paper documents.

604 The first question was whether the Enabling Act authorizes a rule that would establish a duty
605 before any federal-court action has been filed. The Committee still has not decided that question.
606 Instead, it seems useful to determine what sort of rule, if any, seems best. If the preferred rule
607 recognizes a duty to preserve before an action is filed, and if the Committees conclude that Enabling
608 Act authority for the rule is uncertain, Congress can be asked for authority to develop the rule. It
609 was pointed out that federal courts now enforce a duty to preserve that arises before a federal action
610 is filed: what is the authority to do that? If the duty can be — indeed has been — established by
611 decisions, should there not be authority to clarify and regulate the duty through the Enabling Act?
612 One of the chief concerns is that the decisions are not uniform in some aspects, particularly on the

613 relationship between degree of culpability in failing to preserve, the degree of prejudice to others,
614 and selection of an appropriate sanction. That seems the stuff of proper rulemaking.

615 It was suggested that it is troubling to think of developing a rule aimed only at electronically
616 stored information. Other forms of information remain important, and often critical. And leaving
617 other forms of information outside the rule, to be governed by decisional law, would perpetuate
618 disuniformity and create complications in the many cases that involve preservation of information
619 in various forms. And there might be problems of categorization: is a printout of an e-mail message
620 electronically stored information?

621 It was pointed out that the “reasonably expects” phrase in 26.1(a) contrasts with “would lead
622 a reasonable person to expect to be a party” in 26.1(b). “Reasonable person” suggests an objective
623 standard, and the comparison may imply that “reasonably expects” is a subjective standard. What
624 is intended? The Subcommittee intends an objective standard — perhaps 26.1(a) should be revised
625 to say something like “who reasonably should expect.”

626 The relationship to other sources of preservation duties was explored by an observer. There
627 are thousands of sources of obligations to preserve information. They are established independently
628 of whatever duties relate to litigation. The rules should not attempt to interfere with them. Professor
629 Marcus replied that the intent clearly is to leave all other duties as they are. Perhaps it would be
630 better to write the rule like this: “~~In addition~~ Without regard to any duty to preserve information
631 provided by other law * * *.”

632 The relationship to other duties to preserve also is addressed by the “trigger” provisions of
633 26.1(b)(6), invoking a duty to preserve on “the occurrence of an event that results in a duty to
634 preserve information under a statute, regulation * * *.” Does this mean that a litigant is the
635 beneficiary, for example, of a duty to preserve mandated by the SEC? An observer suggested that
636 major problems could be created by invoking external duties established without any thought to use
637 in litigation. A wondrous variety of duties to preserve are created by federal and state statutes,
638 administrative regulations, and ordinances. The focus should be on an objectively reasonable
639 anticipation of litigation, not failure to comply with standards that do not bear on litigation and that
640 often will be obscure or unknown.

641 It was pointed out that duties to preserve information overlap with state attorney-discipline
642 rules. In England, these problems are dealt with in disciplining the attorney who allowed spoliation.

643 The issue of preservation costs was addressed by another observer, who pointed out that
644 costs are imposed by preserving information for litigation that never gets filed. A group of in-house
645 counsel are trying to develop more specific information on these costs.

646 The identity of the beneficiary of a duty to preserve was raised as another source of
647 difficulty. Draft 26.1(b)(2) triggers a duty to preserve on receipt of a notice of claim or other
648 communication indicating an intention to assert a claim. Suppose one person indicates an intent to
649 sue, and suit is then brought by someone else? Does the duty to preserve extend to the benefit of
650 the actual plaintiff? Does it make a difference whether there was a reason to anticipate a possible
651 action by the actual plaintiff — if the original communication is made by the driver of an automobile
652 involved in a collision, for example, should it depend on whether the defendant was on notice that
653 there was a passenger in the automobile who ultimately proved to be the plaintiff? If there was no
654 information about the passenger, and the information was destroyed three years after the
655 communication, could there be a violation of the duty to preserve? For that matter, it was suggested
656 that outside the states that recognize a tort claim for spoliation, the duty to preserve is identified as
657 a duty to the court, not to opposing parties. That is important in determining sanctions.

658 The scope of the duty to preserve described in 26.1(b) raises still other problems. In the first
659 model the list initially appears as a finite and total list, but then (b)(7) seeks to avoid the risk of
660 omissions by adding a catch-all: “Any other [extraordinary] circumstance that would make a
661 reasonable person aware of the need to preserve information.” The catch-all “may catch too much.”
662 But a rule limited to defined categories will invite litigation disputing whether a bit of information
663 falls into any of the categories. Return to the example of a communication of intent to sue over an
664 automobile collision. Does the scope of the duty to preserve depend on whether the putative
665 defendant knows there was a passenger? On whether the model of automobile was identified to a
666 manufacturer defendant? So of the other categories. A potential party might retain an expert
667 consultant, (b)(4), for the purpose of correcting perceived problems in a product, without any
668 thought of being sued. A notice to preserve information, (b)(5) may be detailed — does that give
669 license to discard information not identified? And so on through the list. And the Lawyers for Civil
670 Justice submission identifies still other specific events that might trigger a duty to preserve.

671 One possibility is that ambiguity in the events that trigger a duty to preserve may be taken
672 into account in sanctions decisions. That directs attention to the third model, which relies on
673 provisions that directly govern sanctions as an indirect means of identifying the nature of the duty
674 to preserve.

675 Discussion of these questions began by asking whether “cloud computing” practices that
676 farm out data storage to unknown systems in unknown places is moving us toward a requirement
677 that everyone preserve everything? We need to be educated as to what cloud computing is —
678 perhaps as to the many different and potentially different things that it is or may become. Who
679 controls the cloud — the owner of the information, or the system operator? What happens if the
680 owner stops paying the cloud? How much of this will change in the next three years?

681 A specific example was offered. “Most people would say that filing an EEOC complaint
682 would trigger a duty to preserve,” but only a small fraction of these complaints eventually lead to
683 litigation. Should the filing trigger a duty to preserve? The EEOC liaison responded by observing
684 that an EEOC regulation requires preservation of everything relevant to the EEOC complaint. But
685 he did not know how often private litigation follows after an employee files a complaint with the
686 EEOC. Another observation was that only a small fraction of people who receive right-to-sue letters
687 actually bring an action, but that there are a lot of private Title VII suits independent of the EEOC
688 complaint process. This example may illuminate the choice between defining the duty as one to
689 preserve by a person who is reasonably certain to become a party or one imposed on a person who
690 should reasonably expect to become a party. Perhaps “reasonably anticipates” would work better?

691 A member asked whether the “laundry list” of triggers might better be included in a
692 Committee Note, not rule text. The second version of 26.1(b) provides the same list, but in the form
693 of “such as” examples of a generally described duty to preserve. That approach also could be shifted
694 to a Note. An observer who had been a member of the Joseph panel noted that some panel members
695 thought the list of triggers should be exhaustive, while others thought it should include a catch-all.
696 A different observer who had been a member of the panel noted that he had preferred relegating the
697 list to a Committee note.

698 An observer asked why a list of triggers will cause any appreciable harm if preservation is
699 inexpensive? It was suggested that “we hear different things about the cost of preservation.” And
700 so long as preservation is not costless in any dimension, there is a risk that expansive preservation
701 duties will impose unwarranted costs, or lead to unwarranted sanctions when they are overlooked.
702 An enterprise that frequently confronts the possibility of litigation may encounter substantial costs
703 if there is an expansive duty to preserve associated with each of them. And the cost of preserving

704 information is not limited to direct preservation costs — once you have preserved it, you face the
705 prospect of search costs if litigation is actually commenced.

706 After the trigger provisions of 26.1(b) come the “scope” provisions of 26.1(c). These may
707 create greater difficulty than the trigger provisions. An anecdote from long ago illustrates the
708 problems. In *United States v. IBM* the preservation order required IBM to retain “all documents
709 related to computing.” IBM responded by not throwing away anything. The waste baskets were
710 emptied into storage. When the order was vacated, IBM had to file an environmental impact
711 statement because there was so much paper. “Scope matters.”

712 The starting point of 26.1(c) requires “actions that are reasonable under the circumstances
713 to preserve discoverable information.” Bracketed alternatives then invoke the proportionality
714 criteria of Rule 26(b)(2)(C) by cross-reference or by paraphrase. But when and how can a
715 prospective party identify what is proportional to litigation that has not even been filed?

716 The preface is followed by 26.1(c)(1), presented as four alternative provisions to define the
717 subject matter of what must be preserved. One of them is very narrow — it demands only
718 preservation of information relevant to a subject on which a potential claimant has demanded
719 preservation, seemingly obviating the duty to preserve anything in response to any of the other
720 triggering events listed in 26.1(b). The first alternative broadly requires preservation of anything
721 relevant to any claim or defense that might be asserted in the action: is that too broad? The fourth
722 alternative looks to what a reasonable person would appreciate should be preserved under the
723 circumstances: does that give sufficient guidance?

724 The next provision, 26.1(c)(2), addresses the sources of information to be preserved. One
725 alternative is limited to information “that is reasonably accessible to the person.” This test looks to
726 the Rule 26(b)(2)(B)(2) protection against discovery of electronically stored information, but it
727 presents questions. Why not require preservation, particularly if the cost is low, against the prospect
728 that cause may be found for discovery? And how does this affect other forms of information? The
729 second alternative is specific, invoking all sorts of technological concepts that many will not
730 understand and that may become obsolete in short order. How many lawyers, for example, will fully
731 understand what it means to establish a presumptive exclusion that excuses preservation of “deleted,
732 slack, fragmented or unallocated data on hard drives”?

733 Draft 26.1(c)(3) extends the duty to preserve to documents and tangible things as well as
734 electronically stored information. But what of real property?

735 At this point Judge Campbell suggested that the central point had been made. Difficult and
736 controversial issues will arise at many points, perhaps at every point, in attempting to define a
737 specific duty to preserve. It may make better use of remaining meeting time to offer general
738 observations, leaving specific suggestions for later messages.

739 One suggestion was that it would be good to include in the September conference
740 representatives of medium-sized businesses that are based outside the United States but do business
741 here. It seems likely that they would view either version of Rule 26.1 as frightening, much more
742 frightening than the Rule 37 approach to preservation obligations by defining the occasions for
743 sanctions.

744 This observation led to another. The European Union, moved by privacy concerns different
745 from those that prevail in the United States, is aggressive in imposing obligations to discard data
746 after a relatively brief time. Stringent requirements in the United States could whipsaw enterprises

747 that operate in both places. Perhaps the United States Trade Representative's Office might be able
748 to send someone to the conference to explore these issues.

749 The suggestion that the conference should be structured to include representatives of the
750 plaintiff perspective was renewed. It will important to learn what they think is sensible, what they
751 need to be able to discover.

752 It will be more difficult to know how to gain information about imposing duties to preserve
753 on individual litigants. A prospective plaintiff or defendant may give little thought to these matters.
754 In employment cases, for example, employers seek discovery of Facebook pages for information that
755 may undercut the plaintiff's litigating positions. Similar quests may be made in class actions for
756 information bearing on adequacy of representation and commonality of class-member interests.
757 Other plaintiffs may be different — governments often appear as plaintiffs, and may be expected
758 to preserve in a sophisticated way. Here too, the plaintiffs' bar should be searched for information.

759 Discussion closed with a statement that the Subcommittee hopes to be able to recommend
760 a general approach at the November meeting, and to have a concrete proposal for consideration at
761 the Spring 2012 meeting.

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763

Pleading: FJC Report

764 Judge Kravitz noted that the Supreme Court has already delivered two opinions on pleading
765 standards in 2011. The Skinner opinion invokes the Swierkiewicz decision and applies it outside
766 employment law, finding the complaint sufficient. Matrixx Initiatives also seems to reflect a
767 relatively relaxed approach. It has been suggested that before the Twombly and Iqbal decisions the
768 Court seemed to swing back and forth between pronouncements that heightened pleading is not
769 required and somewhat indirect approaches to raising pleading thresholds. It may be that a similar
770 fluctuation is going on now.

771 The Committee asked the Federal Judicial Center to study the impact of the Twombly and
772 Iqbal decisions on the district courts. The study will be presented by Joe Cecil. In addition, Judge
773 Rothstein and Joe Cecil have agreed to do a follow-up study to determine what happens when
774 dismissal is coupled with leave to amend: is a new motion filed to challenge the amended
775 complaint? What happens on the renewed motion?

776 Joe Cecil presented the report, beginning with an expression of thanks to Professor Gensler,
777 who recruited University of Oklahoma Law School students to do the coding for the study. "That's
778 how we got it done."

779 The purpose of the study was to assess changes in Rule 12(b)(6) practice over time in broad
780 categories of civil cases. Footnote 4 in the study summarizes other studies that have been done. The
781 other studies find increases in motions to dismiss, particularly in civil rights cases. But they have
782 relied on cases published in the Westlaw database, which is likely to overrepresent orders granting
783 motions, and have examined orders decided soon after Iqbal and before interpretation of the
784 decisions by the courts of appeals.

785 The study was based on 23 districts, generally the largest two districts in each regional
786 Circuit. Together, these districts account for 51% of the actions filed in federal court.

787 The central conclusions of the study are that there has been an increase in the rate of filing
788 Rule 12(b)(6) motions to dismiss, although this may not prove out in civil rights cases where the rate

789 of motions was high before the Twombly and Iqbal decisions. But the rate of granting motions and
790 the rate of termination after a grant both held constant. And as noted below, the picture is more
791 complicated than that.

792 Joe Cecil found this study the most complicated study that he has done in 30 years at the
793 Federal Judicial Center because of the need to make statistical adjustments to account for other
794 events that were occurring in the federal courts apart from the Twombly and Iqbal decisions.
795 Looking to the period immediately before the Twombly decision, for example, is subject to the
796 prospect that courts may defer rulings in anticipation of new guidance from the Supreme Court. But
797 decisions in 2006 are not likely to be affected by anticipation of Twombly.

798 The study is based on actual CM/ECF records. This approach yields more cases than
799 reliance on published decisions. It also shows more decisions denying motions, which are less likely
800 to be published than decisions that grant motions.

801 Prisoner and pro se cases were excluded from the study.

802 Motions in response to counterclaims and affirmative defenses also were not considered.
803 The study also excluded cases in which a motion to dismiss was converted to a motion for summary
804 judgment because materials outside the pleading were considered.

805 “A lot changed between 2006 and 2010 that was unrelated to Twombly and Iqbal.” The
806 types of cases changed. There were fewer tort cases in 2010, and motions to dismiss are not made
807 as frequently in tort cases as in other types of cases. There were many more financial instrument
808 cases in 2010 than in 2006. The financial instrument cases often were filed in state court, removed,
809 dismissed as to the federal claims as a matter of law, and remanded. And there were more amended
810 complaints in 2010; they are more likely to be dismissed.

811 Different districts seem to take different approaches to motions to dismiss. Some tend to
812 deny. Others grant with leave to amend. The Southern District of New York seems to have a low
813 rate of filing motions to dismiss, but to tend to grant them without leave to amend. An effort was
814 made to control for these differences.

815 The study looked only to the rate of filing motions to dismiss in the first 90 days of an action.
816 It found an increased filing rate in all types of cases, including § 1983 civil rights cases, but not in
817 other types of civil rights cases where the rate was already high in 2006. Financial-instrument cases
818 “are a bubble in the data we have to account for.”

819 Without statistical adjustments to account for factors unrelated to the Supreme Court
820 decisions, the grant rate increased from 66% to 75%. But it is an increase in grants with leave to
821 amend — the cases were not terminated. There were great variations across districts. And there
822 were more amended complaints in 2010 than in 2006.

823 The raw numbers seem to show an increase in claims dismissed, but after statistical
824 adjustment that held only for financial-instrument cases. As for types of cases where particular
825 concerns have been expressed, there was no increase in the rate of dismissal in employment
826 discrimination and civil rights cases.

827 The study did not examine possible changes in substantive law. Nor did it consider the effect
828 of any changes in pleading practices that may have resulted from the Twombly and Iqbal decisions.
829 Remember that it was based only on motions filed in the first 90 days of an action. And it did not
830 determine the outcomes after leave to amend was granted.

831 Critics of the study do not accept the statistical adjustments, but they have not heard of the
832 need to make the adjustments. They also question the exclusion of pro se and prisoner cases. But
833 the prisoner cases have a different procedure.

834 The study is not able to identify cases that were not filed in federal court because of pleading
835 standards, whether the choice was to file in state court or not to file at all. Removal rates were
836 considered; no change was found even after separating fact-pleading states from notice-pleading
837 states. (It was recognized that classifying state pleading practices can be difficult. California
838 formally seems to be a code pleading state. But at various times, and in different types of actions,
839 actual pleading standards may be more sympathetic to plaintiffs than federal notice pleading is. "It
840 goes in cycles.")

841 Nor was the study able to identify cases where the pleadings suffered from factual
842 deficiencies that could be cured only by discovery. The further study will attempt to determine
843 whether discovery continues after dismissal with leave to amend, but it may be difficult to find this.
844 A related comment observed that the problem of access to information available only to defendants
845 can be resolved by informal means in some situations. Antitrust plaintiffs, for example, may be able
846 to offer one potential defendant an exchange — give us all the information you have about the
847 conspiracy, and we won't name you as a defendant.

848 In response to a question, it was agreed that Table 4 shows a 7% increase in the rate of filing
849 motions to dismiss in civil rights cases, but the increase does not meet the ordinary 0.05 standard
850 of significance. It would be significant if a 0.10 standard of significance were employed. And the
851 number of cases increased from 2006 to 2010.

852 Another question pointed out that page 21 of the report finds no increase in the rate of
853 granting motions with or without leave to amend. But this reflects the difference between the raw
854 figures in Table 4 and the statistical adjustments. Table 5 shows that after statistical adjustments,
855 only financial instruments showed an increase. The adjustments are described in Appendix B. They
856 provide a way of accounting for changes that would have happened even if Twombly and Iqbal had
857 never been decided.

858 A judge observed that many district judges have said that Twombly and Iqbal have not made
859 much of a difference, apart from an increase in the rate of filing motions. Joe Cecil responded that
860 the study confirms these observations. And the study of what happens after leave to amend will be
861 important.

862 Another judge asked the direct question: if the rate of filing motions has increased, and if the
863 rate of granting motions holds constant, doesn't that mean that there are more dismissals? Joe Cecil
864 agreed that might be the case. With more cases being filed, and motions more likely to be filed in
865 those cases, the same rate of granting dismissal will result in more dismissals. "But we have two
866 very different data sets, so we can't just combine the estimates and be confident of the answer." It
867 is important to remember that leave to amend is more often granted than before.

868 Pro se cases were addressed by asking whether it is possible to go back to examine fee-paid
869 pro se cases. They may prove interesting because Twombly and Iqbal may make it easier to dismiss
870 "fanciful" claims than it was earlier. They are only conceivable, not plausible.

871 It was suggested that Committee members should think about anything that would be
872 particularly useful for the study about leave to amend. Do cases settle after leave to amend is
873 granted? Is there a renewed motion to dismiss?

874 And what about staying discovery while a motion to dismiss is pending? Joe Cecil was
875 uncertain whether the codes will show whether there is a formal stay of discovery. But it would be
876 useful to know whether discovery proceeds, with or in the absence of a formal stay. The difficulty
877 is that discovery requests and responses are not filed. And the parties may suspend discovery
878 without an order, perhaps after consulting with a judge who recommends the suspension. It was
879 suggested that many pro se cases are brought against “the government,” which responds with a
880 motion for summary judgment that the plaintiff does not think to address by requesting an
881 opportunity for discovery. Joe Cecil said he would think about the challenges of making reliable
882 findings about discovery stays.

883 Joe Cecil also said that the greatest difficulty with the study arises in attempting to
884 distinguish pleadings that fail for want of factual sufficiency alone and those that fail in whole or
885 in part for advancing an untenable legal theory. The difficulty is most acute with cases decided
886 before the Twombly decision. It was noted that the recent Skinner decision says that a complaint
887 need not pin the claim on a precise legal theory. A plausible short and plain statement of the claim
888 is all that is required. “This is likely to be quoted a lot.”

889 Responding to a question about the time taken to decide motions to dismiss, Joe Cecil said
890 that the motions may be filed a couple of days earlier after Twombly and Iqbal. The person who put
891 the question then said that “there are cycles of relative desirability of state courts and federal courts.”
892 In California, the state courts believe the facts stated in the complaint; the baseline assumption is
893 that discovery continues while the court deliberates a motion to dismiss. And the state court is
894 required to decide the motion quickly. In the federal courts, at least in complex cases, discovery is
895 stayed pending decision on the motion to dismiss. “State-court desirability is at an all-time high.”
896 Joe Cecil agreed to study the time taken to dispose of motions to dismiss.

897 An observer asked what it means to dismiss with leave to amend. Is it possible to find the
898 changes that were made to enable the amended complaint to survive where the initial complaint
899 failed? Joe Cecil said it would be possible to retrieve the pleadings, but the FJC is not in a position
900 to suggest specific lessons about the comparison or the quality of the changes made by the amended
901 complaint. A judge supported this approach, noting that — to take only one example — securities
902 cases often have “huge complaints.” Joe Cecil said it also would be interesting to look at the cases
903 that were terminated by a motion to dismiss.

904 Judge Kravitz praised the report as enormously helpful to the Committee and to scholars.
905 The FJC has the Committee’s thanks. The further work, following up on what happens after leave
906 to amend is granted, also will be very useful. The Al Kidd case pending in the Supreme Court may
907 say something more about pleading.

908 *Pleading: Rule Revisions?*

909 Judge Kravitz introduced the question whether the time has come to consider rules revisions
910 to respond to the Twombly and Iqbal decisions. The Supreme Court continues to describe pleading
911 standards in variable terms. It may continue to provide guidance that helps lower courts to converge
912 on a common understanding. Given this continuing evolution, it may not be useful to attempt to
913 consider amending the pleading rules. Perhaps the right thing is to focus on discovery practices in
914 relation to motions to dismiss. And the Court has not said anything about the standards for pleading
915 affirmative defenses. Plaintiffs complain that defendants often plead affirmative defenses by label
916 alone. It is more useful to require added detail — a fraud defense, for example, should be pleaded
917 with some detail.

918 Doubts about amending the pleading rules were repeated. The Supreme Court seems to
919 continue active consideration of these problems. It is a moving target.

920 The agenda-book sketches of possible revisions of the rules for pleading a complaint were
921 described. The first step is to identify the reason for revision. What is it that needs to be changed
922 in pleading practice has it has developed in the years since the Twombly and Iqbal decisions?

923 One sketch would “restore what never was.” This approach would seek to reduce the
924 pleading threshold to the discarded dictum that dismissal is proper only if “it appears beyond doubt
925 that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.”
926 A pleading need only give notice of the claim. Courts routinely required more than that in countless
927 decisions rendered before the Twombly opinion. It is fair to ask whether new reasons have appeared
928 to justify going in this direction now.

929 Another approach would attempt to find rule language that would reestablish the pleading
930 standards that prevailed before the Twombly and Iqbal decisions. This approach assumes that those
931 decisions have caused the pleading threshold to be raised to some level identifiably higher than the
932 standard prevailing on May 20, 2007. It may be too early to rely on that assumption. An attempt
933 to roll back to pre-Twombly practice, moreover, must account for the fact that there was no easily
934 stated or uniform practice. Actual pleading standards varied among different types of claims, and
935 among different courts. Nor was practice entirely stable. Rule revisions could do no more than
936 invite courts to disregard the Twombly and Iqbal opinions and to carry on the process of adapting
937 practices vaguely characterized as “notice pleading” as they had been doing. And even that
938 invitation would encounter the challenge of persuading lower courts that Supreme Court
939 implementation of the new rule would not be affected by the concerns that led to the Twombly and
940 Iqbal decisions.

941 A third approach might be to seek some sort of middle ground between the practices
942 perceived to have existed before the Twombly decision and the standards perceived to have resulted
943 from it. It could prove difficult to find words capturing this purpose.

944 Another approach would seek to confirm in rule language an understanding of what the
945 Twombly and Iqbal decisions have come to mean. The opinions were not written as rule text, nor
946 should they have been. Clear expression will require a clear understanding of what was intended,
947 or — perhaps more usefully — what has emerged as lower courts have worked to implement the
948 Court’s intent in the best ways possible.

949 Defense interests have suggested another step up the scale. They suggest that, at least as
950 lower courts have developed it, the practice emerging from Twombly and Iqbal has not raised
951 pleading standards as high as they should be. Without attempting to judge whether this position is
952 right, it must be recognized that rules proposed to adopt it would encounter fierce opposition.

953 Still other approaches to pleading a claim are possible, including an explicit revival of “fact
954 pleading.” Or the rules could expand the categories of claims singled out for pleading with
955 particularity. Or, conversely, the rules might establish categories of claims that can be pleaded more
956 generally than most claims.

957 A member asked whether there is any reason to suppose the Supreme Court would adopt a
958 rule that reduces pleading standards below the level set by the Twombly and Iqbal decisions. It was
959 suggested that the Court would be receptive if the Committee could show a major problem, that
960 large classes of cases are being kept out of federal court. But that may not be likely. Observers

961 often complain, for example, about the fate of employment discrimination cases. But “I never get
962 a motion to dismiss in employment cases.” They are pleaded carefully and effectively.

963 Indirect responses also might be well received. Many courts have experimented over the
964 years with a requirement that a plaintiff provide a reply when a defendant pleads official immunity.
965 The Iqbal decision shows special concern for official-immunity cases, concern that might well
966 support a rule requiring a reply.

967 The Committee concluded that it is not yet time to discuss these various possibilities. Nor
968 did it find need to discuss a variety of models that would respond to the arguments that it is unfair
969 to require plaintiffs to plead details of a claim that are known only to defendants. These models
970 would provide for discovery in aid of stating a claim, perhaps before an action is filed, or at the time
971 of filing, or in response to a motion to dismiss.

972 Pleading will remain on the agenda. It may be that further FJC work will show that the rise
973 in orders granting dismissal but also granting leave to amend does not have the benign effect of
974 simply provoking better pleadings that help frame the case and reduce the burdens of discovery. The
975 prospect of further information, a sense that practice has not fully crystallized in the lower courts,
976 and the possibility that the Supreme Court will have more to say, however, undercut arguments that
977 the time has come to begin preparing rules revisions for publication and eventual adoption.

978 *Pleading: Forms*

979 The intense focus on pleading brought on by the Twombly and Iqbal decisions has put the
980 illustrative “Rule 84” Forms back on the agenda. There are powerful arguments for taking the
981 adoption and revision of forms outside the Enabling Act process. Action has been deferred,
982 however, for fear that abrogation of the pleading forms — which are particular targets of criticism
983 and doubt — might appear to be taking a position in the debates engendered by Twombly and Iqbal.
984 But the debates have matured to a point that may make it feasible to launch a forms project.

985 The first observation was that the Forms were important in 1938 when the new pleading
986 philosophy was just that — entirely new. The Forms provided concrete illustrations of “the
987 simplicity and brevity” intended by the new rules. Now the rules are mature. “It is not Charles
988 Clark’s world.” The pleading forms were time-bound, are no longer important.

989 Carrying the Forms forward as creatures of the Enabling Act process presents several
990 problems. One big problem is that they need to be tended to, and tending to them would absorb
991 great amounts of time. The Committee has not been able to devote serious attention to the Forms
992 for many years. Even in the Style Project, they were revised by a process far less intense than the
993 process for the rules themselves. The consequences may be troubling. The Form 18 form complaint
994 for patent infringement, for example, has been excoriated. A related problem is that it would be
995 useful to be able to revise forms with some speed to respond to changing circumstances. “Some
996 speed” is not a characteristic of the Enabling Act process.

997 These problems may be exacerbated by the idiosyncratic selection of topics covered by the
998 Civil Forms. It is not at all clear how possible topics were selected, honoring some problems with
999 forms and ignoring others.

1000 Consideration of the Forms questions should be undertaken in conjunction with the
1001 Appellate, Bankruptcy, and Criminal Rules Committees. The roles played by forms, and the means
1002 of developing them, are different among the different sets of rules. The criminal procedure forms
1003 are developed outside the Enabling Act framework, although the Criminal Rules Committee reviews

1004 some of the forms and offers advice. A similar process could be followed for civil procedure forms,
1005 leaving most of the work to the Administrative Office. Work is under way now on revising the
1006 procedures for the conduct of business by the rules committees. A focus on the procedures for
1007 generating forms is an appropriate adjunct of this work, although in the end it may be that work on
1008 the procedures should finish on other topics, leaving the way for additional provisions after the
1009 several committees and the Standing Committee work through the forms process.

1010 It was pointed out that most of the forms are not illustrative complaints. Revising the whole
1011 framework need not be seen as implicit commentary on the Twombly and Iqbal decisions, but
1012 instead can be recognized for what it is — a program to shift the initiating responsibility for forms
1013 away from the full Enabling Act process.

1014 The Committee concluded that work should begin on Rule 84. The rate of progress will
1015 depend on the interest of other advisory committees in beginning a joint project. At least a progress
1016 report should be submitted at the November meeting.

1017 *Duke Subcommittee*

1018 Judge Koeltl presented the report of the Duke Subcommittee. Its deliberations on possible
1019 rules revisions have been guided by the menu of possible subjects set out in the agenda materials
1020 at page 286. The menu itself is not all-inclusive; it filtered out suggestions that seemed not ripe for
1021 present action. The menu has been whittled down through e-mail messages, meetings by conference
1022 call, and in-person meetings. The agenda materials include a significantly narrowed set of rules to
1023 be considered further. Which of them will lead to specific proposals continues to be discussed.

1024 Some common themes will be recalled. Conference participants repeatedly emphasized the
1025 need for proportionality and cooperation in litigation, and for active judicial management to help
1026 achieve these goals. Radical revision of the rules has failed to command majority, or near-majority
1027 support. There is a strong stream of views that most problems can be resolved within the current
1028 framework of rules given sensible behavior by lawyers as encouraged by case management. But
1029 there is support for relatively modest “tweaks” of various rules to further these goals.

1030 One source of inspiration will be a study of the “rocket docket” practices in the Eastern
1031 District of Virginia. The study will aim to identify practices that might be generalized and carried
1032 to other courts. The Subcommittee will form panels of judges and lawyers to make presentations
1033 about rocket-docket practices at the November Committee meeting.

1034 Employment lawyers representing plaintiffs and defendants, led by Joseph Garrison and
1035 Chris Kitchell, have come together to develop a set of initial disclosures and discovery requests,
1036 documents to be provided and questions to be answered. The hope is to have these standard
1037 obligations incorporated in scheduling orders. They made enormous progress at a meeting at the
1038 Institute for the Advancement of the American Legal System two weeks ago. They plan to meet
1039 again this summer and expect to reach agreement then. They also expect that some judges will be
1040 eager to adopt these queries as scheduling orders. The FJC is prepared to frame a study that will
1041 determine in a rigorous way whether these practices reduce cost and delay. Many nuances remain
1042 to be resolved, but the process of bringing all the lawyers together for direct consultation has proved
1043 very good.

1044 Joseph Garrison said that it would be desirable to use the employment discrimination
1045 protocol as the prototype for developing protocols for other types of litigation. Judge Koeltl was
1046 a great facilitator at the IAALS meeting. The drafting group hopes that twenty or thirty judges will

1047 adopt the protocol as scheduling orders. And the drafting group is working on a model protective
1048 order.

1049 Judge Kravitz suggested that there will be no problem in finding a suitable number of judges
1050 willing to adopt the protocol. But it will be necessary to coordinate with the FJC in order to
1051 establish the framework for effectively measuring the results.

1052 Judge Koeltl noted that the protocol will function as a first wave of discovery, and may lead
1053 to early settlement. The possible facilitation of settlement will be another facet of the study of cost
1054 and delay. At the least, adoption of the protocol in a scheduling order should reduce disputes about
1055 what is discoverable.

1056 Judge Koeltl continued the Subcommittee report by noting that the Administrative Office
1057 did a study of pre-motion conference practices as revealed by district web sites. It asked about the
1058 use of conferences before discovery motions, and also before other motions such as Rule 12(b)(6)
1059 motions to dismiss and Rule 56 summary-judgment motions. The question was raised because some
1060 of the participants in the Duke Conference said that some judges are drowning in discovery motions,
1061 while others do not seem to have such severe problems.

1062 The Administrative Office found 37 districts in which some or all judges require a pre-
1063 motion conference before a discovery motion can be filed. Judges that require a conference before
1064 other motions were found in only four districts.

1065 The dearth of pre-motion requirements for motions other than discovery motions effectively
1066 forecloses exploration of a rule that would impose this requirement. There is no real support for it.

1067 The question whether to require a conference before filing a discovery motion remains on
1068 the table. The same effect might be achieved by calling for oral discovery motions, avoiding the risk
1069 that a judge might fail to do anything after the pre-motion conference, effectively barring any
1070 motion. (That risk also could be addressed by providing that a motion could be filed if no action
1071 were taken within a prescribed number of days after the conference.)

1072 Judge Rothstein has agreed to have the FJC do research on the beginning phases of litigation.
1073 Rule 16(b) directs that a scheduling order must enter as soon as practicable, and no later than 120
1074 days after any defendant has been served or, if earlier, 90 days after any defendant has appeared.
1075 Among other things, the scheduling order must limit the time to complete discovery and file
1076 motions. And lawyers are required by Rule 26(f) to confer at least 21 days before a scheduling
1077 conference is to be held or a scheduling order is due.

1078 Several obscurities surround Rule 16(b). One arises from Rule 16(b)(1)(B), which directs
1079 that the order enter after receiving a Rule 26(f) report or after consulting with the parties at a
1080 conference "or by telephone, mail, or other means." What are the other means? Perhaps e-mail
1081 exchanges would be.

1082 The Duke Conference suggested there are problems. Data revealed that no discovery cutoff
1083 is set in nearly half of all cases. Why? Is it because the cases settle? Are dismissed before they
1084 progress to the scheduling-order phase? Do lawyers really hold Rule 26(f) conferences? Are Rule
1085 26(f) conferences helpful? Do the Rule 16(b)(1)(B) timing provisions make any sense, or are they
1086 too drawn out? The experience of Subcommittee members suggests that districts differ in these
1087 dimensions. In some districts lawyers do meet, provide a Rule 26(f) report, and the judges enter a
1088 scheduling order without actually meeting with the parties. It is a loss when the judge does not meet

1089 and confer with the lawyers to provide judicial management. In other districts, lawyers often do not
1090 meet together but instead go straight to a meeting with the judge.

1091 Changes are possible. The time to enter a scheduling order seems too long. Perhaps there
1092 should be a presumptive requirement to meet with the judge. The Rule 26(d) bar on discovery
1093 before the Rule 26(f) conference may deserve reconsideration — it might be better to allow
1094 discovery requests to be served before the conference, so that the parties and later the judge have
1095 a better idea of what the discovery issues may be. The FJC research will help to explore these
1096 issues.

1097 The Subcommittee is open to suggestions of other topics that should be considered, or
1098 excluded. It has tended to keep issues on the table to encourage discussion. The lack of suggestions
1099 has been disappointing.

1100 Initial disclosure under Rule 26(a)(1) has been put in the background. Some lawyers think
1101 it does no good. Others think it is worthwhile in some cases. Courts do impose sanctions for
1102 failures to disclose.

1103 The scope of discovery relates to the questions of proportionality and cooperation.
1104 Proportionality has been required by Rule 26(b)(2) since 1983, but it seems to be buried. It is
1105 seldom raised. When appellate courts describe the scope of discovery they focus on the broad terms
1106 of Rule 26(b)(1) without going on to note the express incorporation of 26(b)(2)(C) at the end of
1107 (b)(1). Should something be done about this? Would even a separate rule on proportionality capture
1108 judges' attention? Is it better to rely on judicial education to ensure that proportionality is addressed
1109 in all discovery conferences?

1110 Judge Grimm has volunteered to generate a list of references and a set of concrete examples
1111 to help walk through the need for proportionality. Cases can be found that note proportionality in
1112 passing, but there are not many cases on how to do it. Professor Gensler has written on it. The
1113 Sedona Conference has generated guides for cooperation. A set of guidelines and examples may
1114 prove helpful. Judge Kravitz thanked Judge Grimm for undertaking this work, and suggested that
1115 efforts to educate judges seem a desirable first step before considering rules changes. Judge Koeltl
1116 noted that Judge Rothstein has agreed to include discovery proportionality in judicial education
1117 materials.

1118 The Subcommittee also has considered the possibility of adding cooperation to the rules.
1119 Cooperation appears now only in the heading of Rule 37, but nowhere in the rule text; it was added
1120 in 1980, when the rules were amended to include a Rule 26(f) conference provision quite different
1121 from the present provision, which dates to 1993, and when what is now Rule 37(f) was added to
1122 reflect the duty to participate in a discovery conference in good faith. One possibility would be to
1123 add a duty of cooperation to Rule 1, imposing on attorneys as well as the courts the duty to achieve
1124 the just, speedy, and inexpensive disposition of every action and proceeding.

1125 Three specific proposals to curtail evasive discovery responses advanced by Daniel Girard
1126 at the Duke Conference continue to attract strong support in the Subcommittee. The first would
1127 amend Rule 26(g)(1)(B)(i) to add a certification that a discovery request, response, or objection is
1128 “not evasive.” The second would add an explicit requirement to produce in response to a Rule 34
1129 request. The third would amend Rule 34 to provide that each objection to a request must specify
1130 whether any responsive documents are being withheld on the basis of the objection.

1131 Other discovery proposals remaining on the agenda would reconsider the role of contention
1132 interrogatories and requests to admit, and consider presumptive numerical limits on the number of

1133 Rule 34 requests to produce and Rule 36 requests to admit. Some judges now adopt pretrial orders
1134 that limit the number of requests to produce, perhaps to 25. The limit encourages parties to focus
1135 on what they need, but may have the counterproductive effect of encouraging more general requests.

1136 Discussion began with the observation that the tenor of the Duke Conference was to ask
1137 whether there is a better way to conduct litigation that too often is too long, too cumbersome, and
1138 too expensive. The Subcommittee has done a great job, but the present agenda does not seem
1139 calculated to accomplish broad improvement. Is there a way to force the Committee to think about
1140 more efficient procedures? Can something be done to help address pro se litigation — the civil
1141 docket in the District of Arizona is now up to 45% pro se cases. The rise of pro se litigation is both
1142 a problem and a symptom of the expense of litigating with a lawyer in federal court. Studying
1143 docket practices in the Eastern District of Virginia may yield clues as to how to experiment with
1144 moving cases along, but there is a concern that a solo practitioner may be forced to devote all
1145 available time to a single case under rocket-docket procedures.

1146 The Committee was reminded of the value in looking to what others do, including state
1147 courts. Oregon uses fact pleading. Arizona has vastly expanded unilateral disclosure requirements.
1148 There even may be lessons to learn from other countries. But we should remember the results of the
1149 FJC study for the Duke Conference. Many cases finish in ten months to a year, with some discovery
1150 but not a great deal, and with a cost of around \$15,000. There are, to be sure, monster cases.
1151 Controlling them requires special techniques, but it is important to remember the frequent advice
1152 that the rules are adequate to the task, that the need is for better implementation of present rules
1153 more than for new rules.

1154 It was suggested that it would be helpful to study ways to deal with pro se cases apart from
1155 rules changes. “Help desks,” and internet forms, might be a start.

1156 Judge Koeltl observed that even within the federal system there is an enormously diverse
1157 array of courts, case loads, and conditions. Courts are experimenting with ways to deal with pro se
1158 cases, and with other procedural devices. The Southern District of New York has adopted forms for
1159 excessive-force cases, and hopes to mount a pilot project for complex cases. The IAALS is looking
1160 for other pilot programs. The Seventh Circuit is well into its pilot project on e-discovery.
1161 Continuing experimentation will help. It also will help to pursue vigorous programs to educate
1162 judges and lawyers about the opportunities available in the present rules.

1163 Fact pleading has been one idea, but “we may not go there.”

1164 Many states track cases. State courts have many more cases than the federal courts do, and
1165 they have many cases with little discovery. State courts also entertain complex litigation, however,
1166 and several states are creating complex-litigation courts that often attract cases that might have been
1167 filed in federal court. The Delaware Chancery court is a familiar example of a state court that has
1168 dealt with highly sophisticated and complex litigation for many years. And state courts entertain
1169 class actions of broad, even nationwide, scope.

1170 An observer suggested that “Rule 56 is a big driver of all the cost and expense.” The
1171 Committee will have to deal with it in ways more fundamental than the recent amendments if cost
1172 and expense are to be reduced. A summary-judgment motion often forces discovery that otherwise
1173 would not be undertaken. Many arbitrators achieve efficiency by going straight to hearings, without
1174 summary judgment. Such, at least, is the experience in employment cases.

1175 A sympathetic comment observed that “Rule 56 makes no sense in excessive-force cases.”
1176 Different judges have different ways of dealing with this.

1177 Another observer said that when acting as a mediator, he uses the costs of litigation as a tool
1178 to encourage settlement. But in arbitration, he finds criticisms that arbitration can be too slow and
1179 too expensive, with calls for summary judgment. What is most important, as said repeatedly at the
1180 Duke Conference, is engagement by and with the judge, cooperation, and proportionality.
1181 Engagement by the judge is the most important factor. The rules we have can work; a really fine
1182 judge can use them to deal with the problems. Long-range improvement must begin with changes
1183 in the law schools, teaching lawyers how to contribute to the administration of justice.

1184 Judge Kravitz noted that it is terrific that the FJC is considering ways to provide judicial
1185 education programs outside D.C. One shortcoming of education programs is measured by the judges
1186 who do not attend, and taking the programs to them may accomplish much good.

1187 Attention should be devoted to finding ways to get feedback from the bar outside major
1188 conferences, occasional miniconferences, and the publication of formal proposals for amendments.
1189 It will be useful to let the bar know what the Committees are doing, and to encourage a flow of
1190 information from lawyers and judges to the Committees.

1191 An optimistic note was suggested. It may not sound like much to achieve a 1% reduction
1192 in the cost of litigating all cases — it would not much reduce the burdens on litigants. But the
1193 cumulative saving for the system would be substantial. Seemingly modest improvements can do real
1194 good.

1195 It was asked when the Committee could devote a day to thinking about these issues. Some
1196 help might be available from the National Center for State Courts. David Steelman at the Center
1197 has studied what works for efficient court systems. Other people can be found who know of
1198 innovative ways of doing things.

1199 These questions will have to be worked out in developing the agenda for the November
1200 meeting. Time should be set aside for the first hearing on the Rule 45 proposals. The rocket-docket
1201 panel will take some time. The Discovery Subcommittee plans to present recommendations on the
1202 approach to be taken to preservation and sanctions issues, whether a highly detailed description of
1203 a duty to preserve, a more open-ended reasonable but express duty to preserve, or an indirect
1204 approach that defines the circumstances and limits of sanctions for failing to preserve. The Duke
1205 Conference Subcommittee can consider what is desirable and make recommendations for making
1206 use of the time available.

1207 And it will be important to let the Standing Committee know that the Advisory Committee
1208 is considering the possibility of aggressive changes, but also is tending to changes in the rules that
1209 can be achieved and do good in the short term.

1210 *Appellate-Civil Subcommittee*

1211 Judge Colloton delivered the report of the Appellate-Civil Subcommittee. There is no
1212 recommendation for present action.

1213 The one topic currently active on the agenda is “manufactured finality.” The question arises
1214 when a plaintiff encounters an adverse ruling that cannot be appealed under normal rules. One tactic
1215 has been to achieve finality by dismissing whatever remains of the action. A common illustration
1216 arises when the principal claim is dismissed by the court, and the plaintiff believes that the
1217 remaining minor claims are not worth litigating alone or that it costs too much to litigate the
1218 remaining claims to final judgment with the hope that an appeal will revive the principal claim for
1219 a second trial. Most courts recognize that the plaintiff can achieve finality by dismissing all

1220 remaining parts of the action with prejudice, but the price is that those parts cannot be revived if
1221 dismissal of the principal claim is reversed. A few courts address that problem by allowing
1222 dismissal of the remaining claims without prejudice, but most courts reject that practice because it
1223 seriously corrodes the final judgment rule. An intermediate approach has occasionally been
1224 recognized, most clearly in the Second Circuit. Under this approach, the plaintiff secures dismissal
1225 of the remaining parts of the action with prejudice, but subject to revival if the adverse court rulings
1226 are reversed on appeal. This practice has been dubbed “conditional prejudice” in Subcommittee
1227 discussions. The Subcommittee has not been able to find out much about the operation of the
1228 conditional prejudice practice in the Second Circuit; it may be that it is little used.

1229 The Subcommittee believes that two approaches are most promising. One would be to craft
1230 a rule that allows finality to be manufactured only by dismissing all remaining parts of the action
1231 with prejudice. The rule would defeat attempts to manufacture finality by dismissing the remaining
1232 parts without prejudice, or with conditional prejudice. The other approach would be to do nothing,
1233 leaving it to the courts to continue present practices as they may evolve in the light of experience.
1234 The Subcommittee is pretty much in equipoise between these approaches. The Appellate Rules
1235 Committee will meet soon. Once its views are known, the Subcommittee will work toward a final
1236 recommendation.

1237 It was noted that Rule 54(b) does not address all of the concerns that lead litigants to seek
1238 manufactured finality. The district judge may refuse to enter a partial final judgment. The court of
1239 appeals may conclude that entry of judgment was an abuse of discretion. Or — and more
1240 sympathetically — the case may not fall within Rule 54(b) possibilities. A common illustration
1241 would be a ruling that excludes vital evidence, or rejects the major components of requested
1242 damages, but leaves all claims alive.

1243 *Rule 6(d): Three Added Days*

1244 The “three added days” provision in Rule 6(d) presents two problems. The more
1245 fundamental problem is whether all of the modes of service that now entitle a party to three added
1246 days deserve the added time. The simpler problem arises from a misstep in the 2005 amendment
1247 that revised Rule 6(d) to establish a single and uniform method of calculating the three added days.

1248 The misstep in drafting the 2005 amendment was identified in an article by Professor James
1249 J. Duane, *The Federal Rule of Civil Procedure that was Changed by Accident: A Lesson in the Perils*
1250 *of Stylistic Revision*,” 62 S.C.L. Rev. 41 (2010). Although the change was made two years before
1251 the Style Project revisions, the misstep was a result of applying Style Project drafting conventions.

1252 The drafting problem is most easily identified by the simple fix: “When a party may or must
1253 act within a specified time after service being served and service is made under Rule 5(b)(2)(C).
1254 (D),(E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).”

1255 Before the 2005 revision, Rule 6(d) provided added time after service “upon the party” if a
1256 paper or notice “is served upon the party” by designated means. “[A]fter service” seemed a
1257 reasonable way of saving words. But it overlooked three rules that permit a party to act within a
1258 specified time after the party has made service. See Rules 14(a)(1), 15(a)(1)(A), and 38(b)(1).
1259 Using Rule 15(a)(1)(A) as an illustration, the unintended but possible effect of the 2005 revision is
1260 to allow a party to expand the time available to amend its own pleading by choosing to serve the
1261 pleading by mail, e-mail, or the other means that support the 3 added days.

1262 No cases have been identified that make anything of the changed wording. It is possible that
1263 a court confronted with an argument from the apparent meaning of the present rule will reject the

1264 argument, ruling that it makes no sense to allow a party to expand its own time to act by unilaterally
1265 choosing the means of serving a paper, and that the rule should be read to carry forward the meaning
1266 clearly established by the prior language. Nonetheless, it seems appropriate to amend Rule 6(d) to
1267 restore the clear meaning that no one thought to change.

1268 The recommendation to amend Rule 6(d) does not determine how soon the amendment
1269 should be made. There is no apparent reason for urgent action. In most circumstances, the worst
1270 result may be that a party has three added days to implead a third-party defendant without seeking
1271 leave, to amend a pleading once as a matter of course, or to demand jury trial. It is possible that a
1272 wily party will make a deliberate decision to defer one of those acts in reliance on the apparent
1273 meaning of the rule, only to confront a court that chooses to carry forward the original clear
1274 meaning. It seems unlikely that the court would then deny leave to act if there were any persuasive
1275 reason for the desired action.

1276 Two reasons appear for delaying action. One is general. It seems likely that various
1277 missteps in the Style Project itself will be identified. Rather than act item-by-item, confronting the
1278 bar with an irregular series of amendments to digest, it may be better to allow non-urgent revisions
1279 to accumulate for a while, to be presented as a package.

1280 A second reason to delay is the growing sense that the 3-added days provision should be
1281 reconsidered. There is particular interest in the question whether 3 added days are appropriate when
1282 service is made by e-mail, particularly when service is made through the court's system. The 3
1283 added days may seem a relatively minor cause of delay, but they also complicate time calculations.
1284 And when the time allowed is 7, 14, or 21 days, they defeat the purpose of same-day time
1285 computations.

1286 Committee discussion concluded that it is, or soon will be, time to reconsider which modes
1287 of service deserve the 3 added days. This question arises in other sets of rules, and likely should be
1288 addressed as a common project. Indeed it may be appropriate to make the question part of a much
1289 larger project for all the Advisory Committees to bring the rules of procedure into the e-filing and
1290 e-service world.

1291 The Committee agreed that case-law developments should be monitored for signs that the
1292 style misstep is causing trouble. Absent any indication of trouble, the question will be carried
1293 forward for action as part of a larger project.

1294 *Next Meeting*

1295 The dates for the next meeting have been set for November 7 and 8. The meeting likely will
1296 be in Washington, D.C.

1297 *Valedictory*

1298 Judge Kravitz noted that he had followed six years as a member of the Standing Committee
1299 with four years as chair of the Civil Rules Committee. The Advisory Committee members
1300 welcomed him warmly and supportively when he arrived, and have provided continued support and
1301 inspiration, and have worked enormously hard, ever since. The Committee has done a superb job,
1302 with first-rate results. The Reporters have provided fine support. Judge Rosenthal has provided
1303 wise and patient guidance. Now term limits provide the occasion for great thanks to all. The
1304 Committee responded with a long and loud standing ovation.

1305 *Respectfully submitted,*

1306
1307

Edward H. Cooper
Reporter

TAB 3

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:

Advisory Committee conference materials:

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

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

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 they 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.

* * *

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 detailed 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

* * * * *

(g) FAILURE TO PRESERVE DISCOVERABLE INFORMATION; REMEDIES

- (1) If a party fails to preserve discoverable information that reasonably should be preserved⁴ in the anticipation or conduct of litigation, the court may[, when necessary]⁵:

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 curative⁶ 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-

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 instruction⁹ 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

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 reasonableness¹³ 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 any¹⁵ anticipated or ongoing litigation; and
- (F) whether the party sought timely guidance from the court¹⁶ regarding any unresolved disputes

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 produce¹⁷ relevant and material information.¹⁸ The determination of the

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 information²⁰ 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

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 nonparty²⁶ 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;

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 remedy³⁰ or sanction necessary to redress a violation of [the preservation rule], taking into account all relevant factors, including:

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

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 preserve 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.

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.

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(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 to preserve evidence or 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 [to preserve information that reasonably should be

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).

* * * * *

- (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

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 not affect the authority of an agency like the SEC to impose such

APPENDIX A
SPOILIATION SANCTIONS CHART

| Circuit Case law | Scope of Duty to Preserve | Can conduct be culpable per se without consideration of reasonableness? | Culpability and prejudice requirements | | | | What constitutes prejudice | Culpability and corresponding jury instructions |
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| | | | For sanctions in general | for dispositive sanctions | for adverse inference instruction | for a rebuttable presumption of relevance | | |
| First | It is a duty to preserve potentially relevant evidence a party owns or controls and also a duty to notify the opposing party of evidence in the hands of third parties. <i>Velez v. Marriott PR Mgmt., Inc.</i> , 590 F. Supp. 2d 235, 258 (D.P.R. 2008). | This specific issue has not been addressed. | <p>“The measure of the appropriate sanctions will depend on the severity of the prejudice suffered.” <i>Velez v. Marriott PR Mgmt., Inc.</i>, 590 F. Supp. 2d 235, 259 (D.P.R. 2008).</p> <p>“[C]arelessness is enough for a district court to consider imposing sanctions.” <i>Driggin v. Am. Sec. Alarm Co.</i>, 141 F. Supp. 2d 113, 123 (D. Me. 2000).</p> | “severe prejudice or egregious conduct” <i>Driggin v. Am. Sec. Alarm Co.</i> , 141 F. Supp. 2d 113, 123 (D. Me. 2000). | “does not require bad faith or comparable bad motive” <i>Trull v. Volkswagon of Am., Inc.</i> , 187 F.3d 88, 95 (1st Cir. 1999); <i>Oxley v. Penobscot County</i> , No. CV-09-21-JAW, 2010 WL 3154975 (D. Me. 2010). | Whether relevance can be presumed has not been addressed. | When spoliation substantially denies a party the ability to support or defend the claim <i>Velez v. Marriott PR Mgmt., Inc.</i> , 590 F. Supp. 2d 235, 259 (D.P.R. 2008). | Intentional spoliation; permissive adverse inference if the jury finds that the spoliator knew of the lawsuit and the documents’ relevance when it destroyed them <i>Testa v. Wal-Mart Stores, Inc.</i> , 144 F.3d 173, 178 (1st Cir. 1998). |

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| <p style="text-align: center;">Second</p> | <p>Documents that are potentially relevant to likely litigation “are considered to be under a party’s control,” such that the party has a duty to preserve them, “when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action.” <i>In re NTL, Inc. Sec. Litig.</i>, 244 F.R.D. 179, 195 (S.D.N.Y. 2007).</p> <p>The duty extends to key players. <i>Zubulake v. UBS Warburg LLC</i>, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).</p> | <p>Yes; specific actions, such as the failure “to issue a written litigation hold,” constitute gross negligence <i>per se</i>. <i>Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.</i>, 685 F. Supp. 2d 456, 471 (S.D.N.Y. 2010).</p> | <p>“[D]iscovery sanctions . . . may be imposed upon a party that has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence.” <i>Residential Funding Corp. v. DeGeorge Fin. Corp.</i>, 306 F.3d 99, 113 (2d Cir. 2002).</p> | <p>““willfulness, bad faith, or fault on the part of the sanctioned party”” <i>Dahoda v. John Deere Co.</i>, 216 Fed. App’x 124, 125, 2007 WL 491846, at *1 (2d Cir. 2007) (quoting <i>West v. Goodyear Tire & Rubber Co.</i>, 167 F.3d 776, 779 (2d Cir. 1999)).</p> | <p>Gross negligence <i>Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.</i>, 685 F. Supp. 2d 456, 478-79 (S.D.N.Y. 2010).</p> <p>Negligence <i>Residential Funding Corp. v. DeGeorge Fin. Corp.</i>, 306 F.3d 99, 108 (2d Cir. 2002); <i>Orbit One Communications, Inc. v. Numerex Corp.</i>, 271 F.R.D. 429, 439 (S.D.N.Y. 2010).</p> <p>Intentional conduct <i>In re Terrorist Bombings of U.S. Embassies in East Africa</i>, 552 F.3d 93, 148 (2d Cir. 2008).</p> | <p>Bad faith or gross negligence <i>Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.</i>, 685 F. Supp. 2d 456, 467 (S.D.N.Y. 2010).</p> | <p>When spoliation substantially denies a party the ability to support or defend the claim <i>Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.</i>, 685 F. Supp. 2d 456, 479 (S.D.N.Y. 2010).</p> | <p>Grossly negligent conduct; permissible inference of “the relevance of the missing documents and resulting prejudice to the . . . Defendants, subject to the plaintiffs’ ability to rebut the presumption to the satisfaction of the trier of fact.” <i>Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.</i>, 685 F. Supp. 2d 456, 478 (S.D.N.Y. 2010).</p> |
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| Third | Potentially relevant evidence; “it is essential that the evidence in question be within the party's control.” <i>Canton v. Kmart Corp.</i> , No. 1:05-CV-143, 2009 WL 2058908, at *2 (D.V.I. July 13, 2009) (quoting <i>Brewer v. Quaker State Oil Refining Corp.</i> , 72 F.3d 326, 334 (3d Cir. 1995)) | No; conduct is culpable if “party [with] notice that evidence is relevant to an action . . . either proceeds to destroy that evidence or allows it to be destroyed by failing to take <i>reasonable precautions</i> ” <i>Canton v. Kmart Corp.</i> , No. 1:05-CV-143, 2009 WL 2058908, at *3 (D.V.I. July 13, 2009) (quoting <i>Mosaid Techs., Inc. v. Samsung Elecs. Co.</i> , 348 F. Supp. 2d 332, 338 (D.N.J. 2004)) (emphasis added). | Bad faith <i>Bensel v. Allied Pilots Ass'n</i> , 263 F.R.D. 150, 152 (D.N.J. 2009). | The degree of fault is considered, and dispositive sanctions “should only be imposed in the most extraordinary of circumstances,” <i>see Mosaid Techs., Inc. v. Samsung Elecs. Co.</i> , 348 F. Supp. 2d 332, 335 (D.N.J. 2004), but a minimum degree of culpability has not been identified. | Negligence <i>Canton v. Kmart Corp.</i> , No. 1:05-CV-143, 2009 WL 2058908, at *2-3 (D.V.I. July 13, 2009). Intentional conduct <i>Brewer v. Quaker State Oil Refining Corp.</i> , 72 F.3d 326, 334 (3d Cir. 1995). | Whether relevance can be presumed has not been addressed. | Spoliation of evidence that would have helped a party’s case <i>In re Hechinger Inv. Co. of Del., Inc.</i> , 489 F.3d 568, 579 (3d Cir. 2007). | Intentional spoliation; permissible inference <i>Mosaid Techs., Inc. v. Samsung Elecs. Co.</i> , 348 F. Supp. 2d 332, 334 (D.N.J. 2004). |
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| <p style="text-align: center;">Fourth</p> | <p>Documents that are potentially relevant to likely litigation “are considered to be under a party’s control,” such that the party has a duty to preserve them, “when that party has ‘the right, authority, or practical ability to obtain the documents from a non-party to the action.’” <i>Goodman v. Praxair Servs., Inc.</i>, 632 F. Supp. 2d 494, 515 (D. Md. 2009) (citation omitted).</p> <p>It is also a duty to notify the opposing party of evidence in the hands of third parties. <i>Silvestri v. Gen. Motors Corp.</i>, 271 F.3d 583, 590 (4th Cir. 2001).</p> <p>Duty extends to key players. <i>Goodman</i>, 632 F. Supp. 2d at 512</p> | <p>The U.S. District Court for the District of Maryland has quoted <i>Zubulake IV</i>, 220 F.R.D. at 220 (“Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.”). See <i>Sampson v. City of Cambridge</i>, No. WDQ-06-1819, 2008 WL 7514364, at *8 (D. Md. May 1, 2008) (finding defendant’s conduct negligent); <i>Pandora Jewelry, LLC v. Chamilia, LLC</i>, No. CCB-06-3041, 2008 WL 4533902, at *9 (D. Md. Sept. 30, 2008) (finding defendant’s conduct grossly negligent); cf. <i>Goodman</i>, 632 F. Supp. 2d at 522 (stating that defendant, “much like the defendants in <i>Sampson</i> and <i>Pandora</i>, was clearly negligent” because it failed to implement a litigation hold, but also explaining why such action was negligent).</p> | <p>“only a showing of fault, with the degree of fault impacting the severity of sanctions” <i>Sampson v. City of Cambridge</i>, 251 F.R.D. 172, 179 (D. Md. 2008) (using “fault” to describe conduct ranging from bad faith destruction to ordinary negligence).</p> | <p>The court must “be able to conclude either (1) that the spoliator’s conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator’s conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.” <i>Silvestri v. Gen. Motors Corp.</i>, 271 F.3d 583, 593 (4th Cir. 2001).</p> | <p>Willful conduct <i>Buckley v. Mukasey</i>, 538 F.3d 306, 323 (4th Cir. 2008) (“the inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction”) (quoting <i>Vodusek v. Bayliner Marine Corp.</i>, 71 F.3d 148, 156 (4th Cir. 1995)); <i>Goodman v. Praxair Servs., Inc.</i>, 632 F. Supp. 2d 494, 519 (D. Md. 2009) (the court “must only find that spoliator acted willfully in the destruction of evidence”).</p> | <p>Willful behavior <i>Sampson v. City of Cambridge</i>, 251 F.R.D. 172, 179 (D. Md. 2008).</p> | <p>When spoliation substantially denies a party the ability to support or defend the claim <i>Goodman v. Praxair Servs., Inc.</i>, 632 F. Supp. 2d 494, 519 (D. Md. 2009); <i>Sampson v. City of Cambridge</i>, 251 F.R.D. 172, 180 (D. Md. 2008).</p> | <p>Willful spoliation; adverse jury instruction, but not the “series of fact-specific adverse jury instructions” that the plaintiff requested <i>Goodman v. Praxair Servs., Inc.</i>, 632 F. Supp. 2d 494, 523 (D. Md. 2009).</p> |
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| Fifth | Party with control over potentially relevant evidence has a duty to preserve it; scope includes evidence in possession of “employees likely to have relevant information, i.e., ‘the key players’” <i>Tango Transp., LLC v. Transp. Int’l Pool, Inc.</i> , No. 5:08-CV-0559, 2009 WL 3254882, at *3 (W.D. La. Oct. 8, 2009). | No: “Whether 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.” <i>Rimkus Consulting Group, Inc. v. Cammarata</i> , 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010). | “some degree of culpability” <i>Rimkus Consulting Group, Inc. v. Cammarata</i> , 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010). | Bad faith (and prejudice) <i>Rimkus Consulting Group, Inc. v. Cammarata</i> , 688 F. Supp. 2d 598, 614 (S.D. Tex. 2010). | Bad faith <i>Rimkus Consulting Group, Inc. v. Cammarata</i> , 688 F. Supp. 2d 598, 617 (S.D. Tex. 2010). | “The Fifth Circuit has not explicitly addressed whether even bad-faith destruction of evidence allows a court to presume that the destroyed evidence was relevant or its loss prejudicial.” <i>Rimkus Consulting Group, Inc. v. Cammarata</i> , 688 F. Supp. 2d 598, 617-18 (S.D. Tex. 2010). | When spoliation substantially denies a party the ability to support or defend the claim <i>Rimkus Consulting Group, Inc. v. Cammarata</i> , 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010). | Willful spoliation; jury instruction would “ask the jury to decide whether the defendants intentionally deleted emails and attachments to prevent their use in litigation.” <i>Rimkus Consulting Group, Inc. v. Cammarata</i> , 688 F. Supp. 2d 598, 620, 646 (S.D. Tex. 2010). |
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| Sixth | <p>It is a duty to preserve potentially relevant evidence that a party owns or controls and to notify the opposing party of evidence in the hands of third parties. <i>Jain v. Memphis Shelby Airport Auth.</i>, No. 08-2119-STA-dkv, 2010 WL 711328, at *2 (W.D. Tenn. Feb. 25, 2010).</p> <p>Duty extends to key players <i>In re Nat'l Century Fin. Enters., Inc. Fin. Inv. Litig.</i>, No. 2:03-md-1565, 2009 WL 2169174, at *11 (S.D. Ohio July 16, 2009).</p> | <p>This specific issue has not been addressed. In <i>BancorpSouth Bank v. Herter</i>, 643 F. Supp. 2d 1041, 1061 (W.D. Tenn. 2009), the court quoted <i>Zubulake IV</i>, 220 F.R.D. at 220 (“Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.”), but it also analyzed the defendant’s conduct to make the finding that it was “more than negligent.”</p> | <p>Bad faith (intentional) destruction, gross negligence, or ordinary negligence <i>In re Global Technovations, Inc.</i>, 431 B.R. 739, 780 (Bankr. E.D. Mich. 2010) (equating intentional and bad faith conduct).</p> | <p>willfulness, bad faith, or fault <i>In re Global Technovations, Inc.</i>, 431 B.R. 739, 779 (Bankr. E.D. Mich. 2010) (using “fault” to describe conduct ranging from intentional conduct to ordinary negligence).</p> <p>Other cases in circuit define “fault” as “objectively unreasonable behavior.” <i>E.g., BancorpSouth Bank v. Herter</i>, 643 F. Supp. 2d 1041, 1060 (W.D. Tenn. 2009); <i>Jain v. Memphis Shelby Airport Auth.</i>, No. 08-2119-STA-dkv, 2010 WL 711328, at *3 (W.D. Tenn. Feb. 25, 2010).</p> | <p>Bad faith not required <i>Miller v. Home Depot USA, Inc.</i>, No. 3-08-0281, 2010 WL 373860, at *1 (M.D. Tenn. Jan. 28, 2010).</p> <p>Ordinary negligence <i>Jain v. Memphis Shelby Airport Auth.</i>, No. 08-2119-STA-dkv, 2010 WL 711328, at *3 (W.D. Tenn. Feb. 25, 2010); <i>Forest Labs., Inc. v. Caraco Pharm. Labs., Ltd.</i>, No. 06-CV-13143, 2009 WL 998402, at *5-6 (E.D. Mich. Apr. 14, 2009).</p> <p>Bad faith <i>In re Global Technovations, Inc.</i>, 431 B.R. 739, 781, 782 (Bankr. E.D. Mich. 2010), <i>aff'd</i>, No. 10-12781, 2011 WL 1297356 (E.D. Mich. Mar. 31, 2011).</p> | <p>“The spoliating party bears the burden of establishing lack of prejudice to the opposing party, a burden the Sixth Circuit has described as ‘an uphill battle.’” <i>Jain v. Memphis Shelby Airport Auth.</i>, No. 08-2119-STA-dkv, 2010 WL 711328, at *2 (W.D. Tenn. Feb. 25, 2010).</p> | <p>When spoliation substantially denies a party the ability to support or defend the claim <i>Jain v. Memphis Shelby Airport Auth.</i>, No. 08-2119-STA-dkv, 2010 WL 711328, at *4 (W.D. Tenn. Feb. 25, 2010).</p> | <p>Unintentional conduct; permissible inference <i>Jain v. Memphis Shelby Airport Auth.</i>, No. 08-2119-STA-dkv, 2010 WL 711328, at *4-5 (W.D. Tenn. Feb. 25, 2010).</p> |
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| Seventh | <p>Duty to preserve potentially relevant evidence party has control over <i>Jones v. Bremen High Sch. Dist.</i> 228, No. 08-C-3548, 2010 WL 2106640, at *5 (N.D. Ill. May 25, 2010).</p> | <p>No: Breach is failure to act reasonably under the circumstances <i>Jones v. Bremen High Sch. Dist.</i> 228, No. 08-C-3548, 2010 WL 2106640, at *6-7 (N.D. Ill. May 25, 2010); see <i>Northington v. H & M Int'l</i>, No. 08-CV-6297, 2011 WL 663055 (N.D. Ill. Jan. 12, 2011); <i>Jacobeit v. Rich Twp. High Sch. Dist.</i>, 227, No. 09 CV 1924, 2011 WL 2039588 (N.D. Ill. May 25, 2011) (“any sanctions rendered [must] be proportionate to the offending conduct.”</p> <p>“The failure to institute a document retention policy, in the form of a litigation hold, is relevant to the court's consideration, but it is not <i>per se</i> evidence of sanctionable conduct.” <i>Haynes v. Dart</i>, No. 08 C 4834, 2010 WL 140387, at *4 (N.D. Ill. Jan. 11, 2010).</p> | <p>Willfulness, bad faith, or fault <i>Jones v. Bremen High Sch. Dist.</i> 228, No. 08-C-3548, 2010 WL 2106640, at *5 (N.D. Ill. May 25, 2010) (stating that fault is based on the reasonableness of the party's conduct).</p> <p>Bad faith <i>BP Amoco Chemical Co. v. Flint Hills Resources, LLC</i>, No. 05 C 5, 2010 WL 1131660, at *24 (N.D. Ill. Mar. 25, 2010).</p> | <p>Willfulness, bad faith, or fault <i>In re Kmart Corp.</i>, 371 B.R. 823, 840 (Bankr. N.D. Ill. 2007) (noting that fault, while based on reasonableness, is more than a “slight error in judgment”) (citation omitted).</p> | <p>Bad faith <i>Faas v. Sears, Roebuck & Co.</i>, 532 F.3d 633, 644 (7th Cir. 2008); <i>Northington v. H & M Int'l</i>, No. 08-CV-6297, 2011 WL 663055 (N.D. Ill. Jan. 12, 2011).</p> | <p>Unintentional conduct is insufficient for presumption of relevance <i>In re Kmart Corp.</i>, 371 B.R. 823, 853-54 (Bankr. N.D. Ill. 2007).</p> | <p>When spoliation substantially denies a party the ability to support or defend the claim <i>Krumwiede v. Brighton Assocs., L.L.C.</i>, No. 05-C-3003, 2006 WL 1308629, at *10 (N.D. Ill. May 8, 2006).</p> <p>When spoliation substantially denies a party the ability to support or defend the claim OR delays production of evidence <i>Jones v. Bremen High Sch. Dist.</i> 228, No. 08-C-3548, 2010 WL 2106640, at *8-9 (N.D. Ill. May 25, 2010).</p> | <p>Grossly negligent conduct; jury instruction to inform the jury of the defendant's duty and breach thereof <i>Jones v. Bremen High Sch. Dist.</i> 228, No. 08-C-3548, 2010 WL 2106640, at *10 (N.D. Ill. May 25, 2010).</p> |
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| Eighth | Duty to preserve potentially relevant documents in party's possession <i>Dillon v. Nissan Motor Co.</i> , 986 F.2d 263, 267 (8th Cir. 1993). | Courts in the Eighth Circuit have not found conduct culpable without analyzing the facts, although reasonableness is not discussed. | Bad faith <i>Wright v. City of Salisbury</i> , No. 2:07CV0056 AGF, 2010 WL 126011, at *2 (E.D. Mo. Apr. 6, 2010). | Bad faith <i>Johnson v. Avco Corp.</i> , No. 4:07CV 1695 CDP, 2010 WL 1329361, at *13 (E.D. Mo. 2010); <i>Menz v. New Holland N. Am., Inc.</i> , 440 F.3d 1002, 1006 (8th Cir. 2006). | Bad faith <i>Greyhound Lines, Inc. v. Wade</i> , 485 F.3d 1032, 1035 (8th Cir. 2007); <i>Menz v. New Holland N. Am., Inc.</i> , 440 F.3d 1002, 1006 (8th Cir. 2006); <i>Stevenson v. Union Pac. RR</i> , 354 F.3d 739, 747 (8th Cir. 2004) (bad faith required if spoliation happens pre-litigation) Bad faith is not required to sanction for “the ongoing destruction of records during litigation and discovery.” <i>Stevenson</i> , 354 F.3d at 750; <i>MeccaTech, Inc. v. Kiser</i> , 2008 WL 6010937, at *8 (D. Neb. 2008) (same), <i>adopted in part</i> , No. 8:05CV570, 2009 WL 1152267 (D. Neb. Apr. 23, 2009). | This issue has not been addressed, but it has been stated that there is no presumption of irrelevance of intentionally destroyed documents. <i>Alexander v. Nat'l Farmers Org.</i> , 687 F.2d 1173, 1205 (8th Cir. 1982). | Destruction of evidence that “may have [been] helpful” <i>Dillon v. Nissan Motor Co.</i> , 986 F.2d 263, 268 (8th Cir. 1993). “irreparable injury to plaintiffs’ claims” <i>Monsanto Co. v. Woods</i> , 250 F.R.D. 411, 414 (E.D. Mo. 2008). | “destruction was not ‘willful’ or malicious,” but plaintiffs’ counsel should have known to preserve the evidence; jury was instructed that “an adverse inference may be drawn from plaintiffs’ failure to preserve the vehicle” <i>Bass v. Gen. Motors Corp.</i> , 929 F. Supp. 1287, 1290 (W.D. Mo. 1996), <i>aff’d on this ground</i> , 150 F.3d 842, 851 (8th Cir. 1998). |
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| Ninth | <p>Duty to preserve potentially relevant evidence in party's possession <i>Leon v. IDX Systems Corp.</i>, 2004 WL 5571412, at *3 (W.D. Wash. 2004), <i>aff'd</i>, 464 F.3d 951 (9th Cir. 2006).</p> <p>Duty extends to key players. <i>Hous. Rights Ctr. v. Sterling</i>, 2005 WL 3320739, at *3 (C.D. Cal. Mar. 2, 2005).</p> | <p>In <i>Hous. Rights Ctr. v. Sterling</i>, 2005 WL 3320739, at *3 (C.D. Cal. Mar. 2, 2005), the court quoted <i>Zubulake IV</i>, 220 F.R.D. at 220 (“Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.”), and found that defendants’ “[d]estruction of documents during ongoing litigation was, at a minimum, negligent.”</p> | <p>Bad faith not required <i>Dae Kon Kwon v. Costco Wholesale Corp.</i>, No. CIV. 08-360 JMSBMK, 2010 WL 571941, at *2 (D. Hawai‘i 2010); <i>Carl Zeiss Vision Intern. GmbH v. Signet Armolite, Inc.</i>, No. 07CV0894 DMS(POR), 2010 WL 743792, at *15 (S.D. Cal. Mar. 1, 2010), <i>amended on other grounds</i>, 2010 WL 1626071 (S.D. Cal. Apr 21, 2010).</p> | <p>Willfulness, bad faith, or fault <i>Dae Kon Kwon v. Costco Wholesale Corp.</i>, No. CIV. 08-360 JMSBMK, 2010 WL 571941, at *2 (D. Hawai‘i 2010) (requiring that party “engaged deliberately in deceptive practices”); <i>Kopitar v. Nationwide Mut. Ins. Co.</i>, 266 F.R.D. 493, 495-96 (E.D. Cal. 2010)</p> <p>“[D]isobedient conduct not shown to be outside the control of the litigant’ is all that is required to demonstrate willfulness, bad faith, or fault.” <i>Henry v. Gill Indus.</i>, 983 F.2d 943, 948 (9th Cir. 1993).</p> | <p>Bad faith or gross negligence <i>Karnazes v. County of San Mateo</i>, No. 09-0767 MMC (MEJ), 2010 WL 2672003, at *2 (N.D. Cal. July 2, 2010).</p> <p>Bad faith not required <i>Otsuka v. Polo Ralph Lauren Corp.</i>, No. C 07-02780 SI, 2010 WL 366653, at *3 (N.D. Cal. Jan. 25, 2010).</p> | <p>This issue has not been addressed.</p> | <p>When spoliation substantially denies a party the ability to support or defend the claim <i>Henry v. Gill Indus.</i>, 983 F.2d 943, 948 (9th Cir. 1993).</p> | <p>The Court’s research has not located case in which the court granted an adverse inference instruction and stated what the instruction would be.</p> |
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| <p style="text-align: center;">Tenth</p> | <p>Duty extends to key players <i>Pinstripe, Inc. v. Manpower, Inc.</i>, No. 07-CV-620-GKF-PJC, 2009 WL 2252131, at *1 (N.D. Okla. July 29, 2009).</p> <p>A party with possession of potentially relevant evidence has a duty to preserve it; even if the party relinquishes ownership or custody, it must contact the new custodian to preserve the evidence. <i>Jordan F. Miller Corp. v. Mid-Continent Aircraft Serv.</i>, 139 F.3d 912, 1998 WL 68879, at *5-6 (10th Cir. 1998).</p> | <p>No. <i>Procter & Gamble Co. v. Haugen</i>, 427 F.3d 727, 739 n.8 (10th Cir. 2005) (stating that district court must consider Rule 26(b)(2)[(C)](iii), which requires the court to limit discovery if “the burden or expense of the proposed discovery outweighs its likely benefit”).</p> | <p>Bad faith not required <i>Hatfield v. Wal-Mart Stores, Inc.</i>, 335 Fed. App’x 796, 804 (10th Cir. 2009).</p> <p>Negligence <i>Pipes v. UPS, Inc.</i>, No. CIV.A.07-1762, 2009 WL 2214990, at *1 (W.D. La. July 22, 2009).</p> | <p>“willfulness, bad faith, or [some] fault” <i>Procter & Gamble Co. v. Haugen</i>, 427 F.3d 727, 738 (10th Cir. 2005) (using language originally in <i>Societe Internationale v. Rogers</i>, 357 U.S. 197, 212 (1958), which distinguished “fault” from a party’s inability to act otherwise).</p> | <p>Bad faith <i>Turner v. Pub. Serv. Co. of Colo.</i>, 563 F.3d 1136, 1149 (10th Cir. 2009); <i>Aramburu v. Boeing Co.</i>, 112 F.3d 1398, 1407 (10th Cir. 1997).</p> <p>Neither bad faith nor intentionality required <i>Hatfield v. Wal-Mart Stores, Inc.</i>, 335 Fed. App’x 796, 804 (10th Cir. 2009); <i>Schrieber v. Fed. Ex. Corp.</i>, No. 09-CV-128-JHP-PJC, 2010 WL 1078463 (N.D. Okla. March 18, 2010).</p> | <p>Although this specific issue has not been addressed, the court declined to “create a presumption in favor of spoliation whenever a moving party can prove that records that might have contained relevant evidence have been destroyed” in <i>Crandall v. City & County of Denver, Colo.</i>, No. 05-CV-00242-MSK-MEH, 2006 WL 2683754, at *2 (D. Colo. Sept. 19, 2006).</p> | <p>Spoliation that impairs a party’s ability to support a claim or defense. <i>Pinstripe, Inc. v. Manpower, Inc.</i>, No. 07-CV-620-GKF-PJC, 2009 WL 2252131, at *2 (N.D. Okla. July 29, 2009).</p> | <p>Bad faith; adverse inference instruction <i>Smith v. Slifer Smith & Frampton/Vail Assocs. Real Estate, LLC</i>, No. CIVA 06CV02206-JLK, 2009 WL 482603, at *13 (D. Colo. Feb. 25, 2009).</p> |
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| Eleventh | <p>Duty to preserve potentially relevant evidence that party has “access to and control over” <i>Nat’l Grange Mut. Ins. Co. v. Hearth & Home, Inc.</i>, No. CIV.A. 2:06CV54WCO, 2006 WL 5157694 at * 5 (N.D. Ga. Dec. 19, 2006).</p> | <p>Courts in the Eleventh Circuit have not found conduct culpable without analyzing the facts, although reasonableness is not discussed.</p> | <p>Bad faith <i>Managed Care Solutions, Inc. v. Essent Healthcare, Inc.</i>, No. 09-60351-CIV, 2010 WL 3368654, at *4 (S.D. Fla. Aug. 23, 2010).</p> <p>Degree of culpability is weighed against prejudice caused by spoliation <i>Flury v. Daimler Chrysler Corp.</i>, 427 F.3d 939, 945 (11th Cir. 2005); <i>Brown v. Chertoff</i>, 563 F. Supp. 2d 1372, 1381 (S.D. Ga. 2008).</p> <p>In determining sanctions in the Eleventh Circuit, “courts look to factors enumerated in state law, because federal law does not set forth specific guidelines.” <i>Ray v. Ford Motor Co.</i>, No. 3:07CV175-WHA-TFM WO, 2011 WL 2149620 (M.D. Ala. June 1, 2011).</p> | <p>Bad faith <i>Ray v. Ford Motor Co.</i>, 3:07CV175-WHA-TFM WO, 2011 WL 2149620 (M.D. Ala. June 1, 2011); <i>Managed Care Solutions, Inc. v. Essent Healthcare, Inc.</i>, No. 09-60351-CIV, 2010 WL 3368654, at *12 (S.D. Fla. Aug. 23, 2010).</p> | <p>Bad faith (but malice not required; mere negligence insufficient) <i>Mann v. Taser Int’l, Inc.</i>, 588 F.3d 1291, 1310 (11th Cir. 2009); <i>Penalty Kick Mgmt. Ltd. v. Coca Cola Co.</i>, 318 F.3d 1284, 1294 (11th Cir. 2003) (bad faith); <i>Managed Care Solutions, Inc. v. Essent Healthcare, Inc.</i>, No. 09-60351-CIV, 2010 WL 3368654, at *13 (S.D. Fla. Aug. 23, 2010) (bad faith).</p> | <p>This issue has not been addressed.</p> | <p>Spoliation of evidence that was not just relevant but “crucial” to a claim or defense <i>Managed Care Solutions, Inc. v. Essent Healthcare, Inc.</i>, No. 09-60351-CIV, 2010 WL 3368654, at *8 (S.D. Fla. Aug. 23, 2010).</p> | <p>Negligence; jury to be instructed that the destruction raises a rebuttable inference that the evidence supported plaintiff’s claim <i>Brown v. Chertoff</i>, 563 F. Supp. 2d 1372, 1381 (S.D. Ga. 2008) (but other courts in Eleventh Circuit will not order any sanctions without bad faith).</p> |
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| D.C. | Duty to preserve potentially relevant evidence “within the ability of the defendant to produce it” <i>Friends for All Children v. Lockheed Aircraft Corp.</i> , 587 F. Supp. 180, 189 (D.D.C.), <i>modified</i> , 593 F. Supp. 388 (D.D.C.), <i>aff’d</i> , 746 F.2d 816 (D.C. Cir. 1984). | Courts in the D.C. Circuit have not found conduct culpable without analyzing the facts, although reasonableness is not discussed. | Case law addresses specific sanctions, rather than sanctions generally. | Bad faith <i>Shepherd v. Am. Broad Cos.</i> , 62 F.3d 1469, 1477 (D.C. Cir. 1995); <i>D’Onofrio v. SFX Sports Group, Inc.</i> , No. 06-687 (JDB/JMF), 2010 WL 3324964, at *5 (D.D.C. Aug. 24, 2010). | Negligent or deliberate <i>Mazloun v. D.C. Metro. Police Dep’t</i> , 530 F. Supp. 2d 282, 292 (D.D.C. 2008); <i>More v. Snow</i> , 480 F. Supp. 2d 257, 274-75 (D.D.C. 2007); <i>D’Onofrio v. SFX Sports Group, Inc.</i> , No. 06-687 (JDB/JMF), 2010 WL 3324964, at *10 (D.D.C. Aug. 24, 2010) (not for mere negligence unless “the interests in righting the evidentiary balance and in the deterring of others trumps the lacuna that a logician would detect in the logic of giving such an instruction”). | This issue has not been addressed. | Case law states that the spoliated evidence must have been relevant, i.e., information that would have supported a claim or defense, but it does not address prejudice. | “[A]ny adverse inference instruction grounded in negligence would be considerably weaker in both language and probative force than an instruction regarding deliberate destruction.” <i>Mazloun v. D.C. Metro. Police Dep’t</i> , 530 F. Supp. 2d 282, 293 (D.D.C. 2008). |
| Federal | Because the Federal Circuit “applies the law of the regional circuit from which the case arose” when it reviews sanctions orders, the Federal Circuit has only begun to develop its own law governing spoliation sanctions. <i>Monsanto Co. v. Ralph</i> , 382 F.3d 1374, 1380 (Fed. Cir. 2004). | | Bad faith and prejudice (but must be a sufficient degree of both and no lesser sufficient sanction) <i>Micron Tech., Inc. v. Rambus, Inc.</i> , No. 2009-1263, 2011 WL 1815975, at *13, 15 (Fed. Cir. May 13, 2011) | Bad faith and prejudice <i>Multiservice Joint Venture, LLC v. United States</i> , 374 Fed. App’x 963, 966 (Fed. Cir. 2010). | Not addressed yet | “Prejudice to the opposing party requires a showing that the spoliation ‘materially affect[s] the substantial rights of the adverse party and is prejudicial to the presentation of his case.’” <i>Micron Tech., Inc.</i> , 2011 WL 1815975, at *13 (citation omitted) | Not addressed yet | |

APPENDIX B

TRIGGER OF THE DUTY TO PRESERVE

Trigger of the Duty to Preserve, By Circuit:

| Circuit | <i>When is the duty to preserve triggered?</i> |
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| First Circuit | <ol style="list-style-type: none"> 1. The duty to preserve is triggered by “the foreseeability of litigation.” <i>Velez v. Marriott PR Mgmt., Inc.</i>, 590 F. Supp. 2d 235, 259 (D.P.R. 2008). 2. The duty to preserve “arises when a party knows or should know about potential litigation.” <i>Citizens for Consume v. Abbott Labs.</i>, No. 01-12257-PBS, 2007 WL 7293758, at *7 (D. Mass. Mar. 26, 2007). |
| Second Circuit | <ol style="list-style-type: none"> 1. “The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.” <i>Fujitsu Ltd. V. Federal Express Corp.</i>, 247 F.3d 423, 436 (2d Cir. 2001). 2. The “obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation—most commonly when suit has already been filed, providing the party responsible for the destruction with express notice, but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation.” <i>Orbit One Commc’ns, Inc. v. Numerex Corp.</i>, 271 F.R.D. 429, 436 (S.D.N.Y. 2010) (quoting <i>Kronisch v. United States</i>, 150 F.3d 112, 126 (2d Cir. 1998), <i>overruled on other grounds, Rotella v. Wood</i>, 528 U.S. 549 (2000)). Therefore, “the preservation requirement arises when a party ‘reasonably anticipates litigation.’” <i>Id.</i> (quoting <i>Pension Comm. v. Banc of Amer. Secs.</i>, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010)). 3. “Once a party reasonably anticipates litigation, it must suspend its routine document retention policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” <i>Pension Comm.</i>, 685 F. Supp. 2d at 466 (quoting <i>Zubulake v. UBS Warburg LLC</i>, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)). |

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| | <ol style="list-style-type: none"> 4. <i>See Neverson-Young v. BlackRock, Inc.</i>, No. 09 Civ. 6716(CM) (RLE), 2011 WL 3585961, at *3 (S.D.N.Y. Aug. 11, 2011) (suggesting that the plaintiff’s “duty to preserve electronic evidence related to this case” began once “she had contemplated . . . this litigation”). 5. “[A]nyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary.” <i>Zubulake</i>, 220 F.R.D. at 217. |
| <p style="text-align: center;">Third Circuit</p> | <ol style="list-style-type: none"> 1. “The duty to preserve evidence arises when a party reasonably believes that litigation is foreseeable and, as such, may arise many years before litigation commences.” <i>Medeva Pharma Suisse A.G. v. Roxane Labs., Inc.</i>, No. 07-5165 (FLW), 2011 WL 310697, at *13 (D.N.J. Jan. 28, 2011) (citation and internal quotation marks omitted). 2. “The duty to preserve begins when litigation is ‘pending or reasonably foreseeable.’” <i>Culler v. Shinseki</i>, No. 3:09-0305, 2011 WL 3795009, at *3 (M.D. Pa. Aug. 26, 2011) (quoting <i>Micron Tech., Inc. v. Rambus, Inc.</i>, 645 F.3d 1311, 1320 (Fed. Cir. 2011)). 3. A duty to preserve is an “affirmative obligation” that arises “when the party in possession of the evidence knows that litigation by the party seeking the evidence is pending or probable and the party in possession of the evidence can foresee the harm or prejudice that would be caused to the party seeking the evidence if the evidence were to be discarded.” <i>Kounelis v. Sherrer</i>, 529 F. Supp. 2d 503, 518 (D.N.J. 2008). |

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| <p style="text-align: center;">Fourth Circuit</p> | <ol style="list-style-type: none"> 1. “The duty to preserve material evidence arises 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.” <i>Silvestri v. General Motor Corps.</i>, 271 F.3d 583, 591 (4th Cir. 2001). 2. “Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” <i>Silvestri</i>, 271 F.3d at 590. 3. “The common law imposes the obligation to preserve evidence from the moment that litigation is reasonably anticipated.” <i>Victor Stanley, Inc. v. Creative Pipe, Inc.</i>, 269 F.R.D. 497, 521 (D. Md. 2010). 4. “The duty to preserve material evidence is triggered not only by litigation but also in the pre-litigation period if a party reasonably should know that the evidence may be relevant to anticipated litigation.” <i>Hare v. Opryland Hospitality, LLC</i>, No. DKC-09-0599, 2010 WL 3719915, at *17 (D. Md. Sept. 17, 2010). |
| <p style="text-align: center;">Fifth Circuit</p> | <ol style="list-style-type: none"> 1. “Generally, the duty to preserve arises when a party has notice that the evidence is relevant to litigation or . . . should have known that the evidence may be relevant to future litigation.” <i>Rimkus Consulting Group, Inc. v. Cammarata</i>, 688 F. Supp. 2d 598, 612 (S.D. Tex. 2010) (citation and internal quotation marks omitted). 2. “A duty to preserve arises when a party knows or should know that certain evidence is relevant to pending or future litigation. Once litigation is reasonably anticipated, a potential party to that litigation ‘must not destroy unique, relevant evidence that might be useful to an adversary.’” <i>Ashton v. Knight Transp., Inc.</i>, 772 F. Supp. 2d 772, 800 (N.D. Tex. 2011) (quoting <i>Toth v. Calcasieu Parish</i>, No. 06-998, 2009 WL 528245, at *1 (W.D. La. Mar. 6, 2009)). |

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| <p style="text-align: center;">Sixth Circuit</p> | <ol style="list-style-type: none"> 1. “As a general matter, it is beyond question that a party to civil litigation has a duty to preserve relevant information, including ESI, when that party ‘has notice that the evidence is relevant to litigation or . . . should have known that the evidence may be relevant to future litigation.’” <i>John B. v. Goetz</i>, 531 F.3d 448, 459 (6th Cir. 2008) (quoting <i>Fujitsu Ltd.</i>, F.3d at 436). 2. “The duty to preserve relevant evidence commences prior to the filing of the action, once the defendant reasonably anticipates an action may be forthcoming.” <i>King Lincoln Bronzeville Neighborhood Ass’n v. Blackwell</i>, 448 F. Supp. 2d 876, 878 (S.D. Ohio 2006). 3. <i>See also J.B. Hunt Transport, Inc. v. Adams</i>, 537 F. Supp. 2d 880, 890 (E.D. Mich. 2007) (noting that “Michigan [state] courts have held that even when an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action”) (citation and internal quotation marks omitted). |
| <p style="text-align: center;">Seventh Circuit</p> | <ol style="list-style-type: none"> 1. “A defendant has a duty to preserve evidence . . . which it reasonably knows or can foresee would be material (and thus relevant) to a potential legal action.” <i>Jones v. Bremen High School Dist.</i> 228, No. 08-C-3548, 2010 WL 2106640, at *6 (N.D. Ill. May 25, 2010). 2. “A party has a duty to preserve evidence over which it has control and reasonably knows or could foresee would be material to a potential legal action.” <i>Bryant v. Gardner</i>, 587 F. Supp. 2d 951, 967–68 (N.D. Ill. 2008). 3. “The duty to preserve documents does not need a formal discovery request to be triggered, the complaint itself can be sufficient when it alerts a party that certain information is relevant and likely to be sought in discovery.” <i>Porche v. Oden</i>, No. 02-C-7707, 2009 WL 500622, at *6 (N.D. Ill. Feb. 27, 2009). |

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| <p style="text-align: center;">Eighth Circuit</p> | <ol style="list-style-type: none"> 1. “When the prospect of litigation is present, parties are required to preserve documents that may be relevant to the issues to be raised, and their failure to do so may result in a finding of spoliation of evidence. The obligation to preserve evidence begins when a party knows or should have known that evidence is relevant to future or current litigation.” <i>Bd. of Regents of Univ. of Neb. v. BASF Corp.</i>, No. 4:04CV3356, 2007 WL 3342423, at *4 (D. Neb. Nov. 5, 2007). 2. “A duty to preserve evidence exists when a party knows or should know that the evidence is relevant to imminent litigation.” <i>Wagoner v. Black & Decker, Inc.</i>, No. 05-1537, 2006 WL 2289983, at *3 (D. Minn. Aug. 8, 2006). 3. “The obligation to preserve evidence begins when a party knows or should have known that the evidence is relevant to future or current litigation.” <i>E*Trade Secs LLC v. Deutsche Bank AG</i>, 230 F.R.D. 582, 588 (D. Minn. 2005). |
| <p style="text-align: center;">Ninth Circuit</p> | <ol style="list-style-type: none"> 1. “Defendants engage in spoliation of documents as a matter of law only if they had ‘some notice that the documents were potentially relevant to the litigation before they were destroyed.” <i>United States v. Kitsap Physicians Serv.</i>, 314 F.3d 995, 1001 (9th Cir. 2002) (quoting <i>Akiona v. United States</i>, 938 F.2d 158, 161 (9th Cir. 1991)). 2. “The duty to preserve evidence arises when a party has notice of a potential claim.” <i>Gronquist v. Nicholas</i>, No. C10-5374 RBL/KLS, 2011 WL 4001103, at *9 (W.D. Wash. Aug. 12, 2011). 3. “It is well established that the duty to preserve arises when a party knows or should know that certain evidence is relevant to pending or future litigation. Stated differently, the duty to preserve is triggered not only during litigation, but also extends to the period before litigation when a party should reasonably know that evidence may be relevant to anticipated litigation.” <i>Surowiec v. Capital Title Agency, Inc.</i>, No. CV-09-2153-PHX-DGC, 2011 WL 1671925, at *5 (D. Ariz. May 4, 2011) (citations and internal quotation marks omitted). |

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| | <p>4. “The duty to preserve attaches ‘when a party should have known that the evidence may be relevant to future litigation.’” <i>In re Napster, Inc. Copyright Litig.</i>, 462 F. Supp. 2d 1060 (N.D. Cal. 2006) (quoting <i>Zubulake</i>, 220 F.R.D. at 216).</p> |
| <p>Tenth Circuit</p> | <p>1. “A spoliation sanction is proper where (1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence.” <i>Burlington N. & Santa Fe Ry. Co. v. Grant</i>, 505 F.3d 1013, 1032 (10th Cir. 2007).</p> <p>2. “‘Ordinarily, the duty to preserve evidence is triggered by the filing of a lawsuit. However, the obligation to preserve evidence may arise even earlier if a party has notice that future litigation is likely.’” <i>McCargo v. Tex. Roadhouse, Inc.</i>, No. 09-cv-02889-WYD-KMT, 2011 WL 1638992, at *3 (D. Colo. May 2, 2011) (quoting <i>Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.</i>, 244 F.R.D. 614, 621 (D. Colo. 2007)). “‘It is well established that the duty to preserve evidence arises when a party reasonably anticipates litigation.’” <i>Id.</i> (quoting <i>Pension Comm.</i>, 685 F. Supp. 2d at 466).</p> <p>3. “For future litigation to be considered imminent, there must be ‘more than a mere possibility of litigation.’” <i>Velocity Press, Inc. v. Key Bank, N.A.</i>, No. 2:09-CV-520 TS, 2011 WL 1584720, at *2 (D. Utah Apr. 26, 2011) (quoting <i>Cache La Poudre</i>, 244 F.R.D. at 621).</p> |
| <p>Eleventh Circuit</p> | <p>1. “The elements of a spoliation claim are (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action....” <i>Green Leaf Nursery v. E.I. DuPont De Nemours & Co.</i>, 341 F.3d 1292, 1308 (11th Cir. 2003).</p> <p>2. The parties “had a duty to preserve relevant information from the time that this litigation became reasonably anticipated.” <i>Se. Mech. Servs., Inc. v. Brody</i>, No. 8:08-CV-1151-T-30EAJ, 2009 WL 2242395, at *3 n.8 (M.D. Fla. July 24, 2009).</p> |

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| | <p>3. “Thus, the duty to preserve evidence may arise prior to commencement of litigation. Indeed, the Court finds that the St. Cyr’s contemplated litigation and that it was reasonably foreseeable that the van would be relevant to the litigation. Thus, the St. Cyr’s were under a duty to preserve the van.” <i>St. Cyr v. Flying J Inc.</i>, No. 3:06-cv-13-33TEM, 2007 WL 1716365, at *3 (M.D. Fla. June 12, 2007).</p> |
| <p>D.C. Circuit</p> | <p>1. ““While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty 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.” <i>DL v. District of Columbia</i>, 251 F.R.D. 38, 47–48 (D.D.C. 2008) (quoting <i>Arista Records, Inc. v. Sakfield Holding Co. S.L.</i>, 314 F. Supp. 2d 27, 34 n.3 (D.D.C. 2004)).</p> |
| <p>Federal Circuit</p> | <p>1. “The duty to preserve evidence begins when litigation is ‘pending or reasonably foreseeable.’” <i>Micron Tech., Inc. v. Rambus Inc.</i>, 645 F.3d 1311, 1320 (Fed. Cir. 2011) (quoting <i>Silvestre</i>, 271 F.3d at 590). “This is an objective standard, asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation. When litigation is ‘reasonably foreseeable’ is a flexible fact-specific standard that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry. This standard does not trigger the duty to preserve documents from the mere existence of a potential claim or the distant possibility of litigation. However, it is not so inflexible as to require that litigation be ‘imminent, or probable without significant contingencies,’ as [one party] suggests.” <i>Id.</i> (internal citations omitted).</p> <p>2. <i>Hynix Semiconductor Inc. v. Rambus Inc.</i>, 645 F.3d 1336, 1347 (Fed. Cir. 2011) (applying “the correct standard of reasonable foreseeability, without the immediacy gloss,” to determine when the duty to preserve was triggered).</p> |

APPENDIX C

NOTES FROM SEPT. 20 DISCOVERY SUBCOMMITTEE CONFERENCE CALL

Notes on Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Sept. 20, 2011

On Sept. 20, 2011, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. David Campbell (Chair, Discovery Subcommittee), Hon. Michael Mosman, Hon. Paul Grimm, Anton Valukas, Elizabeth Cabraser, Prof. Edward Cooper (Reporter of the Advisory Committee), Andrea Kuperman (chief counsel, rules committees), and Prof. Richard Marcus (Associate Reporter of the Advisory Committee).

Judge Campbell introduced the call by saying that the task was to try to decide what should be the Subcommittee's presentation for the November meeting of the full Committee. In particular, there was the question whether the Subcommittee thought it best to focus any possible rulemaking on sanctions provisions only, or to work on a rule that also directly addressed preservation issues such as trigger, scope, duration, etc.

The first participant was not violently opposed to a sanctions-only rule. Many of the speakers at the Dallas conference were passionate about the need to take action to solve a serious problem of overpreservation. But given the multifarious factual contexts in which these problems arise, it seemed likely that developing case law would do a better job of handling these various situations than a rule, and that promulgating a rule might hobble the development of case law. At the same time, many lawyers are concerned about the "explosion" of sanctions rulings. One concern was that overpreservation would become so pervasive that there would be no case law because nobody would take a chance of being sanctioned. It is likely, however, that some will not be as organized as many we heard from in Dallas, with the result that there will be cases to articulate sensible principles.

Another participant offered a contrasting view. This participant had a change of mind during the Dallas conference. Although previously some effort to develop a preservation rule seemed sensible, the discussion disclosed such a variety of difficulties that would result from doing that as to make that course unwise. But with sanctions it is different. Reputable corporations won't run the risk of sanctions; the potential downside is so enormous that they will engage in what may seem senseless over preservation due to uncertainty about what some judge might later rule. Case law will not solve this problem, and the practical way to respond is to craft a rule that can provide assurance that reasonable behavior will not be sanctioned. But trying to develop a rule on trigger, etc., would not be wise or effective, and would create many problems that were emphasized during the Dallas conference.

Another participant agreed that we will ultimately get a more consistent result than we currently seem to be getting through case law development. But these issues very rarely get into court of appeals decisions. And the wait for clarity and consistency may be fairly long. Right now we have important differences on sanctions. The Fifth Circuit says that serious sanctions can only be imposed for willful destruction. The Fourth Circuit seemed in *Silvestri* to make an exception to the willfulness requirement for cases in which the failure to preserve comes close to taking away any way for the other side to present its case. The Second Circuit in *Residential Funding* said that negligence is sufficient to support sanctions. Companies that legitimately want certainty can't find it, and that is particularly true for those that engage in activities across the country. "The existing uncertainty in circuit authority is driving this." Although enabling the development of common law is desirable, it would be more desirable to provide a comfort factor by rule for reasonable behavior. True, we don't have evidence that reaches scientific accuracy about the extent and cost of overpreservation, as pointed out by some in Dallas, but a sanctions rule would be less likely to prompt strong opposition from those who emphasize that we have limited knowledge of the scope of the problem and would be better calculated to provide some relief to those suffering due to overpreservation without causing the multitude of problems that would result from several of the more specific proposed preservation rules.

Another participant began by observing that it is "hard to find a sanctions solution." The emerging reality right now is that there is a common law of sorts in complex litigation. In those cases, the lawyers are now negotiating solutions to these problems on a case-by-case basis. Stipulations are reached that sometimes are then embodied in court orders. But these solutions are not "common law" in the sense that they are reported and available as "precedent" for others. And they are evolving rapidly, keeping pace with evolving and emerging technology. If there were a way to make them accessible to a wider audience, that would be helpful. So it's not a problem of waiting forever; corporations that are preoccupied with the risk of sanctions would be less concerned if they could see what others have been doing. And trying to craft a sanctions rule raises risks unless it is done very carefully. There is always a risk that there will be loopholes, and it will be a challenge to avoid them. The main point of sanctions is to avoid the loss of important evidence. The need to deter destruction of such evidence must be kept in view.

Another participant began by agreeing with the prevailing skepticism about a rule on scope, duration, or trigger. A sanctions rule could to some extent address pre-litigation conduct by making evaluation of that conduct under a reasonableness formulation at the sanctions stage. That might

conceivably might prompt Rules Enabling Act questions, but they would seem much less weighty than those that could arise under a rule that sought directly to prescribe specific or general requirements for preservation itself. For example, there is a "trigger tone" to the proposal included in the Subcommittee's Category 3 exemplar for the Dallas conference, for it looks to failure to preserve information "that reasonably should be preserved in the anticipation or conduct of litigation." That itself has an internal trigger notion, although it does not specify what things cause it to be triggered as did the Category 1 and Category 2 exemplars. In drafting this sort of rule, one issue will be deciding how far our anxiety about rulemaking authority extends.

If one drafts a sanctions-only rule, it is right to worry about loopholes that could be exploited. There is a tension that perhaps cannot be avoided. On the one hand, we wish to provide reassurance that preservation need not be done to an unreasonable extent. On the other hand, we wish to avoid creating discrete opportunities to legitimate destruction of evidence because the destruction seems to fall into a "destruction permitted" category. That links up to the need to integrate the degree of fault with the consequences of failure to preserve. It may be too protective in a significant number of instances to insulate those who did not act willfully or in bad faith against any adverse consequences of failure to undertake preservation that a reasonable person would do. That, after all, is the standard in the Category 3 formulation. True, it is judged in hindsight, but unless the behavior is found to be unreasonable it will not be a ground for any "sanction." To say that unreasonable behavior is totally insulated against any "sanction" may be too much. And that points up the difficulty of distinguishing between "remedies" and "sanctions." Perhaps an adverse inference instruction should be regarded as a "remedy" rather than a "sanction." Articulating a workable distinction may prove exceptionally difficult.

Another participant began by comparing the Dallas conference to a conference at Brooklyn Law School in 2000 to discuss the possibility of rulemaking to deal with issues of e-discovery. Like this conference, that one had an array of rule-amendment ideas to discuss. The striking thing, however, was the near unanimity of those involved in the Brooklyn event that rulemaking should not be pursued at that time because it was not clear what the problems were or that rules of this sort would produce improvements. (Years later, rules dealing with many of these topics were ultimately adopted, but only after considerable additional study and another conference that yielded a very different verdict on whether rules would help.) The Dallas conference was very different from the Brooklyn conference in that many in Dallas firmly favored adopting rules. Among those favoring rules, there was considerable diversity of views, and

one sort of conclusion from some that favored rules was "Don't let pursuit of the perfect get in the way of adopting the good." Put differently, there is a considerable constituency favoring action.

It would therefore be very dubious for the Subcommittee simply to report back that it thinks nothing further should be done now; at least the full Committee should be introduced to the difficulties and promises of rulemaking to address the widespread concerns we have heard about. At the same time, trying to develop anything specific about preservation issues like trigger, scope, and duration seems to invite many troubles. One is the Enabling Act difficulty. That need not be overstated, but should be noted. After all, the only way any such rule could come into play is if a lawsuit ends up in federal court and a party then asks the judge to take action because another party did not do what this rule required before trial. (Perhaps somebody might urge a state court judge to do something because of failure to comply with a federal preservation rule, but that judge presumably could say the rule is not binding in that court. Rule 1 says, after all, that these rules govern "actions and proceedings in United States district courts.")

Focusing on sanctions will raise a number of tricky questions, many of which have already been identified in this discussion. Including a preservation rule could strengthen efforts to curtail "inherent power" as a ground for sanctions because the rule could prescribe that "sanctions" could only be imposed under the terms of the rule. Whether "inherent" power can be limited by rule could be debated, however. The current reality that usually there is no preservation order could be addressed by using the model of Rule 37(c)(1), which makes Rule 37(b) sanctions available for failure to disclose or supplement without the need for a prior order.

Other problems that will arise include efforts to determine what is a "sanction" and what measures are permitted even though a party that failed to preserve acted without the culpability required for sanctions. One could say that sanctions are to "punish" and "remedies" are designed to undo the harm and level the litigation playing field after loss of evidence. But from that view, an order that certain facts will be taken as established, or that certain witnesses or exhibits could not used could be regarded as a "remedy" more than a sanction. Indeed, the Rule 37(b) provision most clearly penal -- contempt -- seems not to be the sort of adverse consequence that preoccupied those who urged action during the Dallas conference.

Linking culpability to sanctions could also pose very substantial problems because of the difficulty of determining what is more serious in the abstract. The New York Bar Ass'n approach, for example, creates such a hierarchy. But it is not

clear how "sanctions" should be grouped. Rule 37(b) seems to distinguish between directing that facts be taken as established and prohibiting a party from supporting or opposing certain claims or defenses, but the N.Y. Bar Association seems to lump them together as calling for the same degree of culpability. That lumping raises questions also about a directive that a court use the least severe under the circumstances. Relatedly, what may be most severe in one case may not in another. For example, if plaintiff has nine claims and has discarded evidence relating to claim no. 9, is dismissal of that claim really serious if the other eight claims are sufficient to support all relief plaintiff seeks in the action? Somewhat similarly, it may be that distinctions between various levels of culpability -- e.g., wilfulness and gross negligence -- are sufficiently debatable so as to provide rulemaking challenges.

Another participant reacted that the consensus of the call seemed to be turning toward a sanctions rule. The Dallas conference certainly included diverse views, and many expressed a very strong desire for rulemaking action.

A participant observed that it would be desirable to find a better word than "sanctions" to describe what Rule 37 is designed to do. Although deterrence is a factor here, a greater or equal concern is to enable parties to prove or defend their cases effectively, not to punish preservation behavior. The problem is the electronically stored information is so easily altered or lost that material that would not have disappeared in the pre-ESI world is often gone now. That prompted the response that, compared to the pre-ESI world, there is now much more information available, so the net effect is not necessarily that there was more remaining information in the past than in the present; probably the reverse.

Another reaction was that at some point the evidentiary issues raised by electronically stored information will have to be confronted. Because it is manipulable, electronically stored information presents singular, perhaps unique, issues of authentication, for example, But that is for the Evidence Rules Committee, not this one.

Returning to the question whether "sanction" is really the right word, it was suggested that "consequences" might be preferable. For example, should an adverse inference measure be regarded as a sanction or a remedy? A response was that this issue is a symptom of the declining awareness of circumstantial evidence. There is so much information now that people may think that the only proof that counts is "direct" proof like a film of the event in suit. Some might call this the "CSI effect," for that TV program seems usually to turn on electronically stored information that unequivocally establishes who is guilty.

A reaction summing up the various views expressed is that the group is pretty much uniformly averse to trying to write a rule dealing with scope or duration of preservation obligations, and not in favor of restating the common law on trigger in a rule.

Discussion shifted to what should be presented to the full Committee. The Subcommittee needs the benefit of the full Committee's thinking, but the full Committee has not had the education that the Subcommittee has received over the past year. The various materials that the Dallas conference generated -- which James Ishida has posted on an A.O. website -- abundantly present the various views that the Subcommittee has encountered. The ultimate decision on how to proceed should be for the full Committee, but the Subcommittee's present thinking is that the rulemaking focus should be limited to sanctions regulation. If the full Committee agrees, the Subcommittee should try between the November and March meetings to develop a specific proposal. All agreed with this plan.

APPENDIX D

NOTES FROM SEPT. 13 DISCOVERY SUBCOMMITTEE CONFERENCE CALL

Notes of Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Sept. 13, 2011

On Sept. 13, 2011, the Discovery Subcommittee of the Advisory Committee held a conference call. Participating were Hon. David Campbell (Chair), Hon. Paul Grimm, Anton Valukas, Elizabeth Cabraser, Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Assoc. Reporter, Advisory Committee), and Andrea Kuperman (Chief Counsel, Rules Committees). Judge Michael Mosman was unable to participate.

Judge Campbell opened the discussion by reiterating that he had concluded that we really should have two calls to conclude our consideration of what to report to the full Committee in November. Today's call, therefore, would be an occasion for exchanging views on what we learned from the Dallas conference. It was agreed that the two-call sequence made sense.

The judge also mentioned that it seemed to him that providing the full Committee with all the materials received in advance of the conference (and perhaps some later submissions, such as one from Google) seemed a good idea. There are so many moving parts that it would be desirable for all to have the fuller grasp of what they are, and how different groups have divergent views. There was discussion of the suggestion that these materials be posted soon on a separate site, and the inquiry from James Ishida about doing that. It was agreed that separate posting in the near future would be desirable.

Finally, it was noted that we have in essence six different rule proposals or packages before us. There are the three we have developed, plus those put forward by Tom Allman, the N.Y. State Bar Ass'n, and the LCJ proposal. It was noted that Google may be submitting a further proposal.

With those preliminaries out of the way, the discussion turned to reactions to the views expressed at the conference.

The first participant began with the "go/no go" question -- should the Committee continue to work on this subject? There is a variety of views. Some urge that it's too early to devise any rule amendments. Others argue that it's urgent to act, and to act promptly. This speaker thinks that given the depth and breadth of the concerns the Committee should proceed. "This concern is real, and it will not go away."

That leads, however, to the question what should be done. It is unclear how to take on trigger, scope, and duration in any specific way. For example, promulgating a rule that says one must go back two years, or a default of ten custodians seems unworkable. That is just not how our legal system deals with

such things, in part because circumstances are so various. Instead, it relies on reasonableness criteria that take account of those circumstances. A prime example of that approach is the negligence standard used in tort cases. Speed limits and the like are specific directives that may bear on negligence determinations, but we don't say anyone who exceeds one is per se negligent as a matter of law, or that anyone who is driving under the limit is per se not negligent. We will not be successful if we try to provide specifics and make them dispositive.

The key thing is to appreciate that the biggest worry is about sanctions. The focus there should be on culpability, the other factors that bear on reasonableness, and the relation between culpability and the aggressiveness of the sanction. The risk of sanctions seems to be the problem that most preoccupies those who are most concerned about the need to act on these issues. Maybe to some extent that worry is overstated. It is hard to find an example in which a company did something reasonable and nonetheless got whacked with serious sanctions. In any event, a sanctions rule is the way to go.

Another participant agreed that if you look at the cases where there have actually been serious sanctions, they have all or almost all involved pretty egregious conduct.

Another participant agreed in general with these opening observations. Indeed, for this participant the materials for the conference and the views expressed there produced a significant reorientation. For example, the various trigger ideas are just not workable. This is pretty settled law. It relies on a reasonableness forecast in all the circumstances. Trying to devise specifics that make it more precise will not work, and might create arguments for preservation in situations in which they don't presently apply. Similarly with the scope considerations. We could spend a lot of time trying to devise specifics that would create as many problems as they would solve.

The real issue is sanctions. It is true that there are very few cases imposing severe punishments on companies that behaved responsibly. But there are some possible examples. For example, a Florida state-court case entered a huge judgment against a company that was affected by the court's conclusion there had been spoliation. That judgment was overturned, but the event was a valid warning for companies across the country. Few could responsibly disregard this kind of danger.

Given these threats, people are driven to keep everything. It is important for the Committee to recognize the validity of these fears, almost to say "We feel your pain." But that does not mean that arbitrary limits or directions on preservation can be written into a rule. So it is important to steer a middle course between a rush to judgment and seeming indifference to

very real and serious problems.

Another participant agreed. The problem is illustrated by the Microsoft submission with an inverted pyramid. That figure is a reality that affects both sides of the litigation. But it is not a problem that can be solved by rules. It would not make sense to differentiate between the scope of discovery and the scope of preservation. The reality with litigation is that a lot of what is produced is not used in discovery, much less at trial. Only a small percentage of the information proves to be important. It is really discovery that we are doing, and once we discover something important we go from there. We have to look through the haystack to find the needle.

Right now, however, there is a more basic problem that is causing people understandable difficulty -- how much to keep for business purposes. The explosion of data has produced an acute need for new approaches to information management. That's independent of litigation. To a significant extent, even if we could prescribe specifics about what should be preserved when litigation is on the horizon, the difficulties of making those other decisions would persist.

Regarding specifics, it seems that the N.Y. State Bar proposal, while potentially attractive as a rule, is really just restating the common law. It is not clear that adopting such a rule would add much, and it might in some specifics produce problems we heard about in Dallas.

Sanctions are the big concern; to a significant extent, and understandably, Corporate America is asking "Will we get whacked?" It is important that the punishment fit the crime, and to ensure that it is not imposed where there really has not been a crime. We should not leave corporations to waste millions because of the in terrorem prospect of crippling sanctions unless they do so. Instead, we want to encourage best practices. But the problem is that there is hugely more material out there now than there was until very recently.

Another participant emphasized that the growth and proliferation of computer-based devices for storing and sending information has placed many stresses on business in particular and society in general. We are in a period of transition in figuring out a way to deal with this expansion of information. That is not a litigation problem or a sanctions problem, however. It is an information management problem. That does not mean that information management can be expected to devise a complete solution to the whole thing, but does mean that we cannot accept responsibility for the larger set of issues. Even if we could devise a thoroughly satisfactory set of preservation specifics, that would likely not ease much of the pain of this transition. It seems, therefore, that the pursuit of precise specifics is not

going to work.

The key thing that rules and litigation add is the threat of possibly draconian sanctions. Sanctions are actually very rare, and it is arguably unreasonable for companies to tell us that they will behave unreasonably unless we give them precise specifics coupled with absolute guarantees they cannot be sanctioned providing they do very specific things.

Sanctions are a different matter; some work can be done on them. Whether one can devise a set of Sanctioning Guidelines is unclear, however. The N.Y. State Bar recommendation attempts to do that, but the question what sanction is more severe than another probably often depends on a lot of specifics. Adverse inference instructions are an example. They may vary greatly in content, and may have very different impacts in different cases. It would likely be difficult to say for sure that they are or are not more severe than, for example, directing that a party is not permitted to use certain proofs.

Another participant commented that the discussion prompted another thought. Yesterday this participant spent the day receiving presentations from e-discovery vendors. They said the direction their organizations are moving is one that will facilitate both retention and analysis of data. The goal is to preserve more efficiently and produce less. It is true we are in a transitional phase, but this is a purposeful transition in that many are trying to facilitate and direct it. The goal on the plaintiff side is to find the needle in the haystack. But for the plaintiff to be able to do that, you have to preserve the haystack.

The fear is that rules might be superimposed on this evolving process. "We can't write a rule that will solve the problem of how much to preserve for how long." And we should not be in the business of enabling bad behavior. There really has not been a case in which a federal court imposed severe sanctions for behavior that was not bad. Nobody on the plaintiff side wants to make a career of sanctions litigation, but we must be very careful not to promise a sanctions free zone.

Another participant took issue with some comments. Yesterday this participant spent two and a half hours on the phone with the CEO of a very large corporation trying to work out how much it had to preserve. For those who say "let's wait," the answer is that this state of highly expensive uncertainty requires attention, and probably a serious rulemaking response. Responsible corporations simply do not hold burning parties. And parties demanding production are not always reasonable. The Government, for example, will often demand everything. Throughout the modern corporation's operations, sanctions constantly loom as a very serious threat. There is always the

risk that some judge will demand too much and follow up that demand with sanctions overkill.

Another participant agreed that there was a problem with discovery demands for "any and all" information on a topic. Gradually judges are resisting those overbroad demands and insisting that lawyers become more focused and specific in what they seek in discovery. "By definition, you are imposing on the other side when you make one of these requests." That is something that might rightly be included in a Note.

A reaction was that this is a desirable development in judicial behavior, but it can come too late for the preservation dilemma. The real problem is before a suit is filed. Then the company must ask itself (and its lawyer) "What do I have to do?" At that point, you can't guess what the judge will do because you don't even know who the judge will be. The default position is to save it all, even fragmented damaged data perhaps.

Another reaction was that the Microsoft inverted pyramid was very helpful in focusing thoughts. During the Sept. 9 conference, that seemed to be on the mind of several of the in-house representatives. But that does not mean we can really solve that problem. Whatever we do, the problem will continue because there are unavoidable uncertainties. Even with presumptive limitations, there will be the possibility that a judge will later conclude that the wrong number was used. Should we have ten custodians or 50? A presumption that ten suffice does not mean a judge will later reject the argument that more (or different) custodians should have been used. And when the threat of litigation first arises, it will not be possible to say for sure where the pertinent information can be found. Inevitably, even with specifics, there will be a need to preserve a great deal. Maybe there is some amount of information now being preserved solely because of the fear of sanctions, and if so a rule effectively reassuring companies that they will not face sanctions will permit them to forgo saving that increment. But the more important reason for broad preservation is uncertainty about what should be preserved, not fear of sanctions. That is a huge problem now because there has been such an explosion of data. And it means we can't solve the problem depicted in the inverted pyramid.

Another participant agreed, in part. The pyramid will always exist. "You have to keep the needle, and you don't know where it is, so you have to keep the haystack." Arbitrary limitations will not work. Nonetheless, there must be a way to improve things from the way they are now. At present the corporations can't see any end to it; it is almost mind-bending. There are more and more locations where data can be and are stored. A rule of reason may not suffice to deal with the force of an inherently unreasonable situation.

A reaction was that this problem is most acute in the pre-litigation phase. After suit is filed, a party in extremis can go to the judge. Perhaps we could devise a way to get the issue before a judge before suit is filed, but how could that be done ex parte? And won't the other side urge that it needs more information before taking a position on such a request? The competing and urgent reality that we heard about is that now there is a risk that it may seem that the lawyers are running the company, at least in terms of information management. Ultimately, however, this is a question of managing risk, and in general corporations know how to do that.

The reply was that it should be possible to provide some useful direction about the level of preservation that would suffice. Maybe a rule of reason would suffice. The goal is, in one sense, to provide some level of comfort.

A suggestion was to think of a sanctions rule continuum. For example, there is a range between the worst bad faith and most understandable and innocent slip-up. In a way, the unsurprising fact that "something else always will turn up" is a version of the understandable slip-up. There is a middle range where distinctions are harder to draw. What is the real difference between simple sloppiness in execution and recklessness, for example? We must be wary of the talismanic value of labels. On Friday, at least one speaker suggested that leaving the automatic deletion in operation could be regarded as willful. If that's so, a protection against sanctions for anything but "willful" deletion might not be worth much. These difficulties are compounded with scope of preservation determinations made before litigation is filed.

Another participant noted that these uncertainties present a tough problem. The caselaw is very detailed and highly fact-specific. One enduring problem is epitomized by the Fourth Circuit's *Silvestri* case, where plaintiff's suit was dismissed even though it's very difficult to say plaintiff willfully failed to preserve the airbag in his landlady's wrecked car. At some point, should culpability not matter if the harm to the other side's ability to put on a case has been serious enough? Presumably that would not apply to loss of information without any party's fault. For example, if an earthquake destroyed the car, making the allegedly defective airbag unavailable, one would presumably not dismiss the plaintiff's suit even though the defendant could not examine the airbag. So there is a ticklish problem on calibrating sanctions.

Discussion turned to misgivings expressed by large organizations during the conference about adopting specific trigger provisions in a rule. It is understandable that a number of entities such as governments may be leery of a rule saying that any letter suggesting a claim will be filed triggers a duty

to preserve. But it is less clear why a rule focusing on sanctions and reasonable behavior would cause difficulties. Governments find themselves on both sides of the "v." in different cases. As investigating or enforcement bodies, their attitudes toward preservation may diverge from the attitudes they bring to the table when they are defendants. It should be possible to devise sensible rules that deal with the needs of both sorts of governmental activity, but understandable that one immediate reaction would be uneasiness about some features of the drafts submitted for discussion during the conference.

It was noted that these considerations might also bear on the way to proceed in November. One way would be for the Subcommittee to resolve what approach makes most sense to it, and present that choice for discussion. Another would be for the Subcommittee in effect to present something of a "redo" of the conference and invite a fuller discussion about which course to pursue. It is uncertain whether other members of the full Committee have strong views, and in any event it is clear that many outside the Committee have strong views. That may mean that there is reason to examine the basic choice whether to proceed and, if so, how to do so in a thorough way in a full Committee meeting. But doing so could make it more difficult to have a fully-formed proposal for the March meeting, which would have to be done to get the proposal into the next rulemaking cycle. Perhaps it would be better to defer for another year, but that would be the consequence of failing to have a full proposal for the March meeting.

Next conference call: The conclusion was to talk again a week later at the same time -- Tues., Sept. 20, at 7:00 a.m. Pacific time. In the interim, members should reflect on the topics discussed during this call and the various rule options already before Committee.

APPENDIX E

NOTES FROM SEPT. 9 DISCOVERY SUBCOMMITTEE MINI-CONFERENCE

Mini-Conference on Preservation and Sanctions
Dallas, Texas
Sept. 9, 2011

On Sept. 9, 2011, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a mini-conference on preservation and sanctions in Dallas, Texas. Present representing the Subcommittee were Hon. David Campbell (Chair), Hon. Michael Mosman, Hon. Paul Grimm, Anton Valukas, and Elizabeth Cabraser. Also present were Hon. Lee H. Rosenthal (Chair, Standing Committee), Hon. Mark Kravitz (Chair, Advisory Committee), Prof. Steven Gensler (member, Advisory Committee), Hon. Arthur Harris (liaison from Bankruptcy Rules Committee to Advisory Committee), Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Associate Reporter, Advisory Committee), Peter McCabe (Secretary, Standing Committee), Andrea Kuperman (Chief Counsel, Rules Committees), James Ishida, Jeffrey Barr, and Benjamin Robinson of the Administrative Office of the U.S. Courts, and Emery Lee of the Federal Judicial Center.

Invited participants present included: Thomas Allman (retired general counsel, BASF Corp.), Jason Baron (National Archives and Records Administration), Theresa Beaumont (Google, Inc.), William Butterfield (Hausfeld LLP), Bart Cohen (Berger Montague), Prof. Gordon Cormack (Univ. of Waterloo), M. James Daley (Daley & Fey), Alex Dimitrief (Gen. Elec. Corp.), Andrew Drake (Nationwide Insurance), Hon. John Facciola (D.D.C.), Yvonne Flaherty (Lockridge, Grindal Nauen PLLP), Maura Grossman (Wachtell, Lipton, Rosen & Katz), Robert Levy (Exxon Mobil), Sarah Montgomery (Department of Justice), Hon. Nan Nolan (N.D. Ill.), Robert Owen (Sutherland, Asbill & Brennan), Ashish Prasad (Discovery Services, LLC), John K. Rabiej (Sedona Conference), John Rosenthal (Winston & Strawn), Hon. Shira Scheindlin (S.D.N.Y.), Allison Stanton (Department of Justice), Ariana Tadler (Milberg), Mark Tamburri (Univ. of Pittsburgh Med. Ctr.), and Kenneth J. Withers (Sedona Conference).

Observers included: E. Farnsworth (G.E.), Jennifer Hamilton (John Deere & Co.), John O'Tuel (GlaxoSmithKline), Michael Beckwith (Shell Oil Co.), William Hubbard (Univ. of Chicago Law School), John Vail (Center for Const. Lit.), Matthew Nelson (Symantec/Clearwell), Mikki Tomlinson (Chesapeake Energy Corp.), Jonathan Palmer (Microsoft Corp.), Tom Mishell (Contoural, Inc.), G. Frank McKnight (Nelson Levine deLuca & Horst), Al Cortese (Cortese PLLC), Emily Johnson (Fulbright & Jaworski), and Thomas Hill (G.E.).

Judge Campbell began by thanking all those who agreed to participate, noting that the papers already submitted had supplied the Subcommittee with a very solid foundation upon which the conference could build. In general, the goal would be to proceed through the three topics outlined in the memorandum for the conference.

1. Nature and Scope of the Problem

The first topic, therefore, was the nature and scope of the preservation problem. The written submissions took different views of the frequency of difficulties resulting from the need to preserve for prospective litigation. Some appeared to say that "virtually every" case presented such problems. But on the other hand, many judges don't seem to see problems very often; perhaps in 1% of the cases before them. So one way of putting the concern is whether the problem was sufficient to warrant rulemaking.

A corporate general counsel opened the discussion by emphasizing the very substantial difficulties encountered at this company. It has over 200,000 employees. More than 10% of those employees change jobs or leave the company every year, presenting problems about what to do with their electronic records and computers. Right now, the company has more than 10,000 employees operating under litigation holds, and approximately 20 terabytes of material on hold. These numbers are "staggering," and produce both expenses for the company and stress for its employees. Three examples would illustrate:

The first illustration was a matter in which there was as yet no litigation pending. As a result, there is no adverse party to negotiate with about preservation. Nonetheless, the company has already spent \$5 million on preservation, and it is currently paying \$100,000 per month to segregate and preserve information for this possible future litigation. One of the serious costs of this undertaking has been the human effort involved in identifying the custodians who must preserve, a judgment that can't be done by any software.

A second illustration is provide by a fairly large active case in which 60 custodians were identified at the outset. But as the case evolved that was expanded to 250 custodians. Despite this widespread preservation, most of the preserved documents had not been reviewed by anyone. But preserving less than this amount raised unacceptable risks from the view of the company. And reassuring it that what it does now will later be judged under a "reasonableness" standard is not a sufficient assurance to deal with this sort of wasteful problem.

The third example is a matter with a "small" value of less than \$4 million. But the company had identified 57 custodians who should preserve. The company tried to reduce the costs of the preservation process by employing services based in other countries, but nonetheless the overall activity has already cost some \$3 million. Despite that, the other side has not even reviewed most of the documents. Yet the court resisted shifting costs to the other side. This raises the question "Is the goal preservation for its own value?" Right now, the rules are not

reasonably contributing to providing for a cost-effective trial.

In sum, preservation and spoliation are not like other issues. Too often, 20/20 hindsight is used to scrutinize what companies do. And the company's reputation is on the line. "What we need are specific guidelines."

One question in reaction to this initial presentation was whether, absent the current rules on preservation, would all the information that has been preserved be gone? The response from the initial speaker was that it depends. The key point, however, is that this is driving the design of information systems. Another company, for example, completely revised its electronic information system so it was designed to be more responsive to litigation demands. "That's upside down."

Another question was whether one could break down these costs. Would it suffice to say "Put a hold on 60 people." Would that reduce the costs? The answer was that it would not. The costs result from the tasks and locating and segregating. Often this turns on a decision by an attorney. The costs result from capturing and segregating the information to be preserved.

Another attorney echoed these comments. A decade ago, many companies had a knee-jerk reaction to keep everything. A lot of companies are still in oversaving mode. As time went by, the cost of saving or accessing legacy backups grew and grew. It is difficult to say there is nothing of value on those tapes. At the same time, companies were without direction about what to do with this data. From the perspective of other countries (which are much more attentive to privacy concerns), it is difficult to explain why we keep data so long.

A judge reacted that "You're talking about big data cases. But in many of my cases there is very little discovery and only a limited amount of pertinent information. You can fit all the discovery into one box." Are we getting to the point where we are talking only about problems of large cases?

Another judge agreed that "We have cases like that. And we also have mega-cases." The problem is to de-link sanctions issues and preservation issues. Sanctions are involved in fewer than 1% of cases, so that's not a frequent issue. The real issue is how much to preserve and at what cost. It sounds like you would like guidance on preservation without regard to sanctions.

Another attorney agreed that the concern was not that sanctions were the driver. Very few cases involve serious sanctions. That simply does not happen to companies that act in good faith.

Another attorney said that the emphasis was on the wrong

problem. Preservation is a very fact-specific issue. It is extremely hard to say in the abstract how many custodians would suffice. The goal seems to be to determine by rule what must be preserved, but the big step missing in that discussion is the 26(f) meet-and-confer session. What should be done is to beef up Rule 26(f). Make it more like the 7th Circuit Guidelines. The goal should be to get the lawyers to sit in a room and work out a specific solution that fits the case. "I have done this with others in this room." It is the right way to solve these problems on a case-by-case basis.

A reaction from a corporate general counsel was that the number of sanctions motions or sanctions impositions is not the right measure of the real problems. Instead, his company is operating under a de facto rule that there must be extremely broad preservation. That is because all it has to utilize is case law based on very specific facts, and some of those decisions appear to raise real risks of sanctions unless extremely extensive preservation is done. He was hired at his company to address this issue. It has gotten to the point where the tech. people want to design efficient systems and the legal people tell them they can't use the most efficient setups because of preservation demands. At this time, his company has over 4,500 employees subject to at least one litigation hold. But of all that preservation, less than 10% of the information is ever even collected for possible use in litigation; we are overdoing by 90% even if measured by the amount produced in litigation. (Often the amount produced is much more than the amount used in the case.) Even the case that produces discovery that will fit into a single box is likely to have much more information preserved. And most of that activity happens before litigation begins; at that point "I can't talk to opposing counsel because there is no opposing counsel."

Another corporate general counsel agreed. The threat of a sanctions motion drives preservation. The Microsoft letter is very good on the issues raised. The result is that the company has to preserve everything, including the emails about the daughter's birthday party. Too often, once you do get to the point of a Rule 26(f) meeting the other side assumes that all you have to do is push a button to save everything, or the "right" things. In patent litigation, in particular, these difficulties are very frustrating because complaints are often extremely vague. The cloud environment makes things even harder. It includes a variety of social media, and may involve a collaborative setup that is not entirely suited to preservation.

A judge asked what the expectation about rule guidance really entailed. The fear of sanctions is different from guidance for a given case. Even after a case is filed, considerable uncertainty will exist. Cases evolve. You can't always know what you will eventually need to preserve for.

Another in-house counsel agreed that all uncertainty could not be removed. But at least it would be very helpful to have "objective guideposts" that will enable us to proceed with more confidence than we can under a standard of "reasonableness," particularly where that standard is applied in hindsight. What happens is that we produce millions of documents, but there is always one document left out. With specifics, we can reduce uncertainty about what we have to do.

A plaintiff lawyer commented that the Sedona survey said that preservation was addressed during fewer than 25% of the 26(f) conferences. A one size fits all solution simply will not work on these problems. That leads to a question -- does the burden change after the 26(f) conference and the entry of a 16(b) orders? The reply was that the conference does help. People should use the 26(f) opportunity. But that does not eliminate the problem of the document popping up later.

Another attorney emphasized the size of this problem, which is huge due to technology. We have reduced the cost of storage of a gigabyte of information, but there has been an explosion of information. This is getting worse as we move more and more to reliance on mobile computer-based instruments. The growing importance of the cloud is another factor that multiplies the problem. Some will be tempted to blunt-instrument responses. One company, for example, has revised its voicemail system so that a mailbox is limited to fifteen ten-second messages. The 26(f) meeting, meanwhile, is not working. With experienced lawyers, it works. But that is far from the majority of the cases. Moreover, it simply happens too late.

A plaintiff lawyer observed that no one rule will fit all the varying circumstances affected by preservation requirements. The reality is corporations have huge volumes of information and their opponents are often not sophisticated. But if companies make reasonable, good faith decisions they should be comfortable they will not be subjected to sanctions. Putting more teeth into 26(f) sounds worth considering. But you can't specify the number of custodians in a rule. A rule would be "a band-aid."

Another participant pointed to the Sedona survey. To begin with, this is hardly a representative sample of American lawyers. But some trends can be noted. 95% agreed that preservation issues were more frequent. 75% said that development was due to the proliferation of information. More than half had been involved in cases in which they advised saving everything. Rule 26(f) was used in fewer than half the cases by these sophisticated lawyers. The problem we are seeing is not with the rules, and it does not seem that it is one in which outside counsel are deeply involved either. Problems raised today don't seem to occur often with those surveyed by Sedona; overseas sources, cloud computing, social media, uncertainty about the

trigger all seem not to affect these lawyers regularly.

A judge commented that 80% of the expressed concerns of in-house counsel were about pre-litigation decisions. When litigation is filed, there is a judge to go to if disputes arise and you need guidance. We should try to separate sanctions and preservation. The in-house argument is "We need a guidepost." For something like that, I believe in education more than a rule. Aren't there other types of guideposts you could use? How about Committee Notes, or conferences? Sedona has a great set of principles that people should learn about; judges certainly take them into consideration. The response from one in-house lawyer was that a rule change would be the most dramatic way to address these issues; it would be more effective than education. "Bright line rules are needed."

Another attorney agreed that 26(f) is ideally the best solution to many of these problems, but 85% to 90% of the time you have to make decisions without anyone on the other side to talk to. The 800-pound gorilla is that the scope of discovery is so broad that preservation must also be unreasonably broad. It would be better if preservation was limited to "material" or "necessary" information.

Another participant began by noting that the fact that only 1% of cases involved a preservation issue that was raised with the court is not a good measure of the scope of the problem. The judges don't see the problem. Nobody wants to come to the judge, and the problem exists outside judicial view. One thought would be to recognize that the serious problems are limited to organizational litigants, and perhaps only larger organizational litigants. Perhaps the differentiating factor is data volume; most litigants don't have the sort of volume big companies tend to have. At the same time, empirical research is needed. This research need not be quantitative; qualitative work would be very informative. One goal would be to avoid putting every litigant through the "e-discovery gauntlet." A question was whether smaller operations -- the mom and pop company -- might not really be much less prepared for these problems than large sophisticated companies. The response was that those smaller companies don't have the organization to deal with these issues. They are the ones who overdo preservation.

A judge returned to preservation. We don't have a problem once litigation is on file. The current rules address that. The pre-litigation situation is where the angst lies. That is where guidance would be most useful. The rules we have work well once litigation is filed.

A lawyer responded that guidance is important there, but it is also important not to understate the size of the problem. Too many judges don't believe preservation is something they should

worry about. Unless the parties press the court, the judge won't focus on this.

Another lawyer noted that he had 38 years of experience in commercial litigation. In the last ten years or so, he has seen a change that bears on this topic. Until a decade ago, spoliation was not a major preoccupation. Now, in contrast, we seem to assume there is rampant spoliation unless vigorous litigation holds are in place. What is crucial is to recognize that there is a huge difference between prohibiting deliberate destruction of evidence and adopting an affirmative duty of preservation and punishing those who don't get it right. This shift has produced extremely expensive and largely useless activity. One insurance company, for example, has for the last five years saved everything. A big part of the problem is the inconsistency in the decisional law.

A federal attorney observed that the U.S. Government is a microcosm of the entire litigation system; it is involved as plaintiff and defendant, and in a wide range of cases, both in terms of subject matter and dimension. Bright lines would affect everything, all these cases, and would not be limited to the very small number that involve the very large companies in preserving huge amounts of information. Moreover, trying to intrude into the prelitigation decision to preserve through a rule raises serious Enabling Act issues. One question was raised about why the Department of Justice worries about increased burdens due to such specifics as specified triggers for preservation. The response was that some of the specific triggers mentioned in the circulated discussion drafts focus on such things as retaining an expert, or receipt of a "claim." The government gets lots of "claims." Almost every disgruntled taxpayer's communication with IRS could be called a "claim." Almost all of those are disposed of through an administrative process, and do not result in litigation.

Another question was whether focusing on sanctions would also raise problems for the government. Those issues are dealt with now under a common law method. Why would rules focusing on them raise problems? The response was that there are lots of differences among the circuits. For example, they differ on privilege waiver. Would a rule actually give us the consistency many say they want? Even with a rule there will still be the inherent authority of the court.

Another attorney returned to the 26(f) conference. There is not sufficient emphasis on getting to the 26(f) conference soon enough. Even then, defense counsel repeatedly say "We know our responsibilities. We are doing what we are required to do. That's all you're entitled to know." This prompted a question about how one could add "teeth" to Rule 26(f) to make it more effective. A suggestion was to look at the 7th Circuit project.

That forces people to do what they should do. A judge noted that his 26(f) order commands attorneys to talk about specified topics, but he has found that they almost never report to him about those topics.

Another judge noted that there is a pilot project in the S.D.N.Y. for complex cases that requires attorneys in those cases to develop an ediscovery protocol. That would be far too much to require in the 90% of cases that are not complex, but for those cases that are it moves beyond generalities. An attorney applauded that effort, but emphasized that a pilot is in only one court. "Putting in teeth would be helpful, but it won't solve the problem." The problem is that back-end sanctions decisions are "perfection oriented."

A lawyer familiar with the S.D.N.Y. pilot reported that it gives teeth to the 26(f) process. Counsel must discuss time periods, specific custodians, etc. It requires them to report whether they did discuss these things, whether they agreed on a method of managing them, and invites judicial action when agreement was not reached. "If you do this at the outset, it's tough to question later. 26(f) is working, but not well enough. People are ignorant and don't know what to do. We need a rule with specifics." Also, this does not solve the pre-litigation problem.

An in-house lawyer addressed the question what could be done to provide certainty. One helpful thing that has been suggested is to identify what can be excluded from preservation. ESI has redundancies by its nature. Small companies may have a lot of data that are very complex. And large companies may be "deer in the headlights" regarding preservation, just as small companies may be. Judicial indications of firm guidelines can be important to large and small companies.

Another in-house lawyer noted that relying on the 26(f) conference is somewhat simplistic in terms of the problems companies actually confront. For example, his company is updating 90,000 computers world-wide. As it considers the features it should include, there is no "opposing counsel." We have to worry about our approach. It was asked whether the main influences on such computer upgrades are information management concerns or litigation preparation. The answer was that the IT people design information management, but too often the lawyers then say "You can't do that." The existence of so many litigation holds means that the information management activity is sometimes hobbled by litigation imperatives.

Another in-house lawyer echoed the insecurity being expressed. His company has 54,000 employees in more than twenty facilities. From his perspective, the risk of sanctions is driving his handling of what should be business problems. "When

I issue a litigation hold, I ask myself 'Am I doing enough.'" Plaintiff lawyers will use the ruling in every case against us. Absent an opposing party to negotiate with, should the question be whether we are willfully destroying data, or whether we have "done enough" to make sure nothing is lost? With 20/20 hindsight, it is almost always possible to imagine something more that could have been done. The standard for pre-litigation conduct should focus on whether the party intentionally destroyed evidence. Once litigation is filed, my marching orders to outside counsel are to seek a consent order, and if that is not possible to move for an order from the court. That way, the ground rules become clear early in the case. But before that can be done, we are on our own.

It was asked what a rule should say to address these concerns. The answer was that certainty as to the trigger is item no. 1. The second desirable feature is to provide assurance that, at least in the pre-litigation stage, the only thing that creates a risk of sanctions is willful destruction. But if a preservation rule is triggered by demand letters, it will actually make this problem worse.

A judge asked whether a rule could provide certainty. The response was that the trigger should be service of the complaint. A response raised a hypothetical of a hospital in which three patients die. Assuming there is some reason to believe that their treatment might be questioned, does that mean until the families find lawyers, and the lawyers draft and file and serve a complaint there is no duty to preserve? The response was to refer back to how things were ten or twenty years ago. The current dynamic involves an assumption of rampant spoliation. That is just not reasonable. In the three-death example, there surely would be efforts to keep records about the care of the patients. But in today's climate the focus too often is on whether everything was halted. Hospitals have increasingly complex and interconnected electronic records. The operation of these systems is complex, and modifying them is also complicated. To say that the system of a large hospital must be modified every time there is an unfavorable outcome would seriously hamper its operation. "I am very uncomfortable with the trigger."

Another lawyer added that there is a slippery slope problem if a mere letter triggers the duty to preserve. That could cripple the federal government, for example. The urge to enumerate a lot of specifics in a code disregards the reality that we have a common law, fact-specific legal system. We are caselaw-based, not just rule based.

Another in-house counsel urged the Committee not to let the quest for the perfect solution prevent identification of a "pretty good" solution. As things are now, we have an incredibly high preservation burden. Measures that would materially reduce

that burden without being perfect could be extremely helpful. A general rule could provide that help if it provided examples even if those were not themselves "rules."

A judge noted that the rules provide a framework for decision. For example, suppose a rule that called for good faith actions. The message from some seems to be that there seems now to be a presumption of sanctions. Perhaps a presumption that certain sorts of preservation efforts are ordinarily sufficient would be helpful even in the absence of a strict rule.

Another judge called attention to the trigger standard proposed by the New York State Bar Association -- "reasonably expects to be a party to a litigation." How would that work? It is different from formal notice of a claim, much less postponing until formal service. If there are examples, they belong in the Committee Note, not in the rule.

A response from an in-house lawyer was that "Anything that gets me closer to clarity is helpful." We get subpoenas, for example. If the service of a subpoena results in a duty to preserve, that is a heavy burden. "It would bring us to our knees." Anything like that should be in Rule 45. But, prompted by a question, it was agreed that service of a subpoena results in some duty to preserve, for example the very things requested by the subpoena. The question might be rephrased in terms of whether the scope and duration of the duty to preserve are the same for nonparties served with a subpoena and potential parties.

Another lawyer reacted that such a provision "does not give us complete comfort." For example, consider a governmental investigation. Does the government have to institute a broad preservation regime every time it undertakes an investigation? Many investigations do not result in formal proceedings of any sort. Many that do reach more formal stages result in administrative resolutions. How does this clarify when the trigger is pulled?

A computer scientist observed that it was not clear what the dimensions of the costs would be. One task is to identify information. Another would be to store and preserve data. It seems that much of the discussion is really preoccupied with downstream costs such as review of the data. Privacy is also implicated by storage and retention of data. For the present, it is still unclear what this involves.

An in-house counsel offered an example: If an employee leaves, ten departments have to be involved in litigation holds. "We spend millions on this activity."

2. Effects of technology

Judge Campbell turned the discussion to technology issues. The goal would be to get a sense for what's coming. For example, consider cloud computing and social media. Those could be called "second generation" issues. They were not even on the horizon when the 2006 amendments were drafted. Can we forecast what sorts of further developments may occur, even if we cannot say what exactly they are likely to be? Another sort of topic that might be discussed is whether it would be useful or risky to refer to technology in the rules themselves. On the one hand, that could be very useful if specificity is helpful. On the other hand, references like that could be obsolete even before the rule goes into effect, or soon thereafter.

The first participant to comment said that there seemed to be two sorts of errors embedded in the questions for the conference. First, they seemed unnecessary Malthusian. For example, in the 1890s there were predictions that cities would soon be overwhelmed by manure produced by the horses used to pull carts, streetcars, etc. Of course, alternative means of transportation meant that horses largely disappeared from cities instead. "We can't predict the future." In 2006, nobody foresaw social media. With this technology, we can't foresee anything with confidence more than six months into the future.

A second type of embedded mistake seems to result from vendor hype. Companies say they've solved the e-discovery problems when they haven't. True, there has been a lot of progress. For example, predictive coding is shaping up to be a real improvement for some specific tasks. But even that is hardly the be-all or end-all for all issues. There are inherent limits on the discussion. As a result, it makes sense to be cautious about promulgating rules. Judicial education or Committee Notes providing guidance are one thing, but not rules.

A computer scientist observed that it is not clear what is imaginary and what is real. In a way, the discussion could develop into a comparison of fantasy and possibility. Some things are clearly not possible. For example, there will not be software that can anticipate the issues in future litigation. Then there are things that are possible but don't exist now. For example, somebody asked him recently whether it would be possible to rewind a Wiki to find out exactly what it said three weeks ago. He can conceive of ways to accomplish that, but there is not presently any software that would do so. It is not at all clear why somebody would create such software. Who would buy it? Compare the document review process. It seems imminent that new methods will significantly improve the process of review of large amounts of data for use in litigation. Perhaps that might some time have an impact on an earlier phase -- the preservation phase. But it may be that it is significant because it is cheaper to preserve more material in a seemingly overbroad manner on the assumption that if litigation review becomes necessary the

predictive coding process will make that task relatively bearable.

A judge reacted: "I find this discussion terrifying." One in four cases filed in the federal courts are filed by pro se litigants. A leading example are Title VII plaintiffs. Where will these people get these new technologies? Many other cases involve municipalities. They are cash-strapped. How are they to acquire and use these new technologies? They are in the dark ages.

Another participant focused on cloud computing. The move to the cloud is likely to cause an increase in the volume of data stored because it will lower the cost of storage. Another effect is that preservation and the collection process will be more settled. Right now it is far from settled. Cloud providers and organizations are seeking their way. But by a process of evolution, this will become settled. For later phases of e-discovery, it is already somewhat true that the process is largely the same for data in the cloud and for data stored elsewhere. We can anticipate that e-discovery providers will evolve to do their job in the cloud.

An attorney reacted: "Technology is not the solution." We can't craft a rule that relies on technology. For one thing, that would shut the courts to a majority of litigants. The cost of storage is not critical, but other aspects are.

Another lawyer observed that we can make some predictions. Consider the evolution of communication over a fairly brief period of time. We have shifted from email to texting and instant messaging to social media. We can also see that there is an advantage to cloud computing because it could get easier. Maybe it would permit a search to be made on a live index. On the other hand, one has to be cautious about putting too much confidence into predictive coding. The collection on which that relies is the same as it has been in the past; it has not as yet provided a shortcut for that activity; it only solves the problem of review cost. Indeed, something like an automated enterprise-wide search will probably never be possible. There are multiple systems to be used. It should be clear that putting technology into a rule would not make sense.

Another lawyer noted that it seems many think that "feasible" means the same thing as "reasonable." As soon as a technique (perhaps a costly one) is invented to accomplish a task, it seems that we are expected to buy and use it. Shouldn't the question, instead, be whether it is unreasonable not to use it? For example, it is important to consider whether the new technique fits in with your existing infrastructure, and whether it is commercially available at a reasonable cost.

Another point is that the conflict about what can and should be done is real now, and not just for big companies. The attitude of those outside this country reinforces this point. Other countries have blocking statutes and privacy directives that do not fit with our attitudes about broad discovery and aggressive preservation. Multinational companies can be caught between a rock and a hard place. In most of the world, anyone referenced in ESI is regarded as an "owner" of that information, possessing legal rights over preservation and sharing of the information. This sort of problem is not limited to large multinational entities, however. Mom and pop enterprises that market their wares through the Internet might have to confront it also.

This discussion prompted a question: What should this Committee do with these international implications? It is true that the rest of the world has a very different attitude, but the Supreme Court in the *Aerospatiale* and *Societe Internationale* cases seemed not to consider those factors dispositive or perhaps very important. Given those directions from on high, how should the Committee handle the international attitude toward American discovery? The rest of the world may regard us as cowboys, but the Supreme Court may be telling us that we are supposed to proceed that way.

A response was that it would be helpful to clarify our sensitivity to these issues. A statement of the U.S. judicial system about the validity of the concerns of other countries, or at least a recognition of the difficulties these concerns can cause U.S. companies, would be helpful. But another lawyer cautioned that touching on the international realm in the rules could raise a lot of concerns. "This is a completely different dialogue from the one we have been having."

Another participant noted that in Australia the problems are the same as here, and another added that in the UK they are looking to us for guidance. A judge noted that the heightened concern with privacy that has emerged in some other countries might fit into a consideration of what is reasonable for litigants before U.S. courts. That is different from adopting or importing the non-U.S. attitudes into the U.S. court system. That observation prompted the reaction "Yes, that's the idea" from the participant who originally voiced the concern. In addition, it might also be useful to consider the possibility of a stipulated protective order regarding the handling of data, and how it would be preserved. That could provide comfort.

Another lawyer noted that the European view seemed to focus on "processing." Would that include preservation? An response was that it would. The first lawyer reacted that it could lead down a slippery slope to put it into a rule. Frankly, there is reason to worry that companies that don't want to provide

discovery will use these foreign attitudes as an excuse for not doing what they don't want to do. We must be very careful about creating another hurdle to permitting traditional U.S. discovery.

Another participant observed that there is a thread running through this discussion: Technology has changed something that the rules address -- "possession, custody, or control" of information. That has long been in the rules, and although there have been areas of controversy it seemed relatively straightforward with hard-copy materials. But with the cloud, things are different. The reality is that the "possessors" of data don't have as much control over it as in the past because the cloud providers wield much control. Small entities and individuals are in no position to insist on the arrangements they prefer. Perhaps the best way to regard the situation is that everyone is on the grid when linked to the cloud. But can you preserve your Facebook page exactly as you want to? To ask somebody to preserve could be asking a lot. "Can you tell Google to keep all the data?"

A judge reacted that this comment was "spot on." The reality is that, even though it is "your" data, it may be that you can't control it or get it. Beyond that, it seems that there is no technological solution right now, and no way to foresee whether there will be one sometime in the relatively near future. These are the reasons for problems of scope and sanctions. Consider the entity that has 65,000 computers. It also has to worry about smartphones, home computers of employees, tablet computers, the cloud, and the Stored Communications Act. The problem has grown a great deal since e-discovery first became a focus of the Committee. Now there is also a concern about stifling innovation. Small companies may have to spend a lot to deal with this. All companies may be deterred from adopting innovative business methods because of preservation imperatives. A question was whether many of those difficulties would still exist even if a rule could strikingly ease the burden resulting from preservation for use in litigation. There are lots of other preservation directives, and other reasons to preserve not tied to legal directions to do so. The problem won't go away even if we devise a perfect solution to our part of it. The response was that clarification would still be a major step to deal with a major portion of the overall problem.

Another participant said that the merging of corporate and personal media has already emerged. Companies are turning to social media to market their products. Employees are using social media at work and to communicate with others at work. It is possible that companies could be thought to have a responsibility to guard against harassment via social media. Another example involves logs of Internet or social media activity. Those particularly present privacy issues.

Returning to the "possession, custody, or control" issue, a judge asked whether the need is to rewrite the rules or educate ourselves on the new realities. In 2006, the conclusion was that the rules' term "document" did not capture the variety of items - - such as a dynamic database -- that are included within "electronically stored information." Perhaps developments since then show that refinements are necessary in the notion of "possession, custody, or control." A reaction was that this might open Pandora's box. As things now stand, the rules' concept is held to extend pretty far. On the one hand, we need to keep pro se litigants in mind; they really don't control their own information infrastructure. On the other hand, modifying the concept of control might raise many issues about many sorts of material are sought by a Rule 34 request.

A reaction is that control is a different issue. Courts may assume that you own the data. But we are hearing that you can't really get at it. Instead, you have to get a third-party provider to go along or do what you want done. The response was that in South America, the law says that if my name is on data, I am the owner of it. That is yet another perspective that might bear on "possession, custody, or control."

Another participant observed that social media have further complicated these matters. They are relatively new. But larger corporations are adapting quickly to their emergence, and they increasingly have their own social media sites to market or pursue other corporate objectives. A question was whether this could also implicate employees' social media sites. For example, is it possible that employees might communicate with each other about work via their Facebook sites? The answer is that such things do occur.

A judge asked whether there are clear distinctions between the employer's social media sites and the employees' sites. The response was that it is not clear. Many would say that the content is what drives the decision whether this is company or personal.

A lawyer asked a question prompted by the responses to the Sedona survey: Do we have the technology today to do a better job of records management that will aid preservation?

One response cited electronic medical records; the increased facility there focuses on providing medical care. Another response was that good information governance was foremost. There is surely no rush to delete data. For one thing, there are lots of regulations that require preservation. But we want to encourage saving the right things. Consider financial services. FINRA regulations provide a number of specific directives. But with changing technology, things may be cobbled together in a somewhat happenstance manner. Retrofitting technology is tough.

Thus, a 1990 system may have cloud computing "bolted onto it." These arrangements are designed to achieve business purposes in a cost-efficient manner. The legal department shouldn't dictate IT standards.

A lawyer noted that you really can't separate technology and preservation from scope. We go far beyond asking people to preserve the evidence they will use, or the essential evidence. The real problem arises with records that are largely useless stuff. That prompted another lawyer to emphasize that it is important to keep in mind that information is lost without fault but not on purpose. Consider, for example, a smart phone. Assuming that the owner of the phone takes precautions to avoid intentionally destroying important information, that does not protect against losing the phone. But under the view of some courts, negligence can be sanctioned. That prompted a judge to note that, if the cell phone is dropped in the ocean that probably does not lose most of the data, which is in the possession of the provider. A response to that was that with a PDA the data are in the device, not in the phone company. A further response was "You are both right. Some data are on the PDA, but not on a cell phone. It depends on the nature of the device."

This discussion prompted the recognition that service providers are frequently subpoenaed for information of this sort. Cellphone information may show where the person being investigated for a crime was at all moments, for example. A judge noted "I sign 30 orders a day for this sort of information." Another judge noted that Google has to separate the information-provider aspect from other activities. A lawyer noted that this discussion is more about e-compliance. But the tools for that task are presently limited. The technology companies are not delivering them.

3. Rule Approaches to the Problems

The third topic focused on the various approaches to possible rules outlined in the materials for the conference. One was an effort at a highly detailed enumeration of preservation responsibilities. The second included a more general catalog of preservation provisions, to a certain extent as an effort to capture some approaches derived from caselaw. The third did not include any provisions on preservation but instead focused solely on sanctions, keying on reasonable behavior and inviting consideration of a variety of factors in making that reasonableness determination.

A lawyer with long experience addressing preservation rulemaking issues began the discussion by reporting that many had discussed these problems frequently. The starting point was the idea of a litigation hold, recognized in the Committee Note to

Rule 37(e) as adopted in 2006. Today's discussion shows that many companies are being very aggressive in calibrating their holds. Some people, on the other hand, are taking risks. Meanwhile, it seems that in terms of discovery cost a small portion of the cases (about 5%) are the big problems. Perhaps one should stand back and look at the rest of the cases. For them, strengthening Rule 26(f) is not the answer, and technology seems to hold no promise of providing the answer.

The basic problem is that good faith is not certainly sufficient to avoid sanctions, causing angst and uncertainty. The solution is twofold. First, allow the caselaw to develop. The decisions are increasingly careful and consistent. Although they are not totally in accord, they are moving coherently in a helpful direction.

Second, revisions to Rule 37 would be a good way to deal with the angst. But Rule 37(e) is too cautious and limited. It should be broadened to deal with all information. It should focus on bad faith. The version of the rule recently adopted in Connecticut is a good example of doing that; sanctions are forbidden where the party has acted reasonably or in good faith. Meanwhile, the current rule's limitation to sanctions "under these rules" should be eliminated because it provides no limit on sanctions under the court's inherent power.

This sort of approach would not attempt to address preservation explicitly by rule provision. Dealing with things like the trigger begins to go down the slippery slope of telling people how to run their businesses. "I'm terrified by the proposed specific rules on trigger." If you must have rules directed to these "front-end" matters like trigger and scope, couch them in terms of reasonable conduct, done in good faith.

A judge agreed that specifics would not be appropriate in a rule, but thought that more general provisions about preservation could profitably be considered. For an example, see the New York State Bar Association proposal beginning on p. 36 of its submission. This model is simple and elegant but does not create the risks that would flow from providing specifics.

The judge would not, however, limit sanctions to cases of willful destruction. If that were the standard, why would anyone have any incentive to preserve? Ignorance would produce bliss, if allowing deletion without knowledge of the contents were a complete defense to sanctions. Instead, the N.Y. State Bar links the level of culpability to the severity of the sanctions. This would be desirable and constructive.

Such a rule would foster national uniformity, which is important. There might be an *Erie* issue because there might be an argument that state law cases in federal court must be handled

under state preservation rules. But that should not weaken the effort to develop rules on preservation and sanctions.

Another judge noted that the scope of preservation would have to be at least as broad as the scope of discovery. It would be bizarre to say that one could defeat discovery by destroying material reasonably foreseen to be within that scope.

A lawyer urged that Option 1 should be pursued. The goal should be to provide guidance and take the question out of the caselaw, which has left lawyers and clients with too many serious questions lacking clear answers. There should, at least, be specifics on the trigger, the scope (which should be limited to material that is "relevant and material"), and sanctions. That prompted a question about the second element. How would one make a determination what is not only relevant but material before a suit is filed? Wouldn't that depend on what claims are made, and what allegations are made in support of those claims?

A judge asked why trigger should be included in a rule. The RAND report says that the companies RAND talked to found the trigger clear. Others have told the Committee the same thing. Why address it in a rule?

The response was that the current law on trigger is indeed understood, but it is not the right standard. "At our company, 40% of our holds are not about active litigation." The trigger should be limited to situations in which there is a "reasonable certainty" of litigation. A question returned to the example of the hospital in which three patients died. Would that make litigation reasonably certain? If so, would it also be reasonably certain with regard to EEOC complaints? Only a small percentage of EEOC complaints are followed by suit. And even hospital incidents involving patient death and possible mistakes in treatment may not result in suit.

Another attorney reacted that "You don't need clarity. The problem is that you don't like the current law. This is not an effort to clarify the common law." A judge offered an example: A patient was to have an appendectomy, and instead her kidney was removed. Would it then be reasonably certain that suit would follow? Won't the hospital want to make a special effort to keep all records about this medical procedure?

A plaintiff lawyer offered the example of a plane crash. Under the Option 1 standard, when can the airline or plane manufacturer hold a "shredding party"? There really is not a problem with the trigger caselaw. "I contacted a defense employment discrimination lawyer, expecting to be told this was a problem. But I was told it is not."

An in-house lawyer responded that the "shredding party"

example is off the mark because it could not be justified in light of the precipitating the event. This is not a situation in which the normal information management activities of the party are continued. Instead, it is a change in practices prompted by the event. That should be the focus -- when should the normal preservation practices be modified? That is consistent with the Committee Note to the 2006 amendment to Rule 37. "I agree that it is problematical to itemize." But the New York Bar's proposal is an improvement. The problem of settlement is a confounding one that probably cannot be solved. What if I'm in settlement negotiations and think there's a 95% likelihood that we will settle? Can I then authorize the deletion of the pertinent information? "I like my chances under a rule that emphasizes the possibility of litigation, not just a dispute."

One area that is ripe for specifics, however, is scope. There is a big problem with standards. One could look at it as involving the range from the minimum to the maximum. The minimum would be the key information that any entity would (after trigger) realize is crucial to maintain. The maximum, on the other hand, could include a wide range of materials having only a distant relationship to the present dispute. For example, a familiar dispute in employment discrimination cases is discovery of information about the employment experience of other employees. How does a company determine which other employees' records should be retained because a given employee is disgruntled about an employment decision? A lot of comfort could come from a rule that delineated at least a default guideline such as 10 custodians and a two year limit.

Regarding sanctions, this issue has brought forth a lot of emotion. From the defense side, it is urgent that serious sanctions be limited to situations in which there is clear bad conduct. In conjunction with that, another idea to be considered is authorizing an immediate appeal of outcome-affective sanctions. Then plaintiffs could make a decision about whether they wanted to risk delaying their cases for a considerable period to seek such sanctions.

Another lawyer with a defense background reported that in 38 years of practice he had never encountered conduct like what the plaintiff lawyers fear -- deliberate destruction of evidence. Based on this experience, he feels that the regime of affirmative preservation duties that are becoming more and more exacting is not justified. The FJC study proves that spoliation is not a rampant problem. To accomplish this improvement, there should be two foci:

- (1) It is unlawful for an entity to destroy evidence within its retention period with the intent to make it unavailable to the adversary in litigation; and

(2) The trigger is the service of a complaint. This is the right trigger because Rule 11 and possible malicious prosecution liability recognize that the actual filing of a complaint in court is a serious action. Only then should the serious and costly burdens of preservation attach. On the plaintiffs' side the analogy would be to trigger preservation "when you begin to draft your complaint."

The problem has been that the caselaw has been made in bad cases, but these are all aberrant. Generally, companies behave as they are supposed to behave. Once the complaint has been served, the defendant can determine with some confidence the scope of the dispute.

It was asked whether it would be sufficient to insist on a reasonably specific letter demanding preservation and articulating the basis for the claim, not the service of a formal complaint filed in court. Then the company could make the requisite determination. The response was "Then why not go with the filing and service of the complaint?" At the same time, every company should have a clear policy: "Never destroy documents for the purpose of removing evidence."

A plaintiff lawyer reported having sent letters after service of the complaint that prompt a reply saying "We'll do what we have to do." Even then, defendants will not explore reasonable preservation regimes. Although there are not a lot of shredding parties going on, the automatic deletion systems keep operating. Plaintiffs do not immediately hire lawyers, and lawyers don't immediately file suit. This approach would curtail needed preservation. And a very specific rule would not work for lots of cases. For some cases ten custodians would be too many. For many big organizations, it is too few.

A reaction was to ask whether there is any adverse consequence for sending a preservation letter that is grossly overbroad. "We get totally unreasonable preservation demands all the time." One answer was that the company writes back and says "Here is what we will do." If it does that, and that preservation is reasonable, that should weigh very heavily in any later determination whether it has preserved properly. Another response was that one could liken this to a "tort of wrongful preservation demand." That might be more than a rule could provide.

Another defense-side lawyer urged that it would be desirable to specify in a rule how many custodians are to be affected, and the nature of the data that must be kept.

A plaintiff lawyer disputed the wisdom of presumptive numerical limitations. True, those do exist in some discovery rules, but when they are not appropriate to a case one can ask

for more and, if necessary, go to the court. In addition, with regard to number of custodians, this idea disregards reality. The number is only one consideration; the identity is another. "I spend two or three meetings with defense counsel deciding which custodians are key. You have to review an organizational chart to make this determination."

Another plaintiff lawyer urged that presumptive limitations should not be favored. For example, the proposed two-year limitation on preservation cannot easily be tied to statutes of limitation for they vary from place to place. Beyond that, focusing on the service of the complaint seems inconsistent with the thrust of the *Iqbal* attitude toward pleadings. In order to get the necessary information saved, counsel may feel it's necessary to file and serve sooner.

An in-house lawyer reacted that the burden on a potential defendant should not be imposed on the basis of a demand by somebody who has no Rule 11 obligations. Maybe that was fine in the hard-copy era, but "the universe has changed due to the explosion of data."

A judge noted that it is important to keep in mind that ultimately the duty to preserve is owed to the court. There is at least an argument that the action of the plaintiff in sending a preservation letter or serving a complaint does not change that duty.

Another judge pointed out that there are plenty of statutes that require some sort of exhaustion before filing and service of a complaint. Should the preservation period not start because the plaintiff is satisfying such a requirement? Another judge offered an example: An employee files an EEOC claim, and the employer has a 90-day automatic deletion program for email. Should failure to preserve email about the situation leading to the EEOC claim be regarded as intentional destruction? A defense-side lawyer responded that it would not be permissible "if you know that it will be deleted."

Another judge reacted to the discussion by asking "Do we need a rule change, and if so now?" It's been less than five years since the 2006 changes went into effect. They were a great service, but absorbing any set of rule changes takes time. The effects of those changes have not yet been fully felt. It's dubious to try to make practitioners absorb another set of rule changes. Besides that, it's really too soon to know what should be put into a national rule. Right now, the fact there is some diversity is really a good thing; the differences in approach are stimulating thought and analysis. But that process of refinement of the law by the common law method is much advanced already. This reality is brought home by a review of the very thorough memorandum prepared by Andrea Kuperman. That shows that "the

courts are getting it right." There may be a couple of outlier decisions, but 98% of the judges are doing what we want them to do.

Another judge noted that the rules process itself takes several years and serves as a further learning process. Meanwhile, there is some force to the view that we are not really trying cases any more. And it seems that preservation is touching many things; perhaps it infects the entire litigation process. We are told that the differences in standards that remain are a significant source of cost and delay. It seems at least arguable that interpretations of "reasonable anticipation" of litigation are too disparate, that scope determinations may sometimes seem arbitrary, and sanctions practice could be improved by explicit recognition that reasonable, good faith actions are protected against some more serious consequences.

An in-house lawyer emphasized that the proportion of problems that actually get to a judge for decision is quite small, and these are "extreme" situations, which provide limited guidance for other situations. What the cases show are either defendants who are odious or plaintiffs who are flagrantly overbroad. But we don't have the time to wait for the common law process to proceed. "In 18 months it will be out of control." We now need at least a safe harbor.

Another lawyer urged that there is an "absolute need" to "separate fear from fact." Sanctions are very rarely sought. What is the problem? I agree it's too early to consider rulemaking. We also need a better grasp of how much effect there really is on pre-litigation behavior. There are lots of other preservation regimes besides the one we are discussing. Whatever we do, companies will not be free of many legal requirements to preserve information. Regarding triggers, any specifics produce clear problems. No one size will come close to fitting all. Even a suggestive list is difficult and dangerous. Moreover, there is always the question whether such efforts will supplement or supplant other legal regulation of information storage. There are embedded problems of conflict with myriad statutory and regulatory provisions, and also questions about possibly curtailing inherent authority on this duty that runs ultimately to the court. The Committee should consider very seriously the potential impact on the 99% of cases in which no sanctions problems surface before venturing into this area.

A judge urged that the Committee keep separate the "scope" and "limits" questions. The last time the Committee looked at Rule 26(b)(1) scope of discovery, it began a 20-year debate that resulted eventually in a rule change in 2000 that arguably did not produce much change after generating vehement controversy. The practical utility of limits as tools to get a handle on problems, on the other hand, seems to hold sufficient promise to

deserve more attention. It may be, however, that it is not possible to devise such tools to address these problems. "Taking on relevance is really tough."

Another lawyer said he disagreed with those who say we need more data. Modest steps would provide valuable guidance. Presumptions are useful. They give corporations guidance in a variety of ways. The New York State Bar proposal, for example, would give us useful change. Right now, corporations are laying off people due to the cost of e-discovery. That's not a good direction for the country.

Another lawyer emphasized that those favoring action now are acknowledging that only modest gains seem in prospect. What is not adequately appreciated is the risk of high unintended costs. This area could readily produce such costs, and their true extent is not currently known. One thing is clear -- the cost of e-discovery will not be solved by this rulemaking activity.

Another lawyer emphasized that specific guidance would be very useful. For example, a number of custodians would at least provide a company with something to use in budgeting regarding preservation. It could serve as a maximum from which to work.

An in-house lawyer emphasized that we should not be driven by the outlier case. We should not delay. We need change. Pilot projects won't solve this. Worrying about the possible consequences of a rule change should not mean that we make no progress. It merely warns us what we should focus upon as we move forward.

Another in-house lawyer expressed support for the New York State Bar approach, particularly regarding nonparties served with subpoenas.

Another in-house lawyer observed that there are interesting points with all three approaches outlined by the Subcommittee. But perhaps it would be best to weave some combination of these various methods. There is a need for action. Patent cases provide an example of the need for change. Complaints are very vague. Although the defense tries to focus on clarity, that takes time. Almost unavoidably something that could conceivably have been preserved is not. Focusing on prejudice is critical.

A judge noted that specifics on what could be presumptively excluded from preservation was helpful as an education tool, but probably is not useful in a rule.

Reactions of Observers

Judge Campbell invited any observers who wished to provide comments to do so.

An in-house lawyer urged considering how these issues would look if examined from scratch. Right now there is "monumental inefficiency." One goal should be to avoid the inverted pyramid in the Microsoft submission, showing enormous amounts of information preserved and only a tiny proportion actually used in the case. This has led to "monumental inefficiency." The rules reform should focus on scope and limits and sanctions.

Another lawyer emphasized that the University of London is engaged in a study of cloud computing that could be very useful to the Committee.

Another in-house lawyer emphasized that issues of overpreservation are not limited to huge companies, but afflict companies of all sizes. With relatively small products liability cases (e.g., \$40,000) counsel still lie awake nights worrying about these issues. The tail is wagging the dog here, and there is a risk that the lawyers are running the company. The sanctions piece, in particular, would be very much worth the effort.

Another lawyer noted that the Committee always hears that it is too soon, or too difficult, to make a rule change, or that proposed rule changes won't do any good. The Committee must resist these invitations to do nothing. Right now, preservation complications are affecting hiring and firing at companies that are unable to be efficient in producing the goods and services we need because of the difficulties caused by preservation. Some see these reform ideas as all or nothing propositions. A better way to regard them is as offering a variety of choices. Among those choices, three stand out as most significant: (1) trigger -- "reasonable certainty" is the right rule; (2) scope -- preservation should be limited to material that is relevant and material; (3) Sanctions -- these should be limited to cases where it is proven that a party was guilty of willful destruction of evidence.

* * * * *

Judge Campbell thanked all who attended for taking the time to share their thoughts and expertise. The written submissions alone proved the worth of the conference. The information exchanged in this conference builds on that foundation and greatly assists the Subcommittee in evaluating the various issues before it. He invited all to continue to share their thoughts with the Subcommittee. It would be good if all judges and lawyers could receive the sort of education the Subcommittee got through this conference.

APPENDIX F

JUNE 29, 2011 MEMO TO PARTICIPANTS IN THE SEPT. 9, 2011 MINI-CONFERENCE

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

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CHAIR

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RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

To: Participants in Sept. 9 mini-conference on preservation and sanctions

From: Honorable David Campbell, Chair, Advisory Committee on Civil Rules
Professor Richard Marcus, Associate Reporter, Advisory Committee

Date: June 29, 2011

Re: Focus of discussion

Cc: Members of Discovery Subcommittee

Thank you again for agreeing to assist the Discovery Subcommittee of the Advisory Committee on Civil Rules in analyzing issues presented by preservation and sanctions. As you know, the mini-conference will be held on September 9, 2011, at a Dallas airport hotel. We are writing now to provide materials that will help you prepare for the mini-conference.

Along with this memorandum, you should also receive the following:

- (1) An outline of elements for a preservation/sanctions rule. The outline was prepared by a panel for a two-day conference the Advisory Committee held at Duke University Law School in May, 2010;
- (2) A study conducted by the Federal Judicial Center about motions for sanctions in 19 districts;
- (3) A research memorandum prepared by Andrea Kuperman, then rules law clerk to Judge Lee Rosenthal (Chair, Standing Committee on Rules of Practice and Procedure) about existing case law on certain preservation and sanctions issues; and
- (4) A memorandum entitled Preservation/Sanctions Issues, outlining and raising some questions about three possible rule-based approaches to issues of preservation and sanctions.

Following presentation of the Duke Panel recommendations, the Discovery Subcommittee was assigned to investigate a possible preservation/sanctions rule. The study conducted by the Federal Judicial Center and the research memorandum prepared by Andrea Kuperman were some of the steps taken by the subcommittee to evaluate the nature and scope of the preservation/sanctions issue. The memorandum outlining three possible approaches to such a rule was prepared as an investigative tool to consider possible ways to address the preservation/sanctions issue by rulemaking. The mini-conference is an additional step intended to educate the Discovery Subcommittee and assist it in developing possible recommendations for the full committee on preservation and sanctions issues.

Below are some questions that we expect to raise during the mini-conference; it seemed useful to put them before you in advance. It may be that some of you will want to solicit reactions from others about these issues; please feel free to share any of these materials with others as part of that process. Our goal is to get the most useful insights from the conference.

If it is of interest, we also attach as an Appendix a list of the Discovery Subcommittee members and the invited participants for the conference.

In the near future, you should be hearing from the Rules Committee Support Office with specifics about the hotel where the mini-conference will be held. We look forward to seeing you in Dallas. Please do not hesitate to contact us if you have questions.

Questions for discussion on Sept. 9

1. Nature and scope of the problem:

- To what extent are you finding that preservation of ESI is a problem in your organization or practice?
- What is the nature of the problem, and how are you addressing it?
- In what percentage of lawsuits or potential lawsuits is the problem arising?
- Are problems largely 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?

- Has Rule of Evidence 502 helped you reduce review costs? Why?
- Has technology helped you reduce review costs? How?
- Is the problem significantly different now than it was 5 years ago? Ten years ago? Why?
- Does the problem vary depending on the court where litigation is or may be brought -- various federal circuits? State courts? Why?
- Are preservation rules from other countries (e.g., EU rules) important to your preservation decisions? How do the rules of other countries compare to what you understand to be U.S. requirements? How do you cope with the differences?
- Has your client ever obtained, been denied, defeated, or been subjected to a serious sanction with regard to preservation? Do you think this decision was flawed for reasons that rule changes could solve?
- The FJC study suggests that spoliation of ESI is raised rarely in federal motions practice. Is that consistent with your experience?
- Are preservation issues for plaintiffs becoming prominent? Are the issues significantly different for individual plaintiffs and organizational defendants?
- Since 2006, Rule 26(f)(2) has directed that the parties discuss “any issues about preserving discoverable information” early in the case. Is that actually done in most federal-court cases? Does it help avoid or solve problems when it is done?

2. Technology issues:

- In the last few years we have seen an explosion of information potentially relevant to litigation. Will we see other explosions in the next few years? From what kinds of technology?
- How does the exploding use of social media affect litigation in general, and preservation in particular? For example, if employers monitor employee use of social media at work, or if producers of goods or services monitor social media discussions of their products, should that activity result in preservation of the material reviewed? Can prospective plaintiffs safely change their social media postings after they conclude they may have a claim?
- What implications will cloud computing have for civil litigation?

- What other technological innovations are likely to have a significant effect on litigation?
- How often do you attempt to preserve electronic information stored in sources other than information systems? Examples might include employees' personal computers, e-readers, "pad" devices, voice mail, smart phones and safety recording devices. Are there additional devices that might be involved?
Is there a significant cost associated with storing information preserved for litigation? If so, what is the nature of the cost? In 2000, during a mini-conference about E-Discovery, a prominent lawyer asked rhetorically "Why don't you keep all ESI forever? Storage costs no longer are a problem, so why not do that?" How would you answer that question today?
- How will technology help reduce the costs of dealing with ESI in litigation over the next few years?
- What other technology-related issues should the Committee have in mind if it attempts to craft a preservation/ sanctions rule?

3. Possible solutions:

- We would appreciate your careful review of and comments on the three proposed approaches to a preservation/sanctions rule described in the Preservation/Sanctions Issues memo, as well as the questions included in the three proposals.
- Which of the three approaches do you find most promising and why? Least promising and why?
- Is there a fourth approach we should consider?
- How would a rule help you solve some of the problems you identified in category 1?
- How would a rule help reduce some of the costs you are incurring?
- Are cost savings more likely to be achieved through advances in technology than through a rule of civil procedure?
- Would a federal rule solve problems you now face, given that there may remain uncertainties in state law and procedure? Could a federal rule help reduce those uncertainties, perhaps by providing "leadership" for state courts and rulemakers addressing similar issues?

- Do you encounter spoliation claims that are resolved without motion? Does that informal resolution impose significant costs? Is there a significant risk that promulgation of a federal rule on preservation and sanctions would result in a significant increase in spoliation motions? If so, will the cost of such a development be outweighed by the benefits to be derived from a preservation/sanctions rule?
- What are the three most important elements of a preservation/sanctions rule in your view?
- Do all agree that culpability should be required for serious sanctions? What standard of culpability (e.g., negligence, “gross negligence,” recklessness, purposeful efforts to destroy evidence) should be the minimum for imposition of serious sanctions? Should serious sanctions be forbidden in all cases in the absence of such culpability? Should such sanctions be forbidden even if the failure to preserve severely compromised the opposing party’s ability to put on a case?
- Should significant and proven harm to a party’s ability to litigate the case be required before serious sanctions are imposed? How can that harm be demonstrated if the lost material is no longer available?
- What sanctions are serious enough to be limited in the absence of culpability? Are all adverse inference instructions on that list? Would refusals to permit a party to call a given witness or use a certain piece of evidence always be on that list? Can we devise a hierarchy of sanctions’ severity that will demark where the seriousness requires culpability of a certain degree?
- What other thoughts or suggestions do you have for the committee?

APPENDIX

LIST OF PARTICIPANTS
Sep. 9, 2011, mini-conference
Dallas, Texas

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Hon. Michael Mosman (D. Ore.)
Hon. Paul Grimm (D. Md.)
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APPENDIX G

MEMORANDUM ON PRESERVATION/SANCTIONS ISSUES

PRESERVATION/SANCTIONS ISSUES

This memorandum is designed to introduce participants at the Sept. 9, 2011, mini-conference on preservation and sanctions issues to the questions that have been discussed by the Discovery Subcommittee over the past year.

Shortly after the May 2010 Duke Conference, the Discovery Subcommittee began discussing and evaluating the elements of a possible rule presented by the E-Discovery Panel during the Duke event. As that discussion revealed, there are significant rulemaking challenges for a rule that attempts overtly and solely to regulate pre-litigation preservation. Alternatively, a “back end” sanctions rule might not present the same difficulties that could arise with a “front end” preservation rule. But to the extent the concerns voiced by those who favor a preservation rule could be addressed in the sanctions context, it might be that such a rule could provide much benefit without raising questions about the scope of rulemaking authority. On the other hand, it could be that such a “backward looking” sanctions rule might itself raise concerns about whether it intruded too far into pre-litigation preservation decisions. The scope and significance of limitations on rulemaking authority remain somewhat uncertain.

At the same time, the Subcommittee found that it was also quite uncertain about the real-life dynamics of preservation problems and about whether rules would really provide significant solace for those concerned with these problems. As a very general matter, it seems clear that many are concerned that preservation obligations may often seem far too broad, and that huge expense has resulted from that overbreadth, particularly because the standard for severe sanctions is unpredictable and inconsistent across the nation. But the reasons for the huge expenses, and the components of them, are less clear, as are the nature of measures that would relieve these pressures. At least some preservation-rule ideas seem initially to be quite general, and perhaps they would not provide the solace sought. Others may be so specific that they would be superseded by technological change or would be inapplicable in broad categories of cases.

Given this variety of concerns, the Subcommittee’s conclusion was that it needed more knowledge, and that the way to gain that needed insight would be to hold this conference. To introduce the ideas it has identified thus far, the Subcommittee has developed three general categories of rulemaking approaches, introduced below in an order that does not indicate their priority or any preference in the eyes of the Subcommittee:

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 has received from various interested parties provide a starting point in drafting some such specifics. A basic question is whether it is necessary (or really useful) to include such specifics in rules to make them effective in solving the problems reportedly resulting from overbroad preservation expectations. At least, they could create very specific presumptions about what preservation is necessary. Perhaps they could be equally precise about the trigger. It might be that any such precision would run the risk of being obsolete by the time that a rule became effective, or soon thereafter.

Category 2: A more general preservation rule could address a variety of specific concerns, but only in more general terms. It would, nonetheless, be a “front end” proposal including specifics about preservation in the form of directives about what must be preserved. Compared to Category 1 rules, then, the question would be whether something along these lines would really provide value at all. Are they 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 specific preservation issues. 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.

The remainder of this memorandum introduces an initial set of drafts of the three categories of rule exemplars. These drafts are provided for illustrative purposes only -- they do not represent the Subcommittee’s considered views, and are offered only for purposes of fostering discussion. Some provisions in the Category 1 sketch closely resemble those in the Category 2 sketch because they are in some ways parallel. Footnotes raise a number of questions, but should be included only once even though they focus on rule-amendment ideas that recur later in the package.

Before turning to the specific exemplars, it seems worthwhile to reiterate the Subcommittee has reached no conclusion on whether rule amendments would be a productive way of dealing with preservation/sanctions concerns, much less what amendment proposals would be useful. The purpose of this conference is to provide a basis for making such judgments.

CATEGORY 1

Detailed and specific rule provisions

The concept behind this category is that rules with specifics would be beneficial. A key consequence of having such rules is that they can apprise parties about what they must do in ways that are very specific, providing a level of guidance that more general rules would not. But at the same time, this specificity may produce serious costs if it means that anything not specifically provided for is either beyond regulation or never required. Coupled with these concerns are concerns about transitory terms and technologies. To the extent the specifics are likely not to be important in five or ten years, or that other factors will be equally or more important, they may not be reasonable choices for rules that could not go into effect until the end of 2014 and that cannot be amended in less than three years.

Rule 26.1. Duty to Preserve Discoverable Information

- (a) **General Duty to Preserve.** [In addition to any duty to preserve information provided by other law,]¹ every person who reasonably expects [is reasonably certain]² to be a party³ to

¹ The goal of this rule is not to supersede any existing duty to preserve information. A Committee Note would probably illustrate some of the kinds of sources of law that may bear on particular situations but also say that the illustrative listing was just that, and not complete.

An alternative could be to prescribe a duty to preserve and then assert that it supersedes all other duties. But those duties are numerous and emanate from many sources, both state and federal. Purportedly nullifying them would be a difficult business, particularly since much litigation does not end up in federal court, and in some instances could not constitutionally end up in federal court.

Indeed, the entire notion of supersession may strain the limits of the Rules Enabling Act process. Could a rule supersede state law on preservation as asserted in litigation in state courts, or by state administrative agencies? Even with regard to litigation in the federal courts, it may be that a Civil Rules cannot limit remedies provided by state law for violation of a state preservation requirements.

Given these uncertainties about the effect of a Civil Rules, it is not clear whether such a rule could provide the sort of reassurance about preservation that some hope it could provide.

² Would the bracketed phrase be preferable?

³ Should this be limited to prospective parties? Could a Civil Rule impose a preservation duty on a third-party witness to an accident? Some states have recognized a tort of “spoliation” under some circumstances, but that suggests Enabling Act issues. On the other hand, we probably would say that, after service with a federal-court subpoena for specified information, such a third-party witness would have a duty to preserve the material requested by the subpoena even if it objected to producing it. The federal court’s power to enforce subpoenas should reach that far.

an action cognizable in a United States court⁴ must preserve discoverable [electronically stored]⁵ information as follows.

(b) Trigger for Duty to Preserve. The duty to preserve discoverable information under Rule 26.1(a) arises only if a person becomes aware of one of the following facts or circumstances that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court]:^{6 7}

(1) Service of a pleading or other document asserting a claim;⁸ or

⁴ This formulation is modeled on Rule 27(a), which speaks of a petitioner who “expects to be a party to an action cognizable in a United States court” and of “persons whom the petitioner expects to be adverse parties.”

⁵ One question is whether this duty to preserve should be limited to electronically stored information. On the one hand, that appears to be the main focus of current concerns emphasized to the Committee. On the other hand, other material remains very important in much litigation, and many recent sanctions cases involve more traditional sources of information.

⁶ At least one problem with this formulation is that it includes awareness that the action might be in a federal court. Since subdivision (a) imposes a duty only on those who reasonably expect to be a party of an action in federal court, saying that again here may be harmful; the only duty we are talking about here is the one in (a). For actions brought in state court, it seems fair to assume that some preservation duty would arise also, even though not based on this rule.

⁷ The whole thrust of this approach is that it can identify in advance, at least by fairly specific category, all the events that would justify imposing a preservation duty. As noted below, including a “catch-all” final category may seem desirable because it would build in some flexibility, but that would seem to undermine the basic purpose of the rule. Absent that, however, one might expect fierce litigation about whether given events actually fall into one of the listed categories.

⁸ This need not be a claim against this person, presumably. Under Rule 15(c)(1)(C), relation back may apply to a claim later asserted against an original nonparty who “should have known that the action would have been brought against it, but for a mistake concerning the proper party’s identity.” See *Krupski v. Costa Crociere, S.p.A.*, 130 S.Ct. 2485 (2010) (applying Rule 15(c)(1)(C) to uphold relation back of claim against added defendant). Indeed, in this situation the need to preserve may arise after the commencement of the action but long before the formal assertion of a claim against this party.

But the Rule 15(c)(1)(C) analogy is far from perfect. That rule is concerned primarily with limitations policies, not evidence preservation. Relation back does not involve a “duty” to preserve; it only preserves claims that would otherwise be barred by the passage of time when the party who could assert the limitations defense had adequate notice so that it should have taken precautions such as preserving its evidence. Put differently, the party who succeeds in obtaining relation back for an amended claim does not thereby also acquire a right under Rule

- (2) Receipt of a notice of claim or other communication -- whether formal or informal -- indicating an intention to assert a claim; or
- (3) Service of a subpoena or similar demand for information; or
- (4) Retention of counsel, retention of an expert witness or consultant, testing of materials, discussion of possible compromise of a claim⁹ or taking any other action in anticipation of litigation;¹⁰ or
- (5) Receipt by the person of a notice or demand to preserve discoverable information;¹¹ or
- (6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, contract, or knowledge of an event that calls for preservation under the person's own retention program.¹²

15(c) to argue that the other side therefore should have preserved the evidence it wants to use to support its added claim.

⁹ This terminology is meant to track Evidence Rule 408.

¹⁰ This provision draws on Rule 26(b)(3) for the general notion of "anticipation of litigation." It is worth noting that this is the one most likely to be important to plaintiffs, who do not usually await notice of a claim by others since they are the claimants. But whether the duty to preserve should arise at the same moment Rule 26(b)(3) protection attaches might be debated. Equating the inception of work product protection with the trigger for the preservation duty may mix two very different things.

¹¹ This is very open-ended. It does not purport to address the scope of the obligation to preserve, but only the trigger. It does not focus on the form of this notice, but does focus upon "receipt," which presumably means the demand is directed to the person to whom the duty will thereupon apply. It is worth noting, however, that delivery of such a notice to *A* might be regarded as sufficient to notify *B* of the need to preserve. At the same time, it could be that only a specific demand to preserve would be covered.

¹² Including this provision might be said somewhat to undercut subdivision (a) above, for that provision was designed to specify a duty to preserve imposed by the rules without regard to what other sources of law require. Yet it may well be that failure to comply with other legal requirements would be a legitimate consideration for a preservation requirement imposed by the rules. To the extent subdivision (c) below is the sole definition of the scope of the duty to preserve, making another law (which may have a different scope) the trigger could cause difficulties. Would that trigger also determine the resulting scope of preservation?

[(7) Any other {extraordinary} circumstance that would make a reasonable person aware of the need to preserve information.]¹³

- (c) **Scope of Duty to Preserve.** A person whose duty to preserve discoverable information has been triggered under Rule 26.1(b) must take actions that are reasonable under the circumstances to preserve discoverable information [taking into account the proportionality criteria of Rule 26(b)(2)(C)] {considering the burden or expense of preservation, the likely needs of the case, the amount likely to be in controversy, the parties' resources, the importance of the issues at stake in the action, and the potential importance of the preserved information in resolving the issues}¹⁴ as follows:

The reference to the person's own retention program was not suggested by the Duke panel, but does appear in cases. See *Kerkendall v. Department of the Army*, 573 F.2d 1318, 1325-27 (Fed. Cir. 2009) (upholding adverse inference for destruction of documents by government agency in violation of its own retention program).

Whether this category of triggers should be included is debatable on its merits. Would including it tend to deter parties from adopting preservation rules of their own? If the sole focus of this rule is on the preservation obligation that flows from the prospect of litigation, why does an entirely unrelated preservation obligation -- even if imposed by rule or statute -- matter? At least arguably, it would seem odd that a party who violates a statutory or regulatory obligation and as a result deprives the opposing party of material evidence, can claim that it had no pertinent duty to preserve.

¹³ Because this rule is designed as an all-encompassing catalog of the triggers that invoke the rule's preservation obligation, it may be important to include such a "catch-all" provision to cover situations that did not occur to the drafters. But to the extent the catch-all is really flexible, it may rob the entire rule of its supposed value in protecting the party that does not preserve. How is the potential litigant to know whether something that occurs fits into this provision?

Would it be helpful to add the word "extraordinary"? Without the qualifier, item (7) could swallow the others. But does the qualifier really help? Can the person possibly subject to a preservation duty determine what a court will later regard as satisfying this standard? And how about the sloppy manufacturer whose goods often fail. Is it "ordinary" for another failure to occur, leading to serious personal injury? If so, does that mean these events are not really "extraordinary"?

¹⁴ The bracketed provision is intended to raise the issue of proportionality. Many agree that proportionality concepts should be crucial in determining what is a reasonable preservation regime. But merely saying that preservation should be "proportional" may not be very useful to a potential litigant who may have only the haziest notion what the claim involves and whether serious damages have occurred.

Assuming one wants to invoke proportionality, one could simply say the preservation must be "proportional." To add some specificity, however, the alternatives in text either invoke

- (1) **Subject matter.** [Alternative 1] The person must preserve information relevant to any claim or defense that might be asserted in the action to which the person might become a party or to a defense to such a claim;¹⁵
- (1) **Subject matter.** [Alternative 2] The person must preserve any information that constitutes evidence of a claim or of a defense to a claim;¹⁶
- (1) **Subject matter.** [Alternative 3] The person must preserve any information that is relevant to a subject on which a potential claimant has demanded preservation;¹⁷
- (1) **Subject matter.** [Alternative 4] The person must preserve information that a reasonable person would appreciate should be preserved under the circumstances;¹⁸
- (2) **Sources of information to be preserved.** [Alternative 1] The duty to preserve under Rule 26.1(a) extends to information in the person’s possession, custody or

Rule 26(b)(2)(C) or paraphrase the criteria in Rule 26(b)(2)(C)(iii).

¹⁵ The notion here is to invoke the scope of discovery or right under Rule 26(b)(1). Note that this scope may include such things as other similar incidents, impeaching material, and additional items that may not, on their face, relate to the claim raised.

¹⁶ The effort here is to narrow the scope to what the rulemakers were trying to identify as “core information” in 1991 when initial disclosure was first proposed. This phraseology is different, and raises difficulties about deciding what is “evidence.” For example, does that exclude hearsay? In general, hearsay is discoverable under Rule 26(b)(1) whether or not admissible.

¹⁷ This would impose a very narrow requirement to preserve; unless a party giving notice of a claim has said something about preserving information there would be no duty. This sort of provision would seem to encourage broad demands to preserve in advance of litigation, probably not a desirable thing. Among other things, the person who receives such a demand has no immediate way to challenge the demand, as could happen in regard to undue demands during a Rule 26(f) conference, for those can be submitted to the judge for resolution if needed. Perhaps more significantly, it would impose no duty to preserve unless a demand to preserve were made, seemingly disadvantaging those who don’t have lawyers. A lesser point on that score is that it would cause uncertainty about whether there had been such a demand.

¹⁸ This alternative invokes one of the suggestions of the Duke Panel. It may be circular, and seems to provide very little guidance to the party subject to the duty to preserve.

control¹⁹ that is reasonably accessible to the person;²⁰

- (2) ***Sources of information to be preserved.*** [Alternative 2] The duty to preserve under Rule 26.1(a) extends to information in the person’s possession, custody or control that is routinely accessed in the usual course of business of the person;²¹ the following types of information are presumptively excluded from the preservation duty unless otherwise agreed by the parties or ordered by the court:

¹⁹ This invokes Rule 34(a)(1)’s definition of the scope of the duty to produce in response to a Rule 34 request.

²⁰ The last clause invokes a version of Rule 26(b)(1)(B)’s exemption from initial discovery of electronically stored information that is “not reasonably accessible because of undue burden or cost.”

It is debatable whether any such limitation should be included in a preservation rule. In the Committee Notes to Rules 26(b)(2)(B) and 37(e) in 2006, an effort was made to distinguish between the duty to preserve such information and the duty to provide it in response to discovery. The notion is that preservation imposes a smaller burden than restoration, and ensures that the material will be there if the court later orders production.

Another issue here (already mentioned above) is the question of preserving allegedly privileged material. To the extent that the trigger for the duty to preserve under Rule 26.1 corresponds to the “in anticipation of litigation” criterion of Rule 26(b)(3), for example, much material generated in trial preparation activity might fall within the duty to preserve. Does the fact that a party claims it need not produce this material exempt it from preservation? Ordinarily, as emphasized in Rule 26(b)(5), the decision whether a claim of privilege is valid is for the court, not the party; if the court cannot examine the material because it no longer exists, that is a problem.

Another issue has to do with whether it is desirable to expand the Rule 26(b)(2)(B) standard (at least as to preservation) to discoverable information that is not electronically stored. Hard copy information may be difficult to access or locate, but Rule 26(b)(2)(B) does not provide any exemption from providing it in response to a discovery request. Should preservation be treated differently?

²¹ The idea here is to invoke something that was frequently discussed in relation to preservation around a decade ago -- limiting duties to provide discovery to that electronically stored information that is regularly used by the party. The phrasing used here is borrowed from Rule 34(b)(2)(E)(i) regarding production of electronically stored information.

A different issue is how this duty should be phrased for individual nonbusiness litigants, such as individual plaintiffs. The idea should probably be to look to what they access and use on a regular basis, such as their active email accounts. But what if they have a cache for discarded items. Should that be included?

- (A) Deleted, slack, fragmented or unallocated data on hard drives;
 - (B) Random access memory (RAM) or other ephemeral data;
 - (C) On-line access data such as temporary internet files;²²
 - (D) Data in metadata fields that are frequently updated, such as last opened dates;
 - (E) Information whose retrieval cannot be accomplished without substantial additional programming, or without transferring it into another form before search and retrieval can be achieved;
 - (F) Backup data that substantially duplicate more accessible data available elsewhere;
 - (G) Physically damaged media;
 - (H) Legacy data remaining from obsolete systems that is unintelligible on successor systems [and otherwise inaccessible to the person]; or
 - (I) Other forms of electronically stored information that require extraordinary affirmative measures not utilized in the ordinary course of business;²³
- (3) ***Types of information to be preserved.*** The duty to preserve under Rule 26.1(a) extends to documents, electronically stored information, or tangible things within

²² This provision would not preclude a court order that such information must be preserved. See, e.g., *Columbia Pictures Indus. v. Bunnell*, 245 F.R.D. 443 (C.D. Cal. 2007) (order directing defendant to preserve server access data on downloading of material protected by plaintiff's copyright that would otherwise not be preserved).

²³ This specific listing is taken from submissions to the Advisory Committee. Besides asking whether it is sensible and complete, one might also ask whether a list this specific is likely to remain current for years.

Rule 34(a)(1).²⁴

- (4) ***Form for preserving electronically stored information.*** A person under a Rule 26.1(a) duty to preserve electronically stored information must preserve that information in a form or forms in which it is ordinarily maintained.²⁵ The person need not preserve the same electronically stored information in more than one form.²⁶
- (5) ***Time frame for preservation of information.*** The duty to preserve under Rule 26.1(a) is limited to information [created during] {that relates to events occurring during }

[*Alternative 1*] __ years prior to the date of the trigger under Rule 26.1(b)²⁷

²⁴ The Duke panel suggested including a provision about types of information to be preserved. It did not suggest limitations on the Rule 34(a)(1) scope of the duty to produce, and this initial effort therefore uses that provision as a guide. One possibility mentioned above is that backup tapes or the like could be excluded. But it may be that the scope of the duty provision already suffices for that purpose, and also that excluding backup materials may be unwise.

In a related vein, should preservation duties extend to “land or other property possessed or controlled” by the person, which is subject to discovery under Rule 34(a)(2)? Although that form of discovery is probably much rarer than document discovery, when it does matter preservation may be important.

²⁵ This provision is borrowed from Rule 34(b)(2)(E)(ii). If “ordinarily maintained” includes the form in which information is preserved for litigation purposes, this could be circular.

²⁶ This provision corresponds to Rule 34(b)(2)(E)(iii).

²⁷ This provision has at least two problems. One is that it tracks backward from the date of the triggering event. It is not necessarily obvious that this should be the pertinent event, but in one sense it seems logical -- ordinarily preservation can’t be expected to occur until that triggering event occurs. Of course, there might be multiple triggers, which would probably present additional complications.

A second difficulty is that it calls for the rules to specify a time period for this duty. Statutes of limitation vary considerably for different kinds of claims, and from jurisdiction to jurisdiction. That variability suggests the difficulty that might attend an effort to set a specific all-encompassing limitation here. In addition, some cases -- such as a groundwater contamination case -- may concern events that occurred decades ago. A lawsuit for breach of an old contract likewise could require discovery regarding events that occurred many years in the past. Suggesting that information about such events need not be preserved because they are

[*Alternative 2*] the period of the statute of limitations prior to the date of the trigger under Rule 26.1(b)²⁸

[*Alternative 3*] a reasonable period under the circumstances.²⁹

- (6) ***Number of key custodians whose information must be preserved.***³⁰ The duty to preserve under Rule 26.1(a) is limited to information [possessed by] {under the control of} the [number] {a reasonable number of} key custodians in the person’s organization who are [most likely to possess] {best positioned to identify} information subject to preservation under Rule 26.1(c).³¹

beyond a rule-specified time frame would present obvious problems. A time-period limitation also might foster arguments about the limits of the rulemaking power.

²⁸ This approach might be preferred to setting a specific limit in a rule because it would borrow from other sources of law. But the borrowing experience for limitations periods has sometimes been an unhappy one. For limitations periods for federal claims lacking congressionally-set limitations, the task produced much disarray and finally Congress adopted the four-year limit in 28 U.S.C. § 1658. But that statute applies only to federal claims created by Congress after its effective date; for those already in existence, borrowing of limitations periods remains the rule.

An additional difficulty here is that the person subject to the duty to preserve must make predictions to use this approach. One is to determine what claim would be asserted; a pre-litigation notice may suggest a variety of claims that have different limitations periods. And the limitations period for a given claim may differ significantly in different jurisdictions, so there is a potential choice-of-law guess involved in the forecast. Beyond determining the pertinent limitations period there is also the possibility that a court would rule that the limitations period was tolled until prospective plaintiffs discovered their claims, or on grounds of estoppel or fraudulent concealment. Predicting how a court might resolve those issues would be very difficult.

²⁹ Given the difficulties mentioned in relation to the other two approaches, this might be preferred. But one could object that it provides limited or no guidance.

³⁰ This sort of provision was suggested by the Duke Panel. It is not clear that “key custodian” is a definite enough term, but it is the one proposed by our panelists. If we want to adopt something along this line, there should be careful consideration about what term to use. The Committee Note could elaborate on what is meant. For one court’s use of the “custodian” term, see *Edelen v. Campbell Soup Co.*, 265 F.R.D. 676, 684 (N.D.Ga. 2010) (“Plaintiff then proposed a request that encompasses 55 custodians and 55 search terms over a three-year period.”).

³¹ This provision is a very halting first effort that bristles with issues. The question of how to define “key custodian” has already been mentioned. The question whether we are talking about “possession” or “control” of the information or something else seems somewhat tricky.

- (d) **Ongoing duty.** *[Alternative 1]* The person must take reasonable measures to continue to preserve information subject to preservation under Rule 26.1(c) from the date the obligation to preserve is triggered under Rule 26.1(b) until [the expiration of the statute of limitations if no suit is filed by that date] {the termination of litigation if a suit is filed}.³²
- (d) **Ongoing duty.** *[Alternative 2]* The person must take reasonable measures to preserve information received after the trigger date specified in Rule 26.1(c) unless it notifies [the

Choosing a number is another challenge. Shouldn't that depend on the size and makeup of the organization? In addition, might it not depend on the type of information involved? Isn't there always a risk that 20/20 hindsight will suggest that somebody else is an obvious choice who was overlooked? The alternative of saying "a reasonable number" may be more reasonable but not reassuring to the person seeking certainty about what to do to satisfy preservation obligations. How is the person to make this determination with confidence? Perhaps the answer is to designate twice as many as are minimally necessary. But even then there is the argument that somebody really important was overlooked.

A different question is whether this should excuse preservation by anyone who is not a "key custodian." Are those the individuals who were most involved in the events that matter in the suit, or the individuals who are officially designated as "custodians" in the organization? If the latter, could it be that there is no need to preserve information possessed by the people most involved? Does that bear on what is an adequate litigation hold?

It seems that what we are talking about is the whole scope of information to be preserved pursuant to Rule 26.1(c). Are there likely to be different custodians for different types of information?

This topic seems to relate to the time factor identified in Rule 26.1(c)(5). Are we talking about holders of specified positions in the organization, or the specific individuals? If the former (more likely), how should we deal with the hiring, promotion, and firing of specific holders of these positions, and with revisions in the organizational structure during the pertinent period?

Another question has to do with a litigation hold. Does the listing in this rule identify the only people who should be directed to retain information in a litigation hold? Our sense is that normally the notice of a hold should be directed to a larger group, but perhaps the goal here is to guard against requiring that effort.

Finally, how would this provision apply to parties that are not organizations? Are family members of individual litigants also custodians?

³² The need to specify how long the duty to preserve remains in effect would seem to arise in situations where litigation is not filed. Where litigation is filed, the duration of the duty is more clear. And yet, as noted above, determining when the statute of limitations expires presents difficult issues about which limitations period to apply and whether it has been tolled.

person requesting preservation] {all reasonably identifiable interested persons} that it is not engaged in ongoing preservation.³³

- (e) **Remedies for failure to preserve.** The sole remedy for failure to preserve information is under Rule 37(e).³⁴

**Rule 37. Failure to Make Disclosures
or to Cooperate in Discovery; Sanctions**

* * * * *

- (e) **Sanctions for failure to preserve [electronically stored] {discoverable} information.**

³³ This alternative attempts to provide an out for those who wish to curtail the ongoing burden. But one serious difficulty is determining who should be notified that preservation is not ongoing. Does it apply only when the trigger is a demand for preservation? It does not seem to answer the question what the preserving person must do when the person who is notified objects to cessation of preservation. If anyone can dispense with preservation by giving notice, would everyone (who is advised by a lawyer) immediately give such notice?

³⁴ This hypothetical provision is designed as a bridge to possible amendments to Rule 37, as explored more fully below. The goal is to make clear that Rule 26.1 does not purport to do more than set ground rules in relation to litigation that actually occurs in federal court. Thus, one could not argue for any adverse consequence due to failure to preserve except in a pending case in federal court. By the time that argument occurs, there is no big problem with the authority of a federal court to address the problem. And there seems to be no problem with the idea that it may apply federal legal principles in determining whether a person has failed to preserve. So Rule 26.1 becomes more an advance warning that may limit federal principles of preservation than an all-purpose intrusion into the already crowded realm of preservation.

A court may not impose sanctions³⁵ [under these rules]³⁶ on a party for failure to preserve information if the party has complied with Rule 26.1. The following rules apply to a request for sanctions for violation of Rule 26.1:³⁷

(1) ***Burden of proof.*** The party seeking sanctions has the burden of proving that:

(A) a violation of Rule 26.1 has occurred;

(B) as a result of that violation, the party seeking sanctions has been denied access to specified electronically stored information, [documents or tangible things];³⁸

³⁵ A perennial question is to determine what is a “sanction.” For example, to what extent is a directive to restore backup tapes to locate materials that were inappropriately deleted a “sanction.” To many, it might seem a curative measure. For a thoughtful examination of such issues under the current rule, consider *Major Tours, Inc. v. Colorel*, 720 F.supp.2d 587 (D.N.J. 2010), in which Judge Simandle was presented with plaintiffs’ argument that because defendants had failed to preserve emails they had to restore all backup tapes to see if some of the lost emails could be found on the tapes. Judge Simandle rejected this argument that failure to preserve is dispositive on the question under Rule 26(b)(2)(B) whether to order restoration of backup tapes. Instead, that is just one of many factors, and he declined to make such an order in this case, upholding the magistrate judge’s decision that good cause did not exist for restoring the tapes despite the failure to preserve. Turning the situation around, would the conclusion that the preservation rule was not violated preclude ever ordering restoration of backup tapes?

³⁶ This phrase was inserted in Rule 37(e) by the Standing Committee in 2004, and permits sanctions pursuant to “inherent authority” or based on other sources of law while limiting sanctions under Rule 37(b) or other Civil Rules. Whether that limitation should endure if the rules themselves include a more expansive (and affirmative) set of preservation provisions, like hypothetical Rule 26.1, is not certain.

³⁷ Note that including a provision like this could obviate reliance on “inherent authority” to support sanctions like those listed in Rule 37(b) in cases in which failure to preserve did not violate any court order. A Committee Note could presumably say something like: “Given the introduction of a specific basis in Rule 37 for imposition of sanctions, and specific provisions in Rule 26.1 regarding the scope of the preservation duty, there should no longer be occasion for courts to rely on inherent authority to support sanctions in cases in which a party has failed to preserve discoverable information.”

³⁸ This criterion was suggested by the Duke Panel. The abiding problem is that one does not know what was there before the inappropriate deletion occurred; that makes it rather difficult for the party seeking sanctions (which has presumably not breached its responsibilities under the rules) to specify what it lost.

This factor seems to address the same thing as the harmlessness provision in current Rule

- (C) no alternative source exists for the specified electronically stored information [documents or tangible things];³⁹
 - (D) the specified electronically stored information [documents or tangible things] would be [relevant under Rule 26(b)(1)] {relevant under Evidence Rule 401} [material] to the claim or defense of the party seeking sanctions;⁴⁰
 - (E) the party seeking sanctions promptly sought relief in court after it became aware of the violation of Rule 26.1.⁴¹
- (2) ***Selection of sanction.*** If the party seeking sanctions makes the showings specified in Rule 37(e)(1), the following rules apply to selection of a sanction:

37(c)(1), but to put the burden with regard to that issue on the party seeking sanctions. Perhaps harmlessness is a better way of putting it; doing so would presumably shift the burden of proof to the party resisting sanctions.

Relatedly, it might be noted that this factor can cut differently for parties with and without the burden of proof. In at least some instances, parties with the burden of proof may lose *because* they no longer have evidence they lost. True, parties without the burden of proof may find their cases weakened due to loss of evidence that would have been helpful to them, but in at least some instances there may be an important difference between parties depending on who has the burden of proof.

³⁹ This resembles the current harmlessness criterion, and seems an important focus; to the extent alternative sources of information (or sources of alternative information) exist, there seems little reason for the sorts of sanctions listed in Rule 37(b)(2)(A). As noted above, however, measures designed to extract such information from those sources (e.g., backup tapes) might be called “sanctions” by some. Moreover, since the exact contours of the lost information are usually unknowable, it may be impossible to determine whether there is an alternative source of that information.

⁴⁰ Again, the moving party’s difficulty in specifying what was lost presents something of a conundrum on this subject.

It is not clear that this provision adds usefully to (B), which focuses on the harm to the party seeking sanctions.

⁴¹ This provision does not call for initial attempts to confer with the other side to obtain the nonjudicial solution to the problem. It might be said in a Committee Note that informal communication seems like a good way to explore the availability of other sources of information, but given that hypothetical subdivision (e) is only about sanctions of a rather serious sort, it may be that the time for conferring has passed.

- (A) the court may employ any sanction listed in Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information,⁴² but must select the least severe sanction necessary to redress [undo the harm caused by] the violation of Rule 26.1;⁴³

⁴² As noted, an adverse inference instruction is not included in the Rule 37(b)(2) listing. It is therefore addressed separately, but that does not explain how it should be ranked among the others in terms of "severity." Another issue might be the extent to which Fed. R. Evid. 301 (on presumptions) affects the use of this sanction.

In the same vein, one could consider listing other possible "sanctions" in this new provision. No effort has yet been made to chart these waters.

⁴³ This is a first effort to stratify sanctions. It seems from the ordering in Rule 37(b)(2)(A) that the list there goes from less severe to more severe. It is worth re-emphasizing, however, that an adverse inference instruction is not explicitly included on the list in Rule 37(b). Presumably that sanction is available also. Should sanctions be limited to those listed in Rule 37(b)?

Calibrating the severity of sanctions might sometimes be difficult. Consider, for example, Judge Gershon's reaction to arguments against using an adverse inference instruction:

In its papers, defendant repeatedly refers to adverse inferences and deemed findings as "severe" sanctions, but the case law is clear that these sanctions are not properly considered "severe." In this context, the term "severe" refers to sanctions of dismissal and contempt, not to the more limited sanctions imposed here.

Linde v. Arab Bank, Inc. 269 F.R.D. 186, 199 n.11 (S.D.N.Y. 2010).

Another point with regard to adverse inferences is that they are not all the same. Some may command the jury to find certain facts established, or even to find certain claims established. Others may be entirely permissive, simply telling the jury that if they find that a party lost something it should have retained the jury may infer that this lost item would help the other side if it concludes that the party was trying to get rid of harmful evidence. Even without an instruction, a lawyer could make that argument to the jury; having the judge endorse the possibility with a jury instruction is no doubt important to the lawyer but very different from a "severe" adverse inference instruction.

In re Oracle Corp. Securities Litig., 627 F.3d 376 (9th Cir. 2010), illustrates the range of adverse inferences possible, and also points out that they can be important at the summary judgment stage, not just in jury instructions. Plaintiffs in that securities fraud suit established that defendants willfully failed to preserve the email and other materials from Larry Ellison, Oracle's CEO. When defendants moved for summary judgment, the district court therefore gave the plaintiffs the benefit of an adverse inference that the lost materials would have proved Ellison's knowledge of any material facts plaintiffs were able to establish. But plaintiffs did not persuade Judge Illston that there were any material factual disputes, and she granted defendants' summary-judgment motion.

On appeal, plaintiffs urged that the district court should have used an adverse inference sufficient to establish their prima facie case and therefore to defeat the summary-judgment

- (B) *[Alternative 1]* the court may not impose a sanction listed in Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information unless the party seeking sanctions establishes that the party to be sanctioned violated Rule 26.1 [negligently] {due to gross negligence} [willfully] {in bad faith} [intending to prevent use of the lost information as evidence];⁴⁴
- (B) *[Alternative 2]* the court must not impose a sanction if the party to be sanctioned establishes that it acted in good faith in relation to the violation of Rule 26.1;⁴⁵
- (C) the court must be guided by proportionality, making the sanction proportional to the harm caused to the party seeking sanctions and the

motion. The 9th Circuit disagreed (id. at 386):

Over 2.1 million documents were produced during discovery. Although Ellison's email account files were not produced, the documents that were produced contained numerous email chains in which Ellison's correspondence was contained. If there were material issues of fact supporting securities fraud, Plaintiffs should have been able to glean them from the documents actually produced, the extensive deposition testimony, and the written discovery between the parties. An adverse inference would then properly apply to establish that Ellison must have known of those damaging material facts. Plaintiffs' problem here lies in the dearth of admissible evidence to show fraud.

The court added that an adverse inference sanctions "should be carefully fashioned to deny the wrongdoer the fruits of its misconduct yet not interfere with that party's right to produce other evidence." Id. at 386-87.

⁴⁴ This is an effort to incorporate a showing of state of mind into the criteria for sanctions. Either here or in a Committee Note, one could address the significance of a litigation hold. That is not included in the draft rule language in part because it seems so difficult to determine what a "litigation hold" is, and also because the question whether adequate follow-up occurred could often be important.

The Duke panel urged that "[t]he state of mind necessary to warrant each identified sanction should be specified." Doing that seems quite difficult -- given the range of sanctions listed in Rule 37(b)(2)(A), the range of states of mind identified above, and the variety of facts arising in different cases.

⁴⁵ This is an effort to shift the state-of-mind inquiry from being a matter to be proven to support sanctions into being a matter of defense for the party resisting sanctions.

level of culpability⁴⁶ of the party to be sanctioned.

- (3) ***Payment of Expenses.*** Instead of or in addition to imposing a sanction, the court must order the party in violation of Rule 26.1, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the violation, unless the violation was substantially justified or other circumstances make an award of expenses unjust.

CATEGORY 2

The concept behind this category is that it may be desirable and possible to devise more general rules regarding preservation. A key consideration here is whether rules of such generality will actually be useful to parties making preservation decisions, particularly before litigation begins. (After litigation begins, they can at least apply to the court for clarification about what they should be doing.)

Rule 26.1. Duty to Preserve Discoverable Information

- (a) **General Duty to Preserve.** [In addition to any duty to preserve information provided by other law,] every person who reasonably expects [is reasonably certain] to be a party to an action cognizable in a United States court must preserve discoverable [electronically stored] information in as follows.
- (b) **Trigger for Duty to Preserve. [Alternative 1]** The duty to preserve discoverable information under Rule 26.1(a) arises when a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court].
- (b) **Trigger for Duty to Preserve. [Alternative 2]** The duty to preserve discoverable information arises when a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court] such as:

⁴⁶ This phrase is far from ideal, but attempts to capture what is meant.

- (1) Service of a pleading or other document asserting a claim; or
 - (2) Receipt of a notice of claim or other communication -- whether formal or informal -- indicating an intention to assert a claim; or
 - (3) Service of a subpoena or similar demand for information; or
 - (4) Retention of counsel, retention of an expert witness or consultant, testing of materials, discussion of possible compromise of a claim or taking any other action in anticipation of litigation; or
 - (5) Receipt of a notice or demand to preserve discoverable information; or
 - (6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, contract, or the person's own retention program.
- (c) **Scope of Duty to Preserve.** A person whose duty to preserve discoverable information has been triggered under Rule 26.1(b) must take actions reasonable under the circumstances to preserve [discoverable information]⁴⁷ in regard to the potential claim of which the person is or should be aware, [taking into account the proportionality criteria of Rule 26(b)(2)(C)] {considering the burden or expense of preservation, the likely needs of the case, the amount likely to be in controversy, the parties' resources, the importance of the issues at stake in the action, and the potential importance of the preserved information in resolving the issues}.⁴⁸

⁴⁷ One suggestion from the Duke panel was to specify a different preservation duty for parties and nonparties. In the pre-litigation context, this seems particularly challenging since nobody is yet a party. Whether there should be a distinction on this ground is debatable in any event. For example, should it matter if, under Rule 15(c), the nonparty is one that should have realized it would have been sued?

⁴⁸ The idea here is to invoke the concept of relevance as a defining factor for the duty to preserve. Using it might raise several problems. For one thing, the claim involved has not been made in a formal way. For another, relevance is a very broad concept. Indeed, one might need to address whether this means relevant to the claim or defense or to the subject matter, topics last addressed in the 2000 amendments to Rule 26(b)(1).

Another question that might arise at this point is whether allegedly privileged materials must be preserved. Those are not within the scope of discovery, but the court can't pass on

- (d) **Ongoing duty.** The person must take reasonable measures to continue to preserve information subject to preservation under Rule 26.1(c) for a reasonable period after the date the obligation to preserve is triggered under Rule 26.1(b).
- (e) **Remedies for failure to preserve.** The sole remedy for failure to preserve information is under Rule 37(e).

**Rule 37. Failure to Make Disclosures
or to Cooperate in Discovery; Sanctions**

* * * * *

- (e) **Sanctions for failure to preserve [electronically stored] {discoverable} information.** A court may not impose sanctions [under these rules] on a party for failure to preserve information if the party has complied with Rule 26.1. The following rules apply to a request for sanctions for violation of Rule 26.1:
- (1) ***Burden of proof.*** The party seeking sanctions has the burden of proving that:
- (A) a violation of Rule 26.1 has occurred;
 - (B) as a result of that violation, the party seeking sanctions has been denied access to specified electronically stored information, [documents or tangible things];
 - (C) no alternative source exists for the specified electronically stored information [documents or tangible things];
 - (D) the specified electronically stored information [documents or tangible things] would be [relevant under Rule 26(b)(1)] {relevant under Evidence Rule 401} [material] to the claim or defense of the party seeking sanctions;

whether discarded materials were indeed privileged. This problem will be mentioned again below.

- (E) the party seeking sanctions promptly sought relief in court after it became aware of the violation of Rule 26.1.
- (2) ***Selection of sanction.*** If the party seeking sanctions makes the showings specified in Rule 37(e)(1), the following rules apply to selection of a sanction:
- (A) the court may employ any sanction under Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information but must select the least severe sanction necessary to redress [undo the harm caused by] the violation of Rule 26.1;
- (B) *[Alternative 1]* the court may not impose a sanction under Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information unless the party seeking sanctions establishes that the party to be sanctioned violated Rule 26.1 [negligently] {due to gross negligence} [willfully] {in bad faith} [intending to prevent use of the lost information as evidence];
- (B) *[Alternative 2]* the court must not impose a sanction if the party to be sanctioned establishes that it acted in good faith in relation to the violation of Rule 26.1;
- (C) the court must be guided by proportionality, making the sanction proportional to the harm caused to the party seeking sanctions and the level of culpability of the party to be sanctioned.
- (3) ***Payment of Expenses.*** Instead of or in addition to imposing a sanction, the court must order the party in violation of Rule 26.1, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the violation, unless the violation was substantially justified or other circumstances make an award of expenses unjust.

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

* * * * *

(g) FAILURE TO PRESERVE DISCOVERABLE INFORMATION; REMEDIES

- (1) If a party fails to preserve discoverable information that reasonably should be preserved in the anticipation or conduct of litigation, the court may[, when necessary]⁴⁹:
- (A) permit additional discovery;
 - (B) order the party to undertake curative⁵⁰ measures; or
 - (C) require the party to pay the reasonable expenses, including attorney’s fees,⁵¹

⁴⁹ Whether this qualification is helpful could be debated. The idea is to authorize various responses to the loss of data 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.

⁵⁰ 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.

⁵¹ 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?

caused by the failure.

- (2) Absent extraordinary circumstances [irreparable prejudice],⁵² the court may not impose any of the sanctions listed in Rule 37(b)(2) or give an adverse-inference jury instruction⁵³ 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,⁵⁴ 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;⁵⁵

⁵² 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.

⁵³ 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?

⁵⁴ 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.

⁵⁵ Is this treatment sufficient to substitute for provisions about "trigger" like the ones in Category I or Category II. If those provide useful detail, would it be desirable to add similar detail here?

- (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;⁵⁶
- (C) whether the party received a request that information be preserved, the clarity and reasonableness⁵⁷ 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;⁵⁸
- (E) the proportionality of the preservation efforts to any⁵⁹ anticipated or ongoing litigation; and
- (F) whether the party sought timely guidance from the court⁶⁰ regarding any

⁵⁶ 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 circumstances.

⁵⁷ 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)?

⁵⁸ 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”?

⁵⁹ 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.

⁶⁰ 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

unresolved disputes concerning the preservation of discoverable information.

* * * * *

Besides the footnoted questions, the Category 3 approach is intended generally to permit consideration of the extent to which the backwards shadow of such a rule would reassure and give direction to those making preservation decisions. Would it only do so if it absolutely precluded sanctions (absent “irreparable prejudice”) in the absence of proof of bad faith or willfulness? Would it adequately ensure a uniform treatment of these issues nationwide, or possibly be interpreted in keeping with the existing (and seemingly inconsistent) precedents in the area?

guidance when addressing other courts?

APPENDIX H

**REPORT FROM THE CIVIL JUSTICE REFORM GROUP
(Submitted for the Sept. 9, 2011 Mini-Conference)**

**Preliminary Report on the
Preservation Costs
Survey of Major Companies**

prepared for
Civil Justice Reform Group

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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?

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,

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

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

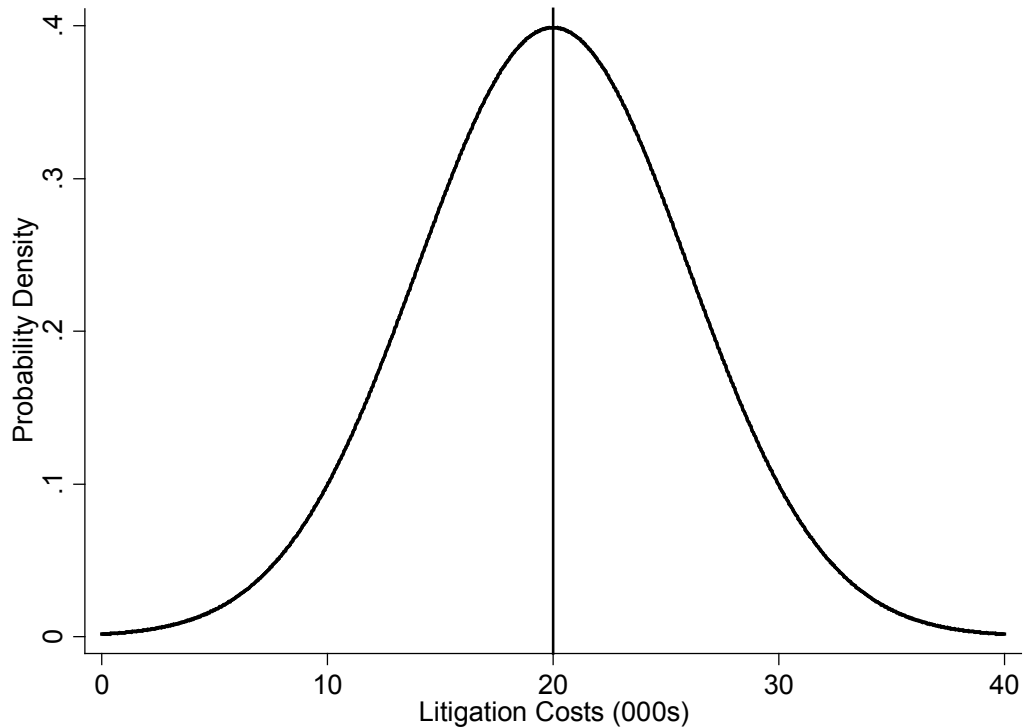
As noted above, this preliminary report is intended to preview the Preservation Costs Survey in light of the need for more empirical evidence on the costs of preservation. Evidence alone, however, is not sufficient to fill the gaps in our knowledge of the challenges presented by preservation obligations. 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.

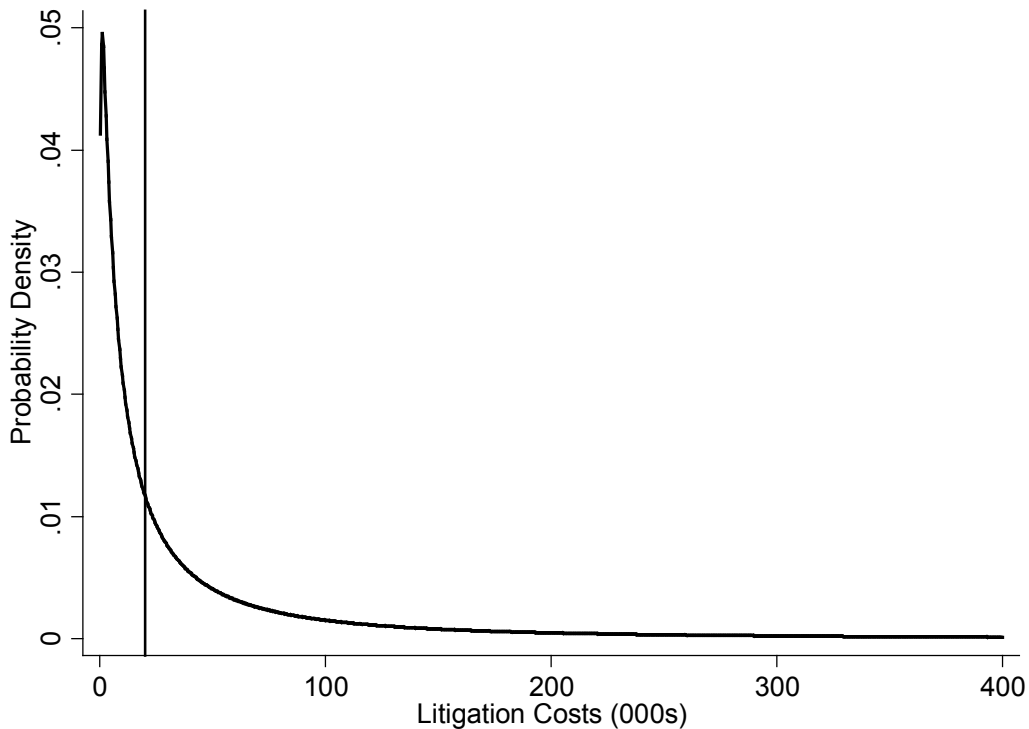
FIGURE 1: LITIGATION COSTS WITH MEDIAN OF \$20,000,
ASSUMING A NORMAL DISTRIBUTION OF COSTS



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

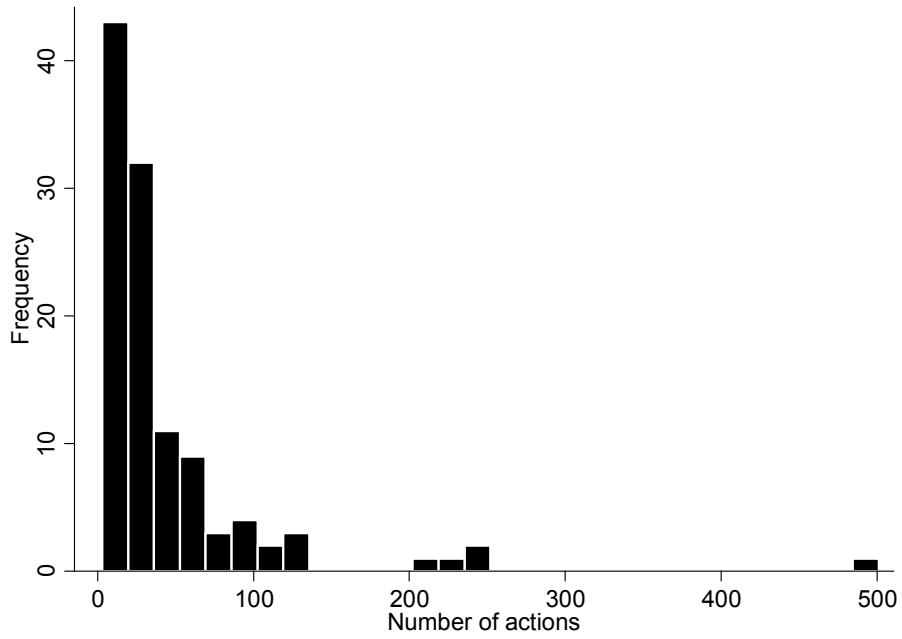
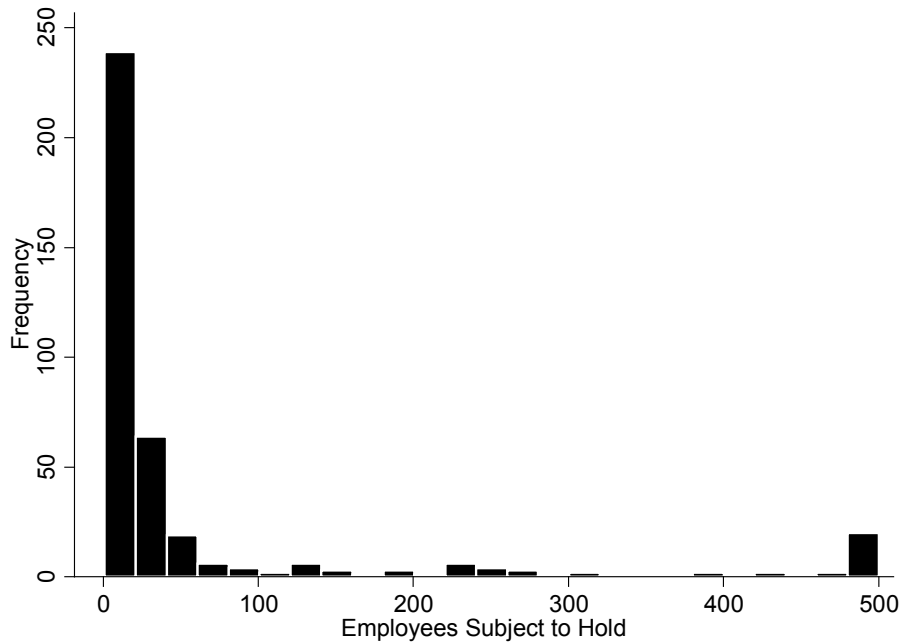


FIGURE 4: DISTRIBUTION OF NUMBER OF EMPLOYEES ON HOLD PER MATTER, COMPANY D LITIGATION HOLD SAMPLE



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.

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)

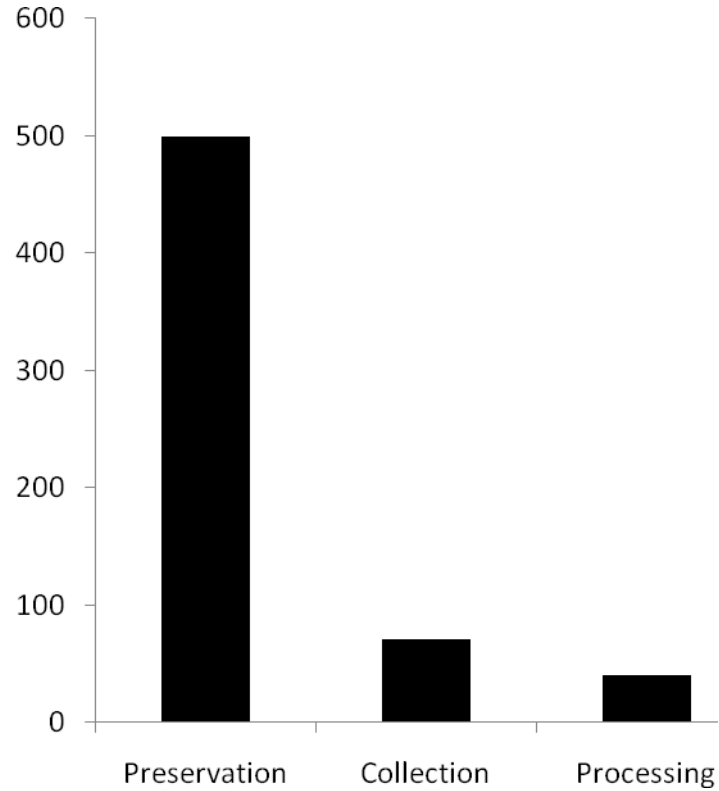
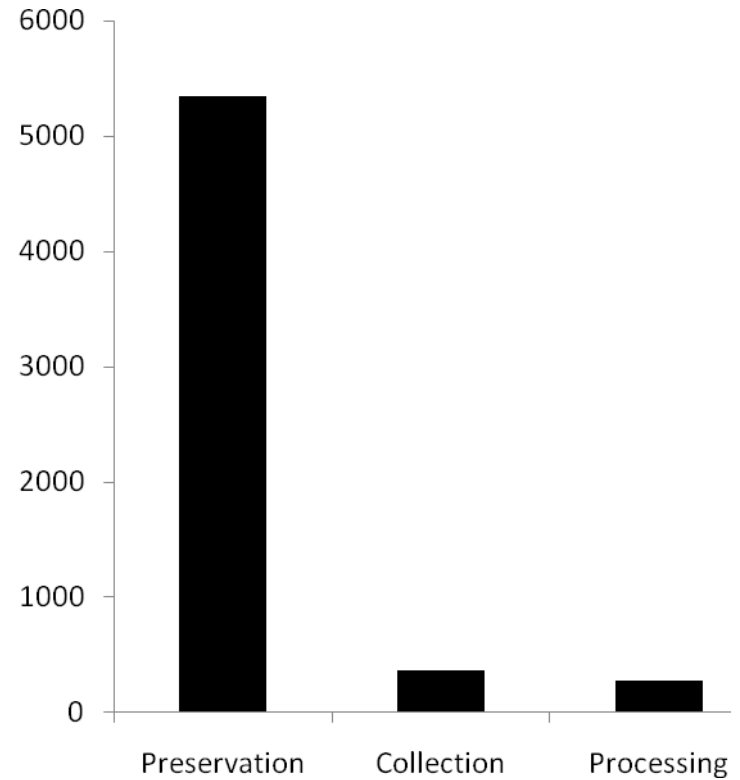


FIGURE 6: NUMBER OF CUSTODIANS WHOSE DATA IS SUBJECT TO PRESERVATION, COLLECTION, AND PROCESSING (COMPANY A)



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 I

**REPORT FROM THE FEDERAL JUDICIAL CENTER
(Submitted for the Sept. 9, 2011 Mini-Conference)**

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 terms¹ 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.

APPENDIX J

REPORT FROM RAND CORPORATION
(Submitted for the Sept. 9, 2011 Mini-Conference)



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September 7, 2011

Honorable David Campbell
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Dear Judges Campbell, Kravitz, and Rosenthal:

As you may know, the RAND Corporation's Institute for Civil Justice has been conducting research into various costs associated with pre-trial discovery of electronically stored information (ESI). This work, which involves collecting detailed information about expenditures related to electronic documents and data produced in response to demands for production in approximately 50 cases, is nearing final publication. We are aware, however, that the Discovery Subcommittee will be holding a mini-conference in Dallas on September 9th where preservation and associated sanction issues will be discussed. In light of the important work of the Discovery Subcommittee, we thought it might be helpful to share what we learned during our research about the dynamics of preservation issues in the eight very large corporations participating in our study. The goal of this particular aspect of our research was to understand how preservation compares to production (which we defined as steps needed to *collect, process, and review* ESI) in terms of overall costs and perceived challenges. Because quantitative data on expenditures for preservation in individual cases are not available, we relied primarily on qualitative interviews for our analysis. These interviews revealed that litigants from the large companies in our study have serious concerns about the defensibility of their practices and procedures for preserving ESI in anticipation of litigation or production requests.

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Summary of Preliminary Findings

- Although litigants at some companies asserted that overall expenditures for collection, processing, and review were higher than those for their preservation responsibilities, others claimed that preservation costs (both direct and indirect) overwhelmed production costs. All companies reported that preservation-related expenditures have become a significant portion of their total costs of discovery.
- Organizational litigants were generally not confident that their preservation choices were defensible ones. They asserted that this uncertainty resulted in preserving far greater volumes of data than was ever likely to be collected as part of actual litigation. We also learned that litigants were not sure that the processes they chose to implement preservation efforts would withstand judicial scrutiny if challenged in the future.
- Those we interviewed claimed that these problems were caused by a dearth of understandable legal authority and clear guideposts for litigants to use when crafting preservation strategies. They asserted that preservation guidance was minimal, limited in precedent, and sometimes conflicting. To the extent that they act in light of these beliefs, their claims that over-preservation and fear of sanctions have triggered unnecessary costs may well be justified. In contrast, litigants report greater confidence in their production strategies because the controlling authority and guidelines in that area are clearer and less ambiguous.
- Preservation appears to be the e-discovery area most in need of standardized, unambiguous, trans-jurisdictional authority. Guidance is needed for the proper scope of the ESI preservation duty, the manner in which that duty should be discharged, and the types of behavior that would be considered sanctionable. The exact nature and form for such guidance was beyond the scope of our study.

Discussion Background

Our original and arguably narrow focus on the production cycle was necessary in order to draw a reasonably distinct line in the sand around the costs to actually turn data over to a requesting party. But in discussions with participants during the background research for this project, a topic commonly brought to our attention involved their concerns about e-discovery-related responsibilities that arise long before a demand for production is received. Such concerns involve not only to the cases we included in our study as examples of ESI production, but extend as well to litigation that never reaches the discovery stage and even to situations where no complaint is ever filed. What we heard were reports that what keeps many in-house counsel up at night are not necessarily the problems —and presumably the costs— related to responding to a request for *production* but in fact the challenges and associated expenditures related to *preservation*.

As such, we felt that it would not be realistic to report on electronic discovery costs if issues related to the duty to preserve potentially relevant ESI from inadvertent or intentional modification or deletion are completely excluded from the equation. But early on it was clear that gauging the magnitude of expenses for preservation in individual cases would present a number of unique difficulties. Our original approach for collecting information regarding e-discovery expenditures looked only at what took place in cases with actual document production, a selection criterion that

might provide unrepresentative examples of the many different circumstances where preservation responsibilities can be in play. Even when clearly connected to actual litigation, preservation is a duty that can extend across multiple cases for the same custodians, files, or data locations, which would make identifying the costs directly related to a specific case speculative at best when the information was subject to a series of cascading and overlapping legal holds. And as will be described subsequently, significant shortcomings characterize the manner in which many organizations track their preservation-related expenditures, and we would likely obtain little useful information with the approach we used for production costs, regardless of how cooperative our participants might be.

The alternative we chose was to continue the interviews we had already conducted with representatives of the companies in our production cost data collection while changing the focus of those conversations. We had certainly discussed preservation issues originally, though primarily as background to understand how each company dealt with demands for production. The way data are preserved, of course, influences many aspects of the collection phase, especially costs. This time our primary goals would be to (a) assess how the costs of preservation within an organization generally compare to costs associated with production, and (b) to assess how preservation compares to production in terms of how large scale organizational litigants perceive the difficulties involved, the state of controlling authority, the degree to which the process has become routine and incorporated into the normal course of business, and their "comfort level" when faced with these e-discovery challenges. Our secondary goal was to better understand methodological issues that would be faced in any rigorous attempt to quantify preservation costs in future research.

Though what might be learned would only reflect the experiences and opinions of staff at eight very large organizations, we have no information that would lead us to believe that the core challenges faced by these specific companies in dealing with preservation duties and issues are markedly different than those faced by others of similar size. This is not to say that all corporations of this magnitude approach preservation requirements in the same way (indeed, there is considerable divergence in preservation practices across our participating companies), but the underlying concerns regarding legal holds and the like should be relatively similar.

Results of Qualitative Interviews

Metrics

To be frank, the general quality of self-collected metrics for the costs of preservation within organizations is poor, even more so than what we encountered when gathering expenditure data for the production cycle. Most interviewees did not hesitate to confess that their preservation costs had not been systematically tracked in any way and that they were unclear as to how such tracking might be accomplished, though collecting useful metrics was generally asserted as an important future goal for the company.

Part of the reason for a lack of existing information in this area appears to be that much of preservation involves expenditures incurred internally, such as the costs of IT staff time, of law department attorney and paralegal time, of other employees' time (such as the effort required by custodians to comply with legal hold notices), and of purchases and licensing of applications and hardware to handle preservation. There are exceptions to this internal orientation of preservation expenses, such as when backup tapes are warehoused at a secure facility, when vendors are used for forensic imaging of large numbers of hard drives, or when the advice of outside counsel is

sought for drafting the proper language to be used in legal hold notices, but for the most part preservation primarily triggers internal costs, which are discussed at length in our main report as ones appearing to be the least well-tracked source of e-discovery expenditures. Even in the relatively small fraction of US corporations that require in-house counsel to record time expenditures at the litigation level, efforts expended for preserving data generally may not always be a type of service or event covered by the tasks or matter codes available in the timekeeping system. Presumably timekeeping for preservation efforts expended by other employees in an organization, such as those made by records management staff or information technology support, would have similar shortcomings.

In addition, preservation efforts are often associated with enterprise-level investments, such as the purchase or licensing of an automatic legal hold tool. Such applications are certainly costly and have an observable price tag, but the expenditures are spread across all of the company's present and future preservation needs. Some aspects of preservation may also be intertwined with other business purposes such as regulatory compliance or records management, which may work against easily identifying those activities associated only with legal processes.

Finally, definitional issues come into play. The scope of what might constitute an expense associated with preservation is not subject to uniform interpretation. While few would challenge an approach that included time spent issuing a legal hold notice in any calculation of preservation costs, it is less clear whether the indirect effects on business productivity should be included as well. For example, there may be economic impacts resulting from a decision not to adopt certain information technology products (such as instant messaging or social networking platforms) that might present significant difficulties when preserving information, from slower computer system performance caused by halting the routine deletion of obsolete information in transactional databases, or from a reduced ability to recover lost but nevertheless important data due to a shift from a long term data backup process to a short term disaster recovery system primarily because of preservation concerns. This uncertainty associated with defining the type of costs clearly associated with preservation, along with the obvious difficulty in calculating what such indirect costs might be, appear to be additional factors discouraging self-collected metrics in this area.

These reported difficulties in collecting useable information regarding preservation expenses are not unique to the companies we contacted. Despite the costs of preservation having become one of the most discussed topics in the legal press of late, we are not aware of *any* empirical research that has collected quantitative information about such costs across significant numbers of actual cases. Our assumption is that the reasons for the dearth of scholarship here are more methodological than any reflection of a lack of interest in the subject. One large scale, comprehensive study examining discovery costs, for example, did ask more than 2,000 attorneys connected with a sample of federal cases terminating in late 2008 as to whether their clients had implemented legal holds. About half of the attorneys representing parties responding to discovery requests in those cases did report that a hold had been initiated and another quarter indicated that there were no holds, but 26 percent of the attorneys could not or would not say one way or another.¹ Presumably, the difficulties of collecting data in this area would be far greater if the

¹ See, e.g., Lee III, Emery G. and Thomas E. Willging, *Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules*, Washington, D.C.: Federal Judicial Center, October 2009, at pp. 21-22.

focus had been on the magnitude of expenditures associated with such legal holds instead of simply asking the relatively straightforward question of whether a hold had been in place. It is also illustrative that of the more than 80 questions included in the survey—one primarily designed to shed some sorely needed light on electronic discovery costs—only the question described above directly touched on preservation. Because the experienced researchers who led this study have pointed out elsewhere that “preservation duties with respect to ESI” are one of the “particularly knotty issues” of pretrial discovery and have called for “additional, credible research on the relationship between pretrial discovery and litigation costs,”² it is reasonable to assume that the absence of more focused questions on preservation costs in a large scale case-based survey reflected a lack of confidence that reliable information could be collected in such a manner.

This situation may change in the near term future. The organizational litigants in our study generally acknowledged a need to do a better job in measuring their preservation costs. One purpose cited for doing so would be to improve the efficiency and effectiveness of a company’s overall approach to preservation duties. Quality metrics would, it was said, help in making important decisions such as to whether or not to invest in expensive enterprise-level legal hold tools. Another purpose mentioned involved the company’s desire to be able to present a more persuasive argument to the court when challenging what are believed to be unusual, disproportional, or overly broad preservation demands. Ongoing efforts by the EDRM group to develop standardized metrics for the preservation process may assist organizations in achieving these goals but at the present time, the information gap in this area is substantial.

How the Costs of Preservation are Believed to Compare to Production

Despite the considerable difficulties currently faced in collecting case-level *quantitative* data regarding preservation expenses, *qualitative* data can help to paint a useful picture of how preservation should be viewed against the backdrop of e-discovery in general. We asked interviewees for their opinion as to how overall preservation costs compare to overall costs associated with production within their organization. The focus here was not individual cases; instead, we were interested in total costs across all of the company’s discovery efforts. The specific frame of reference (such as average annual costs or costs incurred within the recent past) was up to the interviewees. We chose to frame our question in this way because we felt it would be reasonable to assume that key personnel tasked with overseeing e-discovery activities in these companies would be in a unique position to consider, for example, how the level of effort spent by IT department staff for preservation duties over the course of a year compares to the effort they spent for other e-discovery tasks over the same period of time, how application and hardware purchases compare, how vendor service expenditures compare, how outside counsel billings compare, etc., even if they would be unable to state with certainty what the totals might have been in any individual case. Until better metrics are developed and routinely utilized by litigants, such opinions constitute the best source currently available for understanding the relative costs for preservation and production, at least in the organizations participating in this study.

The responses were mixed. For some participants, overall preservation expenses, at least at the time we had these discussions, were strongly felt to overwhelm production cycle costs. But for

² Lee III, Emery G. and Thomas E. Willging, “Defining the Problem of Cost in Federal Civil Litigation,” *Duke Law Journal*, Vol. 60, pp. 765-788, December 2010, at p. 787.

others, litigation-related expenses for collection, processing, and especially review in live litigation consistently dominated their total e-discovery spend. Understanding why a company representative's opinion might fall into one group or another can provide insight into the ways organizations approach preservation challenges.

In companies where preservation costs were reported as predominating, there were a variety of reasons offered for the representative's perception. One revolved around the impact that preservation has on staff throughout the organization, especially when individual employees under legal holds have to change how they manage information, such as spending time on daily basis to figure out what data within their environment and control should be retained and what could be deleted or modified. Another reason offered involved significant preservation costs that were continuing to be incurred as a result of long-term or widespread litigation or ongoing investigations. These costs might arise, for example, from the continued storage of thousands of back-up tapes taken offline years ago or from the need to replace considerable numbers of otherwise business-ready computers that had been physically secured in anticipation of possible requests for forensic investigations. Long term exposure also was said to increase the need to maintain an expensive capability to preserve data in now unused legacy systems. The storage requirements of data preserved at any one point in time was also asserted as tipping the balance towards preservation as the primary source of e-discovery expenditures. The purchase price of individual servers needed to store preserved data may not be impressive, it was said, but when associated expenses for network connections, maintenance, redundancy, development, security, and backup are factored in, it can cost in excess of \$100,000 for all resources associated with a single terabyte of preserved data. One company reported that a third of its IT department's email resources were now dedicated to preserved information. Finally, the burdens associated with implementing and auditing legal holds in an organization of considerable size and technological complexity was said to generate ongoing expenditures, with staff dedicated to little else but managing preservation chores; such personnel costs were in addition to recent or anticipated multi-million dollar outlays for centralized legal hold applications that were hoped to provide a defensible way of documenting their preservation responses.

In companies where production was said to incur greater expenses than preservation, generally one or more of four reasons were offered. The first was that the company's already-implemented enterprise-level collection tool was in fact able to perform a parallel function as a means of routinely preserving data. The company's standard approach was to go out and collect from identified custodians when litigation was initially anticipated or underway, rather than first preserving ESI, then waiting for a formal demand for production before collecting. In such instances, the costs of preservation are essentially indistinguishable from the costs of collection. The second reason that we were given was that the cases defended by the company in question tended to be large scale, multi-year, discovery-heavy, and rarely settled. In the company's experience, preservation was almost always followed up by collection, processing and review of ESI. There were few instances where preservation efforts were triggered by threats of litigation that never actually materialized or by lawsuits where discovery was never conducted. Here, the significant total costs of production, especially those for review, were larger than those to preserve data at the outset of the same case. Third, some asserted that their company had worked hard in recent years to eliminate many of the aspects of its operations that had previously resulted in significant preservation expenditures. For example, traditional practices of retaining many months' worth of backup data had been abandoned in favor of a disaster recovery system covering a time span too

short to be of use in any litigation, the volume of data under sole control of individual employees had been curtailed, a significant investment had been made into more economical data storage, and steps had been taken to eliminate the need to include outside counsel in most routine preservation activities. And a fourth reason we were offered was that the company had undergone a sea change from a “when in doubt, throw it out” philosophy to a “retain everything” policy for at least some business units with heavy litigation pressure. With preservation becoming the norm rather than the exception, the company felt that it was able to incorporate routine preservation into its regular course of business, providing opportunities for efficiencies that were felt to reduce total preservation expenditures over the long run (and avoid “reacting like a fire drill” each time or making forensic copies of the same custodians over and over again), though the upfront and ongoing costs to place most information produced by the company’s employees into a permanent archiving solution were said to be “enormous.”

No matter how a company’s representative arrived at his or her opinion regarding relative costs, all participants reported that expenses associated with preservation now constitute a significant portion of all of the company’s discovery-related activities. We certainly were made aware of numerous instances where a company’s specific decision in regard to preservation duties resulted in surprisingly large expenditures, at least in an absolute sense. Whether those expenditures were unreasonable in light of the stakes of the case is unclear, but it does suggest that preservation can require significant outlays of human and financial capital.

Uncertainty Surrounding Preservation Duties

What was an essentially unanimous take from all participants in our series of qualitative interviews was that the level of uncertainty associated with crafting a proper and appropriate preservation response could be uncomfortably high at times, especially in light of rapidly shifting winds in controlling authority.

In contrast, there was little concern voiced about problems in identifying the point at which the duty to preserve is actually triggered. Participants appeared to be confident that the warning signs suggesting a reasonable likelihood of future litigation or regulatory investigation would be fairly obvious to experienced counsel. It should be noted that one interviewee at a company with a particularly aggressive preservation strategy remarked that if the trigger point was restricted to the actual receipt of a complaint or subpoena, there would be a greatly reduced need for the organization to make the effort to archive essentially every business-related document or communication as they do now. But in general, determining when a duty to preserve has arisen was not thought to be a problem for our participating organizations.

Although the onset of the duty might be obvious in most instances, company contacts indicated it was not always equally clear that the specific preservation choices they have made in the past or were currently making were defensible ones. This lack of certainty was asserted to result in organizations casting a “preservation net” that was either too wide (e.g., inclusion of custodians or data locations with questionable connections to the facts of the litigation) or with too fine of a mesh (e.g., securing entire drives rather than individual active files) than what might have been utilized had they been more confident about their choices, especially when compared to the amount of information subsequently collected from the preserved data. A commonly-voiced fear was that despite good faith efforts to comply with the current state of the law, the scope of what was preserved or the specific process chosen to implement preservation might subsequently be found to

be inadequate. The potentially catastrophic ramifications of such a finding in terms of money, case outcomes, or professional reputations were said to require erring heavily on the side of caution.

There were two distinct issues that arose during our discussions about the scope and process of preservation. The first involved ongoing concerns that not enough custodians or data might be included in their efforts to prevent inadvertent destruction or modification of ESI. An example was given where 100 custodians were placed on legal holds even though it was never likely that data would be collected from more than five. "Never likely" was said to be an insufficient assurance of negligible risk, and as such, there would be unnecessary costs incurred as a result of imposing 95 other holds without any meaningful benefit in the resolution of the dispute in question. Such assertions are not unlike those made by some stakeholders who advocate for health care liability reform. Their claims that expensive and unnecessary over-testing is routinely performed in the face of uncertain risk and exposure arising out of potential medical malpractice litigation were echoed by what we heard from companies participating in this study, even from those who believed that they had taken significant steps to minimize preservation expenditures. With few reliable benchmarks currently available for assessing the risk of employing a particular preservation strategy in each case or dispute they face, it was felt that the most prudent approach in most instances was to go beyond a relatively conservative assessment of custodians, data locations, and data types with potentially relevant evidence and markedly expand the volume of information subject to preservation.

Such concerns over the costs associated with over-preservation appeared to be primarily related to what were asserted to be unnecessary expenditures to lock down and store the information (e.g., the value of time spent by IT staff to mirror hard drives or the capital investment required to create adequate server capacity for preserved files). Costs arising from a corresponding need to perform collection and processing tasks on a much larger universe of data than might have been preserved under a different legal environment were not a commonly mentioned complaint.

The second issue involved the choices that needed to be made in order to create a preservation process that was thorough as practically possible. It was asserted that no matter how much effort might be invested into crafting a comprehensive preservation plan, the reality is that something minor will often go wrong. People make mistakes, a notice to preserve overlooked or lost in the email system, a folder missed, a hard drive not inventoried, all events that were said to have an excellent chance of occurring in organizations of the size and scope included in this study. It was not clear to most of whom we spoke with what the ramifications of such inadvertent mistakes might be. This was less of an issue of direct costs for preservation (though one participant suggested that additional steps taken by his company to reduce the chance for error to a minimum had significant economic implications) than about the potential for a downstream hit for monetary sanctions, adverse inference instructions, or some other undesirable and presumably costly outcome. Much of the discussion in this regard focused on the process of imposing a legal hold within the organization and making sure that employees followed both the intent and letter of the directives to preserve. Corporations with widely distributed computing assets where control over individual files were primarily in the hands of the individual employees who created them appeared to have the greatest concerns in this area. Crafting a preservation approach that defensibly balanced the risks of giving those same employees the primary responsibility to safeguard ESI under their immediate control against the much greater costs of tasking IT or security personnel with the duty of directly seizing the data was said to be particularly difficult. An organizational litigant might feel the steps

they took were reasonable and in proportion to the stakes of the litigation and the value of the information, but it was asserted that there are few guarantees that a judge would see it in the same way.

It should be noted that we perceived a greater comfort level regarding the preservation process in those companies that had completed the installation of an automated legal hold compliance system (some other participants were in the process of implementing such a system or seriously considering the purchase of one but at the time we spoke, these were future goals). But it was noted that these automatic compliance systems essentially routinize only the notification and tracking aspects of legal holds; they do not necessarily directly preserve or collect the information in question (though some tools do offer a form of this capability) nor do they confirm that the information under the control of a custodian is secure from inadvertent or intentional modification or deletion. Nevertheless, moving from an *ad hoc* response for legal holds that depend on individual attorneys to craft and manage both notice and compliance to a process that was more routinized and more consistently documented and auditable was felt to remove some of the danger that the approach could be challenged in the future. But even if the process had been improved, there was still uncertainty about the scope of preservation. Concerns regarding over-preservation remained important issues even for companies with automated approaches to issuing legal holds.

The Sources of Uncertainty

If there was one consistent theme in what we heard, it revolved around complaints of a lack of understandable legal authority and guidance that could be comfortably relied upon when making preservation decisions. Despite the much-discussed risks of a less-than-comprehensive preservation hold or of a failure to adequately guarantee compliance, there are in fact few appellate court opinions that speak directly to the mechanics of preserving electronically stored information. At the moment, the most widely circulated decisions come from individual federal district court judges and magistrates and as such cannot be relied upon to control the law applied in the many jurisdictions the litigants in our study can find themselves. Such decisions may be influential, but there are no guarantees that a trial court judge in another part of the country will see the same issues in the same way. Examples of conflicting holdings across and within jurisdictions include issues related to whether failure to issue a written legal hold notice constitutes gross negligence *per se*, whether there is a duty to notify opposing parties of evidence in the hands of third parties, or whether sanctions should be imposed for the failure to properly preserve data without any need to show that the lost information was relevant or helpful to the requesting party. As a result, preservation practices applied to computer resources located at a company's central office may be subject to very different standards when scrutinized by courts in various federal districts and states. When faced with this Balkanized authority, it was asserted that rational litigants would have few options available other than conforming to rulings that impose the broadest and harshest (at least from a producing party's perspective) preservation duties.

This uncertainty about the scope of preservation duties arising out of a lack of uniform, trans-jurisdictional policies is exacerbated by what was described as less-than-helpful language and confusing directives sometimes found in judicial opinions and court rules that do speak to preservation issues. As the Subcommittee's members no doubt are aware, complaints from lawyers and litigants regarding controlling authority that they believe was crafted to provide the widest flexibility to trial judges and appellate justices —thus lending itself to fluid interpretations and uncertainty about the most appropriate steps to take in response— are certainly not unknown in

many other aspects of the civil and criminal justice systems. But in the context of preservation, a world in which information technology, corporate policies, and the law all are rapidly evolving in sometimes different directions, such complaints may have more traction than is usually the case. Unlike other aspects of the pretrial process where the business practices of litigants have had many decades to adapt to a rich body of legal authority, the preservation of ESI continues to be perceived as an unfathomable black box, one that seems to require litigants to radically shift gears, as one interviewee put it, whenever the “weekly law bulletins tout some obscure judge’s opinion or shout about some new sanction.” A key concern revolved around how a company’s chosen approach to preservation, which may have seemed reasonable to counsel at the time, might later find itself somewhere on the continuum between total acceptability and serious sanctions. To paraphrase a perhaps especially hyperbolic analogy offered by one interviewee in regards to the standards that might be applied to preservation decisions,

I know it’s negligence not to be paying attention and I wind up running a red light and causing an accident. I know it’s gross negligence if I get drunk, run a red light, and cause an accident. And I know it’s an intentional or willful act when I deliberately run a red light in order to cause an accident. What I don’t know is whether it is negligent, grossly negligent, or intentional misconduct if I don’t get a forensic copy of every hard drive in the company each and every time we are sued.

It is important to remember that our focus here is on *litigant perceptions*. Even if one could put forth a convincing argument that in actual practice judges across the country essentially speak with one voice when it comes to preservation, the key issue is that repeat litigants (at least the ones we spoke with) do not believe there is an acceptable level of uniformity and certainty in the law when it comes to interpreting what constitutes reasonable scope or reasonable practices. To the extent that they regularly act on those beliefs, rightly or wrongly,³ then claims that over-preservation have triggered unnecessary costs may well be justified.

A Need for Guidance

Our primary take away from these discussions was the clear and across-the-board desire for standardized, unambiguous, trans-jurisdictional authority, authority that would provide guidance for the proper scope of the ESI preservation duty, the manner in which that duty should be discharged, and the types of behavior would likely be considered sanctionable. Though our original question of whether companies spend more or less on preservation than they do on the production cycle remains of interest, the answer is not likely to be much help to litigants, the courts, or policymakers. A perhaps more useful question might be which of these two aspects of e-discovery are the more stable and settled. A good argument can be made that in the case of the production cycle, there is far more balance between the state of the law and the state of the technology than ever before. Issues regarding reasonable accessibility in collection, once the primary focus of both the rulemaking process and IT system developers, seem to have reached a point of relative stability, with collection having evolved into what might be characterized as a fairly industrialized process where litigants are generally comfortable with the choices they make. While we argue in our

³ One interviewee suggested that at least some of the uncertainty about preservation is fed by the self-interested claims of vendors who are “pedaling fear and snake oil” by “cherry picking” “little one-off” trial court decisions and give them “outsized play.”

report that affirmative steps are needed to encourage the increased use of automated approaches to help reduce the considerable costs of examining electronic documents for relevancy and privileged communications, the organizational litigants we contacted report few uncertainties about what the law requires of them when it comes to review. In regards to preservation, however, a similar understanding between litigant practices and controlling authority does not appear to have been reached.

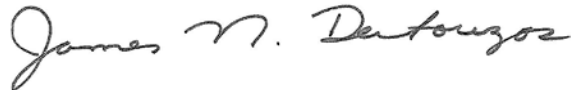
The exact nature and form for such guidance is beyond the scope of this document. We collected no data, quantitative or qualitative, that we believe would help shape the specific language of rules addressing ESI preservation. But it is clear that of the e-discovery areas we examined in this study, preservation is the one most in need of concerted action on the part of the policymaking community.

Please do not hesitate to contact the undersigned if the RAND Institute for Civil Justice can be of assistance.

Sincerely,



Nicholas M. Pace



James N. Dertouzos

cc: Professor Edward H. Cooper
Professor Richard Marcus

APPENDIX K

**SURVEY FROM THE SEDONA CONFERENCE WORKING GROUP
(Submitted for the Sept. 9, 2011 Mini-Conference)**



The Sedona Conference® Working Group 1
Membership Survey on Preservation and Sanctions

Survey date: August 3-15, 2011

Total Responses: 132 (17.8% of WG1 membership)

1.(A) Please indicate the percentage of cases in which you participated in state and federal courts within the past five years.

| | |
|---------------|--------|
| State Court | 33.75% |
| Federal Court | 68.58% |

1.(B) What role do you primarily play in litigation?

| | |
|--------------------|-------|
| Lawyer | 75.0% |
| Vendor | 3.0% |
| Consultant | 9.8% |
| Records Manager | 0.8% |
| Litigation Support | 7.6% |
| IT | 0.0% |
| Other | 3.8% |

1.(C) Regardless of your role, which side were you on?

| | |
|-----------|--------|
| Defense | 69.22% |
| Plaintiff | 27.66% |
| Nonparty | 14.54% |

2. In your experience, how often do preservation problems that you consider significant arise in the following general types of cases?

| | Never | Rarely | Sometimes | Often | Always |
|--|-------|--------|-----------|-------|--------|
| Over \$1 million | 1 | 11 | 38 | 53 | 29 |
| More than \$500k less than \$1 million | 3 | 16 | 56 | 45 | 12 |
| Less than \$500k | 5 | 32 | 52 | 34 | 9 |

3. How often and in what percentage of lawsuits in which you have participated during the past five years has a preservation issue arisen that required court intervention? Please answer both questions (A) and (B).

(A)

| | |
|--------------------|-------|
| No cases | 15.2% |
| 1-10 cases | 64.4% |
| 11-50 cases | 15.9% |
| More than 50 cases | 4.5% |

(B)

| | |
|---------|-------|
| 0-25% | 70.6% |
| 26%-50% | 11.1% |

| | |
|----------|-------|
| 51%-75% | 13.5% |
| 76%-100% | 4.8% |

4.(A) How often within the past five years have you raised with the court (e.g., by motion, phone call, or a letter) a claim that the opponent party has failed to comply with preservation obligations, which adversely affected your ability to present your case?

| | |
|-----------|-------|
| Never | 23.5% |
| Rarely | 38.6% |
| Sometimes | 31.8% |
| Often | 6.1% |
| Always | 0.0% |

4.(B) Please check one of the following statements that most closely matches your experience over the past five years:

| | |
|--|-------|
| Preservation issues arise more frequently in federal court | 46.2% |
| Preservation issues arise more frequently in state court | 8.3% |
| Preservation issues arise about equally in state and federal court | 45.5% |

5. In what percentage of cases in which you have participated on the defense side within the past five years have you taken steps to preserve information before a lawsuit has been filed?

| | |
|----------|-------|
| 0-25% | 31.8% |
| 26%-50% | 19.7% |
| 51%-75% | 22.7% |
| 76%-100% | 25.8% |

6. How often within the past five years have you or your client taken steps to preserve evidence anticipating a lawsuit that has never been filed or that settled before filing?

| | |
|--------------------|-------|
| Never | 11.4% |
| 1 to 10 times | 59.8% |
| 11 to 50 times | 17.4% |
| More than 50 times | 11.4% |

7. Parties engage in multiple stages of preserving and producing information in litigation, each of which can impose substantial costs. Please indicate the percentage of the total cost of all seven stages (including, e.g., time and effort spent by you, your client, and your client's employees) that are typically incurred for each of the following seven preservation and production stages. (your responses must total 100%)

Identifying potentially discoverable information to comply with preservation:

11.38%

Steps, if any, involved in collecting information pending discovery:

10.69%

Costs incurred in storing information in order to comply with preservation obligations:

7.44%

Processing information for review:

14.34%

Reviewing information for responsiveness before production:

29.64%

Reviewing information for privilege before production:

18.12%

Formatting & production of relevant information:

7.34%

8.(A) How often and in what percentage of cases in which you participated within the past five years has ESI, which is discoverable and stored overseas, been subject to the data privacy protection laws of other countries? Please answer both questions (i) and (ii).

(i)

| | |
|-----------|-------|
| Never | 21.2% |
| Rarely | 28.8% |
| Sometimes | 28.8% |
| Often | 18.9% |
| Always | 2.3% |

(ii)

| | |
|----------|-------|
| 0-25% | 65.2% |
| 26%-50% | 20.5% |
| 51%-75% | 10.6% |
| 76%-100% | 3.8% |

8.(B) How often within the past five years have you incurred added costs to preserve ESI stored overseas, which was subject to the data privacy protection laws of other countries?

| | |
|-----------|-------|
| Never | 32.6% |
| Rarely | 28.8% |
| Sometimes | 26.5% |
| Often | 9.8% |

| | |
|--------|------|
| Always | 2.3% |
|--------|------|

9. In what percentage of cases in federal court in which you have participated within the past five years have you met and conferred under Rule 26(f) and discussed preservation issues, the results of which were reported in a Rule 26(f) discovery plan, addressed in a Rule 16(b) scheduling order, or otherwise brought to the attention of the court?

| | |
|----------|-------|
| 0-25% | 28.0% |
| 26%-50% | 22.0% |
| 51%-75% | 27.3% |
| 76%-100% | 22.7% |

10.(A) In what percentage of cases in which you have participated within the past five years have you taken steps to preserve (either “in place” or through collection) ESI stored in laptops, home computers, tablets computers, smart phones, personal assistant devices, or other mobile devices?

| | |
|---------|-------|
| 0-25% | 13.6% |
| 26%-50% | 11.4% |
| 51%-75% | 25.0% |
| 76-100% | 50.0% |

10.(B) In what percentage of cases in which you have participated within the past five years have you taken steps to preserve (either “in place” or through collection) ESI stored on servers controlled by a non-party (i.e., “the cloud”)?

| | |
|---------|-------|
| 0-25% | 65.2% |
| 26%-50% | 16.7% |
| 51%-75% | 12.1% |
| 76-100% | 6.1% |

10.(C) In what percentage of cases in which you have participated within the past five years have you taken steps to preserve (either “in place” or through collection) ESI stored in “social media” sites?

| | |
|---------|-------|
| 0-25% | 80.3% |
| 26%-50% | 10.6% |
| 51%-75% | 6.8% |
| 76-100% | 2.3% |

10.(D) In what percentage of cases in which you have participated within the past five years have you taken steps to preserve (either “in place” or through collection) ESI stored in employer-controlled “collaborative” or shared sites?

| | |
|---------|-------|
| 0-25% | 39.4% |
| 26%-50% | 21.2% |
| 51%-75% | 18.9% |
| 76-100% | 20.5% |

11.(A) How often have issues relating to whether or when a preservation duty is triggered been the subject of dispute in cases in which you have participated within the past five years?

| | |
|-----------|-------|
| Never | 14.4% |
| Rarely | 49.2% |
| Sometimes | 25.0% |
| Often | 11.4% |
| Always | 0.0% |

11.(B) Would a rule change that lists examples of specific events that trigger the preservation obligation (e.g., complaint filing, notice of intent to sue), while

retaining the common-law requirement that the obligation arises when “litigation is reasonably anticipated,” make any difference in your evaluation of when the preservation obligation arises in your cases?

| | |
|-----------|-------|
| Never | 24.2% |
| Rarely | 31.1% |
| Sometimes | 26.5% |
| Often | 15.9% |
| Always | 2.3% |

12.(A) In what percentage of cases in which you have participated within the past five years have you advised your client to preserve “everything” that is potentially discoverable?

| | |
|---------|-------|
| 0-25% | 38.6% |
| 26%-50% | 9.8% |
| 51%-75% | 17.4% |
| 76-100% | 34.1% |

12.(B) In what percentage of cases in which you have participated within the past five years have you advised your client to preserve information that was potentially discoverable when the cost of preservation was not proportional to the amount of damages at risk or the issues at stake in the lawsuit?

| | |
|---------|-------|
| 0-25% | 48.5% |
| 26%-50% | 23.5% |
| 51%-75% | 17.4% |
| 76-100% | 10.6% |

13. Assuming that spoliation of evidence has prejudiced a party, what culpability standard should be required to impose a “serious sanction,” including sanctions listed in Rule 37(b)(2)(A) for failing to preserve ESI?

| | |
|---|-------|
| Purposeful Efforts to Destroy Evidence | 6.1% |
| Willfulness, in Bad Faith | 36.4% |
| Recklessness | 17.4% |
| Gross Negligence | 14.4% |
| Negligence or Fault | 2.3% |
| No Per Se Standard - depends on the circumstances | 23.5% |

Note: The following questions were optional and the response rate varied.

14. In your experience over the past five years, have preservation issues become increasingly significant in civil litigation?

| | |
|-----|-------|
| Yes | 95.1% |
| No | 4.9% |

If yes, is this primarily or substantially due to the increasing volume or complexity of ESI?

| | |
|-----|-------|
| Yes | 77.1% |
| No | 22.9% |

If this change is not due primarily or substantially to ESI, what are the principal factors?

- Another significant contributing factor is the belief - fueled by some of the decisions - that the cost of making a spoliation claim is small compared to the

potential benefit of persuading a court that conduct less than willful deserves a substantial sanction.

- Preservation issues have become increasingly significant in civil litigation over the past five years due to an increased judicial emphasis on sanctions for spoliation without providing consistent direction as to: (a) when the preservation obligation attaches; (b) what is a reasonable scope of material for preservation; and (c) what level of effort is required to avoid sanctions (or, put another way, what level of culpability will give rise to sanctions). In addition, an increased emphasis on this topic in the legal landscape in general has allowed enterprising litigants to leverage issues related to preservation as a means of harassing or burdening opponents with the intent of forcing victory on collateral issues rather than on the merits.
- A small minority of published judicial opinions are increasingly expanding the criteria of what 'ought' to be preserved in the name of reasonableness. Each published opinion adds to the list of obscure ESI which a party risks not preserving and is creating a reasonableness expectation that is skewed towards over-preservation.
- I think the change is also due, in part, to increased awareness by courts and practitioners of the changing nature of business and all communication and, accordingly, the reality that ESI is an essential part of civil litigation.
- Lawyers' and judges' awareness of the issue.
- An additional comment to my "yes" answer - the volume, including in many cases legacy data - has raised the complexity of even identifying sources of potentially relevant data.
- Opposing counsel's lack of knowledge of ESI issues or willingness to engage in a fruitful Rule 26(f) conference. Client's risk adversity and knowledge of cases that involve sanctions. These cases induce hoarding behavior because parties made preservation decisions in an abundance of caution. Outside counsel's risks associated with failure to advise a client to keep information that may be requested later drive behaviors that are at odds with the proportionality principle. Often, the court is asked to arbitrate the issue later in the case, and parties and their counsel feel that they can't take the risk that the court might disagree with their proportionality decisions.
- A better understanding of what is at stake with regard to preservation. As courts and litigants understand the technical issues better, what may have been thought of as easily preservable now can be seen as too costly, or what may have been thought of as unpreservable can now be seen as preservable.

- "Failure to preserve" claims have increasing settlement value. Litigants realize this and seek to raise the specter of such claims as additional leverage in the settlement process. Because the apparent standard is "preserve everything" it is virtually impossible to meet so is a fruitful area for litigation. It is becoming a "standard" part of discovery in large civil cases.
- The weaponization of ediscovery coupled with uncertainty. In the federal system alone, nearly 1000 judges and magistrates, guided but not bound by their brethren, review a responding party's reasonableness through the finely focused lens of hindsight and, when they deem conduct lacking, are empowered to issue harsh even draconian sanctions. As a consequence, winning the procedural war can be just as important, and in some instances more important, as winning the substantive.
- The enactment of the HITECH Act and the requirement that all providers become meaningful users of electronic health records (EHRs) is having a significant impact on the healthcare industry and the process by which information is obtained from the medical record for both regulatory investigations (claims payment, privacy and security, and other matters) as well as issues and concerns about the quality and safety of technology in healthcare -- as evidenced by the following two (2) recent cases: Death of Baby Genesis Burkett, http://www.huffingtonpost.com/2011/04/06/hospitals-sodium-overdose_n_845689.html; http://articles.chicagotribune.com/2011-06-27/news/ct-met-technology-errors-20110627_1_electronic-medical-records-physicians-systems. Suicide of Nurse in Seattle - Kimberly Hiat, http://www.msnbc.msn.com/id/43529641/ns/health-health_care/t/nurses-suicide-highlights-twin-tragedies-medical-errors/

[personally identifying information redacted]

Additionally, the preservation of potentially relevant ESI has the attention of our legislature. The Office of the National Coordinator for Health Information Technology (ONC) has published an Advanced Notice of Proposed Rulemaking (ANPRM) for Metadata Standards to Support Nationwide Electronic Health Information Exchange. It was published in the Federal Register on Tuesday, August 9, 2011:

<http://www.federalregister.gov/articles/2011/08/09/2011-20219/metadata-standards-to-support-nationwide-electronic-health-information-exchange>;
<http://www.gpo.gov/fdsys/search/pagedetails.action?granuleId=2011-20219&packageId=FR-2011-08-09&acCode=FR>;
<http://www.healthcareitnews.com/news/onc-seeks-input-ehr-metadata>.

Response period for the ANPRM is 45 days, so we can expect comments due on or about September 23rd.

I personally, feel a very strong personal and professional commitment to the development of standards which both improve the quality and safety of healthcare and support the spirit and intent of FRCP 1 "just, speedy, and inexpensive determination of every action and proceeding."

- Lawyers fail to proactively negotiate or seek court intervention to identify a sensible scope for preservation when the obligation first arises. Rule 26 is too late.
- Expanding obligations imposed by court rulings, such as sending hold notices to former employees, independent dealers, former lawfirms, etc.
- Storage capacity on live systems and the dynamic nature of many types of ESI (especially data)
- The burgeoning "ediscovery" law practice and advocate judges pushing particular technologies.
- Qualified "yes." Increasing emphasis on preservation has been a function of increasing visibility of ESI as a means of testing the truth of a person's formal statements, and a way to detect dishonesty through a person's efforts to alter or destroy ESI after the fact. ESI itself has been present in "documents" for more than a generation, and much of the increasing "volume" is a matter of more complex form instead of substantive content. Compare, for example, the volume of a one-page, plain-text message (1000 bytes) vs. a one-page Word document (20,000 bytes) vs. a one-minute video clip (10 million bytes). I don't know that ESI has increased the amount of truly material information that has to be preserved. It does seem to have increased the noise & trash surrounding the material information that needs either to be separated, or preserved & separated later.
- It's primarily due to over preservation and none of the questions in the front end of the survey address that cost impact. Generally, we cast the preservation net more broadly than just the actual custodians selected for review and production out of fear of spoliation claims. The mere existence of a motion to compel in the public domain is generally spun by the media as something intentional by the big bad company and once that bell is rung you cannot unring it. The damage to your company's goodwill is impacted. And plaintiffs' counsel are aware of this and will utilize it in their litigation strategy. We use Exchange 2010, so when a custodian is placed under Lit Hold, their mailbox is Lit Hold enabled -- meaning that every email they

send, receive, delete or alter is captured. Effectively there is no way to delete any email. This process ensures there can be no spoliation (voluntary or involuntary) for email. Since 90 to 95% of all collected data is culled out (meaning not responsive), we are over preserving 90 to 95% of the data. If there were rules that required the parties to agree upon search terms, date limitations, custodians, etc. to use in the preservation effort, then only those docs/email with those terms would need to be preserved. A rule could specify that the parties must agree upon search terms within 30 days of the answer to the complaint and 30 to 60 days after each Request for Production is issued -- so the process is iterative. However, there would need to be a safe harbor provision protecting the parties from any spoliation claims arising between the date that the first agreed upon preservation search terms were solidified and the date of the next agreed upon preservation search terms such as RFPs. For example, if the complaint addresses apples and the parties agree upon search terms relating to apples and the parties preserve accordingly. But then discovery comes in and they want docs on oranges and bananas too. The parties will agree upon search terms for the discovery but since oranges and bananas were not mentioned in the complaint nor were they considered in the agreed upon search terms, the parties cannot be left exposed to spoliation claims for the time between the Lit Hold was placed addressing only apples and the time when the discovery added oranges and bananas to the case.

- Increased awareness of ESI as a potential source of information leads to more sophisticated and extensive discovery; strategic use of ESI discovery to leverage settlement and to promote other non-merits-focused purposes;
- I would also add that the ability to preserve and collect information has become easier, so if new technologies make it possible to preserve ESI, parties expect that they must use such technologies to do so.
- Not the increased volume or complexity, but the increased frequency of evidence being electronic.
- Although the proliferation and occasional complexity of ESI is a significant factor in my practice (in-house), there are others, including the strategic use of overbroad or unreasonable preservation demands by requesting parties that are employed to gain strategic advantages and increase settlement values. This seems to occur with greatest frequency in the employment dispute context. I also find that opinions that stressed proportionality in discovery have brought preservation issues more to the foreground, and some requesting parties are more willing lately to have meaningful early discussions about the scope of preservation and collection, without

universally insisting on global preservation without any consideration of the associated burdens (which used to be more common in my experience).

- While technology is a significant factor, the failure to have good rules of thumb and a strong set of proportionality guidelines is the principal factor causing preservation issues to creep into more and more cases. Where one side has its "preservation house in order" (either because it is well organized or has little data), then it can take free shots at the other side at little cost and with a potential huge gain. This problem is exacerbated by a understandable fear among corporate defendants that the decisions that come from these orders may not be nuanced. Therefore, these lead to bad settlements, either of the preservation issue or of the litigation.
- increased awareness of the duty to preserve by opposing counsel
- A smaller factor is the breadth of caselaw that creates an artificial requirement on businesses to retain information.
- gamesmanship; attempt to use as leverage; "discovery about discovery"
- I don't think the volume or complexity has increased dramatically in the past 5 years. I think awareness of esi discovery issues have increased the significance.
- The change is due to ESI but not necessarily the volume - it is more an issue that automated systems destroy and do not retain information. Also an issue is that changes in technology by a party makes older data obsolete which may result in it being purged. There is also a problem with counsel making it clear to clients re what data/information needs to be preserved.
- The single most costly factor in preservation is the incompetence of counsel with respect to their understanding of the sources and forms of ESI, coupled with a lack of reasonable diligence directed to primary sources of ESI. The second factor in my cases has been a pervasive arrogance about ESI that it somehow needn't be treated like evidence--an attitude that, in my unique practice, too often manifests itself in the intentional destruction or willful suppression of electronic evidence. I've seen preservation become easier, not harder, in the past five years as lawyers and clients grudgingly adapt to meet ESI obligations. Unfortunately, far too many attorneys think they will escape the obligation to deal with ESI by waiting until, e.g., rules changes, ameliorate their obligation to acquire the competence needed to perform efficiently and skillfully in the ESI arena.
- Outlier ESI, (not backed up on the corporate servers, e.g. text messages, linked in messages, cloud ...) is rarely preserved by defendants. This ESI is critical in cases involving concealed conduct

- Judicial decisions imposing sanctions and efforts of lawyers to gain a litigation advantage by making spoliation claims and/or attempting to impose burdensome and expensive preservation obligations on their opponents.
- In my experience disputes involving preservation issues have become increasingly more significant because parties increasingly use allegations of spoliation of ESI as a sword in litigation regardless of the value of the ESI as it pertains to the claims and defenses at issue. Spoliation has increasingly become another arrow in the litigants' quiver and in my experience federal judges in particular have become increasingly sophisticated in discerning when preservation issues are being used to gain a tactical advantage and when concerns over spoliation of ESI is a genuine concern.
- Greater awareness of the bar of the role of ESI in litigation overall, and the ability to wield it as a sword.
- Also due to a lack of knowledge of eDiscovery obligations, and about the relevant technologies, by the lawyers.
- Other significant factors include 2006 FRCP ESI amendments, increase in judicial opinions, dramatically increasing awareness, and opponents' efforts to shift the focus to non-merits based litigation.
- The complexity of ESI has not really changed. While the volume has increased, the problem is with my organization's lack of an effective "Information Management" system. It was designed as a very decentralized system that is not conducive to speedy and effective e-discovery efforts.
- The drivers in my cases are (1) cost to preserve by collection and (2) user behavior. If we opt to preserve by collection, we wrestle with the proper scope of the collection (our litigators have not always thought it useful to discuss the scope of preservation with opposing counsel). The scope drives costs, but, if we guess wrong, we may be in trouble. If we preserve in place to save costs, we are responsible to the courts for whatever errors may be committed by users.
- Most of the issues are around scope - parties to collect from, date range, topics
- Opposing parties are more knowledgeable and are demanding preservation
- I think ESI complexity is used as a pretext for raising preservation issues in the first place.
- I think it has become more important because of increased awareness in the profession about these issues, and especially increased awareness that this can be an effective attack where one's client does not have significant ESI of its own to worry about.

- It is also caused by increased awareness of ESI issues by the courts.
- Opposing counsel uses ESI as a means to gain an advantage in the case unrelated to the merits.

15. Which technologies, if any, are you using to reduce out-of-pocket costs associated in preserving ESI? (Optional)

- Enterprise search products, archives, backend collection
- Since I am a U.S. magistrate judge, this question does not affect my actions.
- None found yet that are effective.
- Some clients have committed to legal hold software believing that it will solve preservation issues. We have found that this can sometimes come at the expense of human follow-up. Our experience has been that lower tech preservation approaches, coupled with human follow-up pursuant to a protocol, can be as or more effective a preservation tool.
- Costs of storage have gone down, so preservation is often not a large portion of the cost structure. Collection, processing and review activities create the heavier cost burdens on parties.
- Moving to native format review software to relieve processing cost our clients pay now
- We encourage clients who are involved in litigation frequently to take different steps, depending upon what is most cost efficient: 1) invest in archives; 2) preserve via forensic data collection (and then go on with your lives); 3) negotiate with the opposing party as to what needs to be preserved (requires a good understanding, from both custodians and IT, as to what data is where, and candor with opposing counsel)
- As outside counsel, we don't do this. The client does.
- On-site email journaling.
- We have employed various technologies to comply with preservation obligations, but not to reduce costs.
- Our archive system only stores items once, saving space. We also use a litigation server to snapshot data that needs to be preserved so business can continue to run normally.
- I am working on the HL7 Records Management and Evidentiary Support Workgroup where we are discussing and trying to address issues related to the preservation of ESI in EHRs and data that is exchanged electronically as part of the evolving Nationwide Health Information Network Exchange (NHIN).

- the technology of throwing out old data for which there is no legal or business need to keep
- Legal hold software
- SaaS automated legal hold offerings, self-collection offerings,
- Clearwell, email journaling.
- Clearwell, Summation
- Depending upon the situation, we may use date or custodian filtering; keyword or -phrase searching; enterprise archiving tools for bulk storage; or other tools that are defensible as a regularly conducted activity. The most important step for us, is to accomplish preservation as a usual-course-of-business activity instead of having to pay the hard costs of expert consulting fees & specialized technology.
- Clearwell
- Proprietary software that dedupes.
- With some clients, not specifically technology, but a standardized work-flow around preservation and collection designed to accommodate a large volume of litigation and showing, over time, a track record of reasonableness for purposes of the type of litigation.
- Vendors/software companies that specialize in the collection, hosting and processing of data for electronic discovery and document retention and management solutions.
- Social media download tools such as Facebook's Download Your Information tool and Twitter's Tweetakes.
- Re-engineering of the corporate architecture from distributed to centralized systems-of-record. More judicial use of disaster recovery plans that minimize the perpetuation of backup tapes. Destruction of the PST file.
- Targetted (keyword-based) indexing and collection software (to get away from overbroad imaging of computers, etc.)
- We are moving towards preservation tools that will result in vast over collection of data to avoid the risk of spoliation. This will create other major problems however. We are also using automated preservation tracking tools to ease management of holds.
- Some clients use archiving approaches for email, which amounts to preserving everything from an email standpoint. That is not much of a "solution."
- Brought into our firm technology for processing data, so that we can process in-house much of what we farmed out to third party vendors

- I rely heavily on sampling and testing, particularly the use of message collections from key custodians to evaluate culling and scope. I also employ native preservation exclusively and apply in-situ preservation judiciously. If you have a fair appreciation of the forms and venues ESI occupies, it's not all that hard or expensive to preserve that which is likely to be of evidentiary value. It's not a technology, but I communicate about the specifics with opponents and seek agreements, which are often more feasible than imagined when you are candid and build trust with an opposing counsel.
- DYI collection hard drives
- Litigation Hold process management software to issue and track active holds and information subject to hold, early case assessment tools to understand potential sources of ESI and gather hard facts for meet and confers regarding scope and obligations.
- Automated legal hold management (issuance, acknowledgements, reminders, releases, etc. - with full audit trail features and robust reporting); advanced technology to cull, filter and identify potentially relevant information
- Because of my organization's decentralized "Information Management" system, there is no practical, technological fix. Until the IM structure is overhauled (underway), we are mired in a labor intensive, manually-driven effort that is less than optimal.
- Preservation of backup tapes and use of Index Engines search appliances to index, search and extract potentially relevant ESI for review and production. Sampling. May use document scoring (predictive coding) as it becomes accepted by courts.
- Records management products that impose automatic deletion of documents and data that are not classified as business records and/or are beyond their retention schedule.
- Various software to assist in archiving, segregate and single instance storage and document management. Also automated legal hold software to help initiate and END holds.
- Automated, remote collection tools are a low cost way to preserve by collection in small cases.
- None, yet. we are looking at "solutions."
- automated review (this is used on the collection side as well, not just review, even though the name is automated review)
- EMC/Kazeon ECA
- None
- PSS, Guidance

- Search term technologies.
- a variety of collection tools, including Kazeon, Stored IQ and other products above and beyond the standard EnCase collection tools.
- Email Archive with search and preservation features.

16. Do you believe that advances in technology within the next three years will reduce the frequency or significance of preservation issues arising in your cases to such an extent that a new preservation rule would be outdated by the time it was promulgated? (Optional)

| | |
|-----|-------|
| Yes | 33.9% |
| No | 66.1% |

Why or why not? (Optional)

- Further, I believe that the forms of ESI that are sought will change as technologies evolve, so the "yardsticks" will always move ahead of the rules-making process.
- Technologies are beginning to help search within the enterprise, and companies are getting better at governing their information so they increasingly know where it is and what is in it. But with the preservation obligation so broad and the ramifications of improperly preserving so severe that the burden is still immense and technology is only helping a little.
- Rules reform on preservation (and discovery in general) is necessitated because of the inconsistency in the law on this topic, not because of the advance of technology. The advance of technology increases the relative burden related to preservation and other discovery issues, but the advance of technology is not the root cause of the problem. Nor will the advance of technology solve the problems posed by an inconsistent and unclear application of the law in this area: indeed, the pace of technology outpaces that ability of technology to provide solutions to yesterday's problems.
- No.
- I think advances in technology will continue to spur significant change, but certainly not in the next three years to make any rule being considered outdated in that span of time.

- As technology advances it will be more prevalent for parties and the court. Consequently as judges become more informed, trained and knowledgeable about ESI issues it will be easier and quicker for rulings to be made. And, the parties will know that the courts are more sophisticated in these issues and work harder to avoid court interaction on ESI issues.
- A properly drafted rule should not be technology-restrictive.
- See answer to 15 above. Parties to litigation should never preserve everything. Determining what should be preserved (whether through the development and use of robust keywords, the identification of data sources (which will also continue to advance), identification of sources likely to be duplicative, etc., will almost always require some human element. A preservation rule that recognizes the need for some discretion (i.e., no one can preserve every possible bit of potentially relevant ESI, reasonableness and proportionality should play a role in individual decision-making and party discussions concerning preservation).
- Technological advancements are increasing the complexity of data transmission and storage activities, not reducing them. Social media and cloud computing, for instance, introduce additional complications for the data identification, preservation, and collection processes.
- Technology is advancing, but not that fast. If the rule is based upon today's cutting edge, then it will certainly be applicable in three years' time. If the rule is not specific to the technology but focuses on principles of law, then it will certainly be applicable as long as the principle is valid.
- Clients will still need to purchase such technology and there will be many that choose not to do so. People love rules.
- Because issues involving preservation are not technical in nature. Here is a great example. A client is a very large, international company that frequently needs to preserve and search data. We have encouraged it for over five years to invest in an email archive, with no success. Instead, they keep DAILY BU incremental tapes. Every time they have an issue of preservation going back several years, they must have us go through hundreds of tapes to restore the email of one custodian. That is not a problem of technology or rule, but one of vision.
- Technology is only part of the solution. Process is equally as important if not more important. Also, technology is a moving target. New things will arise that will not be easy to resolve even if old issues become more manageable.
- Absolutely not. Data is multiplying, the kinds of devices we are using is multiplying, the kinds of data we create is multiplying, etc. That makes

"preservation" of relevant ESI in its pristine condition an increasingly difficult exercise, particularly for collaborate or other software as to which data changes all the time. Data storage costs may be falling, but the complexity of figuring out which data to preserve is increasingly challenging. Also, counsel (especially plaintiffs) have become more sophisticated on this topic and use it as leverage when the merits of their case are not so good. It becomes a pretext to spend time and money on a distraction rather than litigating the merits, contrary to the spirit of FRCP 1.

- Because I deal with a lot of international clients, I don't see this helping. There is not one standard across the world so I'm not sure what can be mandated which would make sense.
- Identification of potentially discoverable ESI at an early stage in litigation in a large corporation is much more difficult than generally understood. Additional data sources are naturally discovered during the course of discovery in a complex case, and by then, some of that information may have been deleted through routine practices not suspended by the time of discovery. Technology does not help with information not yet identified.
- Technologies influence how we preserve, the rules influence who, what and when.
- Yes. I think it is very difficult to craft hard and fast rules. These issues not only change with the technology but the skill with which the legal profession deals with the issues depending upon the client's data architecture and information management practices which is also changing.
- Of course it will, and already has. With archive systems that keeps storage down and making finding particular information easier, we see a lot less non relevant collections meaning we are getting more of what we need to get to respond to document requests. I only see this technology getting smarter and more helpful.
- As more providers work to become meaningful users of EHRs and more and more health information is exchanged electronically, the issues related to preservation of relevant data needed for a regulatory investigation or litigation will increase exponentially. I believe the judiciary can and will be able to make a positive difference in the lives of others through the development of new standards regarding preservation of ESI - there is so much education and work to be done in this industry segment."
- The drivers of these issues are volume and the lack of clarity as to what must be preserved. Technology will not resolve either issue.
- The problem is not technology - the problem is the lawyers.

- No matter how much the relevant technology advances, it'll still be too expensive for some parties and cases, so it won't solve all problems. The rules need to be clearer, among other things, to drive people toward those technological solutions and (hopefully) to drive down their prices.
- While I believe that technological advances will enhance the ability of some clients to control and manage data to meet preservation obligations, I am concerned that those on the fringes (at both extremes) will remain in a posture similar to what most companies face today, which is not an acceptable status quo. I would hope that limits on the scope of preservation obligations are under discussion, and that federal courts will become more proactive in helping parties to achieve reasonable limits on preservation obligations in the early meet and confer stages of litigation.
- Advances in technology have, in many ways, increased preservation disputes, by causing much more ESI to be saved, and therefore subject to dispute in litigation. Additional advances in technology will not likely reduce such disputes.
- This is a qualified "yes," because I question whether any rule or technology change, by itself, will "solve" preservation issues. For one example, I doubt whether any technology will address issues of witness character & credibility. I question whether any rule would create a safe harbor to shield a person from dire consequences of selectively destroying relevant information in anticipation of an official proceeding. I do believe that advanced *application* of technology will better separate noise & trash from material information as a regularly conducted activity. What I do believe is that persons will integrate responsible retention & disposal policies into their usual information management practices, so the over-retention of ESI compared to other forms of information will not be so prominent. This ordinarily slow & incremental evolution has accelerated in response to judicially-imposed urgency.
- The promise of technology solutions to solve (or mitigate) the preservation problem never matches the corresponding issues technology evolution and adoption creates. I have a sense we are always
- Until the Rules are specific enough to give the parties guidance regarding what must be preserved via agreed upon search terms, date limitations and custodians, the parties will have constant exposure to spoliation claims/motion and have little choice but to continue to over preserve.
- Burgeoning methods/forms/locations by/in which ESI is created and resides with related privacy and other legal concerns are likely to outpace attempts to marshal data.

- It's entirely possible that advances in technology will INCREASE preservation issues to such an extent that a static preservation rule would become outdated.
- The technology will advance significantly but the core issues will remain the same.
- Advances that address/solve today's issues will still be chasing new drivers of preservation issues. I do not know whether the gap will close but there will still be problems. A well-reasoned rule would not solve all problems, but it would help clarify/standardize what is expected, making things at least somewhat more predictable, and thus potentially reducing the need to choose between what feels like over-preserving and risking problems downstream.
- Technological advances unlikely to remove, ever, the element of human judgment involved in identifying what exactly needs to be preserved.
- The main concern about preservation is that it is costly. As we increasingly move to the cloud, I suspect much of the preservation issues we now face will be easily overcome by tools that allow us to easily preserve cloud content. We are just in a growing phase and until our technology and technology-market catch up, it is just going to be more costly than we'd like it to be. I have heard no other "legitimate" concerns about preservation of ESI. The most disturbing concern I've heard is that companies don't want to preserve in one case because it means there will be ESI inadvertently preserved for another case that comes along at a later date. This fear of having too much evidence, i.e., evidence that may be critical to the opposing party, should not be a reason for altering the rules. The purpose of evidence is to enable the truth to come out. We don't want to create a rule that protects a party's ability to destroy evidence just for the sake of destroying potential smoking-gun evidence in another case.
- The shelf-life of a new rule will depend on how it is written. If we end up with a rule requiring pleadings with more specificity, for example, that will probably not expire with the advent of new technology. If we have default limitations such as number of custodians, that will probably also not expire with the advent of new technology. Until and unless we universally adopt technologies that preserve ALL data, we will have preservation issues. A future where ALL data is preserved, however, is equally bad for litigation and for parties. It would surely result in overly broad (and expensive and time consuming) data volumes.
- I expect that regardless of any technological advancements, disagreements over the timing scope of required preservation will continue, as everyone would still be arguing with one another over the meaning and application of

the vague and conflicting common law standards that apply. Additionally, I really don't see preservation technology keeping pace with the proliferation of ESI. It never has, and currently, there are huge unmet needs for the technology in the area of mobile devices, etc.

- I believe the exact opposite is true. Technology will only make the situation worse as potentially relevant data is distributed farther and more widely and it is more difficult for organizational parties to identify where the data exists and capture it.
- We will gravitate away from traditional requests for documents and move toward requests for sources of data, definition of search criteria based on sampling, the testing of criteria against a set of known relevant documents, and agreed upon search engines with the results defining the documents to be used in a case.
- The advances in technology will make preservation issues more difficult and more expensive because these technologies are designed for efficiency and maximizing technological tools. This is usually inconsistent with preservation requirements.
- We need to, if possible, gain clarity on the trigger for and scope of preservation obligations. Technology advancements seem unlikely to solve those issues.
- Absent an outcome where nothing is ever destroyed or rendered difficult to obtain, there will always be cost and strategy challenges associated with what to keep and what may become evidence.
- Change happens so slowly in this area that 3 years is too soon for significant change. Hopefully significant change will take place in the next 5 years.
- Changes in technology won't change the behavior of those charged with making decisions re what to retain.
- Of course, it depends upon the rule. but a rule that employs specific directives based upon a current lay perception of the forms and direction of ESI will be as out-of-touch as the 2006 FRCP amendments would have been if the drafters had lacked the wisdom to shy away from citation of specific technologies. The growing dominance of the cloud, handhelds and social networking were almost entirely out-of-mind in 2006. Why would any thinking person assume that we are done with development of new and innovative ways to create, communicate and store information?
- The rule should tie preservation to standard technology in existence at the time.

- The cost of retaining data is decreasing to the point where one might argue that all commercial data be retained beyond the longest statute of limitations period of say four years unless good cause exists for its deletion.
- Preservation is becoming as important a consideration in driving litigation decisions as the underlying merits of the dispute. I increasingly find my clients in a position where they make decisions about whether or not to litigate or to settle based upon ESI considerations, as opposed to the merits of the case.
- Even if developed it will not be universally adopted by all parties for quite some time, if ever.
- Our problem is "Information Management," not anything having to do with a rule.
- Our use of technology already reduces burden when applied. General rules are more long-lived than specific, feel-good, bright-line tests that cannot be forward looking. Specific rules may actually discourage innovation.
- While many larger clients can employ technologies that would assist in preservation, the vast majority of companies are not sued often enough to justify the cost of software like this.
- Preservation issues are seen as an important "sword" in the advocate's arsenal and will continue to be so unless the rules are amended to contain more "bright line" guidance on preservation and spoliation.
- Technologies are still in the early adopter stages, and will not abrogate the need for clear guidance about when and to what extent the duty to preserve arises.
- There is no doubt that automation and improved technology makes this issue an easier challenge every day. Also, users of information must learn to be accountable for how they use and store information and indeed technological advances will enable them to do so. It's happening right now.
- Not all clients will be in a position to adopt new technologies for preservation. Only the most litigious and well-funded clients will do so. All the rest will be in the same technological position they are in today.
- Technology already exists to help with preservation of the right stuff (info, docs, and scope), that the rules don't need a change. Lawyers just need to get with it about the technology and stop waiting for a court to say technology is OK to use for preservation or review or production of data. It's downright maddening to see how much malpractice law firms do in this area. As a General Counsel of a Vendor that works with many, many companies and

law firms, there are some law firms I would NEVER hire for litigation after seeing how they advise (or not) their client re eDiscovery.

- I have more and more clients who have taken a view that they should just preserve everything, as that option becomes easier and more affordable I can see a lot of clients going that way. This is problematic because they end up preserving things they would not ordinarily preserve which adds costs in the end.
- No matter what technology exists to store and create data there is always going to be someone who comes up with some way of deleting or destroying whether intentionally or unintentionally
- There will always be a need to tailor preservation to the needs of each case, and judgment calls will need to be made. Technology will continue to facilitate this process and will only get better. But a rule that outlines the contours of the duty will still be necessary and helpful in making the necessary judgment calls.
- I don't believe that advances in technology will significantly reduce the burdens of preservation. New technologies will certainly reduce the burden of review and production of preserved material.
- The volume of ESI in general has always been an issue. However, with the increasing "interactivity" of the web (think, product and company message boards for employees and customers, etc.) and the social media explosion has really complicated this issue and raised costs. Larger and larger portions of potentially relevant ESI are now unmanaged and, in many cases, transitory (blogs, twitter, Facebook, etc.) with increasingly "fuzzy lines" between official company sponsored content and unsponsored content.
The technology does not seem as relevant to the preservation trigger question.
- The timing and scope of preservation obligations are key, and advances in technology don't impact those factors.
- Data volumes

17. Are cost savings more likely to be achieved through advances in technology than through a rule of civil of procedure? (Optional)

| | |
|-----|-------|
| Yes | 51.8% |
| No | 48.2% |

Why or why not? (Optional)

- But the rules-makers and courts should not require that parties acquire all new technologies as a cost of doing the business of litigation. American companies - large and small - need to be able to continue conducting productive business in competitive world markets.
- Technology will certainly help, but the current state of the law is immensely burdensome. The triggering event isn't the most burdensome piece. It is the broad definition of what is discoverable that is the problem. An idea of proportionality like in Rule 26 needs to be applied to the preservation element. That way, if the value of the information isn't worth the cost of preserving it, and you can prove that up, then a party shouldn't be held responsible for not preserving it.
- The pace of technology will continue to expand the volume of material potentially subject to the preservation obligation or discovery obligations in general. Only a principled reform of the rules to limit the scope of discoverable material (and consequently that material subject to preservation obligations) can achieve meaningful reduction in burden associated with discovery and with returning our judicial process to one that is designed to adjudicate disputes on the merits and in a speedy, inexpensive and just fashion.
- Advances in technology is making preservation harder and setting up more 'gotcha' scenarios. SharePoint is a great example. Sure you can preserve it, but to capture all the data that might be relevant, you have to take a copy of the full database. Forget about preserving just the relevant data if you want to preserve usage information, calendars, edits, etc.
- At this point, without knowing what the rule would look like, or how technology will advance, that question is difficult to answer.
- More technology, if properly used, will reduce time and expense for parties and courts.
- For the reasons outlined in 15 above. Technologies won't develop robust keywords without human input, technologies won't necessarily identify the least burdensome source of potentially relevant information, and technologies won't necessarily do the legwork to determine when legacy sources do and don't require further investigation. Technology may, however, provide the key information that parties need to have meaningful discussions about cost savings and proportionality.
- Rule advancements are needed. We need rules that put lines in the sand and offer guidance in the advisory notes. Parties and their counsel need

something concrete to point to that supports the decisions they make regarding preservation and collection of certain data sets, but not others.

- I think both will yield cost savings, and both are sorely needed.
- Lawyers are terrified of screwing up. They prefer to rely on rules opposed to technology. They are more likely to be less excessive in their efforts if there are rules. Unfortunately, the common law may end up undermining that rule...
- See my prior answers - they will be achieved by smart use of existing technologies, preservation techniques that fit the specific problem, and cooperation with the parties (or court relief if the opposing party will not cooperate)
- Technology is a moving target. New things will arise that will not be easy to resolve even if old issues become more manageable.
- I think both are necessary. Indeed, perhaps the rule should acknowledge the role of technology. A written rule provides guidance and consistency that the common law has not. Technology on the back end can help us filter and sort data in an efficient way. Both are part of a solution.
- If technology can ensure production of relevant documents without minimal human intervention than technology wins this one. If rules require cost sharing for all discovery than civil procedure wins but I don't see that happening.
- While new technologies reduce costs per unit, volume increases - also due to new technologies - outpace the cost-per-unit reductions. So long as the rules continue to essentially require the preservation and production of all potentially relevant evidence, despite this writer's experience that less than 1% is ever used in pre-trial and far less than that ever makes it to a trial exhibit list, total ediscovery costs will continue to skyrocket.
- A rule change will only add to costs - once a preservation trigger can be litigated, not only do you have any bills for holding the data during the motion practice, but you must pay the actual costs of motion practice. Seldom, if ever, do clients fail to understand what a triggering event is.
- I truly believe (and have seen) that the lack of rules or standards has resulted in a lot of extra time and expense as litigators work to "make up" how to go about preserving or producing relevant information for litigation or a regulatory investigation. Additionally the vendors of EHRs are VERY RELUCTANT (almost anti) to develop and establish legal hold mechanisms into the design and functionality of today's EHR systems - it is very

disconcerting and adds SIGNIFICANTLY to the costs involved with the preservation and discovery of healthcare ESI.

- A clearer path that makes scope of preservation objectively determinable, and that takes into account the cost of preservation in a meaningful way is the most likely means of cost savings.
- All we need to fix this is a rule that requires the parties to meet (or seek court intervention) IMMEDIATELY to identify scope of preservation
- Will be a combination or both
- See above. You need a one-two punch of clearer rules and more robust and accessible (inexpensive) technology.
- Advances in technology are leading to more, not less, ESI and finding a rational basis upon which to set the boundaries will have more impact.
- Technology improvements will scale to an increasing volume of information. Changes to rules can help modify behavior, but that takes much more time to change than technology. Also, the current rules and case law provide a reasonable framework for discovery, particularly ESI. Reviewing and analyzing the rule every 3-5 years is an appropriate action. The evolving technology seems to be only used in mostly federal court cases (or state cases in major cities). The technology is still growing and changing. Five years from now, tweaking the rule will likely generate greater cost savings than technology. Until then, I prefer to let the courts continue to deal with the new technology; the rules committee can use the additional 5 years of jurisprudence to fashion the changes.
- & in addition, increased familiarity of attorneys & judges with realities of EDD will lower costs as demand to preserve e-trash becomes less common.
- See above.
- This is another qualified "yes." It hasn't been the technology that matters, so much as how it is applied. In the hands of experienced users & business IT, simple search & archiving technologies can be more cost-effective than the most recent black-box technology in the hands of expert consultants.
- Maybe - it would depend on the rule but I can't imagine a rule that would lower the costs.
- Intelligent review, predictive coding, automated review should have a positive effect by automating much of the document review discovery. It's still in the early stages of use yet it is gaining much attention. I'm not aware of any company actually relying solely upon predictive coding in lieu of the more generally accepted page by page review. However, none of this technology addresses the over preservation issues.

- Common law duty to preserve is extremely broad and diverse; improved technology will not prevent/curtail disputes.
- Cost savings resulting from a change in the rules will much more likely be offset by corresponding disruptions in the litigation process, intentional or otherwise.
- The rules are naturally reactionary while technology is proactive. This does not mean that effective civil rules cannot help to curtail costs.
- I wish there was a "hard to say" choice on this one. Technological advances may help in some areas, rule changes perhaps in others. The approaches are not exclusive, they can complement. Also, for more modest sized cases, where the cost of better technology may be more of an issue, rule changes may hold the most promise.
- (see comments above)
- Technologies will continue to provide for cost savings, but technology will also continue to perpetuate the problem. At the end of the day, we KNOW that the world will produce more data than the world can store, by a magnitude (see IDC annual report on the Data Universe). Therefore it will be impossible to preserve all data and decisions must be made. Without guidance or limits, there will always be greater preservation than necessary. The efficiencies gained by technology will also, most likely, be offset by the increased ability of technology to create data volumes.
- See above.
- So long as we can begin to move away from the notion that everything must be reviewed to locate the illusive (and usually non-existent) smoking gun document.
- The lack of rules under the current situation provides no clarity. We have to design approaches based on what one judge might say in any potential case. We have litigation in many jurisdictions and we have to design processes and procedures to meet the varied standards in all potential courts. Technologies make this more difficult because the types of tools used by businesses make it more difficult to preserve and manage this vastly increase trove of information.
- see above
- Rule changes, and clarification will be the best cost saving tool. Technology requires capital expenditures or significant "per click" charges. Rule changes, especially those that address proportionality questions, will have a greater impact.

- Although the greatest cost savings will come through the fostering of competence in those charged with designing and implementing preservation, the move to the cloud--to cite only one significant development--will have a huge impact on the cost and mechanisms of preservation. Certainly a rule that operates to exclude a crucial swath of probative evidence from preservation and, in turn, deprive the courts of same will save a lot of money, and more so by freeing those who might be required to pay damages from being held accountable for their malfeasance. This will bring significant benefits to American business, though greater savings could be achieved by simply closing the civil courts and trusting that what's good for business is good for America.
- BC defense firms aren't incentivized to reduce ediscovery costs e.g. they refuse to use anything but Boolean search instead of more robust analytics that improve recall and precision.
- Storage costs will decrease to a trivial amount such that commercial entities will have a hard time justifying deletion except to preserve consumer privacy or to reduce risk of evidence in future lawsuits.
- Both are equally helpful, but the current problems do not stem from a lack of rules, they stem from a lack of enforcement of the current rules that are more than adequate at controlling discovery when applied.
- Getting agreement of all parties will save more money than any technology.
- Our problem is "Information Management," not anything having to do with a rule.
- Technology generally solves the problems it creates. Rule changes may delay that process via temporary band aids.
- A rule may put more definition on exactly what might need to be preserved. With all new technology comes additional preservation issues.
- Not clear whether this question refers to cost savings solely in connection with the preservation (i.e. storage) of ESI, or more broadly to the entire process of preserving, collecting, reviewing and producing.
- Rules can be interpreted and litigated myriad ways. Technology can be leveraged to save money when properly used.
- It's not a technological problem. It's a problem of pure guesswork--will my best guess on the scope and manner of preservation pass muster with the courts months from now if it becomes an issue?
- As I said above, technology already exists to help in preserving the right info; lawyers are just afraid to use it. And by this, I mean law firm lawyers. I see companies doing this because they need an economical and defensible way to

preserve less data and to preserve the right data. They don't want to pay to store it all or to have to search it all if litigation arises. They have a business incentive to save only what they need.

- I think both can have a substantial impact.
- I think it will take advancements in both
- More clear-cut and even rules could reduce costs by preventing parties from pursuing spoliation claims when they have no merit. Motion play and proving and defending spoliation claims is costly. Often times, there is a fight and nothing of significance was deleted and most of the time anything deleted is not all that relevant to the case. It simply gives a piece of mud for the parties to fling. Clear rules regarding burden of proof might help.
- The general contours of the duty to preserve are already pretty well established. A new rule will mostly codify the leading case law and maybe provide some additional clarity. A rule will help us to navigate these issues when they arise and this can help reduce disputes and litigation costs. But advances in technology will be what makes preservation less expensive.
- Some guidance on how far into the social media or "blogosphere" that a producing party needs to go would be helpful. Using a pharmaceutical company as an example in descending order of company control - they have company sponsored social media sites for employees - web sites for drugs and diseases with message boards where clients, patients, and doctors are allowed to comment - Facebook pages sponsored by the company - and non-sponsored message boards where their employees may or may not comment in their spare time. Where does the preservation obligation end? How far down the rabbit hole?
- The largest cost is attorney review. I don't anticipate that even with the best technology that we won't be having to review volumes of data, a lot of which is not relevant.
- The subjective nature of the preservation obligation (timing, scope) is what impacts the costs more directly than the technology used.

18. Does the current state of the law (rules, case law, statutes, or regulations) provide you with adequate guidance as to the scope of your duties concerning:

(A) The events or circumstances that trigger a preservation obligation (Optional)

| | |
|-----------|-------|
| Never | 4.1% |
| Rarely | 13.2% |
| Sometimes | 33.9% |
| Often | 39.7% |
| Always | 9.1% |

Please comment on your answer. (Optional)

- If the question is expanded to include secondary authorities, such as The Sedona Conference Commentary of Legal Holds, my answer would have been "often". But there will necessarily always be an element of "judgment" which is inherent in a "reasonableness" standard.
- This is the most clear part. Harder for plaintiffs, but not terribly difficult.
- It most definitely depends on the type and circumstances of the case, but there could be more guidance overall.
- The only dicey issues arise when there is the possibility of litigation (sometimes with non-specific threats). But typically, my cases do not involve a lot of doubt as to whether a preservation obligation has been triggered. However, one area that could use clarification is whether "reasonable anticipation of litigation" means the same thing in the context of legal holds and the work product doctrine. In other words, if a party is claiming that materials have work product protection does that automatically mean a legal hold must be in place.
- Some courts have taken a very broad view of appropriate triggering events. They drive conservative decision making by parties and their counsel around the United States.
- Yes, until there is disagreement. It is too subjective to be defensible.
- I generally advise our clients that if we act in good faith, take efforts to preserve information to the best of their knowledge and ability, we should be okay in the end.

- "Always" is too extreme - "almost always" is the best answer. There are some ambiguous situations, but they are rare.
- The hardest issue is whether non-parties to a potential litigation have a duty to preserve, and, if so, when that duty arises. The "reasonable anticipating of litigation" standard does not make clear whether it applies only to parties.
- The term "reasonable" is debatable. In tort law, JURIES decide whether someone has acted "reasonably" and a lot goes into that inquiry. Therefore, it can often be difficult to predict at the outset whether preservation efforts will be looked at with approval in retrospect. The guidance is therefore to err on the side of caution, but this is expensive and usually unnecessary.
- Because I deal with global clients the rules do not help as they are in conflict with National rules regarding data privacy
- The trial courts in Hynix and Micron prove, even for potential plaintiffs, reasonable minds can differ as to when the plaintiff "reasonably anticipated" litigation. Who knows, how far in advance of a complaint a defendant "reasonably anticipates" litigation.
- The Sedona Conference® remains the trusted source I (and my clients) refer to to understand the scope, events or circumstances regarding the events that trigger a preservation obligation. I appreciate it when TSC is cited as an authoritative resource in this regard.
- This is a well-developed area with a good deal of case law.
- I believe I can make defensible decisions, but I cannot confidently predict outcomes.
- Plaintiff's trigger is unclear. When is litigation reasonably foreseeable during the investigative phase of the plaintiff's decision making, especially when it is undertaken with the explicit purpose of litigating if at all possible. Also when is the trigger for government investigations for both the government and the investigated entity?
- I appreciate the general rule, and in many contexts, especially from the defense side, it is adequate; however, in instances where a handful of months one way or the other can mean the loss or preservation of literally tens or hundreds of thousands of electronic documents and communications, small subjective disagreements can have potentially profound effects. The rule changes you are apparently considering to me seem most pertinent to such large scale cases and cases where those with disproportionate IM burdens are opposed.
- Lawyers are trained and paid to advise our clients. We use common law, statutes, and rules - along with our experience - to fashion that advice. Three

to five years ago, there was a lack of common law and experience to really understand and implement preservation law across the profession. The lawyers who fail to undertake appropriate duties today do not lack guidance from the law; they lack awareness of current discovery rules. (I know many otherwise sophisticated attorneys, even those in their 30s and early 40s, who are simply unaware.) A new, or modified, rule will not address this unawareness.

- I have practiced cases in jurisdictions which applied different standards, ranging from anticipation of litigation to the filing of an action to "it depends on the circumstances." As long as I have been able to find *some* kind of guidance, it has been enough to advise my clients on a range of more-to-less-safe practices. The most important consideration has been to act in an even-handed way, because I question whether any jurisdiction would ever tolerate an appearance of selective destruction of relevant information in anticipation of an official proceeding.
- 'reasonable anticipation of litigation' is too vague. Unless the triggers are articulated specifically, we'll effectively be stuck with 'reasonable anticipation' which is too subjective yet easy to define in vastly different ways based upon whether you are a plaintiff or defendant.
- The current state of the law provides a good deal of guidance. Unfortunately changes in the common law are steered by reigning in the "outliers" who don't follow the guidance of current law.
- As noted above, the standards are currently based on common law. Too many of the underlying cases are vague or entirely unrealistic in the duties that they purport to impose. Some decisions, such as those in *Zubulake*, appear to require omniscience from corporations in assessing when the duty triggers. Likewise, there are decisions that speak to scope that describe preservation obligations that are literally impossible for businesses to achieve without shuttering themselves. Although there are increasing decisions that articulate more rational and realistic approaches, the conflict means that there is no certainty, and often one can't tell what the standards are, sometimes even within a district court jurisdiction. Thus, attorneys like me who advise producing parties must routinely warn that the law in this area is very unsettled, and if preservation decisions receive judicial scrutiny, the results are likely to be unpredictable.
- A more objective standard should be defined, such as actual notice of a claim. The primary burden should be on the Plaintiff to define the claim and give notice so that the defendant knows what to preserve and when. There may be certain types of cases where the duty can be defined by some other criteria

but those would be special cases. However, the question of whether such notice by a plaintiff would trigger a declaratory judgment action would have to be addressed.

- The question of when a trigger takes place when litigation is not yet filed is very unclear and fraught with the gotcha element. Therefore we have to assume the worst.
- varies state to state, but proportionality is still a very big issue.
- The trigger is fuzzy particularly when a large company with a robust consumer complaint department could treat almost any such complaint as a something which could trigger a duty to preserve.
- In an ideal world, the preservation decision would be like a light switch, with only options for "on" and "off". The realities of litigation are that "on/off" switches are a rarity. About the best we could hope for is uniform guidance, so litigants can at least base their decisions on the same set of rules. For that reason, I would prefer to see uniform guidance from a federal rule of civil procedure.
- There is significant inconsistency at the periphery. For example, it is unclear what the obligations are as to companies faced with EEOC claims filed against them that are not yet reached the level of litigation. There is some case law saying a hold is necessary for all claims and other cases saying the opposite. Not sure even a rule change would ever bring 100% certainty though.
- standards are too vague and the application depends on the specific facts and circumstances of each case; the cases are very fact specific; not particularly helpful more generally
- Other major factors include ensuring an understanding of the nature of the matter, knowing how and where information is stored, and collaborative efforts with involved parties to define and narrow the scope.
- "Claims" submitted to government agencies need to be excluded from being a trigger. Agencies have formal claim adjudication programs that resolve 95% +/- of all claims submitted. Thus, when an agency receives a claim, it does not reasonably anticipate litigation; quite the opposite. The ability to rely on this default standard would be hampered if receipt of a claim is enumerated as a trigger.
- It's more obvious to me because I am a member of this group, but others in the firm often disagree.
- Extremely difficult to objectively characterize "reasonable anticipation of litigation," when the vast majority of claims (e.g. trademark cease and desist

letters) and notices (e.g. notices of accidents involving products that are often involved in accidents as a result of user error) never result in litigation. Even as a prospective plaintiff, there is no clarity on when the duty is triggered, i.e. what degree of certainty and specificity must the prospective plaintiff have that there is a reasonable basis to file a complaint for a specific cause of action against a specific defendant before the duty is triggered? In the commercial context, when a relationship between two contracting parties begins to sour, at what point must one or both anticipate it will turn into litigation and start preserving documents, when most of the time such disputes are eventually resolved without litigation?

- To me it is relatively clear when litigation is reasonably anticipated, but my understanding is irrelevant. Defense counsel are not usually engaged until litigation is known, then we must determine when our client should have reasonably anticipated litigation. I don't know if a new rule or new technologies will cause lay people to begin regularly evaluating whether they reasonably anticipate litigation and preserving information accordingly. The only rule that may be helpful would be excruciatingly detailed. For example, the *Zubulake* case (and others) make clear that the filing of an EEOC complaint is a preservation trigger. As soon as one of our clients has an EEOC complaint filed against them, we begin preservation. Similarly specific triggers are desired in all industries but developing such a list to put in a rule seems unworkable.
- reasonably anticipate litigation is a "reasonable person" type standard that people interpret in hind sight, which is always 20/20 - this, of course, leads to different interpretations, depending on one's side.
- still many gray areas and varying demands court to court
- I think the law coupled with common sense is generally sufficient. All too often lawyers want to be zealous and push the boundaries for no real cost benefit on both sides.
- The case law has long established that preservation duties arise when one does, or reasonably should anticipate some legal process for which one's evidence may be needed. This is not a bright line rule but it works. Any attempt to apply it in advance to specific events is too complex to reduce to a precise rule and will always end up falling back on the general rule. For example, pre-litigation demands, oral or written, can trigger the duty to preserve. *Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57, 61 (Ct. Cl. 2003); *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1446 (C.D. Cal. 1984). But it depends on what they say and on the context. *Cache La Poudre Feeds, LLC. V. Land O'Lakes, Inc.*, 2007 WL 684001 (D.

Colo. Mar. 2, 2007) (Duty not triggered by letter that “alluded to ... possible ‘exposure’” but “did not threaten litigation” and “hinted at the possibility of a non-litigious resolution”). This is too nuanced an issue to be reduced to a rule that is any more specific than the general rule. For another example, take hiring an expert. Many times we hire an expert to figure out if filing a claim is worth it, or to help bring about a business resolution. It doesn’t necessarily mean a lawsuit is likely. Similarly, lawyers are sometimes hired to draft complaints where there is no intention to file them; perhaps just to see if the complaint might be viable, or just to get the attention of someone to resolve a business dispute. There is no reason to think that even destructive testing necessarily means litigation is coming. In *MacNeil Automotive Products, Ltd. v. Cannon Automotive Ltd.*, 715 F.Supp.2d 786, 801 (N.D. Ill. 2010), the court found that the plaintiff did not know, and should not have known, that litigation was likely when it destroyed evidence of possibly defective products, because in the past the parties had resolved their previous business disputes short of litigation. The court explained: Defendant had supplied defective mats to Plaintiff on occasions prior . . . but legal proceedings never resulted – the parties were able to resolve the disputes among themselves. And even after the disagreement . . . the parties continued their business relationship for at least a year. During this time, Plaintiff sought to resolve the dispute without court intervention. It was entirely reasonable for Plaintiff to believe that Defendant would remedy the problem, thus negating the need for judicial involvement; indeed, Defendant had, on prior occasions, acknowledged the issues and committed itself to doing just that. *MacNeil*, 715 F.Supp.2d at 801. In sum, none of the activities listed in the proposed amendments necessarily means that litigation is or should be reasonably anticipated. They are certainly relevant to the question but they are not dispositive. All this list could ever be is a list of factors, which we don't really need.

- I feel like the issue is not when a trigger begins as much as how far back to we have to go to preserve information. I would like guidance on that issue that would allow me to act reasonably and not have to preserve everything that could be potentially relevant from the beginning of time.
- Preservation and scope is too fact specific.

18. Does the current state of the law (rules, case law, statutes, or regulations) provide you with adequate guidance as to the scope of your duties concerning:

(B) The events or circumstances that end a preservation obligation (Optional)

| | |
|-----------|-------|
| Never | 11.8% |
| Rarely | 22.7% |
| Sometimes | 26.1% |
| Often | 32.8% |
| Always | 6.7% |

Please comment on your answer. (Optional)

- Much attention at conferences and the like is spent on the subject of when the duty to preserve attaches. Much too little time and attention is spent on the question of when a preservation obligation has been satisfied. As a result, there are huge amounts of accumulated ESI in most organizations. It would be a huge help if courts were receptive to applications for orders that preservation obligations could be deemed satisfied, so that holds could be released and this problem mitigated.
- Very little guidance on this, and a lot of variation amongst jurisdictions.
- More guidance is needed on when parties can relax or reduce the scope of their preservation of information after:
 - discovery closes
 - the trial is over and the case is on appeal
 - a "related case" is ongoing that overlaps in some way with a case that has been terminated (or the record has been closed)
- The big unanswered question which I know is being debated is when does a preservation obligation in which litigation is anticipated but never occurs, end. I think it is unduly burdensome to have the obligation continue until the SOL expires.
- This is ALWAYS in question.
- Same as above

- This is an especially big issue in government investigations. The government often does not say when it is "done" with an investigation. It should.
- Usually this is the end of the case and the exhaustion of time to appeal.
- There could be further development in this area - oftentimes the preservation obligation (or belief that one needs to keep saving everything) never ends and this is costly.
- Seems straightforward.
- Major problem for defense is when to end preservation if claim/suit is never filed or formally settled. This is difficult to address in a rule if an action is never commenced & no judicial intervention sought. Potential defendant could commence declaratory judgment action to put potential claim to bed, but this is rarely practical or wise. There should be tort liability for negligently, recklessly, knowingly or intentionally failing to withdraw preservation demand after making such demand or after deciding not to file a threatened suit or claim. Liability would be cost of preservation up to date of judgment on tort. Question: Consequential damages liability due to existence of record that would not have existed but for legal hold that was negligently not terminated when it should have been?
- Law regarding the end of a proceeding has not been the sticking point for continued preservation. The issue has been whether the information might be needed or useful at some indefinite point in the future, as a subjective matter of fact.
- The governmental departments that issue subpoenas/CIDs where you are a 3rd party rarely advise you when their investigation is closed. Sometimes the same is true when your company is the target of the investigation.
- The guess work must be minimized
- The lack of clarity when a preservation obligation ends adds significant uncertainty, including with third party subpoenas as well as situations when lawsuits are not filed but threatened.
- While it is fairly understood that it is reasonable to anticipate litigation whenever an employee is fired, or a contract is breached, or a number of other events that would suggest an impending conflict, except for the settlement of a matter, or document preservation regulations for public documents, there seems to be little guidance on how long is too long to be hanging on to ESI.
- Often, this is not difficult to determine. The difficulty occurs when trying to determine whether the preserved information is subject to other legal holds or can be returned to regular retention management.

- We treat the end of the preservation obligation as the end of litigation or the running of the statute of limitations, which, necessarily, requires guesswork as to the legal theory.
- Too many 'what-if' scenarios.
- If claims or notices of incidents never result in litigation, it's not clear if the duty to preserve extends as long as the statute of limitations. If one lawsuit ends, it's not clear whether the duty to preserve continues because there might be more. When documents are gathered for a subpoena, the subpoenaed party, who is not a party to the underlying litigation, never knows when its duty ends - upon production? upon close of discovery? not until the lawsuit is over? [all of which are dates to which it will have no visibility anyway].
- Preservation ends when a case is finally resolved and all appeal periods have expired.
- If there is a final order, you can tell that the litigation is over. The difficulty we have is in conjunction with subpoenas and investigations which a change in the federal rules will not address.
- Clearer guidance can be given here through case law - not sure we need another rule. When one suit ends, should I have anticipated another one - that could go on forever.
- still many gray areas and varying demands court to court
- This one is tougher, especially for companies that are often involved in litigation. However, I think better internal planning, versus a change in the law, is the answer to tacking that issue.
- The anticipates-litigation trigger already provides the answer. It is built in. The duty ends once the litigation is over or the credible threat of litigation has otherwise passed, or the likelihood of the documents being properly sought in discovery has passed. Making the determination is a judgment call. But the standard is already known.
- Other than settlement or final decision. Then, the data is likely responsive to another investigation or matter. I rarely see data "purged".
- It would be helpful to have guidance on when we can release a legal hold. We now follow a 6 months to one year guideline when we have received a threat and no litigation follows.

18. Does the current state of the law (rules, case law, statutes, or regulations) provide you with adequate guidance as to the scope of your duties concerning:

(C) The subject matters of information to be preserved (Optional)

| | |
|-----------|-------|
| Never | 5.0% |
| Rarely | 23.5% |
| Sometimes | 42.0% |
| Often | 22.7% |
| Always | 6.7% |

Please comment on your answer. (Optional)

- This is an area where the rules makers might make a difference, i.e., by clarifying that the scope of preservation is only as good as the pleadings and/or parties' agreements around the scope of relevance in a given matter. Thus, if the pleadings are vague, the preservation obligation cannot be broad. It should suffice for a responder in the case of vague pleadings to make a subjective determination of what is relevant, communicate that at a 26(f) or otherwise, and have no risk of sanction unless and until the pleadings or scope of relevance are refined. This would be consistent with the long-held tenet that the scope of relevance can expand or contract during the course of a matter. As it is, there is much too much games-playing by requesting parties. Courts should make clear that requesting parties - on both sides of the aisle - must live by the effort they put into framing the case, and that they will not tolerate loose pleading and later claims of failure to preserve according to later-framed pleadings. In the case where a party provides a tardy amendment that clarifies the scope of relevance, that party -- and not the responding party -- should bear the risk that, in the interim, some now-relevant information will have been lost.
- But way too broad with no proportionality or balancing.
- Same as above
- This is always a difficult point, as it is hard to predict the scope of discovery and who will be deemed relevant custodians of relevant ESI. The current guidance is overbroad, in my opinion, and assumes that most of the relevant

data can't be found in several places. It often is, but the cases require us to preserve all sources of potentially relevant ESI.

- Again, more work and further development in this area would be very helpful.
- The standard enunciated in case law is unhelpful. Virtually anything can be the subject of discovery given the broad interpretation to Rule 26 ordinarily espoused by the courts. Thus, preservation scope is often dictated by guessing at the whims of plaintiff's counsel. This is a particular problem in class and collective actions where the scope of a claim is often not defined for an extended period.
- Fact specific.
- Proportionality is a pretty blunt instrument and does little in helping you to determine what things to preserve and what not to preserve.
- This is always tough and in large cases always puts outside counsel in a terrible spot between their client, the court and opposing counsel. The more clear cut the standard, the better; however, I am not sure I have good suggestions as to how to draw bright lines here ...
- Proportionality is still a tough call, especially before the lawsuit is filed. Divining the opposing party's intent and possible claims is a difficult part of an attorney's work. Still, early involvement by the court to winnow claims is a better way to address this issue. Unfortunately, many state court judges are reluctant to take this action. Many federal courts, though, appropriately address these issues, making a rule change unnecessary to address this specific issue.
- The dichotomy in federal discovery between claims or defenses, and the subject matter of an action, creates an ambiguity that is not unique to ESI issues. However, it may appear most clearly in the ESI context. It would be helpful to have additional guidance on factors constituting "cause" for discovery beyond the claims & defenses, because that in turn would help a party better predict the need for broad preservation.
- any potentially relevant documents' is too broad. Common sense should dictate because attorneys are officers of the court and have ethical obligations to adhere to. Properly outlining the scope of what needs to be retained is part of those obligations.
- This requires an attorney who is familiar with electronic discovery and knows the right questions to ask.
- Please see my comments above about the lack of certainty over the required scope of preservation.

- The scope of potential discovery, particularly in early stages of a lawsuit requires significant over protection of information to avoid the risk of missing something. This adds considerable costs to the processes.
- Scope needs to be addressed, particularly the concept of proportionality in preservation.
- The subject matter of preservation is very fuzzy and overlaps with work product privilege - it requires an educated guess at to what each party thinks is relevant before seeing a lawsuit - and reasonable lawyers can often guess wrong.
- electronic information is overwhelming and often has nothing to do with the case; separating it out and devising a methodology that can withstand after the fact attack is difficult, resulting in the preservation of everything
- Other major factors include ensuring an understanding of the nature of the matter, early identification and interview of key custodians, and collaborative efforts with involved parties to define and narrow the scope.
- Presently, we are left to work through what could be included in "all potentially relevant information." That is basically everything. Given our decentralized information management structure, this also requires end users to engage in some amount of analysis in making this determination.
- Litigation issues evolve as cases mature. What was thought to be irrelevant at the outset (and not preserved) often becomes relevant later in the case and thus subject to a motion for sanctions. Unless preservation orders (holds) are overly broad, there is a great risk of missing something that later provides fodder for the sanction motion practice.
- Extremely difficult to assess the appropriate scope of preservation when claims or notices are not specific about what actual claims might be made.
- Meet and confer process critical - rule won't diminish or enhance the significance of this critical step.
- It depends almost entirely on the facts of the case.
- If it's likely to lead to discoverable evidence - ok - that's pretty broad. Maybe a bit more guidance would be helpful in the notes, but please no more rules. It seems like we could get rid of a few more rules if we just enforced Rule 1 - after all it is the FIRST rule!
- The scope of the duty to preserve evidence that has emerged from the case law is clear enough. The duty to preserve evidence extends to documents, ESI and tangible things in a party's possession, custody or control that it reasonably should anticipate will be subject to discovery in the litigation. "Subject to discovery" is meant to incorporate all aspects of the discovery

rules, including expanders and limiters. For it would seem unjust to sanction a party for not preserving something that the party correctly concluded would be beyond the scope of legitimate discovery in the case. Of course, prudence will suggest erring on the side of caution in close calls. But too often rules build over-preservation into the duty itself (see Delaware's recently adopted rules), which is a mistake. If a litigant tries to get very close to the line without seeking advance guidance from the court, the party has taken its chances. But the rule should not be written so as to put the party in technical fault even though the party does not actually cross the line.

One case that comes very close to articulating this standard is *Wiginton v. CB Richard Ellis, Inc.*, No. 02 C 6832, 2003 WL 22439865, at 4-5, 7 (N.D. Ill. Oct. 27, 2003) (“party must provide all evidence that it has notice is reasonably likely to be the subject of discovery request even before a discovery request is actually received”). Inserting the word “proper” before “request” would have made it complete. It is apparent from the whole of the opinion that the court did not mean that discovering parties have the unilateral power to force opponents to preserve anything under the sun just by asking for it, no matter how improper the request.

In *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y.1991), the court held that “[w]hile a litigant is under no duty to keep or retain every document in its possession ... it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action.” The shorthand use of simple “relevance” in *Turner* is an obvious over simplification. Nothing in the opinion suggests that the court meant to rule out all of the other discovery standards in the rules; whether those that broaden the relevance standard (“reasonably calculated” for example) or those that narrow it (proportionality for example). It is common shorthand to say discovery extends to the “relevant” even though all are well aware that there is more to discoverability.

In *Zubulake*, 220 F.R.D. at 217, the court held that a party need not “preserve every shred of paper, every e-mail or electronic document” but “must not destroy unique, relevant evidence that might be useful to an adversary.” This formulation supports discarding even relevant evidence that is not unique, showing that relevance is not alone sufficient but rather that the cumulativeness factor from the proportionality rule also matter. Also note the qualifier “that might be useful to an adversary,” which hints

that things that won't be important enough to be discoverable need not be retained.

In *Miller v. Phillip Holzmann*, CA No. 95-01231 (RCL/JMF), 2007 U.S. Dist. LEXIS 2987 (D.D.C. Jan. 17, 2007), the court held that "a party has an obligation to preserve evidence it knew or reasonably should have known was relevant to the litigation and the destruction of which would prejudice the other party to that litigation"). Like Zubulake's qualifier, that "might be useful to an adversary," Miller's "prejudice" qualifier even more clearly suggests that things that wouldn't ultimately be discoverable need not be retained.

In *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988), the court held there is a duty to preserve any documents that a company "knew or should have known ... would become material at some point in the future"). The use of "material" rather than merely "relevant" again suggests mere relevance, and possibly even the minimum discoverability threshold, is not the standard for the scope of preservation. The documents may need to be not just minimally discoverable, but also material to the case.

See also, Jones v. Bremen High School District, No. 08-C-3548, 2010 WL 2106640 at *5 (N.D. Ill. May 25, 2010) ("[A] party has a duty to preserve evidence that it has control over and which it reasonably knows or can foresee would be material (and thus relevant) to a potential legal action"); *Dardeen v. Kuehling*, 821 N.E.2d 227, 231 (Ill. 2004) ("the plaintiff must show that the duty extends to the specific evidence at issue by demonstrating that a reasonable person in the defendant's position should have known the evidence would be material to potential civil litigation.").

The 7th Circuit Pilot Program supports the application of the proportionality standard to the scope of evidence preservation. Principle 2.03(a) states:

Appropriate preservation requests and preservation orders further the goals of these Principles. Vague and overly broad preservation requests do not further the goals of these Principles and are therefore disfavored. Vague and overly broad preservation orders should not be sought or entered. The information sought to be preserved through the use of a preservation letter request or order should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C).

Principle 2.04(a) also incorporates the proportionality principle into the evidence preservation calculus:

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. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.

As an aside, it would be helpful if the Rules Committee can define “control” in a way that settles some of the competing case law. Some courts seem to find control by a subsidiary or affiliate by asking the nearly tautological question whether the parent or affiliate would provide the documents if the related entity needed it for some business purpose. *E.g., Camden Iron & Metal, Inc. v Marubeni America Corp.*, 138 F.R.D. 438 (D.N.J. 1991) (a court will find “control” if the court is convinced that the company could secure the information “to meet its own business needs” or if “the need [were] to arise in the ordinary course of business.”) Taken literally it is almost inconceivable to answer that question in the negative. It essentially says that related companies always control each other’s documents, even if there has never been and is unlikely to be an actual need to request the documents for any such business purpose in the real world. This control issue frequently is a tough one for large multi-nationals to navigate when setting up preservation steps, since they often need to manage to the most aggressive case law in the country.

18. Does the current state of the law (rules, case law, statutes, or regulations) provide you with adequate guidance as to the scope of your duties concerning:

(D) The custodians to be notified of preservation obligations (Optional)

| | |
|-----------|-------|
| Never | 6.8% |
| Rarely | 25.4% |
| Sometimes | 39.8% |

| | |
|--------|-------|
| Often | 22.0% |
| Always | 5.9% |

Please comment on your answer. (Optional)

- The rules, case law, regulations, etc., should not be expected to identify the custodians; the nature of the matter drives that issue.
- I find that clients are often extremely broad in notification. For big corporations with large litigation profiles, one wonders if these notices lose impact given their wide distribution. Neither the rules or the case law provide meaningful guidance to limit who should receive initial notification. But limits may not make sense, especially if notices are constructed in a way that recipients are asked to "raise their hands" if they may have relevant information.
- Same as above
- As with these other questions, we are making determinations before or at the moment litigation is brought, and they are judged after the issues in the case become much more clear (and, potentially, after the amendment of pleadings). This leads to a potential "gotcha" game.
- Especially as healthcare records evolve from a hybrid state (paper and electronic) the issues (and cost associated with these issues) regarding custodianship have become murky and confusing.
- We need clarification of the concept of key player. Some case law suggests that the term should be given its natural meaning. Other case law suggests that the definition is dependent on who might have anything subject to discovery, which raises the same issue as C above. This is a particular problem in class and collective actions where the scope of a claim is often not defined for an extended period.
- Fact specific.
- Here, the rules are so ambiguous as to be all but meaningless, especially when whatever decisions are made are attacked in court with the benefit of hindsight.
- Sooner or later, counsel has to decide who the material witnesses & sources of information are in resolving the case. The fact that an explicit preservation duty accelerates that diligence to the early stages of a matter is not, in itself, troublesome to me.

- Generally, there are a small group of custodians who are the decision makers relating to the subject matter of the litigation. If the Rule required an agreement of counsel on the number of custodians with a provision for adding custodians, it would help.
- This requires an attorney who is familiar with the electronic discovery and knows the right questions to ask.
- There is no clear answer on who needs to be subject to a hold. Therefore we usually over protect, adding people to holds who should not be required to retain information. This has significant costs.
- This is more of a factual inquiry than a legal one.
- This is more easily achieved by early identification and interview of key custodians, and ensuring key custodians identify during the interviews others who may have relevant information.
- There could be hundreds of individuals with only tangential connection to the possible claims, yet arguably having information "that could lead to the discovery of relevant information" -- sales representatives, for example. Anyone could have sent an email to someone that mentioned the product or relationship at issue.
- Again, must meet and confer and have transparency and cooperation.
- It depends almost entirely on the facts of the case.
- This is just plain common sense - we don't need a rule here. Lawyers aren't doing their jobs if they can't figure out who the right people/custodians are.
- The individual determinations often involve difficult judgment calls. But the standards seem pretty well established. And it is difficult to imagine any rule that could lay out in any bright line way what is reasonable and proportionate in each and every situation.
- You usually have "some" custodians but most require identification through investigation and interviews.

18. Does the current state of the law (rules, case law, statutes, or regulations) provide you with adequate guidance as to the scope of your duties concerning:

(E) The process necessary to notify preservation custodians (Optional)

| | |
|-----------|-------|
| Never | 11.1% |
| Rarely | 16.2% |
| Sometimes | 30.8% |

| | |
|--------|-------|
| Often | 34.2% |
| Always | 7.7% |

Please comment on your answer. (Optional)

- The law states that reasonable efforts should be made to inform custodians. Further the law should not do, as the situations of those giving such notice will vary greatly. A not-for-profit organization should not be expected to use the same process as a multi-national oil company.
- Many questions are left unanswered by the rules, but have been filled in by courts. E.g., is a written notice required or sufficient? How specific must the notice be in explaining the claims (and likely defenses)?
- The cases are pretty clear about the process of sending out a litigation hold and issuing reminders.
- see 18 a
- There needs to be A LOT of education and resources dedicated to embracing ediscovery as a business process -- especially in healthcare -- the issues are (literally) sometimes a matter of life or death and without good controls in place - justice may not always be served to the party involved.
- This is a matter of judgment not rule or regulation
- There may be some ambiguity over the need for a formal, documented process that arises from some judges' frustrations with the ad hoc, crisis-oriented handling of ESI that has been the ordinary course of business for a generation. But most courts seem to look to the ultimate issues -- whether there is any indication that important sources of information were overlooked, or whether important information has gone missing. In those circumstances, custodians should be notified <somehow>; followed up as circumstances require; and otherwise treated as material witnesses. To restate a previous point, it has not been a significant issue as long as the jurisdiction has provided *some* guidance.
- There is no guidance with any specificity regarding the notification process. Judges tell us that simply issuing a Hold Notice is not sufficient -- but that you need to remind the recipients. OK -- how often? Judges would also like to see a compliance mechanism - what does that look like? No one can go around watching the employees in how they use their email so you either have to rely upon technology such as the Lit Hold feature in Exchange 2010

to achieve compliance but there are some kinds of data that do not have the Lit Hold feature that Exchange 2010 does.

- This requires an attorney who is familiar with electronic discovery and knows the right questions to ask.
- We use a tool to provide notice via email. It would help for a rule or comment to provide clarity that this process is appropriate.
- This process is becoming more manageable over time as entities accept the necessity - from all perspectives: business units, upper level management, IT, RIM, Compliance, Information Security, HR, etc. Whether to invest in technology solutions is proportional to the litigation portfolio of an entity. Huge investments required for automated solutions, however, are not appropriate for entities with a low volume of litigation.
- Some cases have addressed what should be included in a litigation hold letter. However, I find this largely meaningless without the information management structure needed to implement an effective hold.
- No clarity in the law about whether more detailed notices are better because they provide more guidance about the types of information to be preserved, or more streamlined notices because they are shorter and more likely to be read, even if their scope is not understood. The concept of "key" sources who should be followed up with in person may be meaningful in a *Zubulake* type case where a discrete number of individuals was involved in the alleged incidents, but is much more nebulous in commercial, product liability, or intellectual property cases where dozens or hundreds of people could be involved in some aspect of the design, development, manufacture or marketing of the product in suit.
- We deploy written litigation hold notices in all matters based on the case law.
- The process is left up in the air, as it should be. Documentation of the process used could be required by case law or by rules. This little change would make a huge difference. Lawyers couldn't come in and argue straight-faced that someone didn't do the right thing, if they actually documented what they did and why.
- still many gray areas and varying demands court to court
- The case law, including *Zubulake*, holds that issuing a legal hold "is not enough." In *Zubulake* there was a legal hold notice issued but it was not followed either by the direct participants in the underlying events or by IT personnel, and sanctions were imposed. Other cases also impose sanctions against a company where important ESI is lost through negligence or worse misconduct of key players, even though the company issued a legal hold

notice to those key players. *See, e.g., U.S. v. Philip Morris USA*, 327 F.Supp. 2d 21, 26 (D.D.C. 2004) (sanctioning company because 11 executives failed to comply with legal hold notices). My point is that issuance of a legal hold notice is often given way too much significance. The simple fact is that issuing one is not always necessary, and that issuing one alone is not necessarily enough. So building some presumption of reasonableness around whether a legal hold notice was issued makes little sense to me.

18. Does the current state of the law (rules, case law, statutes, or regulations) provide you with adequate guidance as to the scope of your duties concerning:

(F) The information sources to be investigated for possible preservation
(Optional)

| | |
|-----------|-------|
| Never | 7.6% |
| Rarely | 27.1% |
| Sometimes | 39.0% |
| Often | 21.2% |
| Always | 5.1% |

Please comment on your answer. (Optional)

- The liberal relevance standard (made even more liberal when it is expanded to things that are, in the earliest days of litigation, viewed as "potentially relevant," does not offer much in terms of reasonable limitations. The requirement that one identify sources claimed to be "not reasonably accessible" also could use more clarity. As it is, it may lead to over-designation and over preservation where an opponent is not willing to agree to limits (because so little is known about the source).
- This, in my humble opinion is a critical step to be taken to help control costs and the scope of the preservation obligation.
- See comment C
- This is a matter of due diligence not rule or regulation
- Direction on investigation of Cloud and collaborative repositories would be helpful

- See (D-E), supra. Every information source has a person who should be accountable for its responsible preservation. If none seems to exist, then its potentially responsive information should be collected & placed into the custody of an accountable person.
- This obligation falls on the shoulders of the parties which is logical since they should know what data they have.
- This requires an attorney who is familiar with electronic discovery and knows the right questions to ask.
- The lack of certainty regarding sources of information adds significant concern as to the scope of holds.
- This is primarily dependent on how well a party and counsel understand the ESI infrastructure and landscape of the entity. Other major factors include ensuring an understanding of the nature of the matter, knowing how and where information is stored, and collaborative efforts with involved parties to define and narrow the scope.
- Some cases have addressed what locations should be searched. However, I find this largely meaningless without the information management structure needed to implement an effective search.
- It depends almost entirely on the facts of the case.
- This part changes so much depending on the business, the IT technology that the company uses, and the software used to run it all that it senseless to try to make this part rules based.
- still many gray areas and varying demands court to court

18. Does the current state of the law (rules, case law, statutes, or regulations) provide you with adequate guidance as to the scope of your duties concerning:

(G) The information sources to be preserved (Optional)

| | |
|-----------|-------|
| Never | 6.8% |
| Rarely | 29.7% |
| Sometimes | 38.1% |
| Often | 20.3% |
| Always | 5.1% |

Please comment on your answer. (Optional)

- For all of these questions, the laws are too varied between states and federal jurisdictions to give any guidance on the appropriate limits to preservation.
- The issue of what metadata needs to be preserved often arises. Courts that have considered the issue do not seem to differentiate between metadata that is useful and metadata that the program uses to allow access to a file or information about the file.
- Again, the information sources (at least in healthcare) are all over the place and not at all slightly controlled - without metadata standards, appropriate EHR designs which mandate legal hold requirements and mechanisms to protect the privacy and security of the information, the costs and appropriate preservation of relevant information for discovery can't/won't happen.
- See comment C
- See comment C
- Increasingly, third-party data hosts are becoming integral to the relevant preservation analysis. Unfortunately, this is often as big or an even bigger issue for smaller and less sophisticated clients than for larger ones. The irony is that those portions of the bar that have been exploiting preservation issues to harass larger defendants may find themselves confronted by extremely complex and elusive preservation issues where their clients have placed critical data or information into the cloud depending on how courts define what is and is not within a parties' control. The evolution of such a standard is likely to be painful and inconsistent and slow.
- This is a reasoned judgment based on proportionality and reasonableness which cannot possibly be reduced to a bright line rule
- See above
- See (D-E), supra. Every information source has a person who should be accountable for its responsible preservation. If none seems to exist, then its potentially responsive information should be collected & placed into the custody of an accountable person.
- This obligation falls on the shoulders of the defendant which is logical since we should know what data we have.
- This requires an attorney who is familiar with electronic discovery and knows the right questions to ask.
- The current law is very unclear as to whether databases for example have to be preserved, or web sites, etc. It is usually practically impossible to preserve that type of data source for ongoing cases in any event.

- There should be a duty for counsel to ask key custodians about all possible sources of outlier ESI and then follow up to collect and/or vet veracity of custodian.
- Major factors include ensuring an understanding of the nature of the matter, knowing how and where information is stored, and collaborative efforts with involved parties to define and narrow the scope.
- It depends almost entirely on the facts of the case.
- Same answer as above in F
- My prior comments explain that I believe the standard of what needs to be preserved is now pretty well established. Applying that standard to specific facts on the ground can be complex and involves judgment calls. But I don't believe a rule could ever provide the specific answer, up front, for every possible scenario.

19. Please indicate your preference among the approaches to a new preservation rule being considered by the Advisory Committee, described in detail at <http://www.thesedonaconference.org/wgs/content/wgs110/?tab=ref>: (Optional)

Approach 1 is a comprehensive rule that includes detailed prescriptions identifying when the duty of preservation arises, the scope of subject matter, the nature of sources, the duration, and appropriate sanctions for failure to preserve.

36.8%

Approach 2 is a streamlined rule that simply requires parties to act reasonably in determining the trigger and scope of preservation actions.

28.9%

Approach 3 does not define a duty to preserve apart from the implications of listed factors that courts should consider in deciding whether sanctions for failure to preserve are justified.

14.9%

Approach 4 is no rule change or “none of the above.”

19.3%

Please comment on you answer: (Optional)

- The problem the committee should be addressing is not in explaining what needs to be preserved. We don't need any more rules along those lines. We need a set of rules which prescribe what doesn't need to be preserved absent special circumstances, and a culpability standard that requires a showing of intentional misconduct.
- Neither 2 nor 4 is a viable option. #2 because it appears to mirror the current state of affairs and #4 because we would not be having the conversation if nothing was the appropriate response. The specific right course of action is obviously the toughest question, but I believe that a combination of elements from 1-3 is what we should try to achieve--providing enough guidance without being so specific that the rule becomes unworkable.
- Approach 1 is the best route, in my opinion. As a U.S. Magistrate Judge I know that the more detailed and direct the rules are the less wiggle room is available for parties who want to raise arguments based on perceived, or claimed conflicts in the rules.
- Approach 2 with some examples of what should be considered in the reasonableness determination would be helpful.
- I would like to see a hybrid of Approach 2, with some detailed information in the Advisory Committee notes about identifying triggers, the scope, the nature of sources to be considered, and the duration of the duty. I do not think that we need more guidance on the appropriate sanctions for failures to preserve. The body of case law on this issue offers useful guidance that is tailored to the facts of each case. The Committee should not be modifying the Court's discretionary power to impose appropriate sanctions by a one-size-fits-all rule.
- A comprehensive rule would be fantastic, but I have no idea how to draft a rule that is "one size fits all" for all cases. There are too many variables, i.e., type of case, sophistication of litigants, value of matter.
- A comprehensive rule would be welcome. It can assist us in impressing the importance of preservation upon clients, and may defuse disputes as they arise. There does need to be an exception for reasonable efforts under the circumstances, because every case is going to be different, especially when parties are in a pre-litigation mode.
- Litigation is more complex so a comprehensive rule makes more sense especially if you want to get the attention of seasoned attorneys who do not really know how to confront these issues.

- Industries that have mandatory ESI retention, such as brokerage firms or energy traders, have developed software and systems to accommodate the added storage and data management - they have not, to my knowledge, attempted to lobby congress and the judiciary for changes to law that requires them to keep records of every trade, email or instant message related to any trade. The effort to add a rule is simply an attempt to create a curtain for certain parties to hide behind. If parties would act in good faith, meet and confer on these issues, narrow custodian lists to relevant custodians, reserve rights to come back if more information is necessary, then a rule change would be unnecessary. But parties are sometimes more interested in gamesmanship than in an open exchange and honest discovery. My answer to that is that if you want to roll the dice, then roll them - just don't ask the judiciary to legitimize your gamble.
- I can't comment on this preference. I checked on link above and it was bad. I accessed TSC Website and could not find the approaches to preservation discussed above. Would love to know more about this, but I just couldn't find the new preservation rule being considered by the Advisory Committee.
- Approach 1 would provide the greatest certainty. Approach 1 must, however, include within it meaningful limits based on reasonableness and proportionality. Otherwise it will simply further over-burden litigants.
- All we need is a rule that requires the parties to meet and identify scope of preservation as soon as they are aware that they may be filing a claim in federal court. The comments to the rule might say that the parties are presumptively reasonable if they meet and discuss scope immediately upon learning of the potential federal claims.
- Specific guidance is best for most practitioners and will reduce litigation over these issues.
- Today, I believe I can make defensible decisions, but I cannot confidently predict outcomes. Approach 1 would enhance the advice I could give to clients and reduce the "known unknowns."
- In truth, I'd prefer a hybrid approach. There are some areas where I think detailed guidance would be extremely helpful, recognizing that in others, a detailed standard would possibly be more nuisance than benefit. Part of the problem from my perspective is that the burdens and relative benefits are so variable. Mandating that courts be involved in establishing limits on preservation burdens early on would perhaps be the most welcome change for many larger and more sophisticated clients, whereas a uniform and more deferential standard governing sanctions and limits on what data is and is not within a parties' control may be the most important issue for many small

businesses, which are the least likely to seek early representation and the least capable of preserving data without outside assistance and, likely, the cooperation of third parties that are increasingly likely to be hosting much of the data in question. The issues in this context can become extremely complex and the results elusive -- all of which is very challenging in a case with tight budget constraints.

- Category 1's specific preservation triggers undermine the fact-specific inquiry necessary for ensuring reasonable and proportional preservation. A rule of general applicability cannot be crafted in such a manner as to address the wide variety of factors a party must weigh pre-suit when making preservation decisions. Furthermore, the proposed rules changes likely would foster wasteful satellite litigation and produce unfair and inappropriate results. Finally, the court is not suited to regulate pre-litigation activity and some of the proposed provisions present significant issues under the Rules Enabling Act.
- I had been planning to advocate for "no change"; a streamlined rule is probably a better option for two reasons: the courts still have room to adjust to evolving technology and work through a few more years of issues; the committee will have greater flexibility 5 years from now to tweak the rule, if necessary.
- Approach 1 could not be fit every case. Perhaps Approach 1 with different levels based on amount at issue, types of issue & complexity? To approach 2 I'd add duty to confer & agree or if no agreement to get court to rule on scope of preservation. Q. Pro se parties? Q. Pre-litigation (when preservation issues often (usually?) arise).
- The duty to preserve has evidentiary, regulatory & even criminal implications. Thus, I question whether a rule of civil procedure could be "comprehensive" in any meaningful way. On the other hand, a "streamlined" or otherwise non-definitive rule could hinder the efforts of those individual judges who wish to prescribe more specific standards in local practice. I may not agree with rigidly formalistic local rules, but I wouldn't try to stifle them because some may become widely accepted when proven over time. On the other-other hand, I question again whether a rule of civil procedure can trump other laws and rules to prevent selective destruction of evidence from being considered as a matter of character, credibility, or substantive instruction or finding at trial. Particularly in the situation where the selective destruction occurred before a proceeding began or process was served. People have gone to jail & had property forfeited civilly for such pre-proceeding acts, as well as receiving the range of sanctions encountered in

commercial litigation. In sum, I believe we are in a roughly 10-year transition in which courts are requiring litigants to handle ESI in a more disciplined way than through the ad hoc, crisis-oriented methods in which it has evolved. Current prevailing standards require even-handed preservation of potentially relevant (meaning "material") information in the reasonable anticipation of an official proceeding. Interim results of the surveys in the 7th Cir. Pilot Program suggest that ESI discovery is not a significant issue in most cases, but a major concern in some cases. So if any action is needed, perhaps it consists of more guidance about when there is "cause" for extended discovery beyond claims & defenses in large cases. Perhaps more illustration of when subjective thoughts about a possible dispute become "reasonable anticipation" of an official proceeding. Those may be matters for education, not prescription.

- Bright line rules allow the parties to manage to those requirements. Otherwise, the parties are subject to a myriad of different and sometimes conflicting standards as illustrated by the various state and federal court opinions regarding preservation. Measuring whether a party's conduct falls outside of the requirement becomes more objective -- it lessens the subjectivity.
- Approach 1 sounds like an impossible ideal that will not attract consensus. Approaches 2 and 3 sound like what is or should be in place but somewhat amplified -- hard to see positive cost/benefit to expensive/time-consuming business of rule generation. Current rules actually applied with a greater emphasis on proportionality, with less diversity across jurisdictions and greater certainty around expiration of duty might be best outcome.
- I feel that approach 3 is the best way to provide some level of clarity without bogging down in a level of specificity that will not serve the legal system long term.
- I am a little afraid that too much detail will lead to a solution that becomes obsolete with advances in technology, However, I do believe more guidance is needed especially to assist those that have unfortunately not done their homework and become well-schooled on electronic discovery issues.
- First, the directions aren't clear as to where the "approaches" can be found on the WG1 website. The survey should list the document containing the approaches by name of the document as it is saved on the website. From what I have seen on the website, the proposed approaches are flawed in several ways: (1) they allow for unilateral subjective assessment of the financial value of a claim... by the very party that has an incentive to devalue a claim and to avoid preservation; (2) assessment of financial value of a claim

overlooks the possibility that important claims with no financial value (e.g., civil rights cases seeking injunctive relief) would ruin a party's ability to obtain discovery for such claims; (3)

- I believe that a reasonable anticipation standard should be adopted (without a detailed understanding of what are triggering events) and wash away case law that may (or may not) disagree with this standard (Dell, Rambus's reasonably foreseeable standard (?)). However, I think a better definition of scope and a clear reliance on proportionality is required. Moreover, I think that the Rules Committee should look closely at the Seventh Circuit Pilot Program and understand that if a party has no reasonable reason to believe that a data source has unique relevant information in it, then it need not be preserved. The focus needs to be on what information is relevant to the dispute, not the variety of locations that a party may have or use.
- A rule that if followed would provide a safe harbor against sanctions in conjunction with a rule that requires a clear showing of actual, demonstrable prejudice would be preferred. This entire area is akin to fraud such as the inequitable conduct in patent cases which recently has been considerably restricted. That approach is a model that I think would be a starting point for a rule.
- We need a comprehensive approach to provide guidance to all parties on when the trigger applies, what needs to be preserved (and for how long) and when sanctions are appropriate.
- I am strongly opposed to any attempt to craft a "comprehensive" rule. It will never be so and the attempt will be counterproductive.
- My practice experience and line of research leads me to believe that rule changes will not be that effective. Courts, clients and counsel need to follow the current rules and case law (particularly the majority rule re triggering of preservation duties) that are now in place. Were those rules and that case law followed, the number of discovery disputes - plus the costs and delays (see Rule 1) associated with those disputes - would dramatically drop. Initiating new rules will not solve this problem. Moreover, I strongly disagree that a new rule will be a panacea re preservation given the fact intensive nature of this issue.
- In answering these questions it is clear to myself and my clients when these duties arise, it does appear as though it is not as clear in the eyes of other parties. This is particularly true of government, especially federal, agencies, who tend to respond to more specific guidance, especially where a government worker must state their case to a superior as to why a budget is

necessary for ESI preservation compliance. This is why I am in favor of the most specific rule changes.

- Determining when, how and what to preserve cannot be black and white – it cannot be set out in writing – it is definitely judgmental – and must be done in a reasonable, consistent, defensible manner – with adequate documentation. It always has been and always should be. If it were so easy to set out, great minds would not differ in hindsight. For example, the mere receipt of a "demand letter" should never be considered a trigger to preserve standing on its own - it must be considered in light of all involved circumstances, and in many instances, the response will be "we have reviewed your letter, and have determined there is no reasonable likelihood of litigation. Therefore, we will not now incur the tremendous expense of initiating a legal hold. You may rest assured, however, that we will continue to monitor this matter, and will at all times strive to comply with all applicable laws and rules."
- 1) I don't think a rule will fix the perceived problem (the real problem is information management) 2) Any rule enacted now, will be obsolete in a matter of years.
- The real issues are disclosure by parties and education of judges and lawyers about the state of current technologies. The days of paper and the paper model are gone. The new model is being built by the marketplace and in case law, which can react to infinite variations. This is the nature of the Digital Revolution.
- 2 and 3 should be considered but if I had to pick just one it would be 3
- Something between 2 and 3 might be best -- the problem with 2 is that it provides no guidance at all. The problem with 3 is that it doesn't describe a positive threshold that allows a party to determine if it has acted appropriately and reasonably, but only a negative threshold (i.e. whatever you did, it did, or didn't, deserve sanctions).
- The first two approaches are fraught with issues and only add to the ambiguity and complexity, and only create more bases for litigation over discovery. The problem isn't in the triggers as much as it is in the execution. That is, clients and lawyers are worried that their reasoned judgment will be second guessed and sanctioned by the court later. Protecting reasonable preservation will encourage a reasoned and documented preservation process that would provide a "safe harbor" from spoliation claims and sanctions to good-faith litigants. I would like to see some mechanism that protects reasonable laypeople from having their judgments seconded-guessed by more sophisticated courts well after the fact.

- I thought about choosing option/approach 3 but it really is already addressed in case law - it sounds like you just want to codify existing case law (which can make it easier on lawyers) but then it just starts a whole new area of interpretation of the rules. I think judges just need to start calling lawyers on bad lawyering (malpractice) in the ediscovery area. People know what to save, now they just need to work with IT or whoever to make it happen and make the data available to the people that need access throughout the litigation. Guidance on when it can be destroyed or put back in its regular records retention mode is sorely needed. People are afraid to not preserve something so they preserve everything which is extremely costly when it comes to processing and review of the data.
- I would take approach 3 in the sense that the rules should not be phrased to say "every person who reasonably expects to be a party to an action cognizable in a U.S. court shall ..." but rather to say that "each party to an action, or respondent in discovery, in a U.S. court will be subject to sanctions under [insert whatever sanctions rules end up being applicable] unless [insert trigger and scope of duty]." The third option as presently drafted gives factors that include most if not all of the right elements, but that leave open questions of whether any factor is dispositive or essential and the relative weighting of the factors. For example, what if factor (A) is not satisfied because the party was not on notice of the litigation (or had no reason to expect that the lost evidence would eventually be discoverable in the litigation)? As currently drafted, a judge could still impose sanctions. Or, what if factor (E) is not satisfied in that the preservation steps not taken would have been disproportionate to the case? The judge could still sanction the party, perhaps noting its vast resources and sophistication under factor (D). I doubt that is the intention but it could be the result as presently drafted. To fix this I would take some of the elements of approaches 1 and 2 and build them into the structure of approach 3. So, putting this all together, a rule might read something like:

Each party to an action, or respondent in discovery, will be subject to sanctions under [insert applicable rules] if that party or respondent is unable to produce discoverable evidence because it failed, beginning promptly upon notice of facts that would make a reasonable person anticipate litigation or subpoena, to take reasonable steps to preserve evidence that was in its possession, custody or control and that a reasonable person under the circumstances would have anticipated to be discoverable in the action.

The Advisory notes would explain that "discoverable" is meant to encompass all of the discovery rules, including both expanders (e.g., "reasonably calculated to lead to") and limiters (e.g. proportionality and such).

The referenced sanctions rules would then provide the contours of appropriate sanctions including levels of culpability, what showing of prejudice is needed, and what kind of sanctions can be imposed. Or maybe this same rule just carries on from here and sets out all of the conditions for sanctions.

By the way, I think that "notice of facts that would make a reasonable person anticipate litigation or subpoena" covers the water front, including actual notice of, as well as formal service of a complaint or subpoena. They are subsumed within that formulation. No need to redundantly add "pending" litigation or the like. You can anticipate litigation if you know it is already pending. No one would say work product's "reasonable anticipation" standard ceases to apply once the case is already pending. Same here. The Advisory notes could explain this.

Note that I used "evidence" as a catch all for "documents, ESI, and tangible things." It is less of a mouthful. But, unless it becomes a defined term, it may be ambiguous; some may think it means "admissible" evidence. Unless we come up with a defined term that includes all three items, we'll need to repeat "documents, ESI, and tangible things" quite a lot. Something should be done about this problem throughout the rules, since, for one of many examples, Rule 26(b)(3)(A) still says "documents and tangible things" without mentioning "ESI." I think somewhere in the advisory notes, maybe to Rule 34, there is some sort of caution about not narrowly interpreting references that still refer to just documents and not ESI. But it seems like it is time to fix this terminology throughout the rules, either by defining a catch-all term, or consistently referring to all three items everywhere.

- I can't really answer this question as written. There may be some instances where additional guidance would be helpful, particularly identification of what ESI in ordinary circumstances does not need to be preserved.

APPENDIX L

LETTER FROM THE SEDONA CONFERENCE REGARDING ITS 10TH ANNUAL WG1 MEETING



October 17, 2011

Hon. David G. Campbell
United States District Court
Sandra Day O'Connor U.S. Courthouse, Suite 623
401 West Washington Street, SPC 58

Dear Judge Campbell:

The Sedona Conference® is a non-profit organization dedicated to the reasoned and just advancement of the law in the areas of antitrust law, complex litigation, and intellectual property rights. At the recent 10th Annual Meeting of our Working Group One: Electronic Document Retention and Production (“WG1”), approximately 200 of the 750 members of WG1 attended and devoted the bulk of the meeting to a review of information preservation and spoliation issues, including, in particular, those issues presented by the Category One, Two, and Three proposals to potential rulemaking on preservation and spoliation outlined by the Advisory Committee on Civil Rules (“Rules Committee”).¹

Among the resources available to us during the WG1 meeting were the results of a survey of our membership, submissions by various WG1 members, and the observations and comments by thirteen WG1 members and observers who attended both the September 9, 2011 mini conference conducted in Dallas by the Rules Committee and the WG1 meeting.² The discussions that ensued over the two days of our WG1 meeting were spirited, with the participating members fully engaged in dialogue to assess the extent to which consensus might be achieved regarding at least some of the issues with which the Rules Committee has been grappling.

Members in attendance generally recognized that issues relating to preservation, spoliation, and sanctions exist, but the members did not agree as to the extent of such problems; whether now is the time to address them or whether more experience should be gained before such an attempt is made; and whether the solutions to the perceived problems can be accomplished best by Rule amendment or some other approach, such as continuing education of the bench and bar.

¹ Preservation/Sanctions Issues, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Materials/Preservation-Sanction%20Issues.pdf.

² Judicial observers Lee H. Rosenthal and John M. Facciola, and, in alphabetical order, WG1 members Thomas Y. Allman, Jason R. Baron, William P. Butterfield, Steven S. Gensler, Maura R. Grossman, Robert L. Levy, Robert D. Owen, Ashish S. Prasad, John J. Rosenthal, Allison C. Stanton, and Ariana J. Tadler attended both meetings, as did Sedona Conference Directors John K. Rabiej and Kenneth J. Withers.

With respect to the proposed Categories outlined by the Rules Committee, certain reactions by WG1 members in attendance at the most recent meeting are worthy of note and, we hope, will be given serious consideration by the Committee. General consensus among the members in attendance was achieved at least as to some issues:

- As to the **Category One proposal** – involving specific triggers, scope, and sanctions – an overwhelming consensus was expressed *against* the proposal.
- The **Category Two proposal** – setting forth more general preservation standards – received an even greater *negative* reaction.

On the subject of a stand-alone rule regarding spoliation sanctions – in both remedial and punitive forms – there was a robust and wide-ranging diversity of opinions among the attendees. A majority seemed to believe that the uncertainty about sanctions, insofar as there have been inconsistent rulings across courts throughout the nation, deserved attention, but there was no consensus on the remedy. In this regard, the **Category 3 proposal**, involving a new Rule 37(g), was not discussed in detail, but aspects of it were favorably mentioned and led to some preliminary, albeit inconclusive, dialogue. On the other hand, some sentiment was expressed for focusing only on existing Rule 37(e).

WG1 is committed to focusing its efforts over the next several months to explore in greater depth and detail the possibility of reaching consensus on whether and in what form there should be additional rulemaking, with particular emphasis on whether there should be a proposed national standard regarding remedies/sanctions for spoliation under Rule 37. We also will be considering potential modifications to Rules 16, 26(f) and perhaps Rule 26(c) to better inform practitioners and judges of the specific points to be discussed and resolved – a point of discussion which had a groundswell of support. We plan to submit the end results of this process in advance of the Rules Committee's March 2012 meeting.

The one dominant theme that emerged from our discussions was that a continued emphasis on education of the bench and bar about cooperation on and transparency in discussions of preservation obligations is an essential part of the solution. The Sedona Conference is committed to its continuing mission of educational service.

Hon. David G. Campbell
Letter from The Sedona Conference® WG1
October 17, 2011
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We thank the Committee for its important work in this area and hope that our efforts can help facilitate a resolution that best serves the bar and improves the administration of justice.

Respectfully submitted,

The Steering Committee of WG1*

Jason R. Baron
William P. Butterfield
Conor R. Crowley
Maura R. Grossman
Sherry B. Harris
Timothy Moorehead
John J. Rosenthal
Ariana J. Tadler
Edward C. Wolfe

Thomas Y. Allman (Chair emeritus)
Jonathan Redgrave (Chair emeritus)

* The opinions expressed by WG1 Steering Committee members do not necessarily represent the views of any of their employers, clients, or any other organizations with which they are affiliated. In addition, members of WG1, including members of the Steering Committee, reserve the right to express their individual opinions and advocate proposals that may differ from that proffered by WG1.

APPENDIX M

COMMENTS FROM T. ALLMAN RE CHANGE IN FRCP

Rules Discovery Sub-Committee Mini-Conference at DFW Airport,
September 9, 2011

Change in the FRCP: A Fourth Way

Thomas Y. Allman

Requests for spoliation sanctions continue to dominate the e-discovery litigation process and, if anything, are dramatically increasing.¹ Sanctions are typically addressed in the lower courts through “the relatively unstructured analysis” of inherent powers.² Rules 37(a)(b)(c) & (d), read literally, do not cover violations of the duty to preserve in the absence of a prior order, but do provide a wide range of appropriate responses for failures to make discovery.

I agree with the Rules Committee, however, that it is time to update the sanction provisions of the Federal Rules to “obviate reliance on ‘inherent authority’”³ by authorizing use of the listed sanctions in Rule 37. This would promote uniformity of result and facilitate appellate review as well as eliminate the artificial and unnecessary distinction between non-performance of preservation and discovery obligations.

A Modest Proposal

Accordingly, I would amend Rule 37 to apply to breach of the duty to preserve while making appropriate changes to Rule 37(e) to encourage uniform culpability requirements for serious sanctions. As a result, courts

¹ The number of instances in which litigants sought sanctions has doubled in the first half of 2011. Gibson Dunn 2011 Mid-Year E-Discovery Update, July 22, 2011, copy at <http://www.gibsondunn.com/publications/pages/2011Mid-YearE-DiscoveryUpdate.aspx>.

² *Sentis v. Shell Oil*, 559 F.3d 888, 900 (8th Cir. March 24, 2009)(contrasting use of “specific rules tailored for the situation” and “the relatively unstructured analysis associated with inherent authority”).

³ Memo on Preservation and Sanctions Issues, (hereinafter “ISSUES MEMO, , 14, at n.37 & 22 (“should generally make reliance on inherent authority unimportant”), copy at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publications/Preservation.pdf>.

could act within the four corners of the Federal Rules, because they would be “up to the task.”⁴

I would not, however, incorporate the types of proposals considered by the Rules Subcommittee⁵ to detail the trigger and scope of the duty to preserve, but would, instead, leave that to the continued evolution of the common law. At the most, a general standard of care could be included.

Rule 37

Rule 37(c) currently authorizes attorney fee awards, jury instructions and “other appropriate sanctions,” including the evidentiary, remedial and punitive options listed in Rule 37(b). The changes required to make these provisions applicable to preservation violations would be easy to make.

Thus, Rule 37(c)(1) could be amended to authorize sanctions if a party “fails to *preserve or provide information as required by these rules or by known preservation obligations.*” Rule 37(b)(2)(A) could provide that it applies “[if a party] fails to obey an order to *preserve evidence* or provide or permit discovery.” Existing case law would apply to selection of a sanction as long as it yielded “just” results,⁶ constituted an “appropriate” sanction⁷ and was “substantially justified.”⁸

Rule 37(e)

Expanding Rule 37 to explicitly cover spoliation would bring Rule 37(e) into focus and finally allow it to meet its full potential. That rule, added in 2006, restricts sanctions for losses of ESI due to “routine, good faith” operation of information systems, a crucial linchpin in the argument for adopting neutral policies and practices in the management of information. This trend ought to be encouraged.

Currently, the Rule applies only to sanctions issued “under these rules,” tempting some to dismiss its teaching absent exclusive reliance on a

⁴ Chambers v. NASCO, 501 U.S. 32, 50 (1991)(a court should “ordinarily” rely on the Rules rather than inherent power); Kovilic Construction v. Missbrenner, 106 F.3d 768, 773 (7th Cir. 1997)(inherent power available “only when no direct conflict with laws or national rules of procedure”)(Wood, J.).

⁵ See Proposed Rule 26.1, ISSUES MEMO, 3-13 & 18-20.

⁶ Rule 37(b)(2)(A).

⁷ Rule 37(c)(C).

⁸ Rule 37(d)(3).

rule.⁹ Authorizing sanctions for failures to preserve under Rule 37 would broaden the scope of Rule 37(e) while providing a reason for clarifying enhancements, such as those recently adopted by Connecticut in its Rule 37(e) counterpart. That provision bars sanctions for failure to provide information, including ESI, due to “routine, good-faith operation of a system or process in the absence of a showing of intentional actions designed to avoid known preservation obligations.”¹⁰

An alternative formulation which could be adopted is before the Rules Committee. One of the suggestions in proposed Rule 37(g) would permit reliance on existing rules “unless the failure to preserve discoverable information was willful or in bad faith and caused [substantial] prejudice in the litigation.”¹¹

Duty to Preserve

Under this proposal, the dimensions of the duty to preserve would continue to be developed under the common law in contrast to describing, in a new rule, the events which would presumptively trigger a duty to preserve, whether or not an action has been commenced, as well as the scope of the duty itself.

My concern is that adoption of a detailed rule risks a “slippery slope” of imposing constraints on primary conduct of persons or entities in managing their non-litigation practices. Moreover, based on informal surveys of colleagues - and a preliminary analysis of responses to the Sedona Conference® Survey¹² - there is no consensus that more detailed rules would meaningfully enhance the ability of parties to meet the fact-specific challenges at the outset of disputes.

⁹ Johnson v. Wells Fargo, 2008 WL 2142219, at *3, n. 1 ((D. Nev. May 16, 2008); *but cf.* Olson v. Sax, 2010 WL 2639853, at *2 (E.D. Wis. June 26, 2010)(relying on Rule 37(e) where recording over occurred after duty to preserve attached since there is no evidence that it engaged in bad faith destruction of evidence “for the purpose of hiding adverse evidence”).

¹⁰ See Sec. 13-14 CONNECTICUT PRACTICE BOOK (2011)(eff. Jan. 2012)(copy at http://www.jud.ct.gov/Publications/PracticeBook/PB_070511.pdf.

¹¹ Rule 37(g)(2), ISSUES MEMO, 23.

¹² Sedona published a survey of over 700 members of WG1 based on the Questions raised by the Committee in its June 29, 2011 Memo. A total of 132 responses – many with highly articulate and relevant comments – were received. A full Copy will be made available to the Committee.

At the most, any rulemaking outside Rule 37 should be confined to stating a general standard of care which would apply to parties with actual or constructive knowledge of litigation. For example, such a standard – set forth in the footnote - could acknowledge the importance of core principles, such as reasonableness and good faith and the role of proportionality in assessing compliance.¹³ While it would apply prior to commencement of litigation, the mere fact that an action has not commenced is not decisive under the Rules Enabling Act. The test is whether it relates to conduct which is clearly linked, as preservation implementation assuredly is, to the discovery process.¹⁴

¹³ A standalone provision could simply provide that “Parties with actual or constructive notice of the likelihood that relevant and discoverable evidence is or will be sought in discovery shall undertake reasonable and proportionate efforts to preserve any such evidence within its possession, custody or control subject to the considerations of Rule 26(b)(2)(C) and Rule 37(e).” Thomas Y. Allman, Preservation Rulemaking After the 2010 Litigation Conference, 11 SEDONA CONF. J. 217, 225 (2010).

¹⁴ *Id.*, at 223.

APPENDIX N

**COMMENTS FROM ALLMAN, BARON AND GROSSMAN RE PRESERVATION, SEARCH
TECHNOLOGY & RULEMAKING**

Civil Rules Discovery Subcommittee Mini-Conference at DFW Airport
September 9, 2011

Preservation, Search Technology & Rulemaking

Thomas Y. Allman, Jason R. Baron and Maura R. Grossman¹

I. Introduction

The Rules Committee has sought information about and input on the influence of technology – including predictable future developments – on the possible rulemaking needed to govern preservation obligations. As broadly defined, various forms of automated technologies in addition to search technology are implicated by the question.²

The purpose of this relatively brief Essay is to highlight certain “hot button” issues arising with respect to automated versus manual search methods and technologies, specifically with respect to their current and future use in meeting the initial duty to preserve electronically stored information (ESI). Included in our discussion are certain “cutting edge” techniques that are advocated as effective in identifying preservable information in diverse storage applications throughout the enterprise.³

By way of background, we first describe the role of search technology generally, before turning to the preservation context and our evaluation of the need for rulemaking on the topic. In our view, the drafters of the 2006 Federal

¹ Mr. Allman, an Attorney and former General Counsel, is a Chair Emeritus of The Sedona Conference® Working Group on Electronic Document Retention and Production (WG1). Mr. Baron, Director of Litigation at the National Archives and Records Administration, is one of the current Co-Chairs of WG1. Maura R. Grossman, Counsel at Wachtell, Lipton, Rosen & Katz, is a member of WG1. The views expressed herein are those of the authors alone and have not been reviewed, endorsed or authorized by any public or private institution (or client) with which they are affiliated, including The Sedona Conference®. The authors wish to thank the in-house and outside counsel who reviewed earlier drafts and contributed significantly to our articulation of the issues, as well as Kevin Cheng, a legal intern in Mr. Baron’s office, for his research assistance.

² The Sedona Conference® Survey of WG1 Members (August 2011) (copy on file with authors) makes reference to centralized enterprise search, email journaling, and indexing and collection software, among others.

³ Adam Cohen, *Angst Over Data Retention Ruling May be Misplaced*, 8/24/2009 Nat’l L. J. 15 (Col. 1) (noting products which build on centralized management of data, including enterprise search tools and compliance monitoring tools), copy at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202433204035>.

Amendments wisely did their best to promulgate “technology neutral” approaches to solving e-discovery issues, and the same result should obtain in 2011.

Review for Responsiveness

The status quo ante consists of information being identified and preserved in response to potential or pending litigation followed, when necessary,⁴ by collection, culling, processing and review for relevance and privilege. The latter steps in the process – uniformly regarded as the most costly of the e-discovery workflow due to the involvement of counsel in the process – increasingly have been subject to search-technology enhancement. Whether such methods can be said to be successfully utilized at the earlier stages of preservation and collection remains a more open question.

Despite its limitations,⁵ key word searching, using simple words or word combinations, with or without Boolean operators, is “[b]y far the most commonly used” methodology in the filtering of data for production of responsive information in discovery.⁶ However, alternative search techniques, taking advantage of “predictive coding,” concept searching, and other forms of machine learning, are increasingly used to prioritize and select documents for review.⁷ These techniques are backed up by quality control measures, sampling, and informed project-oriented management.⁸

Recent studies suggest that appropriate use of these techniques can yield results that are superior to exhaustive manual review,⁹ as measured by “recall” and

⁴ There is anecdotal evidence that the majority of litigation holds do not result in collection of the data placed on hold – the holds are primarily prophylactic. However, the “collection” process is sometimes incorporated into and made part of the initial identification and preservation process itself.

⁵ The Sedona Conference® Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery, 8 SEDONA CONF. J. 189, 201 (2007) (*Sedona Search Commentary*) (“simple keyword searches end up being both over- and under- inclusive in light of the inherent malleability and ambiguity of spoken and written English (as well as all other languages)”).

⁶ *Id.* at 200.

⁷ *Id.* at 203 (“Anecdotal information suggests that a small number of companies and law firms . . . are using alternative search methods to either identify responsive documents (reducing expensive attorney review time) or to winnow collections to the key documents for depositions, pretrial pleadings, and trial”); *see generally*, Jason R. Baron, Law in the Age of Exabytes: Some Further Thoughts on ‘Information Inflation’ and Current Issues in E-Discovery Search, 17 RICH. J.L. & TECH 9, at *30 et seq. (2011) (discussing “predictive coding”).

⁸ The Sedona Conference® Commentary on Achieving Quality in the E-Discovery Process, 10 SEDONA CONF. J. 299 (2009)(encouraging greater use of project management, sampling and other means of verifying the accuracy of the e-discovery process).

⁹ *See, e.g.*, Maura R. Grossman and Gordon V. Cormack, Technology-Assisted review in E-Discovery Can Be More Effective and Efficient Than Exhaustive Manual Review, 17 RICH. J.L. & TECH 11, at *1-*2 (Spring 2011) (results of one study found that “a technology-assisted process, in which humans examine only a small fraction of

“precision,” i.e., how effective a given method is in finding all relevant documents, and how accurate it is in eliminating “false positive,” or nonrelevant materials, respectively.

As the *Sedona Search Commentary* states in Practice Point 1, “[i]n many settings involving electronically stored information, reliance *solely* on a manual search process for the purpose of finding responsive documents may be infeasible or unwarranted. In such cases, the use of automated search methods should be viewed as reasonable, valuable, and even necessary.”¹⁰

Nevertheless, even with the most advanced automated techniques, it has become clear that some level of manual review – at initial stages of coding, as a quality control check throughout, and especially for privilege – remains an important part of the workflow process designed to assure that relevant and non-privileged material is identified and produced. We also readily acknowledge that in smaller cases, traditional manual review may continue to constitute the primary means for accomplishing the review task.

The Federal Rules and the accompanying Committee Notes do not address or mandate any particular review methodology nor limit the use of technology in its implementation. Courts have correctly concluded that there is no obligation to “examine every scrap of paper in its potentially voluminous files,” and have cited Sedona Principle 11¹¹ in support of the use of “reasonable selection criteria,” such as search terms or samples to access and identify “potentially responsive electronic data and documents.”¹²

More recently, in connection with privilege review issues, the Evidence Advisory Committee has noted that advanced search techniques may play a role in

the document collection, can yield higher recall and/or precisions than an exhaustive manual review process, in which humans code and examine the entire document collection”); Patrick Oot et al., *Mandating Reasonableness in a Reasonable Inquiry*, 87 DENV. U. L. REV. 533, 551 (2010) (“use of auto-categorization systems can potentially reduce document request response times from over four months to as little as thirty days for even the largest datasets.”); Bennett Borden, *E-Discovery Alert: The Demise of Linear Review* (2010)(alternative search techniques can facilitate faster review times), copy at http://www.clearwellsystems.com/e-discovery-blog/wp-content/uploads/2010/12/E-Discovery_10-05-2010_Linear-Review_1.pdf.

¹⁰ *Sedona Search Commentary*, 8 SEDONA CONF. J. at 208 (italics added).

¹¹ Principle 11, *The Sedona Conference Best Practices Recommendations & Principles for Addressing Electronic Document Production* (“*The Sedona Principles*”)(2nd Ed. June 2007)(A responding party may satisfy its good faith obligation to preserve and produce relevant [ESI] 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 *Treppel v. Biovail*, 233 F.R.D. 363, 374 (S.D.N.Y. 2006).

the context of avoiding a finding of privilege waiver.¹³ The *Victor Stanley I* opinion strongly advocated the application of such advanced techniques to future reviews for responsiveness and privilege.¹⁴

Identification for Preservation

In contrast, the identification of information subject to preservation often must be planned and executed without the benefit of precise knowledge of potential discovery issues. The duty to preserve may arise even before litigation is filed, or before counsel for the requesting party is identifiable – and certainly before the Rule 26(b) conference. It is not surprising, therefore, that the FJC Survey presented at the Duke Conference showed limited use of the conference for that purpose. Thus, initial preservation decisions are often made unilaterally,¹⁵ and a party must take into account the uncertainty as to eventual discovery.¹⁶ Thus, preservation may involve retention of broad categories of sources (such as key and ancillary custodians), or searches of potential sources for subject matter information within a given time frame or on a specific topic.

Automated search techniques may be used for targeted or selective identification from sources such as archives or LAN servers. Increasingly, it is also argued by vendors that the ability to “index” the contents of diverse information sources permits centralized search for and identification of information responsive to legal holds in multiple sources.¹⁷

¹³ FRE 502 Explanatory Note (Revised 11/28/2007)(“Depending upon the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken ‘reasonable steps’ to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.”).

¹⁴ *Victor Stanley v. Creative Pipe*, 250 F.R.D. 251, 259 n.9 (D. Md. 2008)(noting existence of “other search and information retrieval methodologies [which] include: probabilistic search models, including ‘Bayesian classifiers,’” as well as “Fuzzy Search Models,” “Clustering” searches and “Concept and Categorization Tool[s].”).

¹⁵ Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, 13 RICH. J.L. & TECH. 9, at *26 (2007) (“absent agreement with opposing counsel, unilateral preservation decisions about inaccessible sources always carry some risk of post-production challenge for potential spoliation”).

¹⁶ *See, e.g., Wm. T. Thompson v. General Nutrition*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984) (the duty to preserve attaches to what 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 Data Sheet, Symantec Enterprise Vault™ Discovery Collector (2010)(“[e]xtend[ing] indexing and classification of data beyond the archive to include a full spectrum of enterprise sources – network servers, storage systems, application repositories, and personal computers across the enterprise as well as remote locations”), copy at http://eval.symantec.com/mktginfo/enterprise/fact_sheets/b-ev_9_discovery_collector_DS_20982272-2.en-us.pdf.

These techniques are said to enable a party to “crawl”¹⁸ across diverse data sources in order to identify content in repositories subject to hold criteria, regardless of custodian or source.¹⁹ Once identified, the material can be locked down in place via a “hold procedure,” or transferred electronically to secure storage pending review and production.²⁰ The concept of “reaching in” to a variety of indexed content silos,²¹ or to material in the “cloud,”²² bears a resemblance to an earlier suggestion by one court that a party might meet preservation obligations by “conducting system-wide keyword searching and preserving a copy of each ‘hit.’”²³

Advocates for this approach argue that such an enterprise-wide search can achieve better results than the “unpredictability and inconsistency of self-collection.”²⁴

II. Preservation Today

In meeting preservation responsibilities, a party need extend only reasonable and good faith efforts, proportionate to the issues and risks involved, as not “every conceivable step” is required.²⁵ The Sedona Commentary on Proportionality²⁶ explains that the “burdens and costs of preservation” of potentially relevant information should be “weighed” when determining the “appropriate scope of

¹⁸ Charles Babcock, Oracle Challenges Google With New Enterprise Search Engine, Information Journal (March 2006)(describing how search engine can “crawl through file systems and the databases that underlie” various applications and databases as well as email systems and documents, web servers or other sources).

¹⁹ Data Sheet, Autonomy Control Point (2011)(“information is indexed automatically making it visible, transparent, and available to be controlled and governed”), copy at

<http://protect.autonomy.com/products/compliance/controlpoint/index.htm> (scroll to “related products”).

²⁰ Barry Murphy, In-Place Preservation – A Workable Solution?, eDiscovery Journal (2010)(corporations aspire to “in-place preservation” under which “files are placed on legal hold and locked down where they live instead of being copied and moved to a specific preservation repository” which, inter alia, “reduces overall risk because there is less data movement”), copy at <http://ediscoveryjournal.com/2010/11/in-place-preservation-a-workable-solution/>.

²¹ See Andrew Cohen, EMC White Paper (April 2006)(“Federated Search” is the capability of automating search and retrieval of content from various sources within an enterprise by “reaching into” these various applications), copy at <http://www.emc.com/collateral/software/white-papers/h2153-prac-ent-meth-compl-ediscovery-wp.pdf>.

²² Data Sheet, Clearwell Identification and Collection Module (2011)(describing “federated search-enabled collection” of material in “Microsoft Exchange, Microsoft SharePoint and Windows files shares whether deployed on-premise or in the cloud”), copy at http://www.clearwellsystems.com/ediscovery-news/pr_06_13_11.php.

²³ *Sedona Search Commentary, supra*, 8 SEDONA CONF. J. 189 at 200 (citing to, *inter alia*, Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432 (S.D.N.Y. 2004)).

²⁴ Data Sheet, Recommind Accelerate ESCA & Collection (2011)(enables enterprises to “identify, preserve [and] collect”), copy at http://www.recommind.com/products/accelerate_discovery/eca_and_collection.

²⁵ Principle 5, *The Sedona Principles* (The obligation to preserve [ESI] 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 [ESI].).

²⁶ The Sedona Conference® Commentary on Proportionality, 11 SEDONA CONF. J. 289 (2010).

preservation.” Thus, transient or ephemeral data that is not kept in the ordinary course of business and that the organization may have no means to preserve need not be preserved under normal circumstances.²⁷

Traditionally, the decision on what documents and data to preserve has been left to the informed judgments of custodians, assisted, as appropriate, by counsel, and the IT department. This approach is said to be used by “[a] majority of organizations.”²⁸

The Traditional Approach

The focus in pre-discovery preservation of ESI is on user-created or “unstructured” information residing in email, electronic documents, spreadsheets and other similar materials, as well as structured data in the form of databases. It is preservation of the unstructured data, however, which presents the most challenges – and leads to the most disputes in the reported sanction decisions.²⁹

Unstructured information is typically found in active files stored on servers, laptops or office desktops, or other distributed sources (including removable media). It may also be found in third-party cloud-based storage which is susceptible to the control of the entity. It may take the form of email and attachments, compressed and encrypted email archives, spreadsheets, text messages,³⁰ tweets, instant message (IM) chats, or information available on social networks.

The preservation process typically begins with issuance of a litigation hold, triggered by the onset or anticipation of litigation. As described in *Zubulake IV* “[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure

²⁷ *Columbia Pictures v. Bunnell*, 2007 WL 208419 at *3-6 (C.D. May 29, 2007), review denied, 245 F.R.D. 443 (2007).

²⁸ According to William Tolson, “[a] majority of organizations still rely on the practice of instructing custodians to search for and protect potentially responsive ESI locally.” Post, *Are Custodial Self-Discovery and Preserving ESI in Place Good for You?* (January 19, 2011), copy at <http://blog.ironmountain.com/2011/compliance/are-custodial-self-discovery-and-preserving-esi-in-place-good-for-you/>.

²⁹ Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By The Numbers*, 60 DUKE L. J. 789, 803 (2010) (“[i]n the 230 cases in which sanctions were awarded [in the study], the most common misconduct was failure to preserve ESI”).

³⁰ See, e.g., *Computer Forensics and E-discovery, Text message Usage is Exploding*, January 2010, copy at <http://www.fulcrum.com/text-messages.htm> (noting that text message system typically bypasses a business entity’s central server/storage and backup processes and “text message content typically exists only in the senders’ and recipients’ devices”).

the preservation of relevant documents.” Use of a litigation hold was acknowledged in the Committee Notes to the 2006 Amendments,³¹ and its implementation is covered by the recently amended Sedona Commentary on Legal Holds.³²

A litigation hold notice is typically directed to pertinent custodians to retain potentially relevant documents, including ESI and, in some cases, seeking certification that they have taken steps to ensure that it has not been destroyed.³³ The form of the hold may vary according to the circumstances.³⁴ It typically spells out the reasons for the hold and lists the topics subject to it, as well as the manner in which identified information is to be handled. It may ask targeted custodians to identify other potential custodians of potentially relevant data. There may or may not be automated processes in place to track issuance of the litigation hold and to record communications regarding compliance.

The custodian is often responsible for identifying and preserving information stored on the “endpoint devices” he or she uses, such as desktops, laptops and removable devices. Depending upon the specificity of the litigation hold, there could be some selectivity involved in applying the criteria. In many (but not all) cases, the information is then collected for purposes of responding to discovery requests, often without any specific attempt to winnow or cull the information prior to institution of the review process.

The IT department and, in some cases, counsel, may play a role, depending on the scope of the preservation effort. IT is usually responsible for accessing enterprise systems such as databases and implementing any affirmative actions required to support preservation activities. Selective backup media might or might not be retained, depending upon the likelihood that it captured unique copies of relevant materials.³⁵ LAN drive information as well as hard drives from desktops or laptops of former employees who were potentially involved might be retained if not already redeployed. Procedures to address computer maintenance and repair activities for custodians on holds often are also considered.

³¹ Comm. Note, Rule 37(f)(2006)(“intervention in the routine operation of an information system is one aspect of what is often called a ‘litigation hold’”).

³² The Sedona Conference® Commentary on Legal Holds: The Trigger & The Process (2nd Ed. 2011), 11 SEDONA CONF. J. 265, 286-287 (2010).

³³ Mayer Brown Slides, A Refined Litigation Hold (2010), 10-12, copy at http://www.mayerbrown.com/public_docs/12-01-10_Comm_Lit_Webinar_E-Discovery_Slides.pdf.

³⁴ There are circumstances where oral notice may be sufficient. *See* n. 40, *infra*.

³⁵ *See, e.g.,* Wells Fargo Bank v. LaSalle Bank, 2009 WL 2243854, at *3 (S.D. Ohio July 24, 2009) (refusing to order restoration of backup media where hard copies of important emails were retained in loan files).

If incoming and outgoing email has been routinely archived through message journaling, it may or may not be decided to “execute a hold search” at that time to identify email within the archive subject to the hold.³⁶ In some cases, multiple keyword searches may be necessary to fully execute litigation holds against other data storage silos.³⁷

As recognized by some courts³⁸ and commentators, there are potential limitations on custodian-centric approaches to meeting a party’s preservation duty.³⁹ These include the problem of inconsistent, idiosyncratic methods for preserving ESI; late identification of key evidence; the possibility of metadata spoliation; the issue of self-interest or bias on the part of the end-user charged with the task; the non-lawyers absence of legal knowledge, including as to relevancy; and a general failure of attorneys to adequately supervise the process where it involves multiple (and sometimes huge numbers of) would-be custodians.

However, the issue is highly fact-specific, and in some contexts it can be quite reasonable to rely upon the assistance of custodians in selecting material

³⁶ This may depend upon the likelihood that the contents of the archive are subject to culling or application of retention periods by policy in the absence of such a hold. *See, e.g.,* *Velocity Press v Bank*, 2011 WL 1584720, at *1 (D. Utah April 26, 2011)(emails and attachments archived for one year unless a litigation hold is applied).

³⁷ Mia Mazza, et al., *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information* (hereinafter “Creative Approaches”), 13 RICH. J.L. & TECH. 11, at *34 & *79 (noting possible uses in what is “fast becoming a very complex and costly stage of discovery”).

³⁸ For example, in *Pension Committee of the University of Montreal Pension Plan v. Banc of America*, the Court found plaintiffs’ litigation hold policy defective in part because:

“It does not direct employees to preserve all relevant records—both paper and electronic—nor does it create a mechanism for collecting the preserved records so that they can be searched by someone other than the employee. Rather, the directive places total reliance on the employee to search and select what that employee believed to be responsive records without any supervision from Counsel.”

685 F.Supp.2d 456, 473 (S.D.N.Y. 2010) (as amended May 28, 2010); *see* *Adams v. Dell*, 621 F. Supp.2d 1173, 1194 (D. Utah 2009) (holding that defendant had violated its duty to preserve information, in part because the defendant’s preservation practices “place operations-level employees in the position of deciding what information is relevant”); *Jones v. Bremen High School*, 2010 WL 216640, at *7 (N.D. Ill. May 25, 2010)(non-lawyers do not have enough knowledge to correctly recognize which documents are relevant and otherwise may fail to reveal their own mistakes or misdeeds).

³⁹ *See, e.g.,* ARMA, “Is ‘Manual’ Collection of ESI Defensible? (4/10), copy at <http://www.arma.org/news/enewsletters/index.cfm?ID=4270>; Dean Gonsowski, Clearwell Systems, “Adams v. Dell Questions Custodian-Based Retention” (5/28/09), copy at <http://www.clearwellsystems.com/e-discovery-blog/2009/05/28/adams-v-dell-questions-custodian-based-retention-and-litigation-hold-practices-in-electronic-discovery/>; ; John Wang, “Automated Collection: Mitigating the Risks and Costs of Manual Collection” (8/12/10), copy at <http://grokify.com/2010/08/12/automated-collection-mitigating-the-risks-and-costs-of-manual-collection/>; James Shook, “Weekend at Bernie’s and End-user based eDiscovery” (8/10), copy at <http://www.kazeon.com/blog/2010/08/weekend-at-bernie-s-and-end-user-based-ediscovery/>

subject to a litigation hold,⁴⁰ given their greater familiarity with the specific language used and the methods and locations of retention. In addition, if it is not deemed to be feasible to achieve satisfactory results, other methods are available to supplement custodian-based preservation.⁴¹

For example, copies might also be made of specific custodians' mailboxes and files from active drives and other networked shared sites. Backup tape rotations may be modified so as to retain potentially relevant backups. In addition, a forensic image can be made of the desktop environment to remove the element of risk that deleted information could escape preservation.

One key issue, regardless of the form of identification, is whether to leave the information in place (i.e., on live networks), or to undertake its collection and storage, for potential use in future discovery. Preservation in place has, however, been subject to criticism.⁴²

Collectively, these concerns point towards counsel being more actively involved in ensuring that thoroughness in preservation and collection is achieved. However, as one of the authors has pointed out elsewhere,⁴³ the specific role of retained counsel in implementing a team-based approach is determined by the party, upon whom the obligation to preserve lies.⁴⁴ In any event, a party should

⁴⁰ In cases where broad categories of information are sought to be placed on hold or where relative small numbers of key custodians are involved, reliance on custodial collection – even on oral instructions – can be reasonable. *See, e.g., Orbit One v. Numerex*, 271 F.R.D. 429, 441 (S.D.N.Y. 2010) (“[i]n a small enterprise, issuing a written litigation hold may not only be unnecessary, but it could be counterproductive, since such a hold would likely be more general and less tailored to individual records custodians than oral directives could be”).

⁴¹ Greg Buckles, Don't Give Up on Custodial Self Collection, *ediscoversy Journal* (5/25/2011) (“[w]e should not throw out the baby with the bathwater, just because [a Court] has come forth with an example of poorly executed discovery”), copy at <http://ediscoversyjournal.com/2010/06/don%E2%80%99t-give-up-on-custodial-self-collection/>.

⁴² *See, e.g., Brandon D'Agostino, Is the Use of “Preserve in Place” a Gamble in Electronic Discovery* (2010) (pointing out the volatility of storage media, the disruption to business continuity where ESI is locked down, and discussing expense and overpreservation), copy at <http://www.clearwellsystems.com/e-discovery-blog/2010/11/30/is-the-use-of-%E2%80%9Cpreserve-in-place%E2%80%9D-a-gamble-in-electronic-discovery/>; Albert Barsocchini, *Preserve in Place vs. Collect to Preserve*, *Inside Counsel* (Sept. 2009) (pointing out the danger of relying on users who may have proxy rights to delete data, the possibility of metadata failing to be preserved, and the general problem of incompleteness if an entity has continuing preservation duties that carry forward into the future), copy at <http://www.insidecounsel.com/2009/08/24/preserve-in-place-vs-collect-to-preserve>.

⁴³ Thomas Y. Allman, *Deterring E-Discovery Misconduct With Counsel Sanctions: The Unintended Consequences of Qualcomm v. Broadcom*, 118 *Yale L.J. Pocket Part* 161, 164 (2009) (“A client is ethically entitled to limit the responsibility of retained counsel in regard to a discovery engagement, which may well occur when teams of internal experts and vendors are involved”).

⁴⁴ *Compare Casale v. Kelly*, 710 F. Supp. 2d. 347, 365 (S.D.N.Y. April 26, 2010) (“responsibility for adherence to the duty to preserve lies not only with the parties but also, to a significant extent, with their counsel”) *with Centrifugal Force v. Softnet Comm.*, 2011 WL 1792047, at *3 (S.D.N.Y. May 11, 2011) (the obligation to preserve evidence is placed by the Second Circuit “on the ‘party,’ not on counsel” and is met if the party has taken reasonable steps).

work with its IT staff in fashioning ways to work within existing platforms and networks to more efficiently preserve and collect ESI across the enterprise.

A cautionary note about the use of technology in preservation is in order, however, as described next.

Future Developments

First, we believe that there are dangers lurking in over-reliance on “state of the art” automated technologies, such as “predictive coding,” in attempting to completely satisfy a party’s early preservation obligations. The proven efficacy of predictive coding for purposes of early case assessment and document review notwithstanding, such techniques simply remain unproven at this time in addressing the more comprehensive obligation to save ESI for preservation,⁴⁵ and thus may raise defensibility red flags if and when challenged.

Second, the capabilities of automated technology to enable search of the indexed content of multiple storage silos is subject to extravagant and largely unproven claims. The purported advantages include an enhanced ability to manage the repositories pursuant to policy and to avoid the “save-everything” mentality.⁴⁶ Some of the offerings also assert a capability to “automatically update the hold” as the data is revised or new data is added.⁴⁷

There is little publicly available information about the enterprise search approach, although one commentator describes it as a “pro-active” approach which is “now a reality, and is used by an increasing number of firms to prepare for litigation.”⁴⁸ There are, however, knowledgeable skeptics based on the costs and practicability issues involved.⁴⁹

⁴⁵ See Farrah Pepper, “Robot Review: Will Predictive Coding Win the Trust of Courts?,” Law Technology News (Aug. 1, 2011), copy at <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202508331112&slreturn=1&hbxlogin=1>.

⁴⁶ Andrew Cohen, *supra*, EMC White Paper at 19 (advocating use of a “matter vault” for resulting materials within the content management environment for the life of the case).

⁴⁷ Exterro Partner Brief (2010), copy at <http://www.exterro.com/wp-content/uploads/2011/02/Recommind-and-Exterro-Partner-Brief.pdf>.

⁴⁸ Michael D. Berman, et al, Has Indexing Technology Made Zubulake Less Relevant?, ABA Section of Litigation Newsletter (Feb. 11, 2010), copy at <http://www.esi-mediation.com/pdf/hasIndexingMadeZubulakeLessRelevant.pdf>.

⁴⁹ Joe Dysart, Discovery In-House Approach, ABA Journal, August 2011, 32 (“The cost to a large organization, or probably even a smaller or medium organization, to index everything – well, not only is it untenable, but it’s probably cost-prohibitive” [quoting the Director of Legal and Compliance at JPMorgan Chase & Co.]), copy at http://www.abajournal.com/magazine/article/in-house_approach_corporate_lawyers_say_e-discovery_software_savings_there/.

For example, it has been suggested that “the reality of poor connectivity, slow storage, highly mobile decision makers and the radical growth of corporate ESI have kept this promise [enterprise-wide indexing and search] from becoming reality for most corporations.”⁵⁰ Other serious impediments include the very real limits raised by concerns involving inter-connection or control of related corporate entities. It is also possible that significant barriers may be created by the existence of multi-national data storage in countries subject to strict data privacy barriers.⁵¹

Whatever one’s level of optimism that in the near future, successful methods of enterprise search will emerge, it remains the case that at least for today, counsel’s active involvement in fashioning clear and consistent guidance for custodians to implement, coupled with greater involvement of IT staff, constitutes best practice in this area.

III. Rulemaking

The 2006 Amendments suggest that parties to civil actions in Federal Courts should discuss preservation at the Rule 26(f) conference, in order to arrive at practical agreements on scope, timing, and the mechanics to be employed in carrying out a legal hold.

The authors strongly endorse this approach,⁵² when feasible, given the need for a change in culture to deal with the profound and irrevocable changes involving information.⁵³ The Sedona Conference® Cooperation Proclamation is supportive of this effort as well. In many cases, parties can successfully agree on the practical limitations on custodians, date ranges and search and retrieval methodology for the preservation stage.

However, we do not recommend that Rule 26 or its Committee Note be amended to indicate any preference for a particular methodology or technology to be used in implementing preservation obligations. It is simply not possible to

⁵⁰ Greg Buckles, Desktop Collection 2.0 – Tackling the Enterprise Part 1, eDiscovery Journal, (2010), copy at <http://ediscoveryjournal.com/2010/06/desktop-collection-2-0-%E2%80%93-tackling-the-enterprise-part-1/> (“[t]hey have the illusion of live enterprise search, but only as long as they do not look too closely at search results”).

⁵¹ One experienced E-Discovery In-House Manager, who has been pitched on the topic, notes that this includes overcoming barriers to accomplish searches on widely distributed information systems which are not centrally accessible as well as limits on the ability of these tools to access encrypted files (such as Lotus Notes archives) or other files with password protections.

⁵² See, e.g., Allman, Managing Preservation Obligations, *supra*, 13 RICH. J.L. & TECH. 9, at *18 (“[b]oth parties should discuss preservation steps already undertaken and any plans for intervention in business processes”).

⁵³ George L. Paul and Jason R. Baron, Information Inflation: Can the Legal System Adapt?, 13 RICH. J.L. & TECH 10, at *3 (“Litigators must collaborate far more than they have in the past, particularly concerning the discovery of information systems”).

anticipate the rapidly changing needs to which clients and their counsel they may need to respond.

As one Respondent in the poll of The Sedona Conference® WG1 Members put it, “[t]he growing dominance of the cloud, handhelds and social networking were almost entirely out-of-mind in 2006. Why would any thinking person assume that we are done with development of new and innovative ways to create, communicate and store information?”⁵⁴

The Rules Committee has correctly refused to “take sides,” or to require expenditures or investments in technology – the rules deal only with outcomes and leave to parties the determination of the reasonable steps needed to comply.⁵⁵ Thus, while there may be advantages to centralization of search techniques for purposes of preservation, it should not become an obligation under the Federal Rules any more than it already is under the common law.⁵⁶ Sedona Principle 6 correctly posits that the choice of “procedures, methodologies, and technologies appropriate for preserving and producing” ESI should be, absent agreement, made by the party in the best position to assess its own capabilities.⁵⁷

The goal, after all, is not perfection in executing preservation, but rather, making a reasonable effort.⁵⁸ Smaller organizations, for example, “may meet the requirements” of their committed compliance efforts with “less formality and fewer resources than would be expected of large organizations.”⁵⁹

⁵⁴ The Sedona Conference® Survey of WG1 Members (August 2011)(copy on file with authors)(a rule that employs specific directives will be “as out-of-touch as the 2006 FRCP amendments would have been if the drafters had lacked the wisdom to shy away from citation of specific technologies”).

⁵⁵ *See, e.g.,* *Paramount Pictures v. Replay TV*, 2002 WL 32151632, at *3 (C.D. Cal. May 30, 2002)(refusing to order development of software so as to facilitate collection of ephemeral information); *accord* *Oppenheimer Fund v. Sanders*, 437 U.S. 340 (1978)(it “borders on the frivolous” to argue that a party must keep records in a manner most convenient for future litigants).

⁵⁶ *Cache La Poudre Feeds v. Land O’Lakes*, 244 F.R.D. 614, 628 (D. Colo. 2007) (refusing to mandate an enterprise wide keyword search of multiple information sources).

⁵⁷ Principle 6, *The Sedona Principles* (“Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information”).

⁵⁸ *Valentin v. Bank of New York Mellon*, 2011 WL 1466122, at *2 (S.D.N.Y. April 14, 2011) (search methodology needed where there is a large volumes of data is not necessarily appropriate in cases with smaller volumes since reasonable steps – not perfection – is the goal).

⁵⁹ Commentary to the Sentencing Guidelines for the United States Courts, Title 18, Effective Compliance and Ethics Program, 18 USCS Appx. §8B2.1(C)(iii)(“In appropriate circumstances, reliance on existing resources and simple systems can demonstrate a degree of commitment that, for a large organization, would only be demonstrate through more formally planned and implemented systems.”).

The Federal Rules should, however, continue to encourage parties to develop reasonable policies and practices to manage ESI throughout its life cycle.⁶⁰ An innovation of the 2006 Amendments – Rule 37(e) – was intended to provide reassurance to those executing preservation obligations in good faith that a loss through routine processes would not be sanctionable. One of the authors has advocated that this provision be strengthened and broadened.⁶¹

At the very least, existing provisions could be strengthened through acknowledgement in advisory notes and in more detailed local rules that encourage parties to consider the use of innovative techniques across the entire e-discovery spectrum, including at the preservation stage.

III. Conclusion

As one of the authors recently noted, the “re-engineering [of] the discovery process [is] playing out against the backdrop of profound, transformational change.”⁶² The authors have no doubt that a bright future exists for the legal profession in harnessing the power of artificial intelligence and other 21st century information retrieval methods, so as to accomplish the goals of Federal Rule 1. However, it would be premature to assume that alternative search methods, including but not limited to “predictive coding,” are mature enough to be used in a defensible manner for purposes of meeting preservation obligations.

Moreover, while increased centralization of data management by entities may create opportunities to assist in preserving “low-hanging fruit” through enterprise search, the prospect of its availability does not justify abandonment of settled preservation practices, including appropriate custodian-based collection, as described above.

⁶⁰ Arthur Andersen v. United States, 544 U.S. 696, 704 (2005) (acknowledging destruction as a normal aspect of management of information); Sedona Conference® Commentary on Email Management: Guidelines for the Selection of Retention Policy, 8 SEDONA CONF. J. 239 (2007) (describing alternative approaches).

⁶¹ Connecticut recently amended its Rules to provide this approach. See Sec. 13-14 Connecticut Practice Book (2011)(eff. Jan. 2012)(limiting sanctions “for failure to provide information, including electronically stored information, lost as the result of the routine, good-faith operation of a system or process in the absence of a showing of intentional actions designed to avoid known preservation obligations”), copy at http://www.jud.ct.gov/Publications/PracticeBook/PB_070511.pdf.

⁶² J. Baron, Law in the Age of Exabytes, *supra*, 17 RICH. J.L. & TECH. 9, at *3.

APPENDIX O

COMMENTS FROM THE CENTER FOR CONSTITUTIONAL LITIGATION



August 16, 2011

Honorable David G. Campbell
United States District Court
Sandra Day O'Connor U.S. Courthouse, Suite 623
401 West Washington Street, SPC 58
Phoenix, AZ 85003-2156

Dear Judge Campbell:

Introduction and Summary

The current debate about preservation and sanctions should address complicated questions regarding the source of a duty to preserve and the source of a power to sanction. These questions affect the scope of rulemaking authority. I believe that they render elusive, at best, one goal of rulemaking in this area – promoting uniformity and enhancing predictability. See Thomas Y. Allman, *Preservation and Spoliation Revisited: Is it Time for Additional Rulemaking?* (paper for Duke Conference), at 3-4, [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/02E441B3AD64B2D9852576DB005D976D/\\$File/Thomas%20Allman%2C%20Preservation%20and%20Spoliation%20Revisited.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/02E441B3AD64B2D9852576DB005D976D/$File/Thomas%20Allman%2C%20Preservation%20and%20Spoliation%20Revisited.pdf?OpenElement).

In diversity cases, it is generally acknowledged that state law defines the duty to preserve evidence¹ and that *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), requires the federal court to look to that duty. Few cases address the issue of whether *Erie* requires that the federal court also follow state law in fashioning a sanction for breach of that duty. Those that do generally conclude that it does, consistent with the rationale of the key Supreme Court decision on sanctions and consistent with the over-arching principle that state law should govern outcome-determinative questions.

¹ Cases establish that state law governing the trigger for preservation essentially is uniform, and, with slight variations in verbal formulation, arises when litigation is extant or reasonably anticipated. See Andrea Kuperman, *Memo on Elements of a Potential Preservation Rule* (Sept. 23, 1910), at 198 *et seq.*, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2010-11.pdf>. Notably, that standard is consistent with standard insurance industry practice requiring that insureds notify insurers of potential claims “when the insured actually knew or should have known of the possibility that it might be held liable for occurrence in question, or that a claim or lawsuit might ensue which might be covered under its insurance policies. Stephen Plitt, *et al.*, *Couch on Insurance*, 191:9 (3d ed. 2011) (footnotes omitted). No diversion from the “reasonably anticipated” standard currently is contemplated by the committee. See *Draft Notes of Discovery Subcommittee* (Sept. 20, 2010), pp. 2-3, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2010-11.pdf> (pp.159-60).

It is possible to craft a federal rule that defines federal duties to preserve and that prescribes federal sanctions for breach of those federal duties. Such a rule would be useful for federal question cases, but I do not believe that it could, consistent with the Rules Enabling Act, displace state law in diversity cases.

Discussion

Let me focus the discussion on a hypothetical set of facts. Posit that P, a citizen of state X, sues D, a citizen of state Y, in state court in Y, asserting that D violated the law of Y. D has long had clear notice that P was likely to file this claim. D did not purposefully destroy critical documents but through its negligent failure to implement a litigation hold critical documents were destroyed. The substantive law of Y requires that negligent failure to implement a litigation hold be sanctioned by a jury instruction requiring adverse inferences be drawn against Y. May a federal standard require that such an instruction be given only if there is bad faith?

Chambers v. NASCO, Inc., 501 U.S. 32, 35 (1991), is the leading case on authority of federal courts to issue sanctions. The Supreme Court faced the question of whether, in a diversity case, a district court had inherent authority to impose attorney fees on a litigant as a sanction for bad-faith conduct in litigation. The answer was yes. *Id.* at 50.² *Chambers* has been widely cited as authority for the proposition that a federal court has inherent authority to sanction. *See, e.g.*, Allman, *Preservation and Spoliation Revisited*, *supra*. That description is accurate but incomplete, as *Chambers* contemplates that sanctions that are potentially outcome-determinative are governed by *Erie*.

² One Duke Conference participant has suggested that *Chambers* teaches “that bad faith is required before a court can resort to inherent authority to award attorney fees as a sanction.” John M. Barkett, *The Duty To Preserve: Lawyers Beware!*, 25-WTR Nat. Resources & Env’t 53, 54 (2011). The *Chambers* opinion discusses bad faith because bad faith was present in the case but nowhere does the opinion indicate that use of inherent authority is limited to cases of bad faith. Its counsel is more circumspect: “Because of their very potency, inherent powers must be exercised with restraint and discretion. See *Roadway Express*, *supra*, 447 U.S., at 764, 100 S.Ct., at 2463. A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process.” *Id.* at 44-45. In *Roadway Express*, attorney fees were ordered against counsel as a sanction for conduct that did not amount to bad faith. *Roadway Express*, 447 U.S. at 766. Sanctions against parties call for even greater circumspection, but again are not limited to acts of bad faith. *See, e.g.*, *Link v. Wabash R. Co.*, 370 U.S. 626, 632, 82 S.Ct. 1386, 1389 (1962) (affirming, under inherent authority, sanction of dismissal for want of prosecution, and finding that use of inherent authority is justified “to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts.”). Neither lower courts nor commentators are uniform in their approach to what level of culpability justifies particular sanctions. *See, e.g.*, *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 533 (D. Md. 2010) (“The different approaches among the Circuits regarding the level of culpability that must be shown to warrant imposition of severe sanctions for spoliation is another reason why commentators have expressed such concern about the lack of a consensus standard and the uncertainty it causes.”).

In *Chambers* the party sanctioned argued that the punitive purpose of the sanction in question, an award of attorney fees, was inconsistent with applicable state law, which precluded punitive damages. *Id.* at 51. The court rejected this argument because there was no conflict between state and federal law, and because nothing about the sanction the federal court fashioned offended the rule that outcome-determinative issues should be governed by state law:

Only when there is a conflict between state and federal substantive law are the concerns of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), at issue. As we explained in *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), the “outcome determinative” test of *Erie* and *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945), “cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.” 380 U.S., at 468, 85 S.Ct., at 1142. Despite *Chambers*’ protestations to the contrary, neither of these twin aims is implicated by the assessment of attorney’s fees as a sanction for bad-faith conduct before the court which involved disobedience of the court’s orders and the attempt to defraud the court itself.

Id. at 52-53. The Court explained:

[T]he imposition of sanctions under the bad-faith exception depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation. Consequently, there is no risk that the exception will lead to forum-shopping. Nor is it inequitable to apply the exception to citizens and noncitizens alike, when the party, by controlling his or her conduct in litigation, has the power to determine whether sanctions will be assessed. As the Court of Appeals expressed it: “*Erie* guarantees a litigant that if he takes his state law cause of action to federal court, *and abides by the rules of that court*, the result in his case will be the same as if he had brought it in state court. It does not allow him to waste the court’s time and resources with cantankerous conduct, even in the unlikely event a state court would allow him to do so.” 894 F.2d, at 706.

Id. (emphasis added). The Court added:

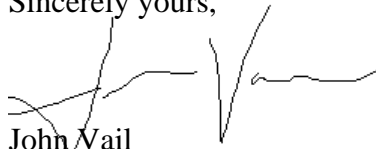
We agree with the Court of Appeals that “[w]e do not see how the district court’s inherent power to tax fees for that conduct can be made subservient to any state policy without transgressing the boundaries set out in *Erie*, *Guaranty Trust Co.*, and *Hanna*,” for “[f]ee-shifting here is not a matter of substantive remedy, but of vindicating judicial authority.” 894 F.2d, at 705.

Id. at 54 (emphasis added). Thus, *Chambers* suggests that when a sanction does involve a substantive remedy, *Erie* is applicable. In the posited hypothetical, the jury instruction is a matter of substantive remedy.

Chambers, essentially, endorsed conflict-preemption in reverse in diversity cases – federal rules can define sanctions, provided those sanctions do not conflict with state law governing sanctions. Any conflict renders the federal rule invalid.

The committee cannot diverge from state law with regard to sanctions for breaches of state-imposed duties. If sanctions differed between state and federal courts, choice of forum could be outcome determinative, in violation of the Rules Enabling Act and the *Erie* doctrine.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John Vail". The signature is fluid and cursive, with a prominent vertical stroke on the left side.

John Vail
Vice President and Senior Litigation Counsel

APPENDIX P
COMMENTS FROM THE DEPARTMENT OF JUSTICE



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](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 not 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.”).

APPENDIX Q
COMMENTS FROM KROLL ONTRACK

MEMORANDUM

To: Hon. David G. Campbell

From: Kelly Kubacki, Esq.
Thought Leadership and Industry Relations
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Michele Lange, Esq.
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David Meadows, PMP
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CC: Hon. Paul W. Grimm, Prof. Richard L. Marcus

Re: Kroll Ontrack Commentary Regarding Rulemaking Efforts

Date: August 31, 2011

Disclaimer: The views and perspectives in this memo do not represent the position of Kroll Ontrack as a corporate entity. Rather, they are designed to drive thought leadership and educational discourse regarding the legal technologies industry and the growing challenges facing practitioners today regarding electronic discovery.

In response to the issues to be addressed by participants at the September 9, 2011 Conference on Preservation and Sanctions,¹ we have drafted this commentary memo to provide the Rules Committee with useful input and suggestions for further research. We strongly support ongoing efforts to enhance the Federal Rules of Civil Procedure by addressing the challenges posed by preservation in this age of electronic discovery.

Kroll Ontrack is a leading provider of services and software to the e-discovery community and is also the publisher of the *Annual ESI Trends Report*, which assesses legal trends in e-discovery, including preservation and collection difficulties identified by respondents.²

The information contained below is primarily reflective of our work as a service provider with thousands of clients each year and includes references to anonymous case studies to provide useful illustrations. The Committee will understand, of course, that in so doing we have acted to protect the confidentiality of our clients by removing identifiable characteristics.

¹ Memorandum, June 29, 2011, copy available at http://pdfserver.amlaw.com/ltn/Judicial_Conference_Comm_on_Rules_of_Practice_and_Procedure_Memo_20110629.pdf.

² Kroll Ontrack, *Fourth Annual ESI Trends Report* (2010). Available for download at: <http://www.krollontrack.com/esi-trends/>.

- Part One of this memo provides answers and input to questions raised by the Advisory Committee on Civil Rules in its June 29 Memorandum.
- Part Two of this memo evaluates the elements identified for potential inclusion in the rules.

We hope this information is helpful as you and the committee members consider further guideposts for our industry. Thank you for your time and diligence addressing this important issue. Feel free to contact any of us for further information.

Part One: Questions Posed By The Committee

We first address the key questions posed in the memorandum addressed to the participants dated June 29, 2011.

Question 1

Rules Committee Question: *To what extent is preservation of ESI a problem in your organization or practice?*

Response:

Typically, our clients have encountered difficulties in executing preservation obligations due to the following reasons:

1. The underlying issues and ultimate risks of the matter did not warrant the expense.
2. Locating and preserving data from a vast number of sources and locations posed too great a challenge, especially when international sources were involved.
3. Turnaround times for the preservation efforts and compliance with discovery obligations as a whole were extremely tight.

Client Example #1

A small to mid-sized web merchant contacted us after being served with a complaint alleging infringement of patents in its usage of web technologies. The client felt the plaintiff was simply looking for a settlement and licensing deal, and believed the claims were unwarranted. The client was tempted to settle due to the potential cost of preservation and discovery, which would have been fairly complex due to the number and variety of systems involved. Ultimately, the client decided against settlement to avoid setting a precedent in these types of claims. As a result, the client:

1. Created and disseminated a legal hold that was inclusive of all custodians, no matter how limited or uncertain their potential involvement.
2. Performed desktop collections for the highest priority custodians (approximately 25%).
3. Performed server e-mail collections for high and medium priority custodians.
4. Performed server shared drive collections for y high and medium priority custodians.
5. Relied on the employees receiving legal hold notices to not delete or destroy data not collected in items 2-4.

Under some circumstances, the client might have been able to preserve evidence on a wider scale, but was unable to do so because of the vast array of data sources. For a variety of reasons, the client acted unilaterally and did not communicate with opposing counsel prior to taking these actions.

Client Example #2

A small transportation company was investigated by the Department of Justice (DOJ), apparently in response to allegations of price fixing. The company was comprised of approximately 25 employees located in 8 locations. Many of the IT services were outsourced to a third party provider and little or no IT usage policies existed. This created a situation where employees and their data were literally everywhere within the company and with the third party hosting provider. Further compounding the problem were the company's limited financial resources which caused it to limit the size of the server mailboxes to 200 megabytes, forcing users to archive e-mail to PST files on their local personal computers.

With our help, the client was able to work with the DOJ to target the highest priority custodians and only collect active data from those custodians' hard drives. Without these efforts to target data, the projected cost to collect and produce the data would have exceeded the company's net profit for the previous two years.

Client Example #3

A medium sized technology company was involved in litigation regarding the implementation of various technologies. After investigation of potential preservation scope, the initial custodian count was into the thousands, but was ultimately narrowed down to 120. However, it was not possible to reduce the volume of shared network data to be reviewed, resulting in collection of an excessive amount of network data totaling tens of millions of files. Responsive search terms did a fair job of reducing this material, but millions of files remained to be reviewed for privilege and relevance prior to production. The client determined that the cost to review this volume of material was unwarranted and decided to perform privileged term searching on the data so as to isolate and review only that material. All data that did not hit on a privilege search term was then mass produced to opposing counsel without review. The client was concerned that opposing counsel might accuse them of "data dumping", but decided the cost savings were worth the risk.

Comments:

We have asked ourselves whether the current Rules were relevant to the client's willingness to take the risks in the third example. Our reaction is that except for the proportionality test outlined in Rule 26, there is neither an incentive nor adequate deterrence (apart from courts which take a firmer stance) that encourages parties to narrow requests or conduct targeted discovery. Parties, in our experience, are continuing to seek to conduct broad discovery at a prohibitive cost, moving the focus away from resolving cases on the merits. This necessarily impacts the perception that preservation must be broadly executed.

We believe, based on our experience, that it would be useful to amend the Rules so as to include firmer guidelines with regard to preservation obligations as an important step towards eliminating any room for interpretation that may confuse parties or allow them to skirt their responsibilities.

Question No. 2

Rules Committee Question: *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?*

Response:

Our clients generally incur costs throughout the full range of e-discovery services, starting with information management and extending through preservation, review and production. The highest costs are often incurred during the document review process, which often accounts for double or triple e-discovery processing and labor (attorney) intensive activity, and hosting charges – especially if automated search techniques are not involved early in the process.

Early Data Assessment

Through use of early data/case assessment (EDA) technology and techniques, parties can determine if and what data must be preserved, which will impact the data which must be preserved, collected, processed, hosted and reviewed. EDA also aids in fact-finding and narrows the scope of important data early on, reduces the number of key custodians, tests key search terms and identifies critical case arguments.

Client Example #1

A Top 200 law firm represented a Fortune 100 corporation client matter concerning a large Securities and Exchange Commission (SEC) investigation. The complexity of the case suggested that the law firm and its client should gain early understanding of the data before processing. The firm had a general idea of the time frames giving rise to the investigation, but needed to isolate specific communications and people involved in the incident.

The law firm loaded 45 gigabytes of data – more than a quarter of a million documents – into an early data assessment platform. A small group of attorneys began running complex searches, seeking to drill down on precise time frames and involved individuals. They also narrowed the document set using field specificity, such as e-mails sent to or from particular individuals. Topic grouping, concept searching, e-mail threading and near-duplication technology was also used to reveal common themes. Last, the team used mathematically sound analytics features to reveal peaks and valleys in volumes of e-mail traffic, common e-mail subjects and the e-mail traffic between custodians.

Within a few days, the original 45 gigabytes of data were narrowed down to 13 gigabytes (approximately 50,000 documents) for processing and review in an online review tool. The 13 gigabytes were loaded into a review database, and the review team was assembled to determine which documents to produce to the SEC. Given the previous early data assessment work performed, the review lasted several days instead of several weeks and the client saved more than 50 percent on its processing and review costs.

Client Example #2

A Fortune 500 pharmaceutical manufacturer brought suit against its competitor. Outside counsel was an international law firm with over 500 lawyers in offices on several continents. The defendant sought identifying, preserving and collecting relevant data sources, and defensibly winnowing the enormous volume of data at issue into a manageable size for processing and review.

The defendant identified a sample set comprised of data from ten custodians central to the underlying matter. The sample set encompassed 470 GB of source data (approximate 1.6 million files), which resulted in 236 GB (almost 1 million files) for review after filtering and deduplication. The data included e-mail, shared materials and hard drive data for each of the ten custodians.

Using early data assessment technology, the defendant ran queries and repeatedly tested, analyzed, sampled and validated the sample data to measure its response to various key terms. After two days of assessing and analyzing the data, the team arrived at a list of defensible keywords that enabled the team to reduce the sample database by 90% for further review.

Computer Assisted Review

Another technology innovation driving document review efficiencies and reducing costs is computer assisted review, which expands the work of automated search beyond the traditional use of keywords through repetitive feedback and analytics. Intelligent Review Technology (IRT) augments the human-intensive aspects of the document review process in four areas:

- Automated Workflow: Minimizes human work and inconsistencies in the staging, distribution, routing, assessment and quality control of the review process
- Intelligent Prioritization: Learns what documents are most likely to be relevant to the case by analyzing human reviewer categorization decisions and elevating those documents for first review
- Intelligent Categorization: Analyzes human categorization patterns and recommends categorizations for documents not yet reviewed by a human
- Statistical Quality Control & Sampling: Monitors the progress and effectiveness of prioritization and review, enabling counsel to make defensible decisions

Client Example #1

A bank needed to design an efficient solution to manage significant amounts of data involved in a series of lawsuits. The client needed to reduce the volume of data for processing and review, strengthen defensibility and reduce costs and risk.

The client collected roughly 1,000 GB of data for 17 custodians for processing. After filtering the data, approximately 250 GB were uploaded into an online review tool. From there, the client's outside counsel utilized automated workflow technology to guide the process of the review. In this case, outside counsel designed a workflow process that was organized into two separate tracks: one for electronic documents and one for scanned documents that they wanted to treat differently.

Not only did workflow provide the desired flexibility in this case, it also increased coding accuracy by including a built-in quality control (QC) process that helped identify documents that were improperly or inconsistently coded. This sharply reduced instances of human error from the start, rather than requiring multiple QC searches to ensure that only responsive, non-privileged documents were produced. The technology instilled confidence in outside counsel and the client, and demonstrated the effectiveness of a documented, organized and defensible review method.

Client Example #2

Embroided in a complex patent litigation, a national law firm representing a major health care provider needed to ensure the document review process was efficiently conducted to meet case critical deadlines. Already faced with 334 gigabytes of data, totaling over 750,000 documents from the outset of the case, the law firm was surprised to discover an additional 325,000 documents mid-way through the review period.

Moving the deadline for review was not an option, but reviewing the new batch of documents using traditional linear review methods would have necessitated a significant break from the budget and no guarantees that the deadline could be met.

The legal team first used an early data assessment platform to narrow the data set, excluding almost 200,000 documents before transitioning to the online review platform. Once the data was ready for review, the legal team utilized Intelligent Prioritization which elevated documents that were more likely to be responsive. This technology significantly aided the review process, allowing the team to review and produce 50,000 documents after only two weeks.

The legal team also utilized Intelligent Categorization, combined with sampling and analysis of reporting, to remove documents determined to have a 90 percent confidence rating on non-responsiveness – instantly eliminating nearly half of the documents from the new data set that was uncovered mid-way through the review process. A rigid quality control process revealed a staggering 94 percent agreement rate between a human review “dream team” and the iC determinations across the data set, and counsel was able to confidently report to the senior partners that the deadline would be met on time, within budget and without risk. The entire process using this technology saved almost \$200,000 in review costs by significantly reducing the number of hours needed for review – with \$65,000 attributable to iC alone.

Through the use of advanced technologies such as early data assessment and Intelligent Review Technology, we are seeing our clients proceed through the e-discovery process in a smarter, more efficient fashion, saving valuable time and money.

Question No. 3

Rules Committee Question: *The FJC study suggests that spoliation of ESI is raised rarely in federal motions practice. Is that consistent with your experience?*

Response:

Kroll Ontrack conducts an annual review in which we analyze cases summarized over the previous year. Our findings run contrary to the Federal Judicial Center study that suggests the spoliation of ESI rarely is raised in federal motions practice. Unfortunately, in our research, there appears to be a growing prevalence of making e-discovery the main battle, taking away from the merits of the case and challenging the implementation steps described.³

We have noted increased challenges to proper preservation techniques, the continued frustration by the judiciary for resulting discovery failures and the renewed call for cooperation amongst counsel.

From January 1, 2010 to October 31, 2010, Kroll Ontrack summarized 84 of the most significant e-discovery cases on a federal level. These 84 opinions represent the trends demonstrated in jurisdictions across the nation. The breakdown of the major issues involved in these cases is as follows:

³ The number of instances in which litigants sought sanctions has doubled in the first half of 2011. Gibson Dunn 2011 Mid-Year E-Discovery Update, July 22, 2011, copy at <http://www.gibsondunn.com/publications/pages/2011Mid-YearE-DiscoveryUpdate.aspx>; See also *Rimkus Consulting Group, Inc. v. Cammarata*, 2010 WL 645253 (S.D.Tex. Feb. 19, 2010) (finding “spoliation of evidence – particularly of electronically stored information – has assumed a level of importance in litigation that raises grave concerns” and “distract[s] from the merits of a case, add[s] costs to discovery, and delay[s] resolution.”).

- 39 percent of cases addressed sanctions
 - 49 percent of sanctions involved preservation and spoliation issues
 - 27 percent of sanctions involved production disputes
 - 24 percent of sanctions involved withholding discovery and other abuses
- 18 percent of cases addressed various production considerations
- 17 percent of cases addressed various procedural issues (such as searching protocol and cooperation)
- 11 percent of cases addressed privilege considerations and waivers
- 8 percent of cases addressed computer forensics protocols and experts
- 2 percent of cases addressed cost considerations
- 2 percent of cases addressed preservation and spoliation issues (but not sanctions)
- 2 percent of cases addressed discoverability and admissibility issues

Almost every case that discussed preservation and spoliation issues also included a conversation regarding sanctions. This is not surprising, given that 24 percent of respondents to the *Fourth Annual ESI Trends Report*, published by Kroll Ontrack, ranked preservation and collection difficulties as their number one concern.⁴

Thus, our case law analysis over the past several years have demonstrated that sanctions continue to be a pervasive aspect of e-discovery, with the rise of preservation and spoliation issues among the leading causes of why parties seek sanctions and why courts impose sanctions.

Question No. 4

Rules Committee Question: *How does the exploding use of social media affect litigation in general, and preservation in particular? For example, if employers monitor employee use of social media at work, or if producers of goods or services monitor social media discussions of their products, should that activity result in preservation of the material reviewed? Can prospective plaintiffs safely change their social media postings after they conclude they may have a claim?*

Response:

We are aware of statistics published indicating that Americans spent 22.7% of their time online using social networking sites and blogs as of June 2010, representing a 43% increase from June 2009.⁵ People are increasingly turning to social networking sites to conduct their day-to-day communications, outpacing other mediums such as text messaging and e-mail. Businesses are also turning to sites such as Twitter, Facebook and LinkedIn to market their products and strengthen their relationships with consumers.⁶ In addition, we are beginning to see requests from clients that include the need to collect, analyze and review evidence gathered from social media sites.

⁵ http://blog.nielsen.com/nielsenwire/online_mobile/what-americans-do-online-social-media-and-games-dominate-activity/. Last Accessed April 1, 2011. Gartner also predicts that social media will replace e-mail as the dominant form of communication by 2014. Gartner Predicts Social Networking to Overtake E-Mail. Computerworld.com, July 8, 2010.

⁶ A 2009 study reports that consumers are 2.8 times more likely to search for a brand if they are exposed to it via social networking sites such as Twitter, Facebook and YouTube. GroupM Search, comScore, "The Influenced: Social Media, Search and the Interplay of Consideration and Consumption", October 2009. Available at <http://www.searchfuel.com/2009/10/search-marketing-social-media-interplay/> (last accessed April 1, 2011).

The bottom line is that potentially relevant information is increasingly likely to be contained in cutting-edge data sources, such as social media sites. In addition, the overall trend of the judiciary seems to be moving toward greater permissiveness for e-discovery with regard to social media, as well as a strong likelihood that privacy concerns will be outweighed by the weight and relevance of the information. While there has yet to be a consistent and uniform standard, corporations and counsel clearly must anticipate and plan for requests for information from these popular communication mediums.

Question No. 5

Rules Committee Question: *What implications will cloud computing have for civil litigation?*

Response:

Although difficult to define, generally speaking, we understand cloud computing as an extension of the operations and functions of a traditional data center to resources accessible remotely via the Internet. The services outsourced to a cloud provider can include pure data storage, the provision of computer applications through Application Service Providers (ASPs), software, platform or infrastructure through Software-as-a-Service (SaaS), Platform-as-a-Service (PaaS) and Infrastructure-as-a-Service (IaaS), respectively, or some combination thereof.

Cloud computing services are often attractive because they can provide companies access to a wide range of high-quality IT services at lower costs than a company providing and maintaining these IT functions on its own. Furthermore, these variable operational costs require very little up-front investment or need for reinvestment later. Best of all, reducing IT spending allows companies to redirect more resources into core business practices. As more companies and law firms move data to the cloud issues will arise in terms of data location, privacy and collection which may impact civil litigation.

Data collection from the cloud is a developing practice that is still in relative infancy in terms of frequency and best practices. Even if the location of the information is known, significant obstacles may make access infeasible or even impossible. First, cloud providers typically maintain servers in multiple locations. Network load balancing, local outages and other factors can lead to decisions – often made without any human intervention – to relocate data, programs and processing from one location to another. Making matters worse, the data may be dynamically fragmented for efficiency, meaning that various parts of data may be stored in, and move among, multiple venues at any point in time.

Data privacy concerns also impact the collection process as granting access to servers may be illegal in some jurisdictions because of the multi-tenancy nature of cloud servers. Cloud providers are not data owners, and allowing forensic collection could result in the inadvertent seizure of an unrelated client's data, which could constitute a costly, even if unintended, data breach for both the client and cloud provider. Even the specter of this risk could be enough to make voluntary permission to access the data impossible and require litigation in a foreign court to gain access. Similar to social media, cloud computing is a growing channel where organizations will need to preserve, access and produce data. Thus, it is important that a rule designed to address preservation is broad enough to encompass these emerging technologies.

Question No. 6

Rules Committee Question: *Is there a significant cost associated with storing information preserved for litigation? If so, what is the nature of the cost? In 2000, during a mini-conference about E-Discovery, a prominent lawyer asked rhetorically "Why don't you keep all ESI forever? Storage costs no longer are a problem, so why not do that?" How would you answer that question today?*

Response:

Corporations must balance the need to comply with legal and regulatory requirements with the business efficiency and storage capacity concerns of IT. Although the costs of storage are becoming increasingly less significant in terms of storing documents indefinitely, over-retention poses significant risks, including the ability to produce relevant information in the event of litigation or an investigation, increased IT staffing and storage needs, and increased e-discovery costs by creating larger data volumes, which significantly increases document review time. At the end of the day, the costs associated with saving everything run deeper than the costs associated with simply storing the information, primarily because of the costs of review, as noted earlier

Kroll Ontrack recommends the development, implementation and enforcement of sound document retention policies, tempered by the responsibilities imposed through the litigation process and applied in a reasonable manner and in good faith in order to manage information in a more efficient fashion, saving costs down the road.

Question No. 7

Rules Committee Question: *We would appreciate your careful review of and comments on the three proposed approaches to a preservation/sanctions rule described in the Preservation/Sanctions Issues memo, as well as the questions included in the three proposals. Which of the three approaches do you find most promising and why? Least promising and why?*

Response:

Category 1: This proposed solution appears to be too limiting because of the excessive specificity included within the rule. No one can predict with absolute certainty to what bounds the “data explosion” that modern society has witnessed will reach, which includes a potential exponential increase in data volumes, sources and custodians included in litigation. Specifying amounts in a rule could severely hamper its effectiveness.

Category 2: This rule proposal is closest to what we feel would be an appropriate rule. Although the language is more general, it is necessary given the rapid expansion on the world of e-discovery. Many felt the Fed.R.Civ.P. amendments made in 2006 to include “electronically stored information” were too general in terms of defining what the term encompassed, but over the years it has proved to be an essential portion of the rule as data sources continue to expand to include such sources as social media and text messages.

Category 3: The Category 3 rule also seems insufficient as it would solely address sanctions that would be imposed. Rulemaking efforts would be better served to offer a rule directly addressing the requirements and elements of an appropriate preservation effort in order to achieve the goal of providing clearer guidance to corporations and practitioners regarding their preservation obligations.

Question No. 8

Rules Committee Question: *Are cost savings more likely to be achieved through advances in technology than through a rule of civil procedure?*

Response:

A combination of technology and rules can help achieve maximum cost savings. However, some litigants and corporations remain hesitant to implement new technologies, such as Intelligent Review Technology,

as no court or judicial opinion has commented on defensibility.⁷ Kroll Ontrack and other e-discovery service providers are hosting numerous thought leadership events and discussions to help educate the legal and judicial community on this technology. Yet, until there is a overt acceptance – particularly from the judiciary – there may not be a larger push to adopt it by practitioners. As such, technology cannot develop in a vacuum without rule-making efforts and judicial commentary bringing formalized attention to and validation of these options to the masses of legal practitioners.

Question No. 9

Rules Committee Question: *Would a federal rule solve problems you now face, given that there may remain uncertainties in state law and procedure? Could a federal rule help reduce those uncertainties, perhaps by providing “leadership” for state courts and rulemakers addressing similar issues?*

Response:

Through its thought-leadership division, Kroll Ontrack tracks the evolution of state rulemaking activity with regard to electronically stored information. According to our research, over 33 states have enacted rules to address ESI in some format since 2006. However, many of the rules and requirements vary from state to state, providing a sense of confusion for practitioners and corporations that operate and litigate in multiple jurisdictions, and are involved in both state and federal court proceedings. A federal rule addressing preservation would provide uniform guidance that could then be adopted on the state level. We have started to see this effect from the adoption of Federal Rule of Evidence 502, although only a small handful of states have enacted this rule on the state level.⁸ Adopting rules amendments takes time, but if a federal rule is implemented and proves to be successful in reducing costs and issues related to preservation, states may see the benefits of moving swiftly to enacting these changes on the state level.

Question No. 10

Rules Committee Question: *What are the three most important elements of a preservation/sanctions rule in your view?*

Response:

Out of the eight elements identified as important to the preservation rule, we believe trigger, litigation hold and the consequences of failure are the three most important. First, the trigger of the duty to preserve is one of the more litigated aspects in preservation disputes and is a point where case law differs vastly.

⁷ Anne Kershaw & Joe Howie, *Judges’ Guide to Cost-Effective E-Discovery* (2010), published by the Electronic Discovery Institute (now referred to as The Law Institute). The largest single obstacle to more widespread adoption of technology-aided review (intelligent review technology) is the uncertainty over judicial acceptance of this approach. This paper encouraged use of intelligent review technology to lower the costs of reviewing and producing electronic evidence.

⁸ Arizona adopted Arizona Rule of Evidence 502 in January 2010 to address a disclosure of a communication or information covered by the attorney-client privilege or work product protection (<http://www.azcourts.gov/portals/20/2008RulesA/2009Rules/Aug2009orders/R090004.pdf>). Rule of Evidence 502(f) was also adopted by Arkansas. According to the Explanatory Note for Arkansas Rule of Evidence 502: “Under new subdivision (f), disclosure of information covered by the attorney-client privilege or the work-product doctrine to a government agency conducting an investigation of the client does not constitute a general waiver of the information disclosed.” (http://courts.arkansas.gov/rules/rules_of_evidence/article5/index.cfm#2). Iowa also approved Evidence Rule 5.502 which is analogous to Federal Rule of Evidence 502. This rule addresses waiver of privilege and inadvertent disclosure. (http://www.iowacourts.gov/wfData/files/CourtRules/40209RptreIREvid5_502,5_615,5_803,4&7.pdf). Rule 502 to the Washington Rules of Evidence (ER) was adopted effective September 1, 2010. ER 502 is based closely on Federal Rule of Evidence 502. (http://www.courts.wa.gov/court_rules/?fa=court_rules.adopted).

Second, the litigation hold aspect of the rule raises several serious questions that are not answered in the proposed rule language and considerations. In addition, courts have also differed on when a litigation hold that is issued (either verbally or in writing) is sufficient to fulfill the party's preservation obligation. Third, the consequences of failure is another element where case law on a nationwide basis differs and is where both parties – those requesting sanctions and those defending themselves – are impacted to varying degrees. We discuss all three of these elements in-depth, in addition to pertinent case law, in Part Two of this memo.

Part Two: Eight Rule Elements Discussed

As requested, Kroll Ontrack summarizes our observations regarding the eight elements identified by the Committee.

Element 1: Trigger

As demonstrated by the sampling of cases described below, we believe that parties are confused as to when the duty to preserve arises. A preservation rule should include the common law trigger standard (pending or reasonably foreseeable litigation) in addition to examples of specific triggers that indicate when the preservation duty arises. In our opinion, the sooner a party implements a preservation protocol, issues a litigation hold and starts utilizing cutting-edge preservation repository technologies,⁹ the more defensible the process will be if called into question, in addition to being more effective at achieving proper preservation of information that is potentially relevant to the litigation.

For example, in a recent case from the Northern District of Indiana, the plaintiff requested that the court order the defendant to preserve e-mail evidence, claiming the defendant previously deleted e-mails from the plaintiff's account without her permission and had refused to issue a litigation hold prior to the Fed.R.Civ.P. 26(f) meet and confer. The defendant argued the plaintiff's request was premature as Rule 26(d)(1) prohibited a party from seeking discovery before the Rule 26(f) conference. Disagreeing with the defendant's argument, the court noted Rule 26(d)(1) prohibited requesting production – not compelling preservation – and stated that ruling to the contrary would leave a party with knowledge of an intent to destroy evidence without a remedy. Accordingly, the court found the plaintiff could suffer measurable prejudice based on the suit's heavy reliance on e-mails if evidence was destroyed and ordered the defendant to implement a litigation hold.¹⁰

Although the defendant put forth a novel argument, it failed to acknowledge that the duty to preserve evidence "includes an obligation to identify, locate, and maintain information and tangible evidence that is relevant to specific and identifiable litigation."¹¹

However, the issue of when the duty *actually* arises is often a challenging one as different courts have found various triggers to be applicable. Generally, courts recognize that the "mere possibility of litigation" does not trigger the duty to preserve because litigation is "an ever-present possibility" in modern society. *Cache La Poudre Feeds, LLC v. Land O' Lakes, Inc.*, 2007 WL 684001 (D. Colo. Mar. 2, 2007).

⁹ As noted in Principle 14 of The Sedona Conference[®], *Sedona Principles* (2nd Ed. 2007), "[a] responding party may satisfy its good faith obligation to preserve . . . 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 evidence."

¹⁰ *Haraburda v. Arcelor Mittal USA, Inc.*, 2011 WL 2600756 (N.D. Ind. June 28, 2011).

¹¹ The Sedona Conference[®], *Commentary on Legal Holds: The Trigger and the Process*, 11 *Sedona Conf. J.* 265, 267 (2010).

However, in employment cases, the filing of a formal complaint is often held to put the defendant on notice to preserve. See, e.g., *McCargo v. Texas Roadhouse, Inc.*, 2011 WL 1638992 (D. Colo. May 2, 2011). In *Goodman v. Praxair Services, Inc.*, the District of Maryland concluded that the defendant's duty to preserve triggered following receipt of a letter informing the defendant the plaintiff had consulted attorneys.¹² In contrast, a ruling from the Southern District of New York found the duty to preserve arose no later than the lawsuit's filing. *Green v. McClendon*, 2009 WL 2496275 (S.D.N.Y. Aug. 13, 2009).

Element 2: Scope

We do not agree with the imposition of presumptive limits on the number of key custodians whose information must be preserved.

Although the amount of ESI and data sources continues to grow exponentially, technology and processes are available to provide parties with a cost-effective method to locate, preserve and access potentially responsive information across company information systems, sources and custodians. Companies can implement preservation repositories and enterprise archiving systems that provide a central storehouse for important information, develop a data map that outlines a company's information systems and processes that can help litigators plan and pilot the e-discovery process, and can use sampling, early data assessment and intelligent review technology to locate, identify, collect, process, analyze and review data in a quick, cost-effective manner.

In particular, we believe that limiting custodians is an extremely dangerous proposition. There are several issues raised in this proposal, including what should constitute the "maximum number" and whether this limit will lead to further time and resources spent to "fight" for additional custodians. There is also a question of what actually constitutes a custodian in the first place. Is it a person of interest and all of their data sources or is it a data source? Does the size of the custodian's data matter? Does the type of data matter? What happens when a custodian is a departmental file server share that contains terabytes of data? Is it appropriate to limit discovery or argue burden simply because a litigant has poor or no data management practices and policies? These are all questions that may lead this to be a disastrous gray area.

With regard to the scope of the preservation obligation for non-parties, we do feel the rules should remain the same for this group. However, we do not believe it is fair to impose all of the costs of complying with your preservation obligations onto parties not involved directly in the litigation. Thus, we would prefer to see language in this aspect of the rule that provides cost relief to the non-party from the party requesting the information. In addition, we feel this is one aspect of a preservation rule that would benefit in particular from a discussion on proportionality.

However, as a general matter, the relationship between preservation and proportionality is a dubious one. In *Orbit One Communications v. Numerex Corp.*, the Southern District of New York rejected the standard of "reasonableness and proportionality" advocated in *Victor Stanley II* and *Rimkus Consulting Group* as "too amorphous to provide much comfort to a party deciding" what information to retain. Instead, the court favored the *Zubulake IV* standard of retaining "all relevant documents . . . in existence at the time the duty to preserve attaches."¹³ Nonetheless, without a consistent rule or standard in the rules, there will continue

¹² 2009 WL 1955805 (D. Md. July 7, 2009).

¹³ *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 2010 WL 4615547 (S.D. N.Y. Oct. 26, 2010).

to be a need to vary the levels of obligations required under the duty to preserve in relation to the principles of proportionality.

Element 3: Duration

We do not agree that the upper end of the duration of the preservation obligation should be established in a Federal rule. Setting limits will likely not result in parties losing the “fear” of what may happen if they dispose of information. Typically we advise parties that a litigation hold should remain in effect until all appeals deadlines have tolled and the entered judgment and award is final, a final settlement agreement has been reached and a formal release has been signed by all parties, and/or the case is dismissed with prejudice and no outstanding related claims remain. Parties should then issue an explicit notice to lift a litigation hold that serves to officially resume scheduled disposal. However, care should be taken not to lift the hold on particular data that may be concurrently under hold for another matter.

Element 4: Ongoing duty

We do believe, however, that the rule should specify whether a duty to preserve extends to information generated after the duty has accrued. This information could be essential to the matter at hand, and should be preserved in the same manner with the same responsibilities as data created before the duty to preserve arose. This should only be a concern in matters where newly created content may be relevant. It should also be limited to systems or data sources when applicable.

Element 5: Litigation hold

According to the proposed rules discussion, one possibility is to specify that disseminating a litigation hold is sufficient to show due care under the duty to preserve. However, this raises several questions: What minimal standards apply for the litigation hold distribution? What would be required (i.e., number of people distributed to, data sources put on hold, efforts to enforce compliance)? Is issuing a litigation hold *really* sufficient to prove due care or should it be only a presumptive standard?¹⁴ Does the litigation hold have to be in writing, or is an oral litigation hold sufficient?¹⁵ Who in the organization should be tasked with issuing the litigation hold, or is it a responsibility of outside counsel?¹⁶ Are there different standards imposed depending on the size of the corporation/party?¹⁷ These are all valid questions that can be attributed to inconsistencies among jurisdictions if this element is not further developed.

¹⁴ *Tango Transp., LLC v. Transp. Int'l Pool, Inc.*, 2009 WL 3254882 (W.D. La. Oct. 8, 2009). (Distributing a litigation hold on e-mail accounts of custodians six months after the initial request from the defendant was insufficient to satisfy the plaintiff's preservation obligation and awarded the defendant almost \$13,000 in attorney fees and costs to serve as a deterrent against the plaintiff's future commission of similar discovery abuses).

¹⁵ See *Acorn v. County of Nassau*, 2009 WL 605859 (E.D.N.Y. Mar. 9, 2009). (Defendants claimed it issued a “verbal” litigation hold and instructed key individuals to search for responsive documents despite lacking the technical resources to locate and access electronic documents. Finding the defendants had a duty to preserve evidence and were grossly negligent in failing to issue a proper litigation hold, the court granted motion costs and attorney fees. However, the court denied an adverse inference instruction citing the plaintiffs' failure to demonstrate the favorability of the lost evidence.)

¹⁶ See *Swofford v. Eslinger*, 2009 WL 3818593 (M.D. Fla. Sept. 28, 2009). (Defendants' in-house counsel only forwarded a copy of preservation letters sent by the plaintiff to senior-level employees – who did not ensure other employees complied with the defendants' preservation obligations – and failed to issue a litigation hold. Citing *Zubulake V*, the court found that it is insufficient for in-house counsel to simply notify employees of preservation notices, but rather counsel “must take affirmative steps to monitor compliance” to ensure preservation. Finding sanctions appropriate for the preservation failures, the court issued an adverse inference sanction for the laptop wiping and deletion of e-mails. The court also awarded attorneys' fees and costs to the plaintiffs, holding the defendants and in-house counsel jointly and severally liable.)

¹⁷ See *Voom HD Holdings LLC v. EchoStar Satellite LLC*, No. 600292/08 (N.Y. Sup. Nov. 3, 2010). (Defendant acted in bad faith in destroying relevant e-mails and engaged in the “type of offensive conduct that cannot be tolerated by the court.” Court imposed an adverse inference instruction and awarded attorneys' fees and costs. In support of its findings, the court noted that

Element 6: Work product

Protecting work product from disclosure in discovery is an important right for any practitioner, as it allows parties to concentrate on advocacy and case development without falling prey to distractions regarding whether the materials they are creating in the course of defending their client are discoverable by the opposing party. Modern technology used for document review allows counsel to easily segregate work product from fact documents providing for an effective safeguard against the inadvertent production of privileged information. We also believe, however, that it would be important to have a statement in the rule or the Committee Notes addressing what actions taken in furtherance of the preservation duty are protected by work product.

There is limited case law on whether actions taken in furtherance of the preservation duty are protected by work product, and the few cases on record present conflicting opinions. In *Carlock v. Williamson*, the Central District of Illinois asserted that a litigation hold spreadsheet was inadvertently produced and was protected as work product. Addressing the litigation hold spreadsheet, the court determined it was an ordinary business record not protected by work product doctrine and was discoverable based on the virtual absence of ESI produced by the defendants, which constituted a threshold showing that they failed to preserve documents. However, the court held the spreadsheet must be properly redacted and allowed the plaintiff to refile once the redaction was completed.¹⁸ Conversely, in *Gibson v. Ford Motor Co.*, the Northern District of Georgia denied the plaintiff's request for a copy of the defendant's litigation hold notice, finding the document was closely related to attorney work product material. The court further noted that litigation holds are often over-inclusive and the documents do not bear any relevance to the actual litigation and cautioned that compelled production of this notice would encourage other companies from not issuing litigation hold notices under fear of possible disclosure and adverse consequences.¹⁹

Element 7: Consequences and procedures

A rule regarding preservation would not be complete unless there were consequences outlined in the rule. As recent case law demonstrates, courts across jurisdictions vary in terms of degrees of the severity of the sanctions imposed for the failure to preserve information, particularly when the party requesting sanctions does not fully demonstrate the relevance of the lost information (a daunting task) or if the spoliating party has not acted willfully or in bad faith.

The proposal seems to support the logic of the 2010 *Pension Committee* decision to the effect that the failure to issue a written litigation hold is, in and of itself, evidence of gross negligence.²⁰ Whatever may be the rule in that District Court, other cases have expressed concerns that this fails to adequately address smaller cases where informal means are effective. *Orbit One Communications, Inc. v. Numerex Corp.* (also issued by a court in the Southern District of New York) respectfully disagreed with the *Pension Committee* ruling that held some level of sanctions are warranted as long as any information was lost due to inadequate preservation practices and denied the sanctions request determining there was insufficient

the defendant is "a large public corporation with ample financial resources" to institute and enforce a proper litigation hold and referenced the fact that the defendant hired a new in-house lawyer following the Broccoli decision primarily to address these issues.).

¹⁸ 2011 WL 308608 (C.D. Ill. Jan. 27, 2011).

¹⁹ 2007 WL 41954 (N.D. Ga. Jan. 4, 2007).

²⁰ See *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 465 (S.D. N.Y. May 28, 2010) ("failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information") (emphasis in original)."

evidence that any relevant information was destroyed.²¹ In *Steuben Foods, Inc. v. Country Gourmet Foods, LLC*, the court also distinguished *Pension Committee* and declined to follow the court's presumption in that case that a failure to implement a written litigation hold would support an inference of spoliation.²² Further, in *Surowiec v. Capital Title Agency, Inc.*, the court declined to apply the *Pension Committee* culpability standard, but nonetheless found the defendants' in-house counsel's failure to issue a litigation hold, suspend routine document destruction and capture evidence, constituted gross negligence.²³

Finally, in *Rimkus Consulting Group, Inc. v. Cammarata* – one of the more discussed cases in regard to its disagreement with the *Pension Committee* standard – the court distinguished the *Pension Committee* ruling, finding the differences between circuits in relation to culpability of parties limited the applicability of the approach taken in *Pension Committee*. The court identified an additional distinction in regard to the burden of proof in relation to relevance and prejudice of spoliated evidence.²⁴

The point raised by the court in *Rimkus Consulting Group* was not lost on Magistrate Judge Grimm when he authored his *Victor Stanley II* decision.²⁵ According to Judge Grimm, inconsistencies across the country regarding what steps a party must take to navigate data preservation successfully is troubling to “institutional clients” – including corporations – since they conduct business many jurisdictions. Judge Grimm noted that such companies must follow the requirements of the “toughest court” that has issued an opinion regarding preservation and attached a 12 page appendix analyzing the varying requirements. Creating a uniform rule and standard regarding preservation would help corporations to understand what their exact obligations are and avoid having to achieve a higher standard than necessary.

On a different note, the language in the proposed rule that “[c]ompliance with the rule should insulate a responding party from sanctions for failure to preserve” is again suspect unless the questions raised in the litigation hold element of the proposal are clearly answered and the duties are clearly outlined.

Element 8: Judicial determination

We do feel that the use of a judicial officer, such as a special master or service provider expert, can be an important aspect of resolving numerous e-discovery disputes including preservation. A recent effort to tackle e-discovery's challenges using special masters comes from the Western District of Pennsylvania. On November 16, 2010, the Board of Judges approved the establishment of the Electronic Discovery Special Masters (EDSM) program to assist litigants in certain cases where e-discovery issues may arise.

When e-discovery issues arise, the court or the parties can decide to appoint an EDSM from a special pool of candidates previously approved by the court. To qualify as an EDSM, the candidates must meet specific criteria set by the court. The court's Alternate Dispute Resolution Implementation Committee, chaired by Judge Joy Flowers Conti, developed and approved the required selection criteria which includes active bar admission, demonstrated litigation experience (particularly with electronic discovery), demonstrated training and experience with computers and technology, and mediation training and experience.

²¹ 271 F.R.D. 429 (Oct. 26, 2010).

²² 2011 WL 1549450 (W.D.N.Y. Apr. 21, 2011)

²³ 2011 WL 1671925 (D. Ariz. May 4, 2011).

²⁴ 688 F. Supp. 2d 598 (S.D.Tex. Feb. 19, 2010).

²⁵ See *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. Sept. 9, 2010).

If appointed, the court will set the scope of the EDSM's duties which may include, but are not limited to, developing protocols for the preservation, retrieval or search of potentially relevant ESI, developing protective orders to address concerns regarding the protection or confidential information, monitoring discovery compliance and resolving discovery disputes. The EDSM may also present findings of fact or conclusions of law to the court; however, these must be issued as a report and recommendation which will be subject to de novo review and opportunities for objection by the parties.

Finally, while it is still too soon to assess the effectiveness of the new EDSM program, another high-profile, local e-discovery program reported significant success in the use of discovery liaisons. The Seventh Circuit Electronic Discovery Pilot Program noted in its May 2010 report on Phase One of the multi-phase program that the participating judges "overwhelmingly felt the [program]" had a positive effect on the test cases, and "[i]n particular, the judges felt that the involvement of e-discovery liaisons required by [the program] contributes to a more efficient discovery process."²⁶

The Seventh Circuit's findings and the basis for the EDSM program are encouraging, and reinforce the notion that many of the problems in the e-discovery process stem from a general lack of knowledge which e-discovery liaisons can provide until the bench and bar at large catch up. Time will tell if the EDSM program is successful, but in light of the consistent difficulties seen in e-discovery case law, any attempt to improve the process will likely be worthwhile.

²⁶ <http://www.discoverypilot.com/about-us>

APPENDIX R
COMMENTS FROM LAWYERS FOR CIVIL JUSTICE



COMMENT

Preservation – Moving the Paradigm to Rule Text

Submitted to the

Civil Rules Advisory Committee

**On behalf of
Lawyers for Civil Justice**

April 1, 2011

Introduction

This Comment is respectfully submitted to the Civil Rules Advisory Committee (“Committee”) to offer our views on suggested rule language that incorporates the necessary elements of a preservation rule. We have relied to a great extent in developing our proposal on the “Elements of a Preservation Rule” presented at the 2010 Litigation Conference at Duke Law School¹ and the “Category 1 Detailed and Specific Rule Provisions” of the “initial set of drafts of the three categories of rule exemplars” presented in the Discovery Subcommittee’s “Preservation/Sanctions Issues” memorandum for the Committee’s April 4-5 meeting.² As we said in our earlier comment (“Preservation Comment”),³ bold action is needed to fix real problems related to preservation of information in litigation; those problems exist for plaintiffs, defendants and third-parties; the problems, although real, are not readily quantifiable; and rule making solutions exist that do not violate the Rules Enabling Act.

We do not here intend to re-plow the ground covered in our earlier Preservation Comment or in our White Paper,⁴ but it is worth rehearsing briefly how the current *ad hoc* patchwork of preservation obligations created by individual courts is creating burdens on litigants far beyond what anyone would consider reasonable. The current paradigm involving preservation and spoliation of electronically stored information (ESI) is undermining the “just, speedy and inexpensive” determination of actions. Cases are being settled, discontinued or not brought in the first place because the cost of preservation is too high, the risk of spoliation sanctions is too great, and the impact of ancillary litigation proceedings on discovery disputes is too debilitating. We respectfully submit that the few high profile sanctions decisions are merely the tip of the iceberg. They have forced litigants to spend millions of dollars to address an unquantifiable risk in computing systems that are designed for myriad business purposes, not litigation holds.

In short, it is important to reemphasize some key points. In today’s world, technology has and will continue to dramatically change the way individual litigants and companies create, store and dispose of business and personal records. And, complying with expectations of preservation standards developing around the country is not as easy to honor as flipping a switch, buying more digital storage or distributing a litigation hold notice. Thus, meaningful rule amendments would supply the guidance necessary to help solve these increasingly serious and costly preservation problems that our members see in everyday litigation. Most seem to agree that amendments should be considered in each of the three key areas: Triggers, Scope, and Sanctions.

First, determining the time at which the duty to preserve exists (the trigger) is an almost impossible task under the current varying interpretations of what we might call the “reasonable anticipation” of litigation standard. We believe that it is necessary to consider developing a standard that better and more pragmatically articulates the events and time at which the duty to preserve information is triggered.

¹ *Elements of a Preservation Rule*, 2010 Litigation Conference (May 10, 2010), *passim*, [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/EAF7D6B2D709B78E85257700487925/\\$File/E-Discovery%20Panel%2C%20Elements%20of%20a%20Preservation%20Rule.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/EAF7D6B2D709B78E85257700487925/$File/E-Discovery%20Panel%2C%20Elements%20of%20a%20Preservation%20Rule.pdf?OpenElement)

² *Preservation/Sanctions Issues Memorandum*, Committee Agenda Book, Tab 6 (April 4-5, 2011), <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/AgendaBooks.aspx>.

³ *Comment, Preservation – Moving the Paradigm* at 2-3 (November 10, 2010), [Preservation - Moving the Paradigm](#).

⁴ *White Paper, Reshaping the Rules of Civil Procedure for the 21st Century* (May 2, 2010) [Reshaping the Rules of Civil Procedure for the 21st Century](#)

Therefore, we propose for consideration a “bright line” standard based on analysis of certain specific facts and circumstances that create the reasonable expectation of the certainty of litigation. Our “trigger” proposal is an attempt to incorporate what we consider to be the best and most workable features of the elements of such a rule proposed by the Duke panel and the “rule exemplars” in the Preservation/Sanctions Issues Memorandum.⁵

Second, a rule addressing 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, for example, and should more realistically align with the principle that the right to discovery is not absolute. Rather than engage in extensive efforts to litigate what information might have been missed in a litigant’s preservation efforts, we suggest that the Rules should guide courts and litigants to focus instead on what information exists that is related to a claim or defense and has been preserved because of the needs and requirements of conducting the litigant’s business or personal affairs. Our scope proposal also attempts to incorporate the Duke “elements” and the more specific “rule exemplars” in the Preservation/ Sanctions memorandum.⁶

Third, 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, not by the inadvertent failure to follow some procedural step like issuing a written notice, failing to identify a key custodian, failing to identify an electronic storage location or failing to anticipate a specific request for ESI. Therefore, we have proposed a sanctions rule that permits sanctions to be imposed by a court only if information, documents, or tangible things were willfully destroyed for the purpose of preventing their use in litigation on proof of a duty to preserve information relevant and material to claims or defenses as to which no alternative source exists and which demonstrably prejudiced the party seeking sanctions. Again, we have attempted to combine the Duke “Elements” and the “rule exemplars” into a practical rule.⁷

The following three sections explain our approach and set forth the Rule text we respectfully submit for the Committee’s consideration. The full text is in the Appendix.

⁵ *Op. cit. supra* fn.1 and 2. See, Gregory P. Joseph, *Electronic Discovery and Other Problems* (May 2010) , [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/EE0CC8AFE81F5D90852576480045504B/\\$File/Gregory%20P.%20Joseph%2C%20Electronic%20Discovery%20and%20Other%20Problems.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/EE0CC8AFE81F5D90852576480045504B/$File/Gregory%20P.%20Joseph%2C%20Electronic%20Discovery%20and%20Other%20Problems.pdf?OpenElement); John M. Barkett, *Walking the Plank, Looking Over Your Shoulder, Fearing Sharks Are in the Water: E-Discovery in Federal Litigation?* (May 2010), http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h_Library/9E884B4174EE27B6852576E900738E7B/?OpenDocument; and Thomas Y. Allman, *Preservation and Spoliation Revisited: Is it Time for Additional Rulemaking?* (April 9, 2010), [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/02E441B3AD64B2D9852576DB005D976D/\\$File/Thomas%20Allman%2C%20Preservation%20and%20Spoliation%20Revisited.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/02E441B3AD64B2D9852576DB005D976D/$File/Thomas%20Allman%2C%20Preservation%20and%20Spoliation%20Revisited.pdf?OpenElement)

⁶ *Id.*

⁷ *Id.*

I. Proposed Rule 26.1(a): Trigger Events and Fundamental Fairness in Discovery

We propose a version of Rule 26.1(a) which seeks to clarify the commencement, or "trigger" of the duty to preserve information. In "Preservation/Sanctions Issues", the Discovery Subcommittee suggested various alternative approaches to possible rule amendments. For example, proposals for more general language, as well as quite specific phrasing, are to be evaluated. In this proposal, we seek to strike an appropriate balance between specific and general provisions, avoiding the extremes of language which is so general as to be essentially meaningless, and that which is so specific that it risks becoming obsolete even before it is given effect. The proposed Rule 26.1(a) below aims to create a general standard for the start of the duty to preserve which is more quantifiable than current rule language (e.g., that litigation be "reasonably certain" to occur), while at the same time providing concrete guidance with specific instances defining and exemplifying what "reasonably certain" means.⁸

The first goal of the proposed Rule is to eliminate the current practice in which each district court formulates its own standards concerning what constitutes a trigger of the duty to preserve information, replacing it with a standard applicable to federal civil actions generally. Under the current procedure, a litigant is confronted with a hodgepodge of varying standards and requirements among the circuits and the district courts. As stated in our earlier Preservation Comment, the *ad hoc* patchwork of preservation obligations created by individual district courts creates burdens on litigants far beyond what could be considered reasonable.

For example, in some district courts, the duty to preserve is said to arise "...from the moment that litigation is reasonably anticipated."⁹ In other courts, this duty is held to commence when the party has

⁸ **Rule 26.1. Duty to Preserve Information.**

(a) **Duty to Preserve Information.** The duty to preserve information relevant and material to civil actions and proceedings in the United States district courts applies only if the facts and circumstances below create the reasonable expectation of the certainty of litigation:

- (1) Service of a complaint or other pleading; or
- (2) Receipt by the party against whom the claim is made of a written notice of a cognizable claim setting out specific facts supporting the claim [or other reproducible communication indicating an intention to assert a claim]; or
- (3) Service of a subpoena, CID, or similar instrument; or
- (4) Retention of outside counsel, retention of an expert witness or consultant, testing of materials related to a potential claim, discussion of possible compromise of a claim or taking any other action specifically in anticipation of litigation; or
- (5) Receipt of a written notice or demand to preserve information related to a specifically enumerated notice of a cognizable claim; or
- (6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, or rule.

⁹ *Victor Stanley, Inc. v. Creative Pipe, Inc.*, MJG-06-2662, 2010 WL 3530097 at pp. 22-23 (D. Md. Sept. 9, 2010).

notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.¹⁰

Compounding this problem are the differing standards for preservation existing in state courts. For example, in *Royal & Sunalliance v. Lauderdale Marine Center*,¹¹ the Court rejected the contention that there was a common law duty to preserve materials when litigation is merely anticipated. The court held that a duty to preserve evidence can arise by contract, statute, or by a properly served discovery request, after a lawsuit has been filed.¹² The issue of divergent state standards would not seem to be solvable by federal rule. However, the harmonization of the various considerations utilized in district courts would help stabilize the expectations of parties in federal cases involving such intense discovery.

This mélange of differing discovery rules is unlikely to enhance either the efficiency of the discovery process or provide the necessary guidance or certainty.¹³ A number of courts have acknowledged the need for clarity and guidance in this area.¹⁴ Although most of the “standards” in use, however worded, seem to boil down to some sort of “reasonable anticipation” of litigation, such “standards” are themselves less than clear and definite.¹⁵

Our proposed Rule 26.1(a) seeks to replace this uncertainty with a more definite, objective standard, which may be stated as follows:

The duty to preserve information relevant and material to civil actions and proceedings in the United States district courts applies only if the facts and circumstances below create the *reasonable* expectation of the *certainty* of litigation (emphasis added).

Then our proposed rule seeks to clarify the existence of and the beginning point of a duty to preserve. It provides in the six subparts of 26.1(a) specific examples of events that would “create the reasonable expectation of the certainty of litigation” and trigger the duty to preserve. These are:

- (1) Service of a complaint or other pleading; or
- (2) Receipt by the party against whom the claim is made of a written notice of a cognizable claim setting out specific facts supporting the claim [or other reproducible communication indicating an intention to assert a claim]; or
- (3) Service of a subpoena, CID, or similar instrument; or

¹⁰ *Zubulake v. UBS Warburg LLC* (“Zubulake IV”), 220 F.R.D. 212, 216 (S.D.N.Y. 2003); *see also*, *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001); *Sylvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001); *Pension Committee of Univ. of Montreal Pension Plan v. Banc of America LLC*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010).

¹¹ 877 So.2d 843 (Fla. 4th DCA 2004)

¹² 877 So. 2d at 845.

¹³ S. Scheindlein and J. Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up To the Task?*, 41 B.C. L. Rev. 327, 378 (2000).

¹⁴ *See*, *Rimkus Consulting Group v. Cammarata*, 2010 WL 645253 at 6 (S.D. Tex. Feb. 19, 2010); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 2010 WL 3530097 at 36-7 (D. Md. Sept. 9, 2010).

¹⁵ *Compare*, for example, the disparate treatment of the same conduct in *Samsung v. Rambus*, 439 F. Supp.2d 524 (E.D. Va. 2006) (litigation should have been anticipated, giving rise to a duty to preserve information), with *Hynix Semiconductor, Inc. v. Rambus, Inc.*, 2006 WL 565893 (N.D. Cal. 2006) (the same conduct did not trigger a duty to preserve).

- (4) Retention of outside counsel, retention of an expert witness or consultant, testing of materials related to a potential claim, discussion of possible compromise of a claim or taking any other action specifically in anticipation of certain litigation; or
- (5) Receipt of a written notice or demand to preserve information related to a specifically enumerated notice of a cognizable claim; or
- (6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, or rule.

Subparts (1)-(6) thus give needed definition to the task of identifying the point at which the duty to preserve is triggered¹⁶. As indicated in (1), the receipt of a complaint in most instances is certainly an event that triggers the commencement of a duty, so that the inquiry would ordinarily move on to determining the scope of the duty. Likewise, in (2), receipt of a claim which specifically says what the source of the complainant's dissatisfaction is, could give rise to notice that litigation is reasonably certain. Subpart (3) reflects the reality that service of a proper subpoena, production request or similar instrument can also trigger the duty to preserve.¹⁷

Subpart (4) reflects the reality that the perception of the need to take positive steps in anticipation of litigation, such as the retention of counsel or experts, or both, can indicate the existence at that point of the duty to preserve information.¹⁸ Proposed Rule 26.1(a)(5) concerns the receipt of a written demand to

¹⁶ The "Preservation/Sanctions Issues" Memorandum at 8 identifies the issue of whether the duty to preserve should be limited to electronically stored information. Certainly, as the Memorandum points out, electronic discovery has been the main focus of the current discussion. However, LCJ's proposed Rule 26.1(a) speaks in terms of "information" and is not only limited only to electronically stored materials. "Hard Copy" and other tangible things will continue to play an important role in litigation, thus in discovery, and we believe a new rule should cover them. For example, our proposed Rule 26.1(b)(3) states: "The duty to preserve information extends to all documents, electronically stored information, or tangible things within Rule 34(a)(1). . . ."

¹⁷ However, see the discussion *infra* at 10-11, pointing out that complaints, claims, production requests and the like which are vague, unclear and indefinite should not automatically trigger the duty.

¹⁸ A clear distinction must be drawn between the commencement of a duty to preserve information and events which initiate the attorney-client privilege and work product protection. The considerations surrounding these latter legal principles are well-known and not necessary to discuss in detail here. Any argument that a party's invocation of the privilege or the work product doctrine demonstrates that the party reasonably anticipated litigation, completely misses the mark. Attorney-client privilege and work product are favored in our law, in order to facilitate open and candid discussions between client and lawyer. In the context under discussion here, the presence of these principles can enable the lawyer to gain a more complete understanding of the information in question, which could avoid subsequent disputes among the parties. A client may consult the lawyer when litigation is "reasonably certain," (or indeed, has already started), when it is merely anticipated, or when a lawsuit may be only a remote possibility. Privilege and work product protections attach in each instance. Thus, there is no connection between privileged communications between client and lawyer, or the creation of work product-protected materials, and the trigger of a duty to preserve. By the same token, the mere discussion of possible resolution of settlement of a disagreement does not per se trigger a duty to preserve all information possibly relating to that dispute. See, e.g., *Goodman v. Praxair Services, Inc.*, 2009 U.S. Dist. LEXIS (D. Md. July 17, 2009) (...the mere existence of a dispute does not necessarily mean that parties should reasonably anticipate litigation or that the duty to preserve arises.") Many companies do risk audits associated with activities around a product launch, and implement recommendations based on that audit. It is a risk avoidance activity so it could be argued that it is done specifically in anticipation of litigation, which is the justification for the expense. Also, companies utilize outside counsel for compliance investigations, but then may take action on findings associated with the investigation which are risk avoidance actions and done specifically in anticipation of future litigation.

preserve information. Such a demand of course must provide clear indications of exactly what information is sought to be preserved. Subpart (6) makes reference to the numerous requirements for record-keeping imposed by statutes, regulations, local ordinances and the like.¹⁹

We have based much of our proposed Preservation Trigger rule, as well as the Scope and Sanctions provisions, on the Discovery Subcommittee's "Category 1 Detailed and Specific Rule Provisions." Of course, both the Rule 26.1 proposed by LCJ, and the Subcommittee's "Category 1" draft are significantly more specific than either current rule language or the "trigger standards" enunciated in the cases. Two points need to be made: (1) the concern that the specific requirements may become obsolete because of technological advances is overstated, and our members are convinced that a "specific" rule such as the proposed 26.1 will serve well into the foreseeable future; and (2) we believe that the framework of the LCJ proposal is a realistic and workable proposal that will supply the kind of guidance to litigants and the bar that will significantly reduce the enormous costs and burdens of the over-preservation we are experiencing today.

Our proposed Rule 26.1(a), is not in danger of becoming obsolete because of technological advances. Rather, it sets forth specific, but common-sense, criteria defining the types of events which can give rise to a duty to preserve. There is no reference to technology or terminology which may cease to be meaningful in at least the near future. Rather, subparts (a) (1)-(6) represent events of known significance, which are not likely to fall into disuse. For example, the receipt of a complaint, or a request for production, will undoubtedly continue to have legal consequences, whether the item is received on paper, by e-mail, or whatever particular method of communication future technology may make possible.

One of the Category 1 "rule exemplars" presents "reasonably certain" as an alternative to "reasonably expects" with respect to involvement in litigation. We believe that the standard of "reasonable certainty" is much more definite, and provides a clearer "bright line" by which parties (particularly businesses generating large volumes of data) can evaluate their business practices, ascertain their litigation responsibilities, and determine whether or not a preservation duty has been triggered.²⁰

The "reasonable certainty" standard together with its subparts is precisely the kind of specific rule which is needed to give adequate guidance to both courts and parties. When litigants, or prospective litigants, know what their legal duty is, and when it is that such duty commences, steps can be taken to better protect the rights of all concerned. This in itself could have the salutary effect of lessening the need for court involvement in discovery disputes, saving significant court time.

[These activities do not contemplate a specific claim or specific litigation, but are just an acknowledgement of the reality of the litigious environment in which companies operate.](#)

¹⁹ See, Memorandum, K. David, *Laws Imposing Preservation Obligations* (Dec. 15, 2010)

²⁰ The issues of scope of the preservation duty are dealt with in the next part of this paper. However, it is clear that many of the criteria utilized by the courts in addressing discovery disputes bear little resemblance to good business practices, and even less to the needs of daily operation of an ongoing company. Thus, given the excessive breadth and undue burden of many discovery requests, it is simply unreasonable to expect that a business with a number of different offices, and many hundreds or even thousands of employees who receive and disseminate information on a daily basis in the course of their duties, can instantaneously initiate a litigation hold for many categories of information, affecting the work of innumerable employees, and have this process begin and continue perfectly, with absolutely nothing being lost, misplaced or difficult to locate. Yet, this is what some courts have stated must occur, on pain of severe sanctions.

LCJ strongly supports a more “detailed and specific” preservation rule. A more general statement of this duty runs the inevitable risk of engendering the same multiple interpretations, and resultant ambiguity and confusion, as prevails under current practice.

A bright line standard, that there be a "reasonable certainty" of litigation, would at least reduce, if not avoid, the proliferation of costly and, in many cases unnecessary, holds in matters which do not actually result in litigation. A more definitive standard, such as the reasonable certainty of litigation, better and more pragmatically articulates the time at which the duty to preserve information is triggered. This is a standard which can be met, analyzed, and understood under most factual scenarios.

Under the current proliferation of court-enunciated standards for the initiation of the duty to preserve, the tail truly wags the dog. All too often, records retention practices which are perfectly appropriate, and suited to the business of a company, run afoul of legal demands issued, if not in a vacuum, at least with imperfect understanding of those practices, and the effect of litigation preservation requirements on that party. Not only must those in possession of information try to adjust their practices from situation to situation, and from court to court, but must try to do so under criteria which are less than models of clarity. A single, readily understandable standard, such as the one discussed above, would foster confidence in the foreseeability of consequences of actions (or lack thereof), rather than forcing individuals and companies to make decisions in the absence of clear guidelines.

The often-used statement that the duty to preserve information commences when litigation may be "reasonably anticipated"²¹ can be subject to many interpretations. The reported cases are replete with different understandings of which circumstances may or may not give rise to a reasonable anticipation of litigation²². In today's litigious environment, virtually any action or absence of action, particularly on the part of a company or individual conducting a wide-ranging business, could possibly subject that company or individual to a lawsuit or threat of a lawsuit. In this context, a standard that litigation be "reasonably anticipated" loses meaning.

Some businesses, particularly large providers of products or services worldwide, receive many different complaint letters, demands of various types, or other communications evidencing dissatisfaction with some aspect of that provider's business on a daily basis. Undoubtedly, most if not all of these communications may give rise to some anticipation that litigation could ensue, at least pursuant to some of the case law generated over the last several years. Under these circumstances, a large business acts at its peril in ever disposing of anything, as it can anticipate having its actions scrutinized with the benefit of "20-20 hindsight."

For example, suppose that automobile manufacturer A produces 15 different "lines," or basic types of vehicles each model year, each with approximately 10,000 component parts. Suppose further that at least 10 of these 15 lines undergo design changes of greater or lesser magnitude to at least some of their components each model year. Also, suppose that a number of components may be shared by more than one vehicle line. If this manufacturer gets a single complaint of a defect in one or more components of a vehicle line produced 7 years ago, does it have to issue a litigation hold on every record of every vehicle

²¹ See *Victor Stanley, Inc. v. Creative Pipe, Inc.*, supra.

²² See the cases cited in footnote 3. *But see*, *Goodman v. Praxair Services, Inc.*, supra footnote 5; *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 371 (S.D.N.Y. 2006).

ever produced with those components, even if these components were installed in another line? Worse, manufacturer A is likely to receive a vague, general complaint that an entire vehicle is defective, without specifying which of the thousands of specific components is allegedly at fault. Upon which records should the manufacturer place a litigation hold?

Now, still following the hypothetical, assume that this manufacturer of millions upon millions of vehicles gets 100 complaints, warranty claims, customer complaint letters or other communications of dissatisfaction *each day*, concerning innumerable components of vehicles produced by the company over the last 30 years. How are litigation holds to be crafted and disseminated? How is such a company to know which information, even concerning older models, it can safely dispose of? Can it ever discard any information? These are precisely the type of real-life problems faced daily by businesses across the country in attempting to address their discovery obligations.

The explosion of information which can be accessed, stored and retrieved by electronic means has been well documented. The technology involved in electronic records-keeping was designed to reduce the burden on businesses, and ease the task of information management. However, the very opposite has obtained in many instances. The burden on companies, as well as individuals, in being forced to retain ever-increasing mountains of information, for fear of adverse consequences in some future lawsuit, has also been the subject of considerable commentary. A bright line standard for the starting point of a duty to preserve particular categories of information would certainly help reduce this burden, and provide more certainty to guide the business decisions of the community.

It is submitted that this is the precise reason why the standard that litigation be "reasonably certain" is much clearer and more easily understood than the "reasonably anticipated" or other criteria used by the various district courts across the country. Codification of this standard would increase predictability by (1) avoiding the confusion engendered by the multiplicity of different criteria by different courts; (2) better and more pragmatically articulating the point in time at which the duty to preserve information is triggered, thereby (3) decreasing the current exacerbated state of litigation over discovery issues, reducing the "discovery over discovery" battles. The Rule we propose would provide better guidance to courts, relieving individual judges of the burden of attempting to apply a very general, vague standard to specific situations, with understandably disparate results.

Absent a duty to preserve, of course, individuals and organizations are perfectly free to preserve or destroy information as they see fit.²³ Thus, the date of commencement of this duty to preserve is the dividing line between activities with no litigation consequences, and those activities which may give rise to consequences which are potentially disastrous in the context of subsequent lawsuits. Few would argue with the proposition that such an important, or even crucial, point in time must be defined with sufficient certainty to enable litigants or potential litigants to govern their actions appropriately. Yet, this is exactly what may not obtain under the current "balkanized" system, with each district court defining its own trigger for the duty to preserve.

This is not to argue that some trigger events are not easily recognizable, and parties will have little difficulty in these instances in determining that a duty to preserve appropriate information exists. A ready example is the actual filing of a lawsuit with accompanying discovery seeking production of documents and other information. The point being made, however, is that in many other instances the

²³ *Arthur Andersen LLP v. United States*, 544 U.S. 696, 125 S. Ct. 2129, 2135, 161 L. Ed. 2nd 1008 (2005).

duty to preserve may not be as readily identifiable. Too many times judgments made with respect to the initiation of information preservation are subject to "Monday morning quarterbacking," and actions undertaken honestly, even if erroneously, are found to be in bad faith or malicious. The principle advanced in proposed Rule 26.1(a) would provide clarity and certainty to litigants or potential litigants in their decision-making.

The several subparts of 26.1(a) set forth examples of occurrences which typically would demonstrate that litigation is reasonably certain. For example, as mentioned above, the receipt of a complaint would appear to be ample notice that litigation is not only reasonably certain, but actually in progress.²⁴ Likewise, the receipt of a subpoena, written request for the production of information, or specific demand letter could clearly indicate to any reasonable person that information relevant to the action needs to be preserved.

However, even such seemingly clear-cut examples may not be as definitive as they appear. For example, if a complaint is so vague, overly broad and poorly worded that it is difficult or impossible to tell what is sought to be alleged, it may not be sufficient to serve as a bright line indicator of the existence of a duty to preserve information.²⁵

Likewise, receipt of a claim or demand letter which gives little clue as to the wrong alleged or the relief sought, would not be particularly informative in determining whether a duty to preserve information exists from that time forward, much less the scope or extent of that duty. Nor would receipt of a blanket request for production of information which simply asks for "all information concerning your products" be the type of notice giving rise to any sort of "reasonable certainty."

The point is that the provisions of proposed Rule 26.1(a), while attempting to be as definitive as possible, cannot and do not provide *de facto* determinations that proper notice has been given and received, triggering a duty to preserve information. "Reasonable certainty" means just that: the *certainty*, within reason, that litigation will ensue.

Other submissions have amply documented the failure of prior efforts to cure discovery abuse by enacting narrowly focused rule changes, and overemphasizing judicial management of discovery issues.²⁶ As pointed out in the *White Paper*, the systemic problems causing discovery abuse require a comprehensive reevaluation of, among other things, the methods provided under the rule for obtaining information through the discovery process. Rule 26(a), and specifically the provisions concerning the preservation of information, are in great need of this reevaluation as we, the American College of Trial Lawyers, and the Institute for the Advancement of the American Legal System have observed.²⁷

²⁵ Hopefully, the adoption of recommendations to enact enhanced fact pleading standards, as referenced in the LCJ *White Paper*, op. cit. supra n. 4 would make this eventuality much less likely to occur. The *White Paper* also addresses issues concerning the proper scope of discovery and sanctions.

²⁶ See, e.g., *White Paper* at 22-28.

²⁷ Institute for the Advancement of the American Legal System, *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 2* (2009) ("ACTL/IAALS Report") available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008>

Adopting proposed Rule 26.1(a) would be a major step in the right direction. The proposed Rule provides clarity missing from the current discovery rules, and the cases arising under them. In providing guidance, the Rule would also enable those seeking to respond to discovery to make better decisions, avoiding "discovery over discovery" battles which are enormously expensive, and which cause much judicial frustration and case delay.²⁸ It is fair, and would reduce discovery overuse and abuse.

Our system of discovery in federal litigation needs help. Only the type of systemic restructuring contemplated in proposed Rule 26.1(a) can provide it. This proposal goes hand in hand with other proposals for reform of the federal rules outlined in the LCJ *White Paper*, including detailed suggestions regarding discovery scope, the burdens imposed by current discovery procedures, and sanctions issues. If enacted, these proposals would promote fundamental fairness, and advance the basic premise of the rules, to "...secure the just, speedy and inexpensive determination of every action and proceeding."²⁹

II. Preserving Proportionality through Specificity: Reigning in the Scope of Preservation through Clear Limits and Examples

Reasonableness and proportionality are surely good guiding principles for a court that is considering imposing a preservation order or evaluating the sufficiency of a party's efforts at preservation after the fact. Because these concepts are highly elastic, however, they cannot be assumed to create a safe harbor for a party that is obligated to preserve evidence but is not operating under a court-imposed preservation order. Proportionality is particularly tricky in the context of preservation. It seems unlikely, for example, that a court would excuse the destruction of evidence merely because the monetary value of anticipated litigation was low.³⁰

It is widely recognized that the rise of electronic discovery has dramatically changed the litigation landscape, and in particular the nature of discovery. A process once largely accomplished by the exchange of paper and often involving only the lawyers and their clients has now grown into a highly technical endeavor ruled by technology and involving teams of people, often including computer systems specialist, third party "vendors", and other outside consultants, all of whom add significant expense to each parties' litigation costs. Beyond the traditional (albeit dramatically evolved) costs of identifying and producing relevant materials, though, a new cost driver has emerged as a major concern for litigants, namely, the preservation of electronically stored information (ESI).

The cost of preservation can be astronomical. Indeed, public testimony from one corporate representative before the Advisory Committee illustrated the dramatic realities of preservation for large organizations where the number and type of possible repositories of ESI are staggering.³¹ For example,

²⁸ See, e.g., *Pension Committee of University of Montreal Pension Plan v. Banc of America Sec. LLC*, *supra*.

²⁹ Rule 1, F.R.C.P.

³⁰ *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, at n. 10 (S.D.N.Y. 2010).

³¹ *Benchmark Survey on Prevailing Practices for Legal Holds in Global 1000 Companies* at 14 (GCOC 2008) (citing Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure (testimony of Chuck Beach) (January 28, 2005)) available at: <http://www.cgoc.com/events/benchmarkwebinar>. ("We operate in 200 countries around the world. We have 306 offices around the world, 70 of them in the U.S. We generate 5.2 million emails a day, about half of that in the U.S. We have 65,000 desktop computers around the world and 30,000 laptop computers. These are for employees, about half of those in the U.S. We have, in addition to the 65,000 desktops and 30,000 laptops, we have between 15,000 and 20,000 Blackberries and PDAs around the world. We have 70,000 servers worldwide, 4,000 of them in the U.S. We have 1,000 to

the representative testified that his company had no less than 95,000 computers (desktops and laptops), 1,000-2,000 networks, and 3,000 databases. All together, the company maintained approximately 800 terabytes of information (in 2005!)—approximately 400 billion pages.

Keeping in mind the incredible resources required to address preservation obligations across such a wide spectrum of repositories, the revelation of a recent empirical study that, on average, only one tenth of one percent (0.1%) of pages *produced* in litigation are used as exhibits at trial is troubling.³² This disparity is all the more compelling in light of the fact that the number of pages produced is typically only a small percentage of what was originally preserved.

As discussed in our White Paper and follow up Preservation Comment, the need for a rule addressing preservation is widely acknowledged. However, in light of the costs and burdens of preservation that have drastically increased with the rise of electronic discovery, the danger of merely codifying existing preservation practices cannot be overstated. As a practical matter, the scope of preservation can no longer be tied to the current scope of discovery as codified by Rule 26(b)(1) or to the myriad interpretations of reasonableness and proportionality that have thus far proven insufficient to reduce the scope of preservation to more closely align with the true needs of the parties. Rather, a rule addressing 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, for example, and should more realistically align with the oft-forgotten (or perhaps ignored) principle that “the right to discovery is not absolute.”³³

A. The Current Scope of Preservation and its Consequences

Currently, the duty to preserve is extremely broad and extends to all potentially relevant documents.³⁴ While courts have opined that the duty to preserve “is neither absolute, nor intended to cripple organizations”³⁵ or, more notably, 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,”³⁶ in practical reality “courts have tended to overlook the importance of proportionality in determining whether a party has complied with its duty to preserve evidence in a particular case.”³⁷

A major consequence of the broad scope of preservation is the need for significant expenditures of resources to ensure compliance with the duty to preserve, particularly in light of the specter of sanctions

2,000 networks worldwide, about half of those in the U.S. We have 3,750 e-collaboration rooms. I assume that they’re chat room type things, for people to be working on document simultaneously. About 3,000 of those are in the U.S. We have 3,000 databases; 2,000 of those in the U.S. Our total storage of information that we have now is 800 terabytes; 500 terabytes in the U.S. One terabyte equals 500 million pages. 500 terabytes equals 250 billion pages. 800 terabytes equals 400 billion pages.”)

³² Lawyers for Civil Justice et. al. *Statement on Litigation Cost Survey of Major Companies*, App. 1 at 16 (2010) available at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/33A2682A2D4EF700852577190060E4B5/\\$File/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/33A2682A2D4EF700852577190060E4B5/$File/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf?OpenElement) [hereinafter, “Statement on Litigation Cost Survey”].

³³ *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 619 (D. Colo. 2007).

³⁴ *Victor Stanley v. Creative Pipe, Inc.*, 269 F.R.D. 497, 522 (D. Md. 2011).

³⁵ *Id.*

³⁶ *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010)

³⁷ *Victor Stanley*, 269 F.R.D. 497 at 523.

created by spoliation jurisprudence in recent years. As Judge Lee Rosenthal observed in a recent opinion: “The frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential future sanctions than on reasonable need for information.”³⁸

Discovery, and in particular preservation, can be very expensive. For example, according to a recent survey of litigation costs for the years 2006-2008, the average company paid an average per case discovery cost of \$621,880 to \$2,993,567. Companies at the high ends during the same years reported average discovery costs ranging from \$2,354,868 to \$9,759,900 per case.³⁹ As was reported in our Preservation Comment, “we are aware of one company that undertook a recent preservation project that included well over \$7,000,000 in infrastructure costs associated with preservation and collection tools, not including the personnel devoted to managing those tools.”⁴⁰

Beyond the staggering expense, compliance with current preservation obligations under the common law, particularly for large organizations and corporations, requires significant expenditures of time and energy. This is dramatically illustrated in a hypothetical scenario based upon data collected in a recent survey.⁴¹ The hypothetical assumed the need to manage litigation holds across two hundred matters involving 75 custodians over one year and projected that such a scenario would require 60,000 tasks to send out the litigation hold notice and provide quarterly reminders.⁴²

Arguments that the burdens of preservation may be effectively reduced under the current rules, particularly Rule 26(b)(2)(C) are unrealistic. Indeed, the need for herculean preservation measures was recently reinforced by the analysis of United States Magistrate Judge James C. Francis IV, in his discussion of the scope of preservation:

Although some cases have suggested that the definition of what must be preserved should be guided by principles of “reasonableness and proportionality,” *Victor Stanley, Inc. v. Creative Pipe, Inc.*, No. 06-2662, 2010 WL 3703696, at *24 (D.Md. Sept.9, 2010); see *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F.Supp.2d 598, 613 (S.D.Tex.2010), this standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle.^{FN10} **Until a more precise definition is created by rule, a party is well-advised to “retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches.”**^{FN11} *Zubulake IV*, 220 F.R.D. at 218. **In this respect, “relevance” means relevance for purposes of discovery, which is “an extremely broad concept.”** *Condit v. Dunne*, 225 F.R.D. 100, 105 (S.D.N.Y.2004); see *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978); *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 167 (S.D.N.Y.2004); *Melendez v. Greiner*, No. 01 Civ. 7868, 2003 WL 22434101, at *1 (S.D.N.Y. Oct.23, 2003).⁴³

In light of statements such as this and the undeniable evidence of courts’ willingness to impose sanctions even for negligent lapses in the effectiveness of parties’ preservation obligations, litigants are forced to

³⁸ *Rimkus Consulting Group, Inc.*, 688 F. Supp. 2d at 607.

³⁹ Statement on Litigation Costs Survey at 3.

⁴⁰ Preservation Comment at 19.

⁴¹ *Benchmark Survey on Prevailing Practices for Legal Holds in Global 1000 Companies* at 22 (GCOC 2008) available at: <http://www.cgoc.com/events/benchmarkwebinar>.

⁴² See, Preservation Comment at 16 for a graphic representation of the results of this hypothetical.

⁴³ *Orbit OneComm’s, Inc. v. Numerex Corp.*, 271 F.R.D. 429 (S.D.N.Y. 2010).

preserve information not otherwise subject to retention under their document retention policies and which provides little or no value beyond preventing the imposition of sanctions. Put another way, outside of litigation, much of the information subject to preservation would not otherwise be maintained for business purposes. This dilemma has been called a “Hobson’s choice” by the Sedona Conference:

A producing party can face a Hobson’s choice between the burden of the costs of preservation and the risk of sanctions for failing to do so. Parties engaged in ongoing, recurrent litigation can also face a serial preservation duty dilemma, in which preserved data sources that would not be kept for any other reason may become subject to preservation duties in subsequent litigation.⁴⁴

As discussed above, a shockingly small percentage of the information preserved is actually utilized by the parties in support of their claims or defenses. Indeed, much of what is preserved is never even collected, let alone produced. This disparity will only widen as the explosion of technology continues and greater and greater volumes of ESI are created and subsequently subjected to preservation obligations resulting from litigation. The burden of such obligations results in significant injustice where “at a time when potential access to electronically stored information is virtually limitless . . . the costs and burdens associated with full discovery could be more outcome determinative, as a practical matter, than the facts and substantive law.”⁴⁵ It is no wonder considering these facts, that there is widespread agreement that the current “discovery system is broken”⁴⁶ and that while the civil justice system may “not be broken” it “is in serious need of repair.”⁴⁷

B. The Right to Discovery is Not Absolute

The burden of preservation can be addressed without detracting from the rights of litigants to full disclosure. Keep in mind, however, that “full disclosure does not require the production of all witnesses or documents”⁴⁸ and that “the right to conduct discovery is not absolute.”⁴⁹

Parties are not entitled to the discovery of *all* relevant evidence. While the American legal system has long-operated with a premise of broad discovery (“Discovery has become broad to the point of being limitless.”),⁵⁰ a party does not have a right to discover every piece of relevant evidence that may be available. This principle finds ample support in both the civil rules and in case law. Pursuant to Rule 26(b)(1), for example, the presumptive scope of discovery is limited to information relevant to any party’s claim or defense and can be expanded only upon a showing of good cause.⁵¹ Similarly, under Rule 26(b)(2)(C), “a party’s right to obtain discovery may be constrained where the court determines that the requesting party has had ample opportunity by discovery to obtain the information sought, or

⁴⁴ Sedona Conference, *Commentary On: Preservation, Management and Identification of Information that are Not Reasonable Accessible* 4, n. 10 (July 2008).

⁴⁵ *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 620 (D. Colo. 2007).

⁴⁶ Am. College of Trial Lawyers & Inst. For the Advancement of the Am. Legal Syst., Final Report 9 (2009).

⁴⁷ *Id.* at 2.

⁴⁸ Report of the Advisory Committee on Civil Rules 4 (May 1998) available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-1998.pdf>.

⁴⁹ *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 619 (D. Colo. 2007).

⁵⁰ ACTL Report at 9.

⁵¹ See Lawyers for Civil Justice et. al., *A Prescription for Stronger Medicine: Narrow the Scope of Discovery* (September 2010), for an expanded discussion of Rule 26(b)(1).

determines that the burden or expense of the proposed discovery outweighs its likely benefit.”⁵² Pursuant to Rule 37(e), a court may not impose sanctions 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.” Notably, neither Rule 26(b)(2)(C) nor Rule 37(e) are precluded by a showing that the evidence at issue is/was relevant to the claims of the party objecting to their application. That is to say, relevant information may be precluded from discovery upon an appropriate showing pursuant to Rule 26(b)(2)(C) and a safe harbor may be available despite the loss of relevant evidence.

Courts have also recognized that discovery is not unlimited, particularly with the rise of electronic discovery, and have specifically acknowledged the need for appropriate limitations on preservation:

First, to hold that a corporation is under a duty to preserve all e-mail potentially relevant to any future litigation would be tantamount to holding that the corporation must preserve all email. This would be especially burdensome where the e-mail system was used primarily for routine communication rather than to convey material significant to antitrust violations. Any corporation the size of defendant (or even much smaller) is going to be frequently involved in numerous types of litigation. . . . Arguably, most e-mails, excluding purely personal communications, could fall under the umbrella of “relevant to potential future litigation. . . .” Thus, it would be necessary for a corporation to basically maintain all of its e-mail. Such a proposition is not justified. . . . With corporations spending enormous amounts of money to preserve business-related and financial data (the information that is really of the most value in determining the issues of this case), they should not be required to preserve every email message at significant additional expense.⁵³

Five years later, Judge Shira Scheindlin echoed the same sentiments:

The question is: What is the scope of the duty to preserve? Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, “no”. Such a rule would cripple large corporations, like UBS, that are almost always involved in litigation.⁵⁴

Most recently, Magistrate Judge Grimm recognized the applicability of limitations of proportionality to all discovery: “Fed. R. Civ. P. 26(b)(2)(C) cautions that all permissible discovery must be measured against the yardstick of proportionality.”⁵⁵ And, the Civil Rules Advisory Committee has recognized the need for a shift in understanding regarding the practical realities of electronic discovery and the necessary limitations on disclosure:

As we continue to adapt to this information age, the notion of having all information on a subject is almost unattainable. We are going to have to move increasingly to a notion that although disclosure must be fair and full, it does not necessarily require that every copy of every document that relates to a particular proposition be introduced. You need only think about the

⁵² *Cache La Poudre Feeds, LLC*, 244 F.R.D. at 619-620.

⁵³ *Concord Boat Corp. v. Brunswick Corp.*, No. LR-C-95-781, 1997 WL 33352759, at *4 (E.D. Ark. 1997).

⁵⁴ *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (2003).

⁵⁵ *Victor Stanley v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2011).

amount of material on every desktop computer in a large corporation to visualize what that entails.⁵⁶

Despite such widespread recognition of limits to allowable discovery, including preservation, the imposition of drastic sanctions for perceived lapses in preservation obligations, particularly since the explosion of electronic discovery, reveals a schism between principles and reality. In recent years, for example, parties have been sanctioned for the failure to preserve ESI, even where the relevance of the lost information is not clear.⁵⁷ Similarly, some courts have held that sanctions must be imposed for certain ministerial failures regardless of the value of information lost, if any.⁵⁸

Without intervention, parties' preservation obligations will only expand. Studies indicate that the volume of digital material created worldwide has grown dramatically in recent years, and shows no signs of slowing down. Within the current preservation paradigm, the growth and evolution of technology will most certainly lead to an expansion of litigants' already burdensome preservation obligations. For example, since the adoption of the electronic discovery rules in 2006 the popularity of social networking sites has exploded, resulting in a wide range of discovery considerations for litigants, including questions surrounding preservation. Steps must be taken now to establish clear and reasonable limits to the obligation of preservation, lest the substance of litigation be subsumed by the procedures.

C. Proposed Rule Regarding the Scope of Preservation

To be effective, any rule addressing preservation and in particular the scope of preservation *must* incorporate considerable specificity, including examples where practicable. A general rule based in the concepts of reasonableness and proportionality would merely serve to codify the current state of the common law and would not answer the myriad concerns expressed by this organization and many others. Echoing the sentiments of Magistrate Judge Francis discussed above, the concepts of reasonableness and proportionality, while “good guiding principles for a court that is considering imposing a preservation order or evaluating the sufficiency of a party’s efforts at preservation after the fact,” are “highly elastic” and “cannot be assumed to create a safe harbor for a party that is obligated to preserve evidence but is not operating under a court-imposed preservation order.” Specificity, on the other hand, would provide much needed clarification to parties subject to the current common law standards of preservation, which can contract and expand dramatically based on different parties’ interpretations and which often result in over-preservation of all potentially relevant evidence—an expensive and burdensome proposition in light of the volumes of data generated in today’s modern age of technology. Accordingly, our proposal is based on the “Category 1 Detailed and Specific Rule Provisions” draft,⁵⁹ because only such specific proposals will address the serious problems of preservation that exist under the current common law.

⁵⁶ Report of the Advisory Committee on Civil Rules 4 (May 1998), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-1998.pdf>.

⁵⁷ See *e.g.*, *Pinstripe Inc. v. Manpower Inc.*, NO. 07-CV-620-GKF-PJC, 2009 WL 2252131, at *4 (N.D. Okla. July 29, 2009) (imposing sanctions despite finding that “[plaintiff] has not established that [defendant] has not recovered emails at issue or that any missing emails are relevant to [plaintiff’s] claims herein.” (Emphasis added.)).

⁵⁸ *Pension Comm. of Univ. of Montreal Pension Plan v. Bank of Am. Secs., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010) (holding that a party’s failure to institute a litigation hold constitutes gross negligence and imposing sanctions).

⁵⁹ “Category 1” contemplates “Preservation Proposals incorporating considerable specificity, including specifics regarding digital data that ordinarily need not be preserved, elaborated with great precision.” All discussion herein of the alternative

Our proposed new Rule 26.1(b) would provide:

(b) Scope of Duty to Preserve. A person whose duty to preserve information has been triggered under Rule 26.1(a) must take reasonable and proportional steps to preserve the information as follows:

- (1) *Subject matter.* The person must preserve any information that is relevant and material to a claim or to a defense to a claim;
- (2) *Sources of information to be preserved.* The duty to preserve information extends to information in the person's possession, custody or control used in the usual course of business or conduct of affairs of the person;
- (3) *Types of information to be preserved.* The duty to preserve information extends to all documents, electronically stored information, or tangible things within Rule 34(a)(1), but a person need not preserve the following categories of electronically stored information, absent an order or agreement based on a showing by the person requesting preservation of substantial need and good cause:
 - (a) deleted, slack, fragmented, or other data only accessible by forensics;
 - (b) random access memory (RAM), temp files, or other ephemeral data that are difficult to preserve without disabling the operating system;
 - (c) on-line access data such as temporary internet files, history, cache, cookies, and the like;
 - (d) data in metadata fields that are frequently updated automatically, such as last-opened dates;
 - (e) information whose retrieval cannot be accomplished without substantial additional programming, or without transforming it into another form before search and retrieval can be achieved;
 - (f) backup data that are substantially duplicative of data that are more accessible elsewhere;

language proposed in *Preservation/Sanctions Issues* refers to Category 1. Categories 2 and 3 are insufficient to address the problems with preservation that have been widely identified by the legal community.

- (g) physically damaged media; or
 - (h) legacy data remaining from obsolete systems that is unintelligible on successor systems.
- (4) **Form for preserving electronically stored information.** A person under a duty to preserve information must preserve that information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. The person need not preserve the same electronically stored information in more than one form.
- (5) **Time frame for preservation of information.** The duty to preserve information is limited to information created during the two years prior to the date the duty arose.
- (6) **Number of key custodians whose information must be preserved.** The duty to preserve information is limited to information under the control of a reasonable number of key custodians of information not to exceed ten.

1. The duty to preserve should extend only to information that is relevant and material to a claim or to a defense to a claim.

* * * * *

Rule 26.1 (b) Scope of Duty to Preserve. A person whose duty to preserve information has been triggered under Rule 26.1(a) must take reasonable and proportional steps to preserve the information as follows:

- (1) **Subject matter.** The person must preserve any information that is relevant and material to a claim or to a defense to a claim;

* * * * *

As discussed above, the right to discovery is not absolute. Despite this fact, the common law currently requires preservation of all potentially relevant evidence upon the trigger of a duty to preserve. This obligation imposes significant burdens on parties to litigation, particularly large organizations or corporations. As has been recently observed, “It is not an exaggeration to say that many lawyers, as well as institutional, organizational, or governmental litigants, view preservation obligations as one of the greatest contributors to the cost of litigation being disproportionately expensive in cases where ESI will play an evidentiary role.”⁶⁰

The notion of limiting the scope of discovery to information relevant to the claims and defenses at issue has garnered widespread support throughout the years.⁶¹ Indeed, the bifurcation of discovery under Rule 26(b)(1) in 2000 was a direct response to many years of calls for limitations to the scope of discovery

⁶⁰ *Victor Stanley v. Creative Pipe, Inc.*, 269 F.R.D. 497, 516 (D. Md. 2011).

⁶¹ See Lawyers for Civil Justice et. al., *A Prescription for Stronger Medicine: Narrow the Scope of Discovery* (September 2010).

and created a presumptive scope of discovery (“party-controlled discovery”) which is directly in line with the proposed scope of preservation. Because preservation is widely acknowledged as a major contributor to the cost of discovery (and where the cost of discovery is widely acknowledged as a major contributor to problems of civil litigation), the curtailment of the scope of the preservation obligation would serve the principle of proportionality to which all discovery is subject and would assist in the just, speedy, and inexpensive administration of the claims at issue, as contemplated by Rule 1.

Under the amended rule (as proposed), the scope of preservation would align with the presumptive scope of discovery under current Rule 26(b)(1) and *require only the preservation of information that is relevant and material to the claims or defenses at issue in the litigation*. This will strike the appropriate balance between the competing considerations of proportionality in discovery and full disclosure (keeping in mind that full disclosure does not require the production of all relevant evidence). It is also consistent with the concept that the information that must be preserved should be that information that is necessary to the conduct of the business or personal affairs of a litigant.

As discussed ~~above and~~ in greater detail in our Supplemental Discovery Comment,⁶² the broad scope of discovery as defined by current Rule 26(b)(1), even after repeated attempts to restrict the burden to parties by the creation of tiered discovery, remains a major contributor to the overwhelming burden of electronic discovery. Accordingly, recognizing the widespread outcry for a reduction in the burden of discovery, particularly with regard to electronic discovery, and the principle of proportionality currently embodied in the first tier of “party-controlled” discovery under Rule 26(b)(1), a meaningful rule would require only the preservation of that which is currently presumptively discoverable. To tie the scope of preservation to the outer reaches of information discoverable under the broad (“limitless”) scope of discovery would merely codify the current and incredibly burdensome common law standards.

Any rule incorporating only vague or general standards would likewise fail to address the concerns of the legal and business communities. Again referencing Judge Francis, the much-championed principles of reasonableness and proportionality offer little guidance to parties making difficult decisions about preservation and have thus far failed to address the burdensome nature of electronic discovery, despite their notable rise in popularity, particularly within the judiciary, when addressing questions of preservation and sanctions.

Finally, while a narrow scope of preservation controlled by a requesting party’s specific demands (Alternative 3) would no doubt lessen the burden of preservation, the difficulty in adjudicating any objections to such a demand, as discussed by the Committee in footnote, presents an insurmountable barrier to the adoption of such a standard.

2. Sources of Information to be Preserved Should Extend to Information Used in the Usual Course of Business or Conduct of Affairs

* * * * *

- (2) *Sources of information to be preserved.* The duty to preserve information extends to information in the person’s possession, custody or control used in the usual course of business or conduct of affairs of the person;

⁶² *Id.*

* * * * *

The duty to preserve should extend only to those sources of information in a person or entity's possession, custody, and control and which are used in the usual course of business or affairs of the person. Requiring preservation of ESI not used in the usual course of business or affairs of the person absent a court order based on sufficient showing of a party's need for information outside of that scope (or agreement of the parties) is unreasonably disruptive and burdensome and, considering the limitations of Rule 26(b)(2)(C) and the underlying principle of proportionality, is not justified where such information is unlikely to be material and relevant to parties' claims or defenses.

The obligations of litigation should not be allowed to unreasonably disrupt parties' usual course of business or daily affairs. Limiting the preservation obligation to sources of information used in the usual course of business or affairs of the person would mitigate the disruption to business while at the same time maintaining the availability of information most likely to be relevant and material to the parties' claims and defenses. Such a limitation would also ensure proportionality in discovery where preservation of information not regularly utilized can result in significant burden and expense, as discussed above. One example is backup tapes used by a company for disaster recovery, which are often intended to be recycled so that the device (e.g. the actual back up tape itself) can be reused. Discontinuing a company's usual recycling schedule can result in significant and disproportional expense where, as in the case of backup tapes, purchasing additional storage media is quite expensive, and serves no active business purpose for the company.⁶³

The preservation of active data which is regularly accessed in the usual course of business or a person's affairs will result in a reasonably limited burden, while at the same time maintaining the availability of that information which is most likely to be subject to a request for production and utilized in litigation. Unfounded concerns that material and relevant information might be contained only in inaccessible or otherwise difficult to access locations should not trump litigants' rights to reasonable and proportional discovery. Businesses run their information systems to remain competitive in the marketplace. Accordingly, concerns that vital information will be hidden outside of the scope of preservation are baseless where such information, in addition to being material and relevant to the claims or defenses of a party, is also likely to be material and relevant to a business' ongoing operations, and thus would be maintained as active data.

Alternative 2 contemplated in *Preservation/Sanctions Issues* at 17, adequately addresses the substantial burdens of current preservation requirements and is substantially similar to the standard we propose above. However, the "reasonably accessible" Alternative 1 proposed at 16, fails to address the substantial burden of disruption to a party's business or personal affairs and thus does not sufficiently incorporate the principle of proportionality. Information subject to preservation under the current paradigm is often retained only for litigation purposes and offers no continuing value to the company (or person). Additionally, the current cost of preservation frequently results in substantial injustice to the

⁶³ For example, during the testimony before the Advisory Committee discussed above, the corporation revealed that in the U.S. alone, 121,000 backup tapes were generated for disaster recovery purposes. Further, the corporation's representative opined that if ordered to "stop all of our backup tapes, just the replacement of backup tapes would cost 1.98 million dollars a month." Such a significant disruption to a party's business affairs cannot be justified. *Benchmark Survey on Prevailing Practices for Legal Holds in Global 1000 Companies* at 14 (GCOC 2008) (citing Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure (testimony of Chuck Beach) (January 28, 2005)) available at: <http://www.gcoc.com/events/benchmarkwebinar>.

preserving party where much of that information is never requested in discovery, let alone used to support a party's claim or defense.

Specific examples of information outside of the scope of preservation, whether addressed under the umbrella of "sources of information to be preserved" or "types of information to be preserved" (as in the proposed rule above) are *critical* to the success of any preservation rule. Concerns related to whether specific examples will remain sufficiently current are unfounded provided the examples incorporated into any preservation rule are merely illustrative and do not assume to identify the only sources of information properly excluded from a party's preservation obligation (an issue easily clarified in any Advisory Committee Notes).

Moreover, fears of the examples' eventual obsolescence are adequately tempered by the current language of Alternative 2 (and the proposed rule above) where such language makes clear that the identified information is merely an example of the type of information properly excluded from preservation. Taking one example, the language of Alternative 2 precludes the obligation to preserve "Random access memory (RAM) or other ephemeral data." Such a provision, while undoubtedly valuable to members of today's legal community will also provide significant and valuable instruction to future lawyers, litigants and judges where it provides an example of what constitutes "other ephemeral data" that is excluded from the preservation obligation. Even if the day comes when RAM is no longer a concern, litigants could make informed decisions about what constitutes "ephemeral data" by analyzing the ephemeral nature of RAM.

(3) Types of information to be preserved.⁶⁴

Absent a showing of good cause or substantial need, the duty to preserve should not extend to sources of information which are generally recognized as inaccessible or which require disproportional efforts to retrieve and produce the information thereon. Information contained on such sources is unlikely to hold evidence that is material and relevant to any party's claims or defenses. Moreover, to the extent such information does exist, it is likely more easily accessed from a less burdensome source because ESI is commonly duplicated, particularly within a large organization or corporation.

⁶⁴ The duty to preserve information extends to all documents, electronically stored information, or tangible things within Rule 34(a)(1), but a person need not preserve the following categories of electronically stored information, absent an order or agreement based on a showing by the person requesting preservation of substantial need and good cause:

- (a) deleted, slack, fragmented, or other data only accessible by forensics;
- (b) random access memory (RAM), temp files, or other ephemeral data that are difficult to preserve without disabling the operating system;
- (c) on-line access data such as temporary internet files, history, cache, cookies, and the like;
- (d) data in metadata fields that are frequently updated automatically, such as last-opened dates;
- (e) information whose retrieval cannot be accomplished without substantial additional programming, or without transforming it into another form before search and retrieval can be achieved;
- (f) backup data that are substantially duplicative of data that are more accessible elsewhere;
- (g) physically damaged media; or
- (h) legacy data remaining from obsolete systems that is unintelligible on successor systems.

Specific examples of the types of information not subject to preservation provide much needed clarification on the proper scope of the preservation obligation. While no rule can successfully identify all types of electronic information which may be subject to a particular standard, specific examples of the types of information outside of the scope of preservation provide concrete benchmarks from which practitioners may draw in making decisions about the scope of preservation in each case. Parties may also use these benchmarks in discussions with opposing counsel when seeking agreement regarding what information will or will not be subject to discovery and thus preservation.

The types of information excluded from preservation pursuant to this rule have previously been recognized by the Seventh Circuit as “not generally discoverable in most cases” in those cases participating in its Electronic Discovery Pilot Program.⁶⁵ A report on the success of the program after the first phase indicated that the rule identifying the excluded information types “appeared to be promoting some of its goals” and that it was “achieving some of its objectives.”⁶⁶

As discussed above specific examples of information outside the presumptive scope of preservation are critical to the success of any rule and can be appropriately included within a discussion of either sources or types of information excluded by the rule.

(4) *Form for preserving electronically stored information.*

* * * * *

A person under a duty to preserve information must preserve that information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. The person need not preserve the same electronically stored information in more than one form.

* * * * *

Information subject to preservation should be maintained for possible production in a form or forms in which the information is ordinarily maintained or in a reasonably usable form or forms but need not be maintained in more than one format. This rule corresponds to the production requirements of Fed. R. Civ. P. 34(b). As with Rule 34, this proposed rule acknowledges the diversity of information likely subject to a party’s preservation obligation and seeks to maintain flexibility and to avoid any unnecessary cost or burden potentially associated with a mandated format of preservation. For example, pursuant to this rule, a party who changes a relevant computer system during the preservation period would not be required to maintain legacy data on the old hardware and software (and bear that expense) so long as it is exported from the legacy system in a reasonably usable format.

⁶⁵ See Seventh Circuit Electronic Discovery Pilot Program Statement of Purpose and Preparation of Principles, Principle 2.04 (Scope of Preservation), at 14 (Oct. 1, 2009) (identifying the following sources of ESI as “generally not discoverable in most cases”: (1) “deleted,” “slack,” “fragmented,” or “unallocated hard drives; (2) random access memory (RAM) or other ephemeral data; (3) on-line access data such as temporary internet files, history, cache, cookies, etc.; data in metadata filed that are frequently updated automatically, such as last-opened dates; and (5) backup data that is substantially duplicative of data that is more accessible elsewhere; (6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.)

⁶⁶ Seventh Circuit Electronic Discovery Pilot Program Report on Phase One 64 (May 2010).

The proposed rule above substantially conforms to the illustrative language provided in Category 1 of *Preservation/Sanctions Issues* at 21 and should be incorporated into any preservation rule.

(5) *Time frame for preservation of information.*

* * * * *

The duty to preserve information is limited to information created during the two years prior to the date the duty arose.

* * * * *

The time frame for preservation of information should be limited to a reasonable but specifically defined time prior to the date the duty arose. Such a limitation would recognize the significant burden of preservation under the common law and instead impose an obligation that is more proportional to the likely value of any information subject to the preservation duty. Presumptive limitations to the scope of discovery have proven successful in the past. Currently, the civil rules impose bright-line limitations on the number of interrogatories and depositions, for example. These limitations have been in place for almost 18 years and have not caused substantial hardship to litigants or prevented parties from establishing their claims. On the contrary, as expressed in *Reshaping the Rules*, “parties have adapted to the presumptive limits” and, “more importantly, they have contributed to at least some streamlining of federal litigation.”⁶⁷ A proposed temporal limitation would likewise serve the interests of justice by essentially codifying the principle of proportionality and in turn reducing the unreasonable burdens of preservation currently imposed under the common law.

As has been established, the percentage of information actually utilized in litigation versus that which is preserved creates an unfair burden on parties in possession of large volumes of ESI, usually large organizations and corporations. Where the volume of information created and saved in the modern age, even when limited for purposes of discovery by subject matter and type, can nonetheless grow to incredible volumes, a bright-line time limitation will serve to bring parties’ preservation obligations more closely in line with the value of the issues at stake in the case without requiring time consuming and costly negotiations or motions. Additionally, a bright line will prevent the inevitable over-preservation of material commonly undertaken to mitigate the threat of sanctions absent more specific guidelines.

Limiting the temporal scope of preservation would also reduce other costs of discovery, including the costs of collection and review. Specifically, limiting the scope of preservation to a reasonable time period will serve to reduce the costs of collections where the information at issue is more likely to be maintained on active systems. A temporal limit on preservation will also serve to limit the volume of ESI subject to processing, which in turn will reduce the volume subject to review—both expensive components of current electronic discovery practices.

Alternative 1 considered in *Preservation/Sanctions Issues* at 21-22 best addresses the problems with preservation that exist in today’s common law paradigm as discussed above. Alternative 2 at 22-23 is less desirable and would do less to relieve the burden of preservation. The primary problem with Alternative 2 is the need for parties to determine, even prior to the filing of litigation, the likely claims

⁶⁷ White Paper at 39.

and defenses in the case before efforts to preserve information can begin. Often, at the time of the trigger of the duty to preserve, there is insufficient information upon which to base such a decision. Such uncertainty would inevitably support a continuation of the current practices of over-preservation where parties unable to definitively rule out the possibility of certain claims and/or defenses (particularly those with longer statutes of limitations) would no doubt err on the side of caution, lest sanctions be imposed for the loss of information.

A direct temporal tie to the statute of limitations of any claim may also encourage plaintiffs to assert claims, at least initially, that are subject to longer statutes of limitations and which would therefore require greater preservation efforts. While such claims might later be withdrawn, the “damage” would already be done.

Finally, Alternative 3 at 24-26 is simply too general and would not serve the purpose of lessening the burden of preservation where “reasonableness” provides too vague a limitation on the scope of preservation and would not substantially change current preservation practices under the common law.

(6) *Number of key custodians whose information must be preserved.*

* * * * *

The duty to preserve information is limited to information under the control of a reasonable number of key custodians of information not to exceed ten.

* * * * *

Limiting the number of custodians subject to preservation will, like the temporal limit, serve to bring parties’ preservation obligations within reasonable bounds. Included in the limitation are both human (custodial) and non-human (informational) sources. The limitation as proposed corresponds to the current limitations on the number of depositions—limitations which, despite initial reticence, are now well-accepted by litigants.

Limitations on the number of custodians subject to preservation addresses problems of cost associated with preservation of duplicative ESI where employees of a corporation working within the same unit or division are likely to maintain substantially identical (if not exactly identical) versions of the same ESI. Thus, it is reasonable to identify a single person through whom key communications were filtered as the single custodian for subject matter related to that group and to thereby obtain the most relevant materials while reducing duplication (and thus cost).

Attempts to limit the number of custodians using principles of reasonableness and proportionality, absent bright lines, will do little to address the problem of the burdens of preservation. As discussed above, vague standards offer little comfort or direction to litigants struggling to make the “right” decisions about preservation, particularly with the ever-present specter of sanctions that has grown with the rise of electronic discovery.

Again, recalling the success of prior limitations to the scope of discovery currently present in the civil rules, a limitation on the number of custodians will serve the interests of justice by ensuring

proportionality in the scope of preservation and by reducing the related burdens of collection, processing, and review.

III. Sanctions Should be Based on Willful Destruction of Relevant and Material Information that Results in Demonstrable Prejudice

1. The Problem

As we have said on many prior occasions, the current paradigm involving preservation and spoliation of ESI is undermining the legal system. Cases are being settled, discontinued or not brought in the first place because the cost of preservation is too high, the risk of spoliation sanctions is too great, and the impact of ancillary discovery disputes is too debilitating.⁶⁸ A particularly troubling abuse is the trend of using spoliation as a litigation tactic.⁶⁹ Parties, seeking to gain a litigation advantage, “have an incentive to request some electronic documents not because they are relevant but rather in hopes of securing a large sanction when the opposing party cannot produce them.”⁷⁰ In light of this new avenue of abuse, it is not surprising that the emergence of electronic discovery “has coincided with a substantial growth in allegations that spoliation has occurred”⁷¹ and that e-discovery sanction cases are at an all-time high.⁷² We understand that the numbers of sanctions cases may not be overwhelming, but the most recent opinion sends legions of lawyers and technicians scurrying to adjust their clients’ preservation practices to the new lowest common denominator.

Sanctions litigation creates new conflicts for both the courts and parties involved. In pursuing these sanctions, parties often engage in “discovery about the discovery,” wasting valuable resources searching for the “absence of evidence,” rather than on the materials relevant to the suit.⁷³ Courts then in turn must expend judicial resources to entertain these motions, often investigating whether parties preserved all of the document based facts in existence.⁷⁴ Parties attempting to avoid costly and time-consuming sanctions litigation spend huge amounts of money and valuable resources over-preserving digital information that may have little or no use in the litigation.⁷⁵ Indeed, as Judge Rosenthal noted recently: “Spoliation of evidence--particularly of electronically stored information--has assumed a level of importance in litigation that raises grave concerns.”⁷⁶

⁶⁸ Preservation Comment at 2.

⁶⁹ See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ELECTRONIC DISCOVERY: A VIEW FROM THE FRONT LINES 21 (2008), available at <http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf>

⁷⁰ John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 563 (2010).

⁷¹ Thomas Y. Allman, *Preservation Rulemaking After the 2010 Litigation Conference*, 11 Sedona Conf. J. 217, 221 (2010).

⁷² Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations by the Numbers*, 60 DUKE L.J. 789, 790-96 (2010)

(“there were more e-discovery sanction cases in 2009 than in all years prior to 2005 combined”).

⁷³ See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 3, at 21.

⁷⁴ In *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, No. 05 Civ. 9016, 2010 WL 184312, at *32 (S.D.N.Y. Jan. 15, 2010), Judge Scheindlin articulated that sanctions motions related to electronic discovery are “very, very time consuming, distracting, and expensive for the parties and the court” and that they “divert court time from other important duties -- namely deciding cases on the merits.” *Id.* at *32, n. 56.

⁷⁵ See Memorandum from Hon. Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Procedure, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of and Procedure 6 (Dec. 6, 2010) (on file with author) (“Uncertainties as to the duty to preserve and fear of spoliation sanctions have generated great concern in large organizations that process huge volumes of information . . . Many voices have proclaimed that uncertainty leads to vastly expensive over-preservation.”).

⁷⁶ *Rinkus*, *supra* n.38 at 607.

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Corporations which are accused of deficiencies in electronic production are typically presumed guilty until they can somehow manage to prove themselves innocent. The burden is squarely placed upon the producing party to show that all requested items have been supplied. Even in large businesses, with thousands of employees sending and receiving electronic messages and other data on an hourly basis, absolute perfection is often required in attempts to preserve, recover and produce millions upon millions of documents. Performance short of perfection is treated as gross negligence or bad faith, resulting in crippling sanctions. Sanctions proceedings under the present rule sometimes seem to resemble the courtroom scene in which the Queen of Hearts asks: "Now then, are you ready for your sentence?" To which Alice replies: "But there has to be a verdict first." The Queen shouts: "Sentence first! Verdict afterwards."

Draconian discovery requirements are unreasonable, and often do not comport with the operating needs of the company involved, or with good business practices. The LCJ recommendations have the aim of restoring a measure of balance and fairness to the discovery procedures under the federal rules. Predictability, rationality, and a lessening of the burden on the courts should result from their adoption.

Moreover, federal courts across the nation have inconsistently imposed sanctions for alleged electronic discovery violations, whether decided pursuant to the federal rules or the court's inherent powers to impose spoliation sanctions. Specifically, courts have varied views with regard to the level of culpability required to impose sanctions.⁷⁷

This inconsistent treatment persists notwithstanding the existence of the current FRCP 37(e), which attempts to provide some protection against sanctions for ESI "lost as a result of the routine, good-faith operation of an electronic information system."

However, Rule 37(e) falls short of creating a "safe harbor" from sanctions for several reasons.⁷⁸ First, "routine, good-faith operation of an electronic information system" is too vague to provide clear guidance as to a party's preservation obligations. Second, Rule 37(e) does not make clear what exceptional circumstances might warrant the imposition of sanctions even when data are lost through the routine, good-faith operation of a computer system. Third, the Rule does not require courts to consider the degree of prejudice resulting from a party's failure to preserve electronic data in determining whether sanctions are warranted. Thus parties abuse the system by making overly broad discovery requests to expose imperfections in preservation efforts as a basis for sanctions that have no valid connection to the merits of the case. Finally, courts have rarely applied the rule in practice."⁷⁹

⁷⁷ Compare *Penalty Kick Mgmt. Ltd. v. Coca Cola Co.*, 318 F.3d 1284, 1294 (11th Cir. 2003) ("[A]n adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith.") (citation omitted), and *Rinkus*, 688 F. Supp 2d at 614 ("the severe sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of 'bad faith'"), with *Pension Comm.*, 2010 U.S. Dist. LEXIS 4546, 2010 WL 184312, at *105 (adverse jury instruction appropriate when defendants demonstrated that plaintiffs conducted discovery in a grossly negligent manner).

⁷⁸ See, Beisner, *supra* note 70, at 591-2

⁷⁹ Willoughby, *supra* note 77, at 826. The authors conducted a comprehensive review of federal written opinions prior to January 1, 2010 involving motions for sanctions. Willoughby, *supra* note 77, at 789. In concluding that courts have not shown a propensity to apply the safe harbor provision of 37(e), the authors observed that:

One court cited the rule at the outset of a case, warning the parties to be cautious in relying on its protection. In another case, the court cited the rule but deferred consideration of sanctions. In twelve decisions, the court denied the safe harbor, with many courts finding that the post-notice destruction of evidence was not within the protection

As we said in our White Paper and Preservation Comment, it is imperative to enact uniform rules that directly address preservation, clearly define “the type of conduct subject to spoliation sanctions,” and focus the inquiry on what information is available, rather than what is missing. With these goals in mind, we propose the following amendments to the Rules regarding sanctions.

2. The Solution - Proposed Rules Regarding Sanctions

Rule 26.1. Duty to Preserve Information.

* * * * *

(e) **Remedies for failure to preserve.** The sole remedy for failure to preserve information is under 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 relevant and material information. The determination of the applicability of this rule to sanctions must be made by the court. The party seeking sanctions bears the burden of proving the following:

- (1) a willful breach of the duty to preserve information has occurred;
- (2) as a result of that breach, the party seeking sanctions has been denied access to specified information, documents or tangible things;
- (3) the party seeking sanctions has been demonstrably prejudiced;
- (4) no alternative source exists for the specified information, documents or tangible things;
- (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;
- (6) the party seeking sanctions promptly sought relief in court after it became aware or should have become aware of the breach of duty.

Proposed rule 37(e) clearly defines the type of conduct subject to sanctions: the “willful destruction” of electronically stored information. Explicitly providing that sanctions are not appropriate in the absence of willful conduct provides much-needed clarity regarding what is and what is not sanctionable conduct. Focusing on the culpability of the actor ensures both that “bad actors” will not benefit from their malfeasance and that “well intentioned parties” will “not be caught up in the attempts by some to cast an

of Rule 37(e). Among these cases, three involved findings of intentional conduct, one involved gross negligence, one involved recklessness, and two involved a failure by the responding party to show good faith. Several courts have also held Rule 37(e) inapplicable to bar sanctions awarded under the court’s inherent power or in cases in which Rule 37 did not govern the conduct giving rise to the sanction. Courts have also declined to apply the rule for other reasons, including that the opposing party had not sought sanctions. Willoughby, *supra* note 77, at 826-27 (quotations and citations omitted).

ever-expanding spoliation net.”⁸⁰ Because electronic information is unique and so easily “created, transmitted and stored,” it becomes a challenge for companies to locate all information that may need to be preserved and “given the large volumes of computer records that now exist in some companies, it may be virtually impossible to preserve all potentially relevant electronic data.”⁸¹

The requirement of a willful state of mind is further “consistent with the nature of sanctions for failure to preserve documents,” which “generally contain some presumption that the lost information would have helped the requesting party or hurt whoever has failed to produce it.”⁸² However, without a finding of willful conduct, “that presumption is unwarranted,”⁸³ as it is not rational to presume that a party who negligently destroys requested information did so because the information was detrimental to their case and helpful to the requesting party. On the other hand, logic does lead to the conclusion that parties who intentionally destroy requested discovery do so because the information is harmful to their claims or defenses. In any event, as discussed below, pursuant to our proposed rule, the party seeking sanctions must prove that they have been “demonstrably prejudiced” by the absence of the requested discovery.

In addition to focusing on the culpability of the actor, the proposed rule emphasizes that “the prejudice to an opponent” and “the usefulness of the evidence that was actually preserved” must be considered when deciding the appropriateness of sanctions. This emphasis, found in sections (3), (4), and (5), aims to preclude a case from being won or lost based on “an alleged lack of preservation of evidence with little or questionable relevance.”⁸⁴ Factor four, which requires that the party seeking sanctions prove that “no alternative source exists for the specified information, documents or tangible things,” refocuses the sanctions analysis on the available information rather than what might be missing. Beginning with an analysis of “the volume and type of existing evidence” will discourage courts from “starting from the premise that it is necessary to examine the actions taken to prevent the alleged destruction of missing evidence.”⁸⁵ As previously outlined, engaging in the latter often results in courts conducting “ancillary litigation over whether enough was done to prevent the loss” of electronically stored information.⁸⁶

3. Consideration of Alternative Rule Exemplars

a. The Need for Specific Rules

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As we said above, we urge the Committee to develop “specific and detailed” preservation rules and, therefore, our focus is on the Category 1 proposals in the *Preservation/Sanctions Issues* memorandum. Therefore, only illustrative rule 37(e) in “Category 1” would in our view come close to adequately addressing sanctions in the digital era.

We believe that any amendments considered must directly address preservation, which in turn will provide guidance regarding the imposition of sanctions. Accordingly, the rule-amendment in Category

⁸⁰ White Paper at 39.

⁸¹ Beisner, *supra* note 70 at 590.

⁸² Richard M. Esenberg, *A Modest Proposal for Human Limitations on Cyberdiscovery* 18 (Marquette Univ. Law Sch., Working Paper Series, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1735122.

⁸³ *Id.* at 18.

⁸⁴ Preservation Comment at 18.

⁸⁵ Preservation Comment at 10 and 5.

⁸⁶ Preservation Comment at 5.

3 is insufficient as it omits two (triggers and scope) of the three major components of a workable preservation rule in favor of relying “entirely on a ‘back end’” sanctions rule. While enacting a “back end” sanctions rule may not create the same “significant rulemaking challenges for a rule that attempts overtly and solely to regulate pre-litigation preservation”, —we believe the Duke Conference and subsequent writings have gone a long way toward ameliorating such concerns.⁸⁷

We also conclude that the more general Category 2 rule will not adequately address the uncertain and inconsistent imposition of sanctions for the same reasons that we believe a rule addressing preservation and in particular the scope of preservation *must* incorporate considerable specificity.⁸⁸

b. Category 1 Exemplar:

**Rule 37. Failure to Make Disclosures
or to Cooperate in Discovery; Sanctions**

* * * * *

(e) **Sanctions for failure to preserve [electronically stored] {discoverable} information.** A court may not impose sanctions [under these rules] on a party for failure to preserve information if the party has complied with Rule 26.1. The following rules apply to a request for sanctions for violation of Rule 26.1:

- (1) **Burden of proof.** The party seeking sanctions has the burden of proving that:
 - (A) a violation of Rule 26.1 has occurred;
 - (B) as a result of that violation, the party seeking sanctions has been denied access to specified electronically stored information, [documents or tangible things];
 - (C) no alternative source exists for the specified electronically stored information [documents or tangible things];
 - (D) the specified electronically stored information [documents or tangible things] would be [relevant under Rule 26(b)(1)] {relevant under Evidence Rule 401} [material] to the claim or defense of the party seeking sanctions;
 - (E) the party seeking sanctions promptly sought relief in court after it became aware of the violation of Rule 26.1.

- (2) **Selection of sanction.** If the party seeking sanctions makes the showings specified in Rule 37(e)(1), the following rules apply to selection of a sanction:
 - (A) the court may employ any sanction listed in Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party’s failure to preserve information, but must select the least severe sanction necessary to redress [undo the harm caused by] the violation of Rule 26.1;
 - (B) [Alternative 1] the court may not impose a sanction listed in Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party’s failure to preserve information unless the

⁸⁷ See generally, Joseph, Barkett, and Allman, all *supra* note 5; White Paper; and Preservation Comment.

⁸⁸ See discussion *supra* at Part II. C.

- party seeking sanctions establishes that the party to be sanctioned violated Rule 26.1 [negligently] {due to gross negligence} [willfully] {in bad faith} [intending to prevent use of the lost information as evidence];
- (B) *[Alternative 2]* the court must not impose a sanction if the party to be sanctioned establishes that it acted in good faith in relation to the violation of Rule 26.1;
 - (C) the court must be guided by proportionality, making the sanction proportional to the harm caused to the party seeking sanctions and the level of culpability of the party to be sanctioned.

Section 37(e)(1)(A)-(E), sets forth many of the requirements on which we based our proposal as both proposals seek to incorporate the “elements of a preservation rule” tendered at the Duke Conference.⁸⁹ Specifically requiring that the party seeking sanctions show that no alternative source exists for the specified ESI and that the specified ESI would be relevant, focuses the sanctions analysis on the relevancy of the information and facilitates courts deciding cases on their merits. These provisions prevent courts and parties from spending time and resources investigating potentially missing discovery, rather than first examining if the missing information is relevant or if it is relevant, if alternative sources of this information exist. As recognized in a footnote to this illustrative rule, “to the extent alternative sources of information (or sources of alternative information) exist, there seems little reason for the sorts of sanctions listed in Rule 37(b)(2)(A).”

The two alternatives set forth in Section 37(e)(2)(B) of the Category 2 exemplar, which discuss the level of culpability required for the imposition of sanctions, will simply not solve the problem. Alternative 1 would authorize a court to impose sanctions on a party who violated the preservation rule on a “sliding scale”: “negligently,” “due to gross negligence,” “willfully,” and “in bad faith.” Alternative 2 places the burden on the party to be sanctioned to prove that “it acted in good faith in relation to the violation” of the preservation rule.

A sanctions rule should clearly set out the principle that sanctions will be imposed only for destruction of relevant and material information for the purpose of preventing its use in litigation which demonstrably prejudiced the party seeking sanctions. If not, certain parties will not be deterred from using spoliation as a litigation tactic. For example, parties attempting to exploit the nature of electronic discovery will still seek overly-broad discovery, with the hope that the responding party will inadvertently lose or fail to preserve a requested item, or already have done so, a scenario that “is almost a certainty in litigation involving electronic discovery.”⁹⁰ Imposing sanctions for different levels of culpability, particularly negligence, fails to account for the unique challenges, and sometimes impossibility, of preserving electronically stored information. Furthermore, Alternative 2’s requirement that the party facing sanctions show that it acted in good faith puts the burden on the wrong party and requires that the preserving party demonstrate that in hindsight it did everything just right. Thus, the inconsistent imposition of sanctions will persist.

⁸⁹ *Elements, op.cit. supra*, n. 1

⁹⁰ See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 3, at 21 (quoting Arthur L. Smith, *Responding to the “E-Discovery Alarm,”* ABA BUSINESS LAW TODAY, Sept./Oct. 2007, at 27-29).

CONCLUSION

LCJ and the many defense trial lawyers and corporate counsel who contributed to the preparation of these comments hope that they will assist the Rules Committee in developing meaningful preservation amendments in each of the three key areas: Triggers, Scope, and Sanctions. Meaningful rule amendments in these areas would supply the guidance necessary to help solve the increasingly serious and costly preservation problems that our members see in everyday litigation.

Respectfully submitted,

Lawyers for Civil Justice

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DRAFT PRESERVATION RULES

N.B.: Material in [brackets] is Comment or alternative language.

Rule 26.1. Duty to Preserve Information.

- (a) **Duty to Preserve Information.** The duty to preserve information relevant and material to civil actions and proceedings in the United States district courts applies only if the facts and circumstances below create the reasonable expectation of the certainty of litigation:
- (1) Service of a complaint or other pleading; or
 - (2) Receipt by the party against whom the claim is made of a written notice of a cognizable claim setting out specific facts supporting the claim [or other reproducible communication indicating an intention to assert a claim]; or [**Comment:** control group test can be explained in Note.]
 - (3) Service of a subpoena, CID, or similar instrument; or
 - (4) Retention of outside counsel, retention of an expert witness or consultant, testing of materials related to a potential claim, discussion of possible compromise of a claim or taking any other action specifically in anticipation of litigation; or
 - (5) Receipt of a written notice or demand to preserve information related to a specifically enumerated notice of a cognizable claim; or
 - (6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, or rule.

APPENDIX i

(b) **Scope of Duty to Preserve.** A person whose duty to preserve information has been triggered under Rule 26.1(a) must take reasonable and proportional steps to preserve the information as follows:

- (1) **Subject matter.** The person must preserve any information that is relevant and material to a claim or to a defense to a claim;
- (2) **Sources of information to be preserved.** The duty to preserve information extends to information in the person's possession, custody or control used in the usual course of business or conduct of affairs of the person;
- (3) **Types of information to be preserved.** The duty to preserve information extends to all documents, electronically stored information, or tangible things within Rule 34(a)(1), but a person need not preserve the following categories of electronically stored information, absent a showing by the person requesting preservation of substantial need and good cause:
 - (a) deleted, slack, fragmented, or other data only accessible by forensics;
 - (b) random access memory (RAM), temp files, or other ephemeral data that are difficult to preserve without disabling the operating system;
 - (c) on-line access data such as temporary internet files, history, cache, cookies, and the like;
 - (d) data in metadata fields that are frequently updated automatically, such as last-opened dates;
 - (e) information whose retrieval cannot be accomplished without substantial additional programming, or without transforming it into another form before search and retrieval can be achieved;
 - (f) backup data that are substantially duplicative of data that are more accessible elsewhere;
 - (g) physically damaged media; or
 - (h) legacy data remaining from obsolete systems that is unintelligible on successor systems.

APPENDIX ii

- (4) ***Form for preserving electronically stored information.*** A person under a duty to preserve information must preserve that information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. The person need not preserve the same electronically stored information in more than one form; [Comment: Note would include discussion of reasonably usable form or forms, including types of ESI that would be preserved and in what format.]
- (5) ***Time frame for preservation of information.*** The duty to preserve information is limited to information created during the two years prior to the date the duty arose.
- (6) ***Number of key custodians whose information must be preserved.*** The duty to preserve information is limited to information under the control of a reasonable number of key custodians of information not to exceed ten.
- (c) **Ongoing duty.** Information subject to preservation must continue to be preserved unless the person subject to the duty to preserve notifies the person requesting preservation (to the extent that a request was submitted) in writing that it is not engaged in ongoing preservation. Later generated information is not subject to preservation except pursuant to written request, court order or agreement. This Rule does not supersede any applicable statute or regulation.
- (d) **Compliance.** Activities undertaken in compliance with the duty to preserve information are protected from disclosure and discovery under Rules 26(b)(3)(A) and (B). [Comment: Does this need to be made more explicit?]
- (e) **Remedies for failure to preserve.** The sole remedy for failure to preserve information is under 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 relevant and material information. The determination of the applicability of this rule to sanctions must be made by the court. The party seeking sanctions bears the burden of proving the following:

- (1) a willful breach of the duty to preserve information has occurred;
- (2) as a result of that breach, the party seeking sanctions has been denied access to specified information, documents or tangible things;
- (3) the party seeking sanctions has been demonstrably prejudiced;
- (4) no alternative source exists for the specified information, documents or tangible things;
- (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;
- (6) the party seeking sanctions promptly sought relief in court after it became aware or should have become aware of the breach of duty.

APPENDIX iv

APPENDIX S
COMMENTS FROM MICROSOFT

August 31, 2011

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, AZ 85003-2146

Re: September 9, 2011 Committee Meeting on Preservation and Sanctions

Dear Judge Campbell:

Microsoft Corporation commends the efforts of the Advisory Committee (and its Discovery Subcommittee) to address the problem of over-preservation in our current system of civil litigation. We understand the Subcommittee will hold a meeting on September 9th in Dallas to gather information about the “real-life dynamics of preservation problems and about whether rules would really provide significant solace for those concerned with these problems.”¹ The Subcommittee, as we understand, will also discuss potential rule-amendments that fall into three general categories: (1) preservation proposals incorporating considerable specificity; (2) preservation rules that address concerns in more general terms; and (3) rule-amendments that address only sanctions.

Microsoft respectfully suggests that rule-amendments of the first type (i.e., that provide specific and detailed guidance, and therefore, *certainty*) are the only effective way to cure the fundamental imbalance in our civil justice system. The purpose of this letter is to share Microsoft’s “real-life” perspective on this issue. We hope it will be helpful to the Committee’s deliberations in Dallas, and thereafter.

I. Microsoft’s Proposed Rule – Amendments

The burden of over-preservation grows heavier by the day. Comprehensive, detailed and explicit standards and limitations will address the problem. Other proposals—such as general standards, or encouragement of increased cooperation and judicial management—will not. Microsoft favors detailed rule-amendments in three key areas—trigger, scope and sanctions. Specifically, Microsoft endorses the proposals set forth in

¹ Report from Subcommittee, following Feb. 20, 2011 meeting, p. 1-2.

the April 1, 2011 Lawyer for Civil Justice Comment, entitled, "Preservation – Moving the Paradigm to Rule Text." This comment argues for:

- Detailed guidelines that establish a trigger for preservation based on a reasonable expectation of the *certainty* of litigation with examples of specific facts that would lead to a determination that this expectation had been established;
- Clear limitations on the scope of preservation, including:
 - (1) Subject matter (only those materials that are *relevant and material to a claim or defense*);
 - (2) sources of information (only materials used in the usual course of business);
 - (3) types of information (categories that are reasonably accessible);
 - (4) form of preserved information (a reasonably usable form);
 - (5) time-frame (information created during two years prior to trigger);
 - (6) number of key custodians (a reasonable number not to exceed 10); and
- A bright-line rule that provides sanctions for spoliation only in the case of "willful destruction" and prejudice to the requesting party.

Our purpose is not to reiterate legal points made in the LCJ comment, nor to argue for rule-changes in the abstract. Rather, in the following pages, we attempt to present "real-life" facts that we believe demonstrate the need for reform.

II. Background – Microsoft as a Company and a Litigant

Microsoft operates throughout the United States, and has representative offices in over 100 countries worldwide. It does business in tremendously dynamic markets, including gaming and entertainment, business productivity software, search, advertising and on-line services, mobile communications and devices, cloud computing and services, servers, and PC operating systems. It releases hundreds of new products across these lines every year.

Microsoft employs a highly educated workforce with backgrounds in engineering, hard sciences and business. Our business culture nurtures innovative thinking, individual creativity, collaboration, adaptation and personal initiative. The typical Microsoft employee changes job duties and business organizations multiple times throughout his or her career to pursue new opportunities within the company. And the typical Microsoft business division reorganizes itself frequently to adapt to the shifting business environment.

Microsoft encourages its employees to use its new technologies to create, develop, market and sell products and services, and to communicate and collaborate with colleagues, partners and customers. The typical Microsoft employee is therefore a heavy user of new technologies and a prolific data generator. This persistent adoption of cutting-edge technology is part of Microsoft's essential DNA, and is critical to its survival and success in a fast-moving industry. Unfortunately, with almost every new and useful

technological advance, conflicting and ambiguous case law on the duty to preserve creates additional burdens. This is a significant drag on innovation and productivity. The law has simply not kept up with the technological changes in our society.

With approximately 90,000 full-time employees and thousands of additional contingent staff who use email and other features of our IT network, Microsoft possesses and/or controls a huge volume of data. Today, for preservation purposes alone, Microsoft *collects*, on average, 17.5 GB from each custodian in litigation (which is equivalent to over 430 banker boxes of documents per custodian). Just three years ago, Microsoft collected only 7 GB from the average custodian. Some of this growth stems from the fact that Microsoft employees store increasing amounts of data in Outlook folders, and some comes from increased use of new technologies—such as smart phones, SharePoint (collaboration software that allows employees to set up Web sites to share information, manage documents, and publish reports), and other social media products.

The average Microsoft employee typically uses or controls multiple SharePoint sites and/or shared file servers, stores a substantial volume of documents on his or her computer hard drives and peripheral drives (including PST files and Word, Excel, PowerPoint, .pdf, and .tif documents), and may also actively create and save instant messages, blog postings, text messages and web content.

Microsoft is typically a defendant in litigation. It also frequently responds to third-party subpoenas—well over 400 per year. Microsoft litigates most of its cases (and at times the vast majority) in the federal courts. The problems outlined in this letter flow exclusively from civil litigation in the United States. While Microsoft also resolves numerous claims in foreign jurisdictions and before arbitration panels, foreign court systems and private arbitration do not present problems with over-preservation.

III. eDiscovery at Microsoft

Given the dynamic and complex nature of its business, Microsoft takes a custodian-based approach to preservation and discovery. This is the only practical approach given frequent corporate reorganizations and internal employee mobility. (This does not include enterprise databases and other systems that are also subject to preservation and collection.)

A. Litigation Holds and Preservation

Based on a current snap-shot, the company currently monitors 14,805 separate custodian legal holds in 329 separate matters. In other words, Microsoft currently places an average of 45 custodians under hold for each matter (or a total of 787.5 GB). This corresponds to nearly 20,000 banker boxes of documents per matter. Thus, the company is effectively preserving several warehouses full of documents at any one point in time. These matters are not just large complex commercial litigation cases, but also include smaller cases, such as single-plaintiff employment cases. Because many of our senior managers and executives remain under legal holds for multiple matters, this translates into 6,732 unique custodians currently under legal hold (or about 12.5% of the company's domestic employees). *Only about one-third of the 14,805 litigation holds at present relate to active litigation.* That means Microsoft preserves the vast majority of material based on some trigger event other than the filing of an actual lawsuit.

Once we believe a duty to preserve has been triggered, Microsoft conducts a reasonable inquiry and delivers a detailed written hold notice to each custodian that is likely to have information relevant to the matter. For reasons discussed below, Microsoft is overly-inclusive when it comes to selecting custodians

and placing them under hold. Microsoft maintains the hold notices in a database, and uses third-party software to track each custodian to ensure that he or she acknowledges receipt and agrees to comply.

At the same time Microsoft issues the hold notice, it activates a retention function at the server-level for each custodian's Exchange mailbox. This preserves in place (i.e. on the Exchange server) all email, calendaring, and archived instant messages that the custodian currently holds in his or her mailbox. (It also results in a substantial increase in the volume of data that must be supported at the server-level.) Depending on the circumstances and their investigation, Microsoft lawyers may also determine that ESI from databases, SharePoint sites, external web-sites, or other sources must also be preserved. The method of preserving such data depends on the needs and circumstances of the case.

B. Collection, Processing, Review, Analysis and Production

When, if ever, the time comes to collect, process, review and produce the data in litigation, Microsoft paralegals collect data from custodians by personally retrieving all relevant hard-copy documents that may have been designated by that custodian for preservation, as well as all of the custodian's email and soft-copy files, excluding non-substantive information such as system files. Paralegals then upload all of this collected data into a dedicated datacenter. This facility currently holds approximately 30 TB of data (or roughly 740,000 banker boxes of documents) related to on-going litigation.

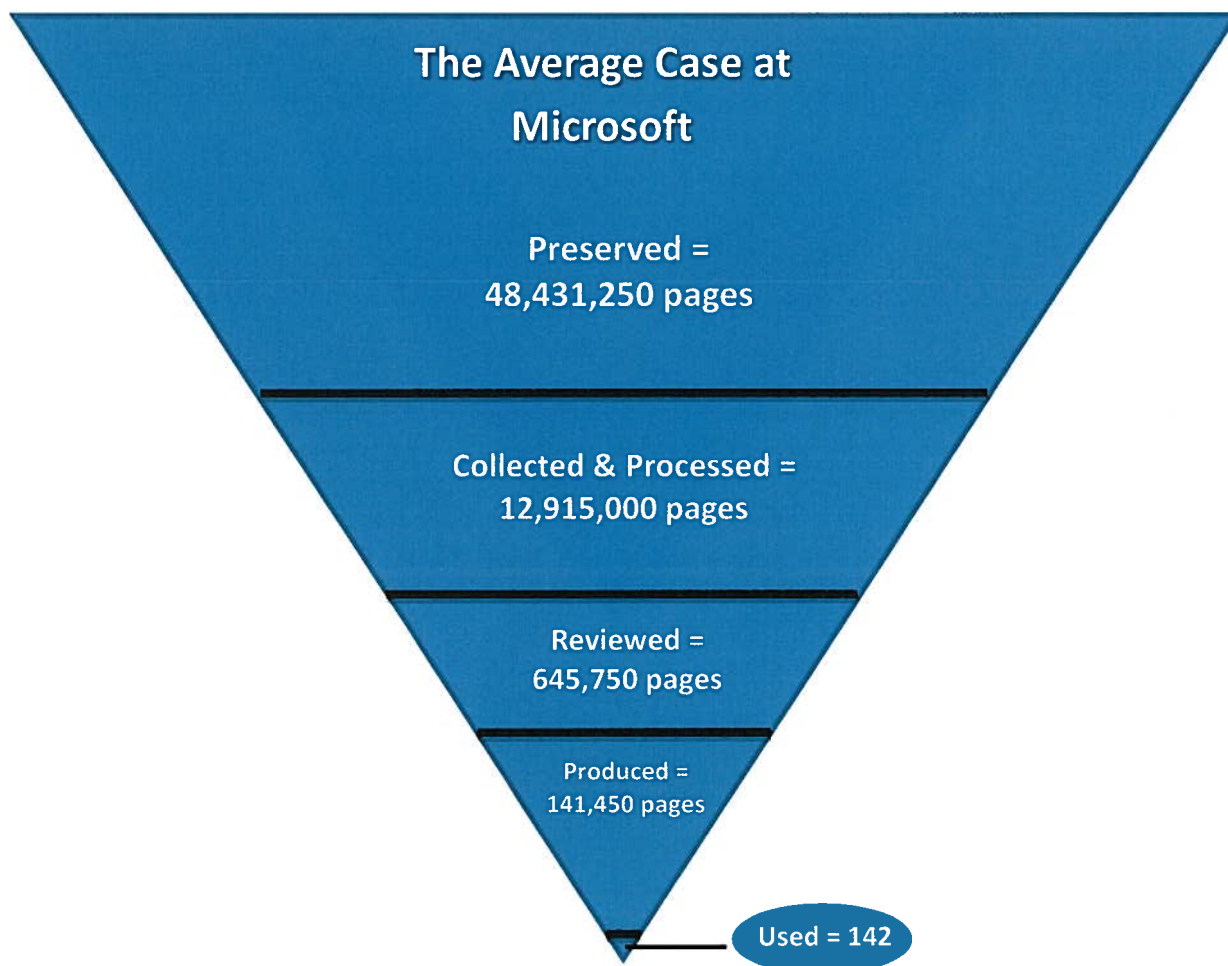
The amount of data stored in this dedicated datacenter greatly understates the *total* volume of documents under preservation at any one time. This is clear for at least two reasons. First, it represents only those materials related to *on-going* litigation matters. As mentioned above, holds for on-going litigation represent less than one-third of Microsoft's existing holds. Second, in the average case, Microsoft actually collects data from only 12 custodians (for a total of 210 GB) rather than from the average of 45 who are initially put under a hold. Even for matters that go to litigation, therefore, the vast majority of custodians who are initially put on hold end up contributing no data to the ultimate production. This variance stems from the conservative approach Microsoft takes at the earliest stages of a matter in order to avoid backward-looking scrutiny regarding the scope of preservation.

After initial collection, the data from the 12 custodians in the average case is further reduced through filtering based on date ranges, search terms, de-duplication, and other data minimization processes. This trims volume, on average, by nearly 95%, to 10.5 GB. Microsoft licenses a third-party solution to accomplish this task. A team of four full-time employees administer the process.

For the average case, the 10.5 GB of filtered data corresponds roughly to 260 banker boxes of documents. Attorneys must manually review and analyze this set to remove privileged material and determine what must be produced in response to relevant discovery requests. Following attorney review, Microsoft produces, on average, 22% (or approximately 2.3 GB) of this filtered set. This corresponds to about 56 banker boxes of documents.

Based on a recent survey conducted by the Searle Center on Law, Regulation, and Economic Growth at Northwestern University, only 1 in 1000 pages produced in discovery is ever actually *used as evidence* to resolve the merits of a case. As described above, the remaining 999 pages are produced at enormous cost—because they are the tip of a very large ice-berg. For every 2.3 MB of data that are actually used in litigation, Microsoft preserves 787.5 GB of data—a ratio of 340,000 to 1.

The following diagram explains these same ratios in terms of the average number of pages preserved, collected, processed, reviewed, produced and used.



IV. The Need for Rule Changes

As the preceding section demonstrates, for each one-page trial exhibit, Microsoft produces an average of 1000 pages, manually reviews more than 4500 pages, collects and processes more than 90,000 pages, and preserves almost 340,000 pages. This, of course, does not capture the total burden. Because most document holds at Microsoft concern matters that have not yet matured (and may never mature) into actual litigation, the ratio of data *preserved* to data *used in litigation* is actually far greater than 340,000 to 1. In short, for the average case, Microsoft preserves an amount of data that is, by any definition, *significantly out of proportion* to the needs of the case.

This costs money. But the hard dollars Microsoft spends on data storage, attorney fees, licensing fees and employee salaries do not reflect the business disruption and full impact on productivity. The average custodian spends many hours trying to understand and comply with his or her obligations. This also typically requires the time and effort of the custodian's management team and legal staff. Although technology has helped Microsoft automate much of the process, a meaningful level of human engagement (and therefore, disruption) can never be avoided. For instance, legal staff will always need to work with custodians to identify and preserve the relevant sources of potentially responsive information.

Additionally, custodians often change jobs and may even leave the company during the pendency of a hold. This also requires disruptive hands-on management to ensure that data is appropriately preserved.

Microsoft's preservation obligations also have a negative impact on the company's ability to implement new systems and technologies. Each new technology or system must be evaluated for its potential impact on the company's preservation obligations. In some cases, legacy systems must be maintained to ensure that no data is lost. In other words, ever-shifting case law can sometimes hamper the implementation of sound business decisions.

Why, then, does the company continue to over-preserve? The causes are deeply rooted in our system.

- First, Microsoft over-preserves because it lacks clear guidance. With preservation standards that are dynamic, uncertain and often opaque, Microsoft must default to the lowest-common-denominator standards articulated by the lowest-common-denominator courts—whether or not the decisions are well-reasoned or informed.
- Second, Microsoft expects that courts will hold it to the highest standards. Like many large, data-rich companies with sophisticated IT systems, Microsoft's motions for protective orders generally fall on deaf ears.
- Third, opposing litigants frequently use the preceding factors for their own tactical advantage. The threat of a spoliation claim—or even the threat of extremely broad discovery or discovery-on-discovery in an attempt to manufacture a spoliation claim—tends to drive up the value of an otherwise weak case. This happens most frequently in employment matters, patent-troll cases, class actions and other asymmetrical cases where the opposing litigant has little or nothing to preserve, and no incentive to be reasonable. The only effective way to combat this tactic is to preserve nearly everything.
- Fourth, Microsoft over-preserves because it is willing to go to great lengths to avoid the risk of motion practice regarding spoliation claims. Under current standards, even negligent conduct can lead to a sanction that may change the outcome of a case and significantly harm the company's reputation. Over-preservation is the only rational response to a system that imposes such high costs for such a low level of culpability.

Microsoft respectfully submits that LCJ's proposed rule-amendments attack head-on these root causes, without compromising the integrity of our civil justice system. In particular, clarity around the trigger should reduce substantially the percentage of Microsoft's holds for non-litigation matters from nearly 70% (of all holds) to something far more reasonable, without any measurable impact on preserving data for the cases that actually go to litigation. Clarity as to the scope of preservation will reduce the number of custodians under hold from an average of 45 to something that is much closer to the 10 or 12 that are actually needed for litigation. Affirmative scope limitations will also reduce the amount of information that must ultimately be preserved and collected from these custodians, because both parties would have a much greater incentive to be selective in negotiating the sources, the search terms, and the other parameters of preservation and collection. Finally, clarity around scope and sanctions would greatly reduce the persistent use of threats of over-broad discovery and spoliation claims. This effective, though utterly wasteful, tactic has nothing to do with the actual merits of claims.


Hon. David G. Campbell

August 29, 2011


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We hope this description of Microsoft's day-to-day experience will assist the Committee in its efforts to restore proportionality and efficiency to our civil justice system. Microsoft would be pleased to take part in further dialogue with the Committee. In particular, one of the undersigned, Jonathan Palmer, intends to attend the Dallas meeting as an observer, and will be available to exchange perspectives before or after the meeting, to the extent it would be helpful.

Sincerely,



David M. Howard
Corporate Vice President, Deputy General Counsel
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Legal & Corporate Affairs – Litigation



Jonathan Palmer
Senior Attorney
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Joe Banks
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cc: Hon. Mark R. Kravitz
Hon. Lee H. Rosenthal
Prof. Edward H. Cooper
Prof. Richard L. Marcus
Mr. Peter McCabe

APPENDIX T
COMMENTS FROM THE NEW YORK STATE BAR ASSOCIATION



INTERIM REPORT
ON PRESERVATION AND SPOILIATION
OF THE
NEW YORK STATE BAR ASSOCIATION'S
SPECIAL COMMITTEE ON DISCOVERY AND
CASE MANAGEMENT IN FEDERAL LITIGATION

JULY 28, 2011



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CASE MANAGEMENT IN FEDERAL LITIGATION**

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* The Special Committee was ably assisted by members of the Federal Procedure Committee of the Commercial and Federal Litigation Section: Stephen T. Roberts, Esq., Mendes & Mount, LLP, NYC, Rachel H. Kim, Esq., Mendes & Mount LLP, NYC, James F. Parver, Esq., Margolis & Tisman LLP, NYC, and Shannon J. Fields, Esq., Kennedy Johnson Gallagher LLC, NYC.

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INTERIM REPORT
ON PRESERVATION AND SPOILIATION
OF THE
NEW YORK STATE BAR ASSOCIATION'S
SPECIAL COMMITTEE ON DISCOVERY AND
CASE MANAGEMENT IN FEDERAL LITIGATION

JULY 28, 2011

This report addresses issues relating to the preservation and spoliation of electronically stored information (“ESI”), documents, and things, including whether changes in the Federal Rules of Civil Procedure are necessary. It provides an overview of current federal case law concerning when and what information is to be preserved, the scope of the duty to preserve, and the elements of a spoliation claim. The second portion of this report discusses proposed Rules and Advisory Committee Notes to provide standards for preservation as well as remedies and sanctions for spoliation.

INTRODUCTION

The New York State Bar Association’s Special Committee on Discovery and Case Management in Federal Litigation (the “Committee”) was formed at the request of then president Stephen P. Younger in the summer of 2010 to study and make recommendations about the perceived burgeoning cost of litigation, largely attributed to discovery, and in particular ESI discovery, and the lengthy delays in concluding actions and proceedings once initiated. The Committee has been examining various topics

relevant to those issues, including the impact of increasing use of electronic communications and electronically stored information, delays in litigation, proportionality, preservation and spoliation, active judicial intervention in case management, the role of magistrate judges, and narrowing issues for trial. The Committee expects to present to the House of Delegates a full report, which will include recommendations for amendments to the Federal Rules of Civil Procedure.

The issues the Committee is addressing are also under consideration by the Civil Rules Advisory Committee of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. The Standing Committee develops proposed amendments to the Federal Rules of Civil Procedure which may eventually be presented to Congress under the Rules Enabling Act of 1934, 28 U.S.C. § 2071, *et seq.* The Civil Rules Advisory Committee is currently studying proposals for federal rules concerning preservation and spoliation. *See* Agenda of the Advisory Committee on Civil Rules, April 4-5, 2011, at 192-271, *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-04.pdf> (“Agenda”). The Advisory Committee’s schedule calls for consideration of proposed rules concerning preservation and spoliation at its November 2011 meeting after a “mini-conference” in September 2011. Accordingly, proposals on preservation and spoliation should be presented to the Civil Rules Advisory Committee by August 2011 at the latest.

The views of the New York State Bar Association, the largest voluntary bar association in the country, and one whose members represent a significant number of parties involved in complex litigation, carry great weight and should be part of the

dialogue on issues such as preservation and spoliation. Therefore, to comply with the schedule of the Civil Rules Advisory Committee and to ensure that the Association will be heard, the Committee has prepared this interim report solely on the subject of preservation and spoliation.¹

Technological developments in data processing and electronic storage have exponentially increased the amount of information available to parties in litigation. Practical realities of business and the expense of maintaining this cache of data militate against indefinite information storage. In the course of business or other activities, ESI is destroyed or compromised through normal and customary document retention/destruction practices. In the past, it was enough to keep paper documents for a set period of time, such as seven years, and off-site facilities could be used for storage. Today, the sheer mass of e-mails and attachments and the capacity of personal computers and networks results in the propagation of enormous amounts of information. This information must be regularly purged or an enterprise may perhaps be overwhelmed.²

The possibility of the loss of such potentially relevant information has led some courts to grapple with preservation and spoliation in an electronic context. Some courts have formulated guidelines to advise parties as to their responsibilities regarding preservation. These guidelines include whether and when a “litigation hold” should be placed on document preservation, how long it should last, what it should encompass, and to whom it should be directed. These cases also address the remedies and sanctions when documents have been lost or destroyed.

¹ This interim report will be incorporated in the Committee’s final report that will address additional issues and make proposals that seek to enhance access to the federal civil justice system, while preventing unnecessary burdens on litigants and the court system.

² In addition, the cost of storage of large volumes of hard-copy documents compels companies to periodically destroy them.

The lack of a federal rule governing preservation complicates the analysis so that courts are often operating within their inherent authority. Consequently, a divergence has arisen in judicial viewpoints analyzing the concepts of preservation and spoliation, particularly in the area of ESI. Amendment of the Federal Rules of Civil Procedure is now necessary to ameliorate this lack of uniformity.

We recommend amending Rules³ 26 and 37 to provide that a duty to take reasonable and proportionate actions to preserve discoverable documents, ESI or things commences (a) for parties or anticipated parties, when they become aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action, and (b) for non-parties, when they receive a subpoena. We propose that the duty require actions that are reasonable under the circumstances to preserve documents, ESI or things discoverable under Rules 26(b) and 34(a) taking into consideration appropriate proportionality factors; that the material be preserved in a form as close to, if not identical to, its original condition, without material loss of accessibility; and that timely preparation, dissemination and maintenance of a reasonable litigation hold should be considered due care, absent exceptional circumstances. Remedies and sanctions should be commensurate with the culpability of the person failing to preserve evidence, the prejudice suffered, and the relevance of the unavailable information or things.

BACKGROUND

A. Historical Overview

“Spoliation” is derived from the Latin “to spoil.” The prohibition against negligent spoliation may be traced to Roman law and Justinian’s maxim *omnipraesumuntur contra spoliatores* (all presumption against the spoliator), Note, *The Spoliation*

³ All references to “Rules” are to the Federal Rules of Civil Procedure unless otherwise noted.

Doctrine and Expert Evidence in Civil Trial, 32 U.B.C. L. Rev. 293, 294-96 (1995); to English cases dating back to the seventeenth century; and to American cases including *The Pizarro*, 15 U.S. (2 Wheat.) 91 (1817), and *Pomeroy v. Benton*, 77 Mo. 64 (1882). See generally Lawrence Solum & Stephen Marzen, *Truth & Uncertainty: Legal Control of the Destruction of Evidence*, 36 Emory L.J. 1085, 1087, n.4 (1987). Early American cases generally required a showing of some level of intent, at times even evil animus or bad faith, before imposing sanctions. See Solum & Marzen at 1088-90. For example, erasing to make corrections or destroying handwritten notes after creating a typewritten document were not spoliation, because the evidence was essentially preserved. See *id.*

Although sanctions have typically been imposed for destruction of evidence after suit has formally begun, some courts have announced rules condemning, or have sanctioned, evidence destruction completed prior to filing of the complaint. The doctrine forbidding [creation] of legal impediments clearly governs obstructive acts committed before suit is filed. The doctrine, which prevents prospective litigants from squirreling away documents into a foreign jurisdiction from whence they cannot be removed, must of necessity govern actions taken before litigation begins. Courts have similarly condemned record-keeping practices – instituted long before any concrete legal action arises – which prevent location of relevant documents in company files. Consistent with these principles, it is not surprising that courts have sanctioned destruction of evidence prior to the filing of a lawsuit when litigation was reasonably foreseeable.

Id. at 1098-1099, nn.58-62, and cases cited therein.

B. Source of the Duty to Preserve

There is as yet no explicit Federal Rule of Civil Procedure concerning preservation in general, although a court can fashion an order to preserve evidence in a particular case. See *Pension Comm. of the Univ. of Montreal Pension Plan v Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010) (“*Pension Comm.*”) (Scheidlin, J.) (“breach of the duty to preserve, and the resulting spoliation of evidence, may result in

the imposition of sanctions by a court because the court has the obligation to ensure that the judicial process is not abused”).⁴

Federal courts have issued sanctions for pre-litigation spoliation under the “inherent authority of the court.” See *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (“the power to sanction for spoliation derives from the inherent power of the court, not substantive law”) (pre-litigation destruction of car alleged to be defectively designed or manufactured); *Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009) (authority to impose sanctions for spoliated evidence arises from a court’s inherent power); Thomas Y. Allman, *Preservation and Spoliation Revisited: Is it Time for Additional Rulemaking?*, 2010 Conf. on Civil Litig., Duke Law School, May 10-11, 2010, at 7, available at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/02E441B3AD64B2D9852576DB005D976D/\\$File/Thomas%20Allman%2C%20Preservation%20and%20Spoliation%20Revisited.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/02E441B3AD64B2D9852576DB005D976D/$File/Thomas%20Allman%2C%20Preservation%20and%20Spoliation%20Revisited.pdf?OpenElement) (“Allman”); John M. Barkett, *Walking the Plank, Looking Over Your Shoulder, Fearing Sharks Are in the Water: E-Discovery in Federal Litigation?*, 2010 Conf. on Civil Litig., Duke Law School, May 10-11, 2010, at 28, n.67, available at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/699991AD4965C1A78525771C0060372C/\\$File/John%20Barkett%2C%20Walking%20the%20Plank.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/699991AD4965C1A78525771C0060372C/$File/John%20Barkett%2C%20Walking%20the%20Plank.pdf?OpenElement) (“*Walking the Plank*”).

⁴ There are numerous municipal and state regulations and laws that address duties to preserve documents in a surprising variety of particularized and technical fields, including alligator parts dealers (Ala. Code § 9-12-207(d) (2010)), transporters of inedible kitchen grease (Cal. Food & Agric. Code § 19313.1); utilities (N.Y. Energy Law § 17.103(2)(a)), and chemical manufacturers (15 U.S.C. § 2607). The proposed amendments to the federal rules would not affect these regulations, and this report does not otherwise address such statutes, codes or regulations.

Some courts have reasoned that the obligation to preserve is owed to the court, rather than litigants. See *Krumwiede v. Brighton Assocs., L.L.C.*, No. 05 C 3003, 2006 WL 1308629 at *11 (N.D. Ill. May 8, 2006) (prejudice to judicial system); *Pension Comm.*, 685 F. Supp. 2d at 461; *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 517. (D. Md. 2010) (“*Victor Stanley*”) (Grimm, M.J.). See also John M. Barkett, *Zubulake Revisited: Pension Committee and the Duty to Preserve*, 2010 Conf. on Civil Litig., Duke Law School, May 10-11, 2010, at 20-24, available at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/C3A77C696C1B3540852576DB005D8764/\\$File/John%20Barkett%2C%20Zubulake%20Revisited.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/C3A77C696C1B3540852576DB005D8764/$File/John%20Barkett%2C%20Zubulake%20Revisited.pdf?OpenElement) (“*Zubulake Revisited*”). Typical of this view is a 1977 opinion from the United States District Court for the Northern District of Indiana:

Although a potential litigant is under no obligation to preserve every document in its possession, whatever its degree of relevance, prior to the commencement of a lawsuit, some duty must be imposed in circumstances such as these lest the fact-finding process in our courts be reduced to a mockery.

Bowmar Inst. Corp. v. Texas Inst. Inc., 25 Fed. R. Serv. 2d (Callaghan) 423, 426-27 (N.D. Ind. 1977) (case citation omitted).

Courts have also relied upon Rule 37 as a source of power to impose sanctions for spoliation arising post-litigation. “[I]f the spoliation violates a specific court order or disrupts the court’s discovery plan, sanctions also may be imposed under Fed. R. Civ. P. 37 [(b) (2)].” *Victor Stanley*, 269 F.R.D. at 517. See also *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106-107 (2d Cir. 2002) (“*Residential Funding*”) (discussing broad discretion to fashion remedies under Rule 37 for violation of a discovery order).

“Whether exercising its inherent power, or acting pursuant to Rule 37, a district court has wide discretion in sanctioning a party for discovery abuses.” *Nycomed US Inc. v. Glenmark Generics Ltd.*, 08-CV-5023 (CBA)(RLM), 2010 U.S. Dist. LEXIS 82014, at *11-12, (E.D.N.Y. Aug. 11, 2010) (some case citations omitted).

C. The Rules Enabling Act

The federal rules, when originally adopted, arguably concerned themselves with conduct after the commencement of litigation on the purported ground that regulation of pre-litigation conduct was outside the Rules Enabling Act.⁵ *See* Allman, at 6; *Walking the Plank*, at 28, n.66. We have found no cases that specifically address whether a rule governing a pre-litigation duty to preserve evidence would run afoul of the Rules Enabling Act. *Cf. Jacobs v. Scribner*, Case No. 1:06-cv-01280-AWI-NEW (DLB) PC, 2007 U.S. Dist. LEXIS 51729 (E.D. Cal. July 5, 2007) (declining to enter a preservation order prior to the appearance of the defendants on the grounds the court lacked jurisdiction to enter such an order as to them).⁶ And, the Civil Rules Advisory Committee was careful in the 2006 amendments to Rule 37 not to make the Rules applicable to pre-litigation conduct. *See* Allman, at 8.

⁵ The Rules Enabling Act, 28 U.S.C. § 2072, provides limits on the rule-making authority delegated to the Supreme Court by Congress. It states: “(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals. (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.”

⁶ Commentator Thomas Y. Allman, who also favors a rule governing a pre-litigation duty to preserve rather than reliance on the inherent authority of the court, finds succor in a Supreme Court decision involving pre-commencement conduct relating to a fraudulent transfer of assets, *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). *See* Thomas Y. Allman, *Addressing Preservation & Spoliation After The Conference on Civil Litigation at Duke Law School*, Mar. 21, 2011, at 11, available at http://www.thesedonaconference.org/conferences/20110407/conference_papers/pdf/Chapter%207%20-%20Addressing%20Preservation%20and%20Spoliation.pdf. However, the *Chambers* decision relied on the inherent authority of the court.

However, there are federal rules that apply to pre-litigation conduct. Rule 27(a) provides for depositions to perpetuate testimony “[b]efore an [a]ction [i]s [f]iled,” albeit on petition to the court with notice to expected adverse parties. Rule 11 imposes a pre-litigation duty to investigate before filing a complaint. Once a complaint is filed, under Rule 11, the court may impose sanctions on an offending party or his attorney, even in the absence of subject matter jurisdiction over the cause of action. *See Willy v. Coastal Corp.*, 503 U.S. 131, 139 (1992) (“[t]he interest in having rules of procedure obeyed, by contrast, does not disappear upon a subsequent determination that the court was without subject matter jurisdiction”). A court has significant discretion in determining what sanctions, if any, should be imposed for a violation of Rule 11 in filing a complaint. *See Perez v. Posse Comitatus*, 373 F.3d 321, 325-26 (2d Cir. 2004); 1993 Advisory Committee Notes to Rule 11 subdivisions (b) and (c).

Were a rule adopted that aimed at a pre-litigation duty to preserve evidence, it would appear to be consistent with the Rules Enabling Act. Indeed, as under Rule 11, the potential violation of such a duty would be tested only once litigation has commenced, and any sanctions or remedies would depend on the particular circumstances.

The regulation of discovery is now clearly considered to be within the scope of the Rules Enabling Act.⁷ Discovery requires not only the collection and production of ESI, documents and things, but also concomitantly their preservation in the first place. Accordingly, a rule concerning the preservation of ESI, documents, and things, even before litigation commences, must be within the scope of rules regulating the disclosure

⁷ *See Sibbach v. Wilson*, 312 U.S. 1 (1940) (determining that Rules 35 (inspection rights) and 37 (sanctions for discovery violations) were constitutional exercises of rule-making power under the Rules Enabling Act and did not abridge or modify substantive rights).

or discovery of those items during litigation. Persons would not be subject to a preservation rule absent some connection to a lawsuit – whether by commencing the action, receiving service of process, or receiving a subpoena in the case of third parties. A pre-litigation failure to preserve could be made sanctionable in a lawsuit only after a consideration of a variety of factors, including a culpable state of mind. Remedies or sanctions could then be narrowly tailored both to deter future conduct and to ameliorate the wrong, if any, committed.

CURRENT STATE OF THE LAW

A. Triggering the Duty

The duty to preserve arises when litigation is reasonably foreseeable or anticipated. See *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001); *O’Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 587-88 (6th Cir. 2009) (remanding to the district court to consider whether it was reasonably foreseeable that missing documents would be needed in future litigation); *Pension Comm.*, 685 F. Supp. 2d at 465, 496 (“pending or reasonably foreseeable litigation”); *Victor Stanley*, 269 F.R.D. at 521 (“reasonably anticipated” litigation); *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 641, 642 (S.D. Tex. 2010) (“*Rimkus*”) (Rosenthal, J.) (“reasonably anticipated” litigation); see also The Sedona Conference, *The Sedona Principles: Second Edition, Best Practices, Recommendations & Principles For Addressing Electronic Document Production*, 70 cmt. 14.a (2007) (“*Sedona Principles*”) (“the common law duty of preservation arises when a party, either plaintiff or defendant, reasonably anticipates litigation”). It has been held that the litigation must be “more than a possibility.”⁸ *Knight*

⁸ One court has rejected a temporal requirement between the destruction of evidence and the commencement of litigation, because to find otherwise would allow a party to destroy evidence so long as

v. Deere & Co., 2:08-cv-01903-GEB-EFB, 2010 U.S. Dist. LEXIS 56736 at *10-11 (E.D. Cal. May 11, 2010) (citing *Realnetworks, Inc., v. DVD Copy Control Ass'n, Inc.*, 264 F.R.D. 517, 524 (N.D. Cal. 2009)).⁹

The standard is not difficult to state; it's application is more problematic. For example, Judge Shira Scheindlin held that the duty to preserve arose four months before the filing of a discrimination claim, because e-mails were marked as privileged attorney-client communications, even though they were not sent to or from an attorney and were not legal in nature. See *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216-17 (S.D.N.Y. 2003) ("*Zubulake IV*"). In *Pension Committee*, Judge Scheindlin again imposed a duty to preserve on certain plaintiffs after two prospective plaintiff groups retained counsel, a bankruptcy had been filed, administrative remedies had been invoked, and some prospective plaintiffs communicated with other parties. *Id.*, 685 F. Supp. 2d at 476.¹⁰

The court in *Aiello v. Kroger Co.*, 2:08-cv-01729-HDM-RSS, 2010 U.S. Dist. LEXIS 97927 (D. Nev. Sept. 1, 2010), held that the filing of an accident report triggered the duty to preserve a surveillance video that may have recorded an accident. *Id.* at *4. However, another court has held that a demand letter does not trigger a duty to preserve,

the action was not commenced within a certain period of time. See *Durham v. Country of Maui*, CIV. NO. 08-00342 JMS/LEK, 2010 U.S. Dist. LEXIS 95219, at *19-20, n.6 (D. Haw. Sept. 10, 2010).

⁹ However, some courts have held that spoliation sanctions require notice that litigation was "imminent." See *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681 (7th Cir. 2008); *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007).

¹⁰ Consulting an attorney may provide guidance in determining whether a duty to preserve exists (if advice is sought regarding rights, then evidence should be preserved as a matter of caution). A letter threatening possible litigation and noting the retention of attorneys was sufficient to trigger a duty, even though litigation was not commenced until three years later. See *Goodman v. Praxair Services Inc.*, 632 F. Supp. 2d 494, 504, 511 (D. Md. 2009). It is less clear that a duty should be imposed on a party not planning to litigate, but who is similarly situated to others who are in litigation. See *Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1194 (D. Utah 2009) (company held to have violated its duty to preserve by not placing a hold on documents five years earlier when it learned that other companies in its industry were being sued).

if the letter does not actually threaten litigation or demand preservation. *See Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 623 (D. Colo. 2007).

Gregory P. Joseph has criticized the reasonably-anticipates-litigation standard as “nebulous, creat[ing] uncertainty, [and] impos[ing] needless costs.” Gregory P. Joseph, *Electronic Discovery and Other Problems*, 2010 Conf. on Civil Litig., Duke Law School, May 2010, at 8, available at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/EE0CC8AFE81F5D90852576480045504B/\\$File/Gregory%20P.%20Joseph%2C%20Electronic%20Discovery%20and%20Other%20Problems.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/EE0CC8AFE81F5D90852576480045504B/$File/Gregory%20P.%20Joseph%2C%20Electronic%20Discovery%20and%20Other%20Problems.pdf?OpenElement) (“Joseph”). He proposes instead that a rule specify the following triggers for an obligation to preserve information: (i) receiving a written notice to preserve; [ii] preparing an incident report or other steps taken in the ordinary course of business in anticipation of potential litigation; [iii] notifying an insurance company or indemnitor of a potential liability; [iv] hiring an investigator or photographer; [v] retaining or instructing counsel; [vi] engaging experts; [vii] breaching a contractual, regulatory or statutory duty to preserve or produce specific data; [viii] issuing an oral or written notice to preserve, or taking steps to draft one; [ix] filing a complaint with a regulator; [x] sending a pre[-]litigation notice that is prerequisite to filing suit or advising that litigation is contemplated; [or] [xi] conducting destructive testing.”¹¹ *Id.* at 8.

¹¹ The Civil Rules Advisory Committee has suggested that the following list of events would lead a reasonable person to conclude that he or she could expect to be a party to an action: (1) service of a pleading or other document asserting a claim; (2) receipt of a notice of claim or other communication – whether formal or informal – indicating an intention to assert a claim; (3) service of a subpoena or similar demand for information; (4) retention of counsel, retention of an expert witness or consultant, testing of materials, discussion of a possible compromise of a claim, or taking any other action in anticipation of litigation; (5) receipt by a person of a notice or demand to preserve discoverable information; or (6) the occurrence of an event that results in a duty to preserve information under a statute, regulation, or contract,

Applying a general standard incorporated in a rule may be difficult and result in some inconsistencies, but the alternative of incorporating a laundry list of triggering events is too limited and inflexible and may create loopholes. See *Victor Stanley*, 269 F.R.D. at 522 (“the duty to preserve evidence should not be analyzed in absolute terms; it requires nuance, because the duty ‘cannot be defined with precision’”) (citations omitted). Thus, the better approach is to provide examples in Advisory Committee Notes to a general standard stated in a rule.

B. Relevance

The information to be preserved is that which is “relevant to litigation or . . . future litigation,” *Fujitsu*, 247 F.3d at 436, and within a party’s possession, custody or control, *Residential Funding*, 306 F.3d at 107. Relevance for purposes of preservation may have a different meaning than relevance in the context of evidence admissible at trial or even in determining a remedy or sanction for spoliation.

At minimum, relevance in the preservation context includes information or things “relevant to any party’s claim or defense,” Rule 26(b)(1), *Victor Stanley*, 269 F.R.D. at 531 (quoting *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 219 F.R.D. 93, 101 (D. Md. 2003)) (“if ‘a reasonable trier of fact could conclude that the lost evidence would have supported the claims or defenses of the party that sought it’”). But, it also might include information or things “relevant to the subject matter involved in the action,” Rule 26(b)(1); *Zubulake IV*, 220 F.R.D. at 218; *Victor Stanley*, 269 F.R.D. at 522; or even information or things “reasonably calculated to lead to the discovery of admissible evidence,” Rule 26(b)(1).

or (7) knowledge of an event that calls for preservation under a person’s own retention program. Agenda, at 198-99.

Until a more precise definition [of relevance] is created by rule, a party is well-advised to “retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches.” *Zubulake IV*, 220 F.R.D. at 218. In this respect, “relevance” means relevance for purposes of discovery, which is “an extremely broad concept.” *Condit v. Dunne*, 225 F.R.D. 100, 105 (S.D.N.Y. 2004). . . . “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1).

Orbit One Commc'ns, Inc. v. Numerex Corp., 08 Civ. 0905 (LAK)(JCF), 08 Civ. 6233 (LAK)(JCF), 08 Civ. 11195 (LAK)(JCF), 2010 U.S. Dist. LEXIS 123633, at *20-21 (S.D.N.Y. Oct. 26, 2010) (some case citations omitted) (Francis, M.J.).

C. Scope of the Duty

A district court recently expressed the basic obligation of parties to preserve and produce documents relating to a claim, and the consequences that flow from a failure to observe that obligation: “Courts cannot and do not expect that any party can meet a standard of perfection. Nonetheless, the courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party. . . . [W]hen this does not happen, the integrity of the judicial process is harmed and the courts are required to fashion a remedy. . . . By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records – paper or electronic – and to search in the right places for those records, will inevitably result in the spoliation of evidence.”

Webb v. CBS Broad., Inc., Case No. 08 C 6241, 2010 U.S. Dist. LEXIS 51242, at *15-16 (N.D. Ill. May 25, 2010) (quoting *Pension Comm.*, 685 F. Supp. 2d. at 461-62) (some citations omitted).

The person with a duty to preserve must act reasonably in the circumstances. *Victor Stanley*, 269 F.R.D. at 522. “The duty to preserve evidence ‘includes an obligation to identify, locate, and maintain[] information that is relevant to specific, predictable, and identifiable litigation.’” *Id.* (quoting The Sedona Conference, *The*

Sedona Conference Commentary on Legal Holds: The Trigger and the Process 3 (public cmt. ed. Aug. 2007), available at http://www.thesedonaconference.org/content/miscFiles/Legal_holds.pdf (“*Sedona Conf. on Legal Holds*”). See *Tango Transp., LLC v. Transp. Int’l Pool, Inc.*, Civ. A. No. 5:08-CV-0559, 2009 WL 3254882, at *3 (W.D. La. Oct. 8, 2009) (the scope of a party’s duty to preserve potentially relevant evidence includes evidence in possession of “employees likely to have relevant information, *i.e.*, ‘the key players’”). “The action must be ‘reasonably calculated to ensure that relevant materials will be preserved,’ such as giving out specific criteria on what should or should not be saved for litigation.” *Victor Stanley*, 269 F.R.D. at 525 (quoting *Jones v. Bremen High Sch. Dist.* 228, No. 08 C 3548, 2010 WL 2106640, at *6 (N.D. Ill. May 25, 2010) (quoting *Danis v. USN Commc’ns, Inc.*, No. 98 C 7482, 2000 WL 1694325, at *38 (N.D. Ill. 2000))).

According to Judge Scheindlin, acting reasonably requires (i) prohibiting the destruction of information, (ii) taking steps to collect and review it, and (iii) monitoring those steps. *Pension Comm.*, 685 F. Supp. 2d at 465. (S.D.N.Y. 2010); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (“*Zubulake V*”) (Scheindlin, J.). Prohibiting the destruction of information may include issuance of a written litigation hold notice to all persons who possess relevant information, *Pension Comm.*, 685 F. Supp. 2d at 465; *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 194 (S.D.N.Y. 2007); *Zubulake IV*, 220 F.R.D. at 217-18, and suspension of a routine document retention/destruction policy, *Zubulake IV*, 220 F.R.D. at 218; *In re Kessler*, No. 05 CV 6056 (SJF)(AKT), 2009 WL 2603104 (E.D.N.Y. Mar. 27, 2009). See *Victor Stanley*, 269 F.R.D. at 524. In other words, prohibiting destruction of information may require a party

“to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party’s possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.” *Pension Comm.*, 685 F. Supp. 2d at 471.

A litigation hold should “direct employees to *preserve* all relevant records – both paper and electronic” – and “create a mechanism for *collecting* the preserved records so that they can be searched by someone other than the employee.” *Pension Comm.*, 685 F. Supp. 2d at 473 (original emphasis). However, “a litigation hold might not be necessary under certain circumstances,” *Victor Stanley*, 269 F.R.D. at 524 (citing *Jones*, 2010 WL 2106640, at *7), such as, for example, when “all sources of likely relevant information are subject to permanent retention pursuant to the organization’s record retention policy” or “all sources of the information can be immediately secured without requiring preservation actions by employees,” *Sedona Conf. on Legal Holds*, at 15.

A litigation hold should generally take the form of a written notice to be distributed to the client, or, where the client is an organization, to any employees who may be in possession of relevant information. *See, e.g., Haynes v. Dart*, Civ. A. No. 08 C 4834, 2010 WL 140387, at *4 (N.D. Ill. Jan.11, 2010) (failure to issue a written notice is at least “relevant” to consideration of sanctions for spoliation of evidence). It should inform the recipient, among other things, as to what information is potentially relevant to the lawsuit. *See, e.g., Chan v. Triple 8 Palace, Inc.*, No. 03 CIV 6048 (GEL) (JCF), 2005 WL 1925579, at *6 (S.D.N.Y. Aug. 11, 2005). The notice should “describe the litigation

in a way that will be understood by everyone with responsibility for preserving documents,” and should “provide specific examples of the types of information” that should be preserved. *See Sedona Conf. on Legal Holds*, at 14-15. A written litigation hold should also “identify potential *sources* of information” (emphasis added) and give “detailed instructions” explaining what each recipient must do in order to ensure that no sources of information are overlooked. *Id.*, at 15; *cf. Orbit One*, 2010 WL 4615547, at *12 (instructions to employees were not sufficiently “detailed” to communicate preservation duties). Moreover, a proper litigation hold should advise the client against “downgrading [potentially relevant] data to a less accessible form – which systematically hinders future discovery by making the recovery of the information more costly and burdensome.” *Treppel v. Biovail Corp.*, 233 F.R.D. 363, n.4 (S.D.N.Y. 2006).

“Although it is well established that there is no obligation to “‘preserve every shred of paper, every e-mail or electronic document, and every backup tape,’” *Consol. Edison Co. of N.Y., Inc. v. United States*, 90 Fed. Cl. 228, 256 (Fed. Cl. 2009) (quoting *Zubulake IV*, 220 F.R.D. at 217), in some circumstances, ‘[t]he general duty to preserve may also include deleted data, data in slack spaces, backup tapes, legacy systems, and metadata.’ [Paul W.] Grimm, [Michael D. Berman, Conor R. Crowley, Leslie Wharton, *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*,] 37 U. Balt. L. Rev. [381,] 410 [(2008)] (emphasis added).” *Victor Stanley*, 269 F.R.D. at 524. “[A] litigant could choose to retain 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 to catalog any later-created documents in a separate electronic file. That, along with a mirror-image of the computer system taken at

the time the duty to preserve attaches (to preserve documents in the state they existed at that time), creates a complete set of relevant documents.” *Id.* (quoting *Zubulake IV*, 220 F.R.D. at 218).¹²

Reasonableness and proportionality are surely good guiding principles for a court that is considering imposing a preservation order or evaluating the sufficiency of a party’s efforts of preservation after the fact. Because those concepts are highly elastic, however, they cannot be assumed to create a safe harbor for a party that is obligated to preserve evidence but is not operating under a court-imposed preservation order. Proportionality is particularly tricky in the context of preservation. It seems unlikely, for example, that a court would excuse the destruction of evidence merely because the monetary value of anticipated litigation was low.

Orbit One, 2010 WL 4615547, at *20, n.10. The *Orbit One* court concluded, “Although some cases have suggested that the definition of what must be preserved should be guided by principles of ‘reasonableness and proportionality,’ *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010); see *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010), this standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle.” *Orbit One*, 2010 U.S. Dist. LEXIS 123633, at *20 (some citations omitted).

¹² The Civil Rules Advisory Committee has suggested excluding specific categories of electronic data from any preservation obligation, such as deleted, slack, fragmented or unallocated data on hard drives, RAM, and legacy media. Agenda, at 202-03. See *Columbia Pictures Indus. v. Fung*, Case No. CV 06-5578 SVW (JCx), 2007 U.S. Dist. LEXIS 97576, at *39 (C.D. Cal. June 8, 2007) (holding that, while data passing through RAM and written only to temporary files constitutes ESI under Rule 34, failure to preserve such evidence would not be sanctioned, although the service log data was to be preserved); cf. *Arista Records LLC v. Usenet.com., Inc.*, 608 F. Supp. 2d 409, 432 (S.D.N.Y. 2009) (discussing case law on duty to preserve transient data absent specific request for same).

We reject the approach of excluding specific categories of ESI. Such a list may well become obsolete in the near future for technical or other reasons. Given the lead time necessary to change a federal rule, a more general standard of preservation seems better. For example, metadata has become an increasingly useful tool for searching or culling ESI, rather than merely an evidentiary requirement in relatively rare cases. See *Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep’t of Homeland Sec.*, 255 F.R.D. 350, 356 (S.D.N.Y. 2008) (noting that the *Sedona Principles* rejected the Sedona Conference’s statement of only two years earlier that there should be a modest legal presumption against the production of metadata).

A party subject to a duty to preserve must preserve the information in its possession, custody or control. *See Canton v. Kmart Corp.*, No. 1:05-cv-143, 2009 WL 2058908, at *2 (D.V.I. July 13, 2009) (quoting *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 334 (3d Cir. 1995)); *Velez v. Marriott PR Mgmt., Inc.*, 590 F. Supp. 2d 235, 258 (D.P.R. 2008); *Nat'l Grange Mut. Ins. Co. v. Hearth & Home, Inc.*, Civ. A. No. 2:06CV54WCO, 2006 WL 5157694, at *5 (N.D. Ga. Dec. 19, 2006). “[D]ocuments are considered to be under a party’s control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action,” according to district courts in the Second and Fourth Circuits. *Victor Stanley*, 269 F.R.D. at 523 (quoting *Goodman*, 632 F. Supp. 2d at 515 (quoting *In re NTL Inc. Sec. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007))). Moreover, according to district courts in the First, Fourth and Sixth Circuits, there is “a [further] duty to notify the opposing party of evidence in the hands of third parties.” *Victor Stanley*, 269 F.R.D. at 523 (citing *Silvestri*, 271 F.3d at 590); *Velez*, 590 F. Supp. at 258; and *Jain v. Memphis Shelby Airport Auth.*, No. 08-2119-STA-dkv, 2010 WL 711328, at *2 (W.D. Tenn. Feb. 25, 2010)); *see also Jordan F. Miller Corp. v. Mid-Continent Aircraft Serv.*, 139 F.3d 912, 1998 WL 68879, at *5-6 (10th Cir. 1998) (if a party relinquishes ownership or custody of potentially relevant evidence, it must contact the new custodian to preserve the evidence). However, “district courts in the Third, Fifth, and Ninth Circuits have held that the preservation duty exists only when the party controls the evidence, without extending that duty to evidence controlled by third parties.” *Victor Stanley*, 269 F.R.D. at 523 (citing *Bensel v. Allied Pilots Ass’n*, 263 F.R.D. 150, 152 (D.N.J. 2009); *Rimkus*, 688

F. Supp. 2d at 615-16; *Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2010 WL 582189, at *4 (D. Ariz. Feb. 12, 2010)).¹³

“The preservation obligation runs first to counsel, who has ‘a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing the destruction.’ Where the client is a business, its managers, in turn, are responsible for conveying to the employees the requirements for preserving evidence.” *In re NTL, Inc. Secs. Litig.*, 244 F.R.D. 179, 197-98 (S.D.N.Y. 2007) (quoting *Chan*, 2005 WL 1925579, at *6). “[I]t is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information.” *Zubulake V*, 229 F.R.D. at 432. Counsel’s duties, in designing a litigation hold, also include directly “communicating with the ‘key players’ in the litigation, in order to understand how they stored information,” thereby ensuring that such information is included in the documents being preserved. *Id.*; see also *Pension Comm.*, 685 F. Supp. 2d at 465 (“the failure to collect records – either paper or electronic – from key players constitutes gross negligence or willfulness”). “To the extent that it may not be feasible for counsel to speak with every key player, given the size of a company or the scope of the lawsuit,” it may be sufficient to perform “a system-wide keyword search” of the client’s electronically stored information, and then to preserve “a copy of each ‘hit’”

¹³ *But see Columbia Pictures*, 2007 U.S. Dist. LEXIS 97576, at *38-39 (a litigant is under a duty to preserve what it knows or reasonably should know, is relevant in the action, is reasonably calculated to lead to discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request).

One commentator has argued that, because ESI may be stored on non-party servers, discovery of these non-parties should proceed by way of subpoena under Rule 45, rather than by making a demand on a party under Rule 26 and then requiring the party to demand the information from the non-party, under the theory that such ESI is under the party’s custody and control. It is argued that courts could better consider the burdens of non-parties in the context of the motion to compel compliance with a subpoena. See Comment: Jurisdictional, Procedural, and Economic Considerations for Non-Party Electronic Discovery, 59 Emory L.J. 1339, 1361-1362 (2010).

located by the search. *Zubulake V*, 229 F.R.D. at 432. In addition, counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.” *Id.* “To do this, counsel must become fully familiar with her client’s document retention policies, as well as the client’s data retention architecture.”¹⁴ *Id.*

Thus, when an allegation of a breach of the duty of preservation leading to spoliation arises, the protections of the attorney-client privilege and attorney work-product doctrine are implicated. For the purposes of determining any sanctions, a tension exists between the protections and the need to ascertain the actions taken in furtherance of the preservation duty. *See Pension Comm.*, 685 F. Supp. 2d at 477 (no protection for “[w]hich files were searched, how the search was conducted, who was asked to search, what they were told, and the extent of any supervision”).¹⁵

Counsel should also ensure that the evidence is preserved in its original form, or as close as possible. “The reviewing court, as well as the parties, should be focused upon maintaining the integrity of the evidence in a form as close to, if not identical to, the original condition of the evidence.” *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 435 (W.D. Pa. 2004). For ESI, absent agreement, this may

¹⁴ One court has suggested that the duty to preserve evidence is discharged once the documents are produced. *See Ferron v. Echostar Satellite, LLC*, 2010 Fed. App. 0793 N (6th Cir. Dec. 28, 2010) (when party produced ESI in original form on CD, no continuing obligation to maintain documents).

¹⁵ Guidelines from *The Sedona Conf. on Legal Holds*, at 15, suggest that sufficient documentation of a litigation hold may avoid disclosing attorney work product and still be sufficient to demonstrate that adequate care was taken to preserve documents, so long as it includes:

- 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;
- notices and reminders sent, confirmations of compliance received (if any), and handling of exceptions;
- a description as to the collection protocol, persons contacted, and the date information was collected; and
- a master list of custodians and systems involved in the preservation effort.

require preserving the evidence in native format and making it available to the requesting party with no loss in the level of accessibility of the document.

Case law has developed guidelines for what the preservation duty entails. Unfortunately, in terms of what a party must do to preserve potentially relevant evidence, case law is not consistent across the circuits, or even within individual districts. This is what causes such concern and anxiety, particularly to institutional clients such as corporations, businesses or governments, because their activities – and vulnerability to being sued – often extend to multiple jurisdictions, yet they cannot look to any single standard to measure the appropriateness of their preservation activities, or their exposure or potential liability for failure to fulfill their preservation duties. A national corporation cannot have a different preservation policy for each federal circuit and state in which it operates. How then do such corporations develop preservation policies? The only “safe” way to do so is to design one that complies with the most demanding requirements of the toughest court to have spoken on the issue, despite the fact that the highest standard may impose burdens and expenses that are far greater than what is required in most other jurisdictions in which they do business or conduct activities.

Victor Stanley, 269 F.R.D. at 523. A uniform federal rule regarding the preservation duty is required, especially in this age of electronically stored information.

ELEMENTS OF A SPOILIATION CLAIM

The elements of a claim for spoliation are:

(1) that the party having control over the evidence had an obligation to timely produce it; (2) that the party that failed to produce the evidence had a culpable state of mind; and (3) that the missing evidence is relevant to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Residential Funding, 306 F.3d at 107; accord *Victor Stanley*, 269 F.R.D. at 520-21 (quoting *Goodman*, 632 F. Supp. 2d at 509 (quoting *Thompson*, 219 F.R.D. at 101)); *Rimkus*, 688 F. Supp. 2d at 615-16; *Jones*, 2010 WL 2106640, at *5; *Melendres*, 2010 WL 582189, at *4; *In re Global Technovations, Inc.*, 431 B.R. 739, 778 (Bankr. E.D. Mich. 2010). In other words, the elements for a claim of spoliation are: (1) a duty to

preserve, (2) breach of the duty to preserve, (3) a culpable state of mind, (4) the loss of relevant information, and (5) prejudice.

A. Relevant Information

To determine an appropriate remedy or sanction for spoliation (as opposed to relevance for purposes of preservation), “[e]vidence is relevant if it would have clarified a fact at issue in the trial and otherwise would naturally have been introduced into evidence.” *Pension Comm.*, 685 F. Supp. 2d at 496. There must be a showing that “the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction.” *Residential Funding*, 306 F.3d at 109 (quoting *Kronisch v. United States*, 150 F.3d 112, 127 (2d Cir. 1998)). “[T]he concept of ‘relevance’ encompasses not only the ordinary meaning of the term, but also that the destroyed evidence would have been favorable to the movant.” *Zubulake V*, 229 F.R.D. at 431. It must be “more than sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence,” *Residential Funding Corp.*, 306 F.3d at 108-09; *Victor Stanley*, 269 F.R.D. at 531 (quoting *Pension Comm.*, 685 F. Supp. 2d at 467).

B. Prejudice

Prejudice “can range along a continuum from an inability to prove claims or defenses to little or no impact on the presentation of proof.” *Rimkus*, 688 F. Supp. 2d at 613.

Spoliation of evidence causes prejudice when, as a result of the spoliation, the party claiming spoliation cannot present “evidence essential to its underlying claim.” *Krumwiede v. Brighton Assocs., L.L.C.*, No. 05-C-3003, 2006 WL 1308629, at *10 (N.D. Ill. May 8, 2006) (noting that even if the files were only modified and not deleted, ‘the changes to the file metadata call the authenticity of the files and their content into question and make it impossible for [the defendant] to rely on them’). . . . Generally, courts find prejudice where a party’s ability to present its case

or to defend is compromised. . . . [A]t least one court has found that the delayed production of evidence causes prejudice. See *Jones*, 2010 WL 2106640, at *8-9 . . . Th[is] court considers “prejudice to the judicial system.” *Krumweide*, 2006 WL 1308629, at *11.

Victor Stanley, 269 F.R.D. at 532. See *Rimkus*, 688 F. Supp. 2d at 613 (prejudice occurs when spoliation substantially denies a party the ability to support or defend its claim); *Henry v. Gill Indus.*, 983 F.2d 943, 948 (9th Cir. 1993) (same); *Pension Comm.*, 685 F. Supp. 2d at 479 (same); *Jain*, 2010 WL 711328, at *4 (same); *Goodman*, 632 F. Supp. 2d at 519 (same); *Velez*, 590 F. Supp. 2d at 259 (same); *Jones*, 2010 WL 2106640, at *8-9 (prejudice occurs when spoliation substantially denies a party the ability to support or defend its claim or delays production of evidence); see also *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 268 (8th Cir. 1993) (prejudice occurs when evidence is destroyed that may have been helpful); *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, Case No. 09-60351-CIV, 2010 WL 3368654, at *8 (S.D. Fla. Aug. 23, 2010) (prejudice occurs from spoliation of evidence crucial to a claim or defense); *Pinstripe, Inc. v. Manpower, Inc.*, No. 07-CV-620-GKF-PJC, 2009 WL 2252131, at *2 (N.D. Okla. July 29, 2009) (prejudice arises from spoliation that impairs a party’s ability to support a claim or defense).

C. Rebuttable Presumptions

Since “[c]ourts must take care not to ‘hold[] the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed [or unavailable] evidence,’ because doing so ‘would . . . allow parties who have . . . destroyed evidence to profit from that destruction,’” *Pension Comm.*, 685 F. Supp. 2d at 468, 479 n.96 (quoting *Residential Funding*, 306 F.3d at 109 (quoting *Kronisch*, 150 F.3d at 128)), some courts employ presumptions for relevance and prejudice.

When a spoliator acts willfully, relevance of evidence or prejudice may be presumed. See *Victor Stanley*, 269 F.R.D. at 532 (relevance); *Sampson*, 251 F.R.D. at 179 (relevance); *Pension Comm.*, 685 F. Supp. 2d at 468 (prejudice). In some circumstances in the Second Circuit, if a spoliator acts in a grossly negligent manner, relevance and prejudice may be presumed. See *Pension Comm.*, 685 F. Supp. 2d at 467 & n.32 (quoting *Residential Funding*, 306 F.3d at 109). However, in the Fourth Circuit, “[n]egligent or even grossly negligent conduct is not sufficient to give rise to the presumption.” *Victor Stanley*, 269 F.R.D. at 532; see also *In re Kmart Corp.*, 371 B.R. 823, 853-54 (Bankr. N.D. Ill. 2007) (in the Seventh Circuit, unintentional conduct is insufficient for a presumption of relevance); *Rimkus*, 688 F. Supp. 2d at 617 (no presumption of relevance and prejudice is available when the level of culpability is “mere” negligence).

In the Second Circuit, “bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party.” *Residential Funding*, 306 F.3d at 109. However, “[t]he Fifth Circuit has not explicitly addressed whether even bad-faith destruction of evidence allows a court to presume that the destroyed evidence was relevant or its loss prejudicial. Case law in the Fifth Circuit indicates that an adverse inference instruction is not proper unless there is a showing that the spoliated evidence would have been relevant.” *Rimkus*, 688 F. Supp. 2d at 617.

If a presumption is available, it is rebuttable by a showing “that the innocent party has not been prejudiced by the absence of the missing information,” *Victor Stanley*, 269 F.R.D. at 532 (quoting *Pension Comm.*, 685 F. Supp. 2d at 468), “for example, by

demonstrating that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party's claims or defenses," *Pension Comm.*, 685 F. Supp. 2d at 469; *Rimkus*, 688 F. Supp. 2d at 617. "If the spoliating party demonstrates to a court's satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required." *Pension Comm.*, 685 F. Supp. 2d at 469.

D. Culpable State of Mind

Case law has identified four culpable states of mind: negligence, gross negligence, willfulness and bad faith.

"Negligence, or 'culpable carelessness,' is '[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation[.]'" *Victor Stanley*, 269 F.R.D. at 529 (quoting *Black's Law Dictionary* 846 (Bryan A. Garner ed., abridged 7th ed., West 2000)); see *Jones*, 2010 WL 2106640, at *6-7 (negligence is a failure to act reasonably under the circumstances). Negligence is "unreasonable conduct . . . that . . . creates a risk of harm to others," *Pension Comm.*, 685 F. Supp. 2d at 464, or "conduct 'which falls below the standard established by law for the protection of others against unreasonable risk of harm,'" *id.* (quoting Prosser & Keeton on Torts § 31 at 169 (5th ed. 1984) (quoting Restatement (Second) of Torts § 282)) (citations omitted). "Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent." *Zubulake IV*, 220 F.R.D. at 220; accord *BancorpSouth Bank v. Herter*, 643 F. Supp. 2d 1041, 1061 (W.D. Tenn. 2009); *Sampson v. City of Cambridge*, No. WDQ-06-1819, 2008 WL 7514364, at *8 (D. Md. May 1, 2008); *Hous. Rights Ctr. v. Sterling*, No. CV 03-859 DSF, 2005 WL 3320739, at *3 (C.D. Cal. Mar. 2, 2005); but compare *Canton*,

2009 WL 2058908, at *3 (quoting *Mosaid Techs., Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 338 (D.N.J. 2004)) (conduct is culpable if “party [with] notice that evidence is relevant to an action . . . either proceeds to destroy that evidence or allows it to be destroyed by failing to take *reasonable* precautions” (emphasis added)).

Gross negligence is “a failure to exercise even that care which a careless person would use . . . and differs from ordinary negligence only in degree, and not in kind.” *Pension Comm.*, 685 F. Supp. 2d at 464 (quoting Prosser & Keeton on Torts § 34 at 211-12 (5th ed. 1984)) (citations omitted). For example, “[a]fter a discovery duty is well established, the failure to adhere to contemporary standards,” such as “to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party’s possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources,” is gross negligence. *Pension Comm.*, 685 F. Supp. 2d at 471; accord *Victor Stanley*, 269 F.R.D. at 529; cf. *Haynes*, 2010 WL 140387, at *4 (“[t]he failure to institute a document retention policy, in the form of a litigation hold, is relevant to the court’s consideration, but it is not per se evidence of sanctionable conduct”).

Willfulness is “intentional or reckless conduct that is so unreasonable that harm is highly likely to occur,” *Pension Comm.*, 685 F. Supp. 2d at 464, or “an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied

by a conscious indifference to the consequences,” *id.* (quoting Prosser & Keeton on Torts § 34 at 213 (5th ed. 1984) (citing Restatement (Second) of Torts § 500 and collecting cases)). See *Victor Stanley*, 269 F.R.D. at 530 (“[w]illfulness is equivalent to intentional, purposeful, or deliberate conduct”).

“[B]ad faith requires ‘destruction for the purpose of depriving the adversary of the evidence,’ *Powell v. Town of Sharpsburg*, 591 F. Supp. 2d 814, 820 (E.D. N.C. 2008), for willfulness, it is sufficient that the actor intended to destroy the evidence.” *Victor Stanley*, 269 F.R.D. at 530. “Conduct that is in bad faith must be willful, but conduct that is willful need not rise to bad faith actions.” *Id.*

The court in *Pension Committee* provided four examples of different levels of culpability: (i) failure to collect records from key players is either gross negligence or willfulness; (ii) destruction of email or certain backup tapes is either gross negligence or willfulness; (iii) failure to obtain records from employees who had any involvement, but were not key players, could be negligence; and (iv) failure to take all appropriate measures to preserve ESI likely is negligence. *Id.*, 685 F. Supp. 2d at 465.

REMEDIES AND SANCTIONS FOR SPOILIATION

The range of potential remedies and sanctions for spoliation from least harsh to most harsh is:

(a) further discovery, *Pension Comm.*, 685 F. Supp. 2d at 469 (citing, *e.g.*, *Treppel*, 249 F.R.D. at 123-24); *Victor Stanley*, 269 F.R.D. at 536;

(b) cost-shifting, *Pension Comm.*, 685 F. Supp. 2d at 469 (citing, *e.g.*, *Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284, 291-92 (S.D.N.Y. 2009)); *Rimkus*, 688 F. Supp. 2d at 647 (“reasonable costs and attorneys’ fees required to identify and respond

to the spoliation . . . [which] may arise from additional discovery needed after a finding that evidence was spoliated, the discovery necessary to identify alternative sources of information, or the investigation and litigation of the document destruction itself”); *Victor Stanley*, 269 F.R.D. at 533, 536 (attorneys’ fees and costs);

(c) fines “to punish the offending party . . . to deter the litigant’s conduct” *Pension Comm.*, 685 F. Supp. 2d at 469, 471 (citing, e.g., *United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21, 25 (D.D.C. 2004), and quoting *Green*, 262 F.R.D. at 291 (quoting *In re WRT Energy Sec. Litig.*, 246 F.R.D. 185, 201 (S.D.N.Y. 2007)));¹⁶

(d) special jury instructions (an adverse inference), *Pension Comm.*, 685 F. Supp. 2d at 469 (citing, e.g., *Arista Records*, 608 F. Supp. 2d at 443-44), “to level the evidentiary playing field and sanction the improper conduct,” *Rimkus*, 688 F. Supp. 2d at 645;¹⁷

(e) preclusion of evidence, *Pension Comm.*, 685 F. Supp. 2d at 469 (citing, e.g., *Brown v. Coleman*, No. 07 Civ. 1345, 2009 WL 2877602, at *4 (S.D.N.Y. Sept. 8, 2009)); *Victor Stanley*, 269 F.R.D. at 533;

¹⁶ *But see Victor Stanley*, 269 F.R.D. at 536-37 (“[A] few courts have ordered the spoliating party to pay a fine to the clerk of court or a bar association for prolonging litigation and wasting the court’s time and resources. E.g., *Pinstripe, Inc. v. Manpower, Inc.*, No. 07-CV-620-GKF-PJC, 2009 WL 2252131, at *4 (N.D. Okla. July 29, 2009); *Claredi v. Seebeyond Tech. Corp.*, No. 4:04CV1304 RWS, 2007 WL 735018, at *4 (E.D. Mo. Mar. 8, 2007); *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 111 (D.N.J. 2006); *Turnage*, 115 F.R.D. at 559. However, . . . it is unclear whether these unappealed trial court holdings would withstand appellate review, because in similar cases the Fourth and Tenth Circuits have vacated discovery sanctions ordering the payment of money to the Clerk of the Court, deeming them to be criminal contempt sanctions, which are unavailable without the enhanced due process procedure requirements criminal contempt proceedings require. *Bradley v. Am. Household, Inc.*, 378 F.3d 373, 377-79 (4th Cir. 2004); *Buffington v. Baltimore Cnty., Md.*, 913 F.2d 113, 133 (4th Cir. 1990); *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1438, 1442-44 (10th Cir. 1998).”).

¹⁷ Judge Scheindlin describes three types of adverse-inference jury instructions: (a) “a jury can be instructed that certain facts are deemed admitted and must be accepted as true;” (b) “a court may impose a mandatory presumption[, that] . . . is considered to be rebuttable;” or (c) a “spoliation charge” may “permit[] (but . . . not require) a jury to *presume* that the lost evidence is both relevant and favorable to the innocent party . . . [and the jury] must then decide whether to draw an adverse inference against the spoliating party” after considering the spoliating party’s rebuttal evidence. *Pension Comm.*, 685 F. Supp. 2d at 470 (original emphasis).

(f) termination (entry of a default judgment or dismissal), *Pension Comm.*, 685 F. Supp. 2d at 469 (citing, e.g., *Gutman v. Klein*, No. 03 Civ. 1570, 2008 WL 5084182, at *2 (E.D.N.Y. Dec. 2, 2008)); *Victor Stanley*, 269 F.R.D. at 533; and

(g) civil or criminal contempt, *Victor Stanley*, 269 F.R.D. at 536 (“Fed.R.Civ.P. 37(b)(2)(A)(vii) provides that the court may ‘treat[] as contempt of court the failure to obey’ a court order to provide or permit discovery of ESI evidence. Similarly, pursuant to its inherent authority, the court may impose fines or prison sentences for contempt and enforce ‘the observance of order.’ *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812).”).

“[T]he applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine.” *Silvestri*, 271 F.3d at 590 (quoting *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999)). Sanctions “should (1) deter the parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position [it] would have been in absent the wrongful destruction of evidence by the opposing party.” *Pension Comm.*, 685 F. Supp. 2d at 469 (quoting *West*, 167 F.3d at 779 (quoting *Kronisch*, 150 F.3d at 126)) (internal quotation marks omitted); accord *Victor Stanley*, 269 F.R.D. at 534. “[T]he range of available sanctions serve both normative – designed to punish culpable conduct and deter it in others – and compensatory – designed to put the party adversely affected by the spoliation in a position that is as close to what it would have been in had the spoliation not occurred – functions. Because . . . the duty to preserve relevant evidence is owed to the court, it is also appropriate for a court to consider whether the sanctions it imposes

will ‘prevent abuses of the judicial system’ and ‘promote the efficient administration of justice.’” *Victor Stanley*, 269 F.R.D. at 534 (quoting *Jones*, 2010 WL 2106640, at *5).

“[A] sanction . . . must be proportionate to the culpability involved and the prejudice that results. Such a sanction should be no harsher than necessary to respond to the need to punish or deter and to address the impact on discovery.” *Rimkus*, 688 F. Supp. 2d at 618. “In determining what sanctions are appropriate, the Court must consider the extent of prejudice, if any, along with the degree of culpability.” *Victor Stanley*, 269 F.R.D. at 533.

The harshest sanctions may apply not only when both severe prejudice and bad faith are present, but also when, for example, culpability is minimally present, if there is a considerable showing of prejudice, or, alternatively, the prejudice is minimal but the culpability is great. . . . For example, in some, but not all, circuits, conduct that does not rise above ordinary negligence may be sanctioned by dismissal if the resulting prejudice is great. *Silvestri*, 271 F.3d at 593 (stating that dismissal may be an appropriate sanction for negligent conduct “if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case” and dismissing case without concluding whether plaintiff’s conduct rose above negligence); see *Rimkus*, 688 F. Supp. 2d at 614-15 (“The First, Fourth, and Ninth Circuits hold that bad faith is not essential to imposing severe sanctions if there is severe prejudice, although the cases often emphasize the presence of bad faith. In the Third Circuit, the courts balance the degree of fault and prejudice.”) (footnotes omitted). Conversely, absence of either intentional conduct or significant prejudice may lessen the potential appropriate sanctions. In the Fifth and Eleventh Circuits, for example, courts may not impose severe sanctions absent evidence of bad faith. See *Rimkus*, 688 F. Supp. 2d at 614; *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, No. 09-60351-CIV, 2010 WL 3368654, at *12-13 (S.D. Fla. Aug.23, 2010).

Victor Stanley, 269 F.R.D. at 533.

Judge Scheindlin in *Pension Committee* stated, “For less severe sanctions – such as fines and cost-shifting – the inquiry focuses more on the conduct of the spoliating party . . . for more severe sanctions – such as dismissal, preclusion, or the imposition of

an adverse inference – the court must consider, in addition to the conduct of the spoliating party, whether any missing evidence was relevant and whether the innocent party has suffered prejudice as a result of the loss of evidence.” *Id.*, 685 F. Supp. 2d at 467. Magistrate Judge James C. Francis, IV disagrees with the implication in this quote from *Pension Committee* that any sanctions, even less severe ones, would be warranted if any information was lost, if there were also no showing of relevance. *See Orbit One*, 2010 WL 4615547, at *10-11. On the other hand, Judge Lee H. Rosenthal in *Rimkus* stated, “[S]evere sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of ‘bad faith.’” *Id.*, 688 F. Supp. 2d at 614.¹⁸

In courts in the Second Circuit, “when the spoliating party was merely negligent, the innocent party must prove both relevance and prejudice in order to justify the imposition of a severe sanction,” *Pension Comm.*, 685 F. Supp. 2d at 467-68, “by adduc[ing] sufficient evidence from which a reasonable trier of fact could infer that the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction,” *id.* at 468 (quoting *Residential Funding*, 306 F.3d at 109 (quoting *Kronisch*, 150 F.3d at 127)) (internal quotation marks omitted). In courts in the Fifth Circuit, “[m]ere negligence is not enough’ to warrant an instruction on spoliation.” *Rimkus*, 688 F. Supp. 2d at 614 (quoting *Russell v. Univ. of Tex. of Permian Basin*, 234

¹⁸ *See Arista Records*, 608 F. Supp. 2d at 442-43, where Magistrate Judge Theodore H. Katz rejected entering case-dispositive sanctions in favor of adverse-inference instructions that would serve the remedial purpose of restoring plaintiffs to the position they would have been in had the evidence not been destroyed. *See also Mullaney v. Hilton Hotels Corp.*, CIVIL NO. 07-00313 ACK-LEK, 2009 U.S. Dist. LEXIS 55629, at *20 (D. Haw. June 30, 2009), where Magistrate Judge Leslie E. Kobayashi held that the loss of digital photographs of an accident warranted telling the jury of the lost photographs and compelling the defendant to produce a live witness with knowledge of the lost photographs to be examined at trial.

Fed. Appx. 195, 208 (5th Cir. 2007) (unpublished) (quoting *Vick v. Tex. Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975))).

“The Eleventh Circuit has held that bad faith is required for an adverse inference instruction.¹⁹ The Seventh, Eighth, Tenth, and D.C. Circuits also appear to require bad faith.²⁰ The First, Fourth, and Ninth Circuits hold that bad faith is not essential to imposing severe sanctions if there is severe prejudice, although the cases often emphasize the presence of bad faith.²¹ In the Third Circuit, the courts balance the degree of fault and prejudice.²²” *Rimkus*, 688 F. Supp. 2d at 614-15 (footnotes in original). In the Fifth

¹⁹ See *Penalty Kick Mgmt. Ltd. v. Coca Cola Co.*, 318 F.3d 1284, 1294 (11th Cir. 2003) (“[A]n adverse inference is drawn from a party’s failure to preserve evidence only when the absence of that evidence is predicated on bad faith.” (quoting *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997))).

²⁰ See, e.g., *Turner v. Pub. Serv. Co. of Colo.*, 563 F.3d 1136, 1149 (10th Cir. 2009) (“Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.” (quoting *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997))); *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008) (“In order to draw an inference that the [destroyed documents] contained information adverse to Sears, we must find that Sears intentionally destroyed the documents in bad faith.”); *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007) (“A spoliation-of-evidence sanction requires ‘a finding of intentional destruction indicating a desire to suppress the truth.’” (quoting *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004))); *Wylar v. Korean Air Lines Co.*, 928 F.2d 1167, 1174 (D.C. Cir. 1991) (“Mere innuendo . . . does not justify drawing the adverse inference requested . . .”).

²¹ See, e.g., *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004) (holding that an inference cannot be drawn merely from negligent loss or destruction of evidence but requires a showing that willful conduct resulted in the loss or destruction); *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001) (holding that dismissal is “usually justified only in circumstances of bad faith” but “even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case”); *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 447 (1st Cir. 1997) (“Certainly bad faith is a proper and important consideration in deciding whether and how to sanction conduct resulting in the destruction of evidence. But bad faith is not essential. If such evidence is mishandled through carelessness, and the other side is prejudiced, we think that the district court is entitled to consider imposing sanctions, including exclusion of the evidence.”); *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17, 23-24 (1st Cir. 1981) (“In any event, Allen Pen has not shown that the document destruction was in bad faith or flowed from the consciousness of a weak case. There is no evidence that Springfield believed the lists would have damaged it in a lawsuit. Without some such evidence, ordinarily no adverse inference is drawn from Springfield’s failure to preserve them.”); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (“Short of excluding the disputed evidence, a trial court also has the broad discretionary power to permit a jury to draw an adverse inference from the destruction or spoliation against the party or witness responsible for that behavior.”).

²² See, e.g., *Bensel v. Allied Pilots Ass’n*, 263 F.R.D. 150 (D.N.J. 2009) (declining to apply a spoliation inference or other sanction for the loss of information resulting from the defendant’s failure to impose litigation holds in a timely manner); *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 335 (D.N.J. 2004) (noting that “[t]hree key considerations that dictate whether such sanctions are warranted are: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice

Circuit, an adverse inference instruction may be given “[w]hen a party is prejudiced, but not irreparably, from the loss of evidence that was destroyed with a high degree of culpability.” *Id.* at 618. In the Second Circuit, “[t]he sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence.” *Residential Funding*, 306 F.3d at 108. *See also Pension Comm.*, 685 F. Supp. 2d at 470 (“[W]hen a spoliating party has acted willfully or in bad faith, a jury can be instructed that certain facts are deemed admitted and must be accepted as true.” However, “when a spoliating party has acted willfully or recklessly, a court may impose a mandatory presumption[, that] . . . is considered to be rebuttable.”). The Sixth Circuit follows the Second Circuit. *See Rogers v. T.J. Samson Cmty. Hosp.*, 276 F.3d 228, 232 (6th Cir. 2002) (allowing severe sanctions for negligent destruction of evidence following Second Circuit in *Residential Funding*).

A sanction of termination may be imposed in the Second Circuit “where a party has engaged in perjury, tampering with evidence, or intentionally destroying evidence by burning, shredding, or wiping out computer hard drives.” *Pension Comm.*, 685 F. Supp. 2d at 470; *see also West*, 167 F.3d at 779 (“willfulness, bad faith, or fault on the part of the sanctioned party” may result in dispositive sanctions). In the Fifth Circuit, a dispositive sanction may be imposed “when ‘the spoliator’s conduct was so egregious as to amount to a forfeiture of his claim’ and ‘the effect of the spoliator’s conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.’” *Rimkus*, 688 F. Supp. 2d at 618 (quoting *Sampson*, 251 F.R.D. at 180 (quoting *Silvestri*,

suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future” and holding that bad faith was not required for an adverse inference instruction as long as there was a showing of relevance and prejudice (quoting *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994))).

271 F.3d at 593)). “In the Fourth Circuit, to order these harshest sanctions, the court must ““be able to conclude either (1) that the spoliator’s conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator’s conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim[.]”” *Goodman*, 632 F. Supp. 2d at 519 (quoting *Sampson*, 251 F.R.D. at 180 (quoting *Silvestri*, 271 F.3d at 593)) (emphasis in *Goodman*)[.]” *Victor Stanley*, 269 F.R.D. at 534. According to Magistrate Judge Grimm, “Elsewhere [than in the Fourth Circuit], dispositive or potentially dispositive sanctions are impermissible without bad faith, even if there is considerable prejudice. See *Rimkus*, 688 F. Supp. 2d at 614 (In the Seventh,²³ Eighth,²⁴ Tenth,²⁵ Eleventh,²⁶ and D.C. Circuits,²⁷ ‘the severe sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of “bad faith.”’)” *Victor Stanley*, 269 F.R.D. at 535 (footnotes added). See also *Micron Tech., Inc. v. Rambus, Inc.*, ___ F.3d ___, 2011 WL 1815975, at *13 (Fed. Cir. May 13, 2011) (“[a] determination of bad faith is normally a prerequisite to the imposition of dispositive sanctions for spoliation”); *Dae Kon Kwon v. Costco Wholesale Corp.*, Civ. No. 08-00360 JMS BMK, 2010 WL 571941, at *2 (D. Haw. Feb. 17, 2010) (requiring that party “engaged deliberately in deceptive practices”); *Global Technovations*, 431 B.R. at 779 (willfulness, bad faith, or fault

²³ In contrast, in his appendix in *Victor Stanley*, Magistrate Judge Grimm states that the standard in the Seventh Circuit for imposing dispositive sanctions is “willfulness, bad faith, or fault” citing *Kmart*, 371 B.R. at 840.

²⁴ See *Menz v. New Holland N. Am., Inc.*, 440 F.3d 1002, 1006 (8th Cir. 2006); *Johnson v. Avco Corp.*, 702 F. Supp. 2d 1093, 1111 (E.D. Mo. 2010).

²⁵ In contrast, in his appendix in *Victor Stanley*, Magistrate Judge Grimm states that the standard in the Tenth Circuit for imposing dispositive sanctions is “willfulness, bad faith, or [some] fault” (brackets in original) citing *Procter & Gamble Co. v. Haugen*, 427 F.3d 727, 738 (10th Cir. 2005).

²⁶ See *Managed Care Solutions*, 2010 WL 3368654, at *12.

²⁷ See *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1477 (D.C. Cir. 1995); *D’Onofrio v. SFX Sports Group, Inc.*, Civ. A. No. 06-687 (JDB/JMF), 2010 WL 3324964, at *5 (D.D.C. Aug. 24, 2010).

ranging from intentional conduct to ordinary negligence may support dispositive sanctions); *Mosaid*, 348 F. Supp. 2d at 335 (dispositive sanctions “should only be imposed in the most extraordinary of circumstances”); *Driggin v. Am. Sec. Alarm Co.*, 141 F. Supp. 2d 113, 123 (D. Me. 2000) (“severe prejudice or egregious conduct” required for dispositive sanctions).

“Pursuant to their inherent authority, courts may impose fines or prison sentences for contempt and enforce ‘the observance of order.’ *Hudson*, 7 Cranch at 34, 3 L.Ed. 259. . . . [T]hey may ‘prevent undue delays . . . and . . . avoid congestion . . . , such as by dismissing a case. *Roadway Exp., Inc. v. Piper*, 447 U.S. [752,] 765 [(1980)] . . . However, the court’s inherent authority only may be exercised to sanction ‘bad-faith conduct,’ *Chambers v. NASCO, Inc.*, 501 U.S. [32,] 50 (1991), and ‘must be exercised with restraint and discretion,’ *id.* at 44.” *Victor Stanley*, 269 F.R.D. at 518.

PROPOSED RULES AND ADVISORY COMMITTEE NOTES

We propose that the following Rules be adopted:

Proposed Rule 26(h). Preservation of Relevant Documents, Electronically Stored Information or Things.

- (1) A duty to preserve documents, electronically stored information, or things discoverable under Rules 26(b) and 34(a) arises when: (A) a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action, or (B) a subpoena is received by a non-party.
- (2) A person whose duty to preserve has been triggered must take actions that are reasonable under the circumstances to preserve discoverable documents, electronically stored information, or things in regard to potential claims or defenses of which the person is or should be aware, taking into consideration:
 - (A) the potential importance of the preserved information in resolving the issues,
 - (B) the importance of the issues at stake in the action,
 - (C) the amount likely to be in controversy,
 - (D) the burden or expense of preservation,
 - (E) the parties’ resources, and

- (F) the likely needs of the case.
- (3) This duty shall continue for existing and subsequently created documents, electronically stored information, or things: (A) when no action has been commenced, until a person becomes aware of facts or circumstances that would lead a reasonable person to expect not to be a party to an action, or (B) when an action has been commenced, until the termination of the party's or non-party's involvement.
- (4) The documents, electronically stored information, or things shall be preserved, subject to Rule 26(h)(2), in a form as close to, if not identical to, their original condition without material loss of accessibility.

Proposed Rule 37(g). Failure to Comply with the Duty to Preserve.

- (1) If a party or non-party is shown to have failed to preserve documents, electronically stored information, or things in accordance with Rule 26(h), the court where the action is pending may enter an appropriate order:
 - (A) providing for further discovery, including the shifting of reasonable expenses of the further discovery to the party or non-party that failed to preserve documents, electronically stored information, or things;
 - (B) requiring the party or non-party, or the attorney representing that party or non-party, 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;
 - (C) imposing a fine upon the party or non-party, or the attorney representing that party or non-party, or both;
 - (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 the 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.
- (2) The court must select the least severe remedy or sanction necessary to redress a violation of Rule 26(h), taking into account all relevant factors, including:
 - (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 non-party failing in its duty.

- (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.
- (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.
- (iv) A sanction may be imposed only if the level of culpability includes at least negligence.
- (v) The remedy of further discovery, including shifting of expenses, may be ordered regardless of any culpability.
- (vi) Absent exceptional circumstances, it is evidence of due care if a person whose duty to preserve under Rule 26(h) has been triggered timely prepares, disseminates and maintains a reasonable litigation hold.

Advisory Committee Notes to Rule 26(h)(1)

It is inadvisable to formally set forth every single possible event that may trigger the duty to preserve. The circumstances of each case will vary. Nevertheless, if a person is anticipating commencing litigation, it should certainly begin preserving its own documents, electronically stored information, or things, and, if a person reasonably anticipates being sued, then it should similarly ensure that information or things that may be discoverable under Rules 26(b) or 34(a) are preserved. Similarly, if a person sends a written notice requesting or demanding that specified information be maintained, then that person should begin preserving its own material, and, when a person receives such a written notice indicating that it will be a party to an action, it should ensure that discoverable material is preserved. For a non-party, receipt of a subpoena should trigger the duty to preserve.

We propose that the duty to preserve be triggered “when a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an

action.”²⁸ This language appears to provide more guidance than the simpler “reasonably anticipates litigation” articulated in some cases and in the *Sedona Principles*, 70 cmt. 14.a. Accordingly, the duty may be triggered, among others, by the filing of an incident report, *Aiello*, 2010 U.S. Dist. LEXIS 97927, at *6-*7; retaining attorneys and sending a letter threatening litigation, *Goodman*, 632 F. Supp. 2d at 511; sending communications bearing the legend “attorney-client privilege,” *Zubulake IV*, 220 F.R.D at 216-17; or learning that others in one’s industry who are similarly situated are being sued, *Phillip M. Adams & Assocs.*, 621 F. Supp 2d at 1194. However, the receipt of a demand letter, which does not purport to present any legal claim, or otherwise to threaten litigation within a reasonable period of time, should, in and of itself, be insufficient to trigger preservation obligations of the recipient. Similarly, seeking advice on the possibility of litigation, whether through solicitation of in-house counsel or retention of outside counsel, should be insufficient, in and of itself, to trigger an obligation to preserve documents. Commentators have suggested other triggering events such as notifying an insurer, hiring an investigator or photographer, engaging experts, breaching a contractual, regulatory or statutory duty to preserve or produce specific data, filing a complaint with a regulator, or conducting destructive testing. *See Joseph*, at 8.

Courts have been more sympathetic to non-parties opposing discovery demands, recognizing that they are strangers to the litigation. *See, e.g., Lawson v. Chrysler LLC*, Case 4:08-cv-19-DDS-JCS, 2008 U.S. Dist. LEXIS 118677, at *4-5 (S.D. Miss. Dec. 18, 2008) (non-party is entitled to special consideration as to time and expense in

²⁸ This proposal is similar to what the Civil Rules Advisory Committee has suggested. *See* Rule 26.1(b) at Agenda page 212,

compliance, citing cases). Accordingly, the proposed Rule provides that non-parties will not have a duty of preservation until receipt of a subpoena.

Consistent with current case law, the description of material to be preserved – discoverable under Rules 26(b) and 34(a) – is broader than relevant material for purposes of determining a remedy or sanction for spoliation. It is logical that material produced in litigation will be a subset of material that is preserved. It also follows that not all material that is or should have been produced will be probative at trial. Therefore, relevance varies according to the stage of the litigation and the purpose for which material is being examined.

Advisory Committee Notes to Rule 26(h)(2)

Proposed Rule 26(h)(2) describes the scope of the duty to preserve.²⁹ The scope of the duty can only be generally described in order to cover the myriad situations that arise. The standard is that a person subject to the duty must act reasonably under the circumstances. What some courts have deemed reasonable under the circumstances is described in more detail above, and it is our expectation that courts will continue development of this standard on a case-by-case basis. *See, e.g., Victor Stanley*, 269 F.R.D. at 524 (quoting *Sedona Conf. on Legal Holds*, at 3) (“conduct that ‘demonstrates reasonableness and good faith in meeting preservation obligations’ includes ‘adoption and consistent implementation of a policy defining a document retention decision-making process’ and the ‘use of established procedures for the reporting of information relating to a potential threat of litigation to a responsible decision maker’”).

²⁹ This proposal is based on the Civil Rules Advisory Committee’s proposed Rule 26.1(c) at Agenda pages 200 and 213.

The duty to preserve applies to “discoverable documents.” This is meant to be a reference to proposed Rule 26(h)(1), which describes the subject matter of the duty as documents, electronically stored information, or things “discoverable under Rules 26(b) and 34(a).”

The proposed Rule seeks to limit the potentially broad scope of the materials required to be preserved in two ways. The first is by requiring preservation only of materials regarding “potential claims or defenses of which the person is or should be aware.” The second is by explicitly describing factors that define a proportionality test applicable to preservation.

The duty to preserve evidence may impose significant burdens. The “presumption is that the party possessing [evidence] must bear the expense of preserving it for litigation,” *Treppel*, 237 F.R.D. at 373, although “[t]his presumption may be overcome if the demanding party seeks preservation of evidence that is likely to be of marginal relevance and is costly to retain and preserve, or where a non-party is in possession of the requested evidence,” *Mahar v. US. Xpress Enters. Inc.*, 688 F. Supp. 2d 95, 113 (N.D.N.Y. 2010); *see also Victor Stanley*, 269 F.R.D. at 522 (“[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 . . . the scope of preservation should somehow be proportional to . . . the costs and burdens of preservation.’ ”) (emphasis in original; citations omitted).

The proportionality limitation is particularly important as a guide to courts trying to determine in hindsight whether a particular preservation program was appropriate and

as a counter to blunderbuss written notices to preserve. Notices to preserve may trigger the duty to preserve, but should not define the scope of that duty.

Advisory Committee Notes to Rule 26(h)(3)

Because the cost of a pre-litigation duty to preserve may be quite high and it may currently be argued that it extends for years (or decades under some state statutes of repose or discovery rules for limitations purposes), the proposed Rule provides a limit on the pre-litigation duty to preserve. While this limit is merely the obverse of when the duty to preserve is triggered, it allows for the cessation of the duty to preserve when a change in circumstances makes it no longer reasonable to expect to be a party to an action.

In the event of litigation, the duty to preserve continues until the person's involvement ends. The obligation for non-parties should ordinarily end once they have complied with a subpoena. If there is doubt about when the duty ends and no agreement can be reached, then the court, upon an appropriate application, may determine when the duty terminates as to all or a portion of the material being preserved.

Advisory Committee Notes to Rule 26(h)(4)

“The reviewing court, as well as the parties, should be focused upon maintaining the integrity of the evidence in a form as close to, if not identical to, the original condition of the evidence.” *Capricorn Power Co.*, 220 F.R.D. at 435. While even copying an electronic file may change it to some degree, such slight change to the original form of the document is better than its destruction. *See Arista Records*, 608 F. Supp. 2d at 435 n.39 (S.D.N.Y. 2009) (“[e]ven if preserving the data meant altering the

Digital Music Files in some manner, to do so would have been for more appropriate than completely deleting data”).

There should also be no material loss in accessibility of the information once the duty to preserve arises.³⁰ Issues pertaining to back-up tapes will continue to evolve as back-up tapes either become an obsolete form of storage or are reconfigured so that they become more easily searchable. See The Sedona Conference, *Interview of Judge Scheindlin* (Mar. 24, 2004), available at <http://www.thesedonaconference.org/content/miscFiles/ScheindlinInterview.pdf>.

The proposed Rule recognizes that ESI need not be retained in exactly the condition it exists when the duty to preserve is triggered. The obligation is specifically stated to be subject to the proportionality principles of proposed Rule 26(h)(2), and “immaterial” losses of accessibility are acceptable, such as transfer to storage media.

The “native format” of ESI refers to the associated file structure that is defined by the original creating application. Viewing or searching documents in native format often requires the availability of the original application. Preserving ESI in native format would comply with the proposed Rule.

It is also possible to store ESI in a “static” or imaged format, such as .tiff or .pdf format, where the static image is designed to retain an image of the document as it would look in the original creating application. Static images, however, generally do not allow metadata to be viewed or the document information to be manipulated. Therefore, the preservation duty under proposed Rule 26(h)(4) under current technology may require

³⁰ In the absence of an event that would otherwise trigger a duty to preserve, data may be deleted, purged, or otherwise subjected to a reduced level of accessibility due to normal document data retention policies. See *Peterson v. Seagate LLC.*, Civil No. 07-2502 MJD/AJB, 2011 US Dist. LEXIS 12423 (D. Minn. January 27, 2011) (where no duty to preserve, ESI may be deleted or stored on backup tapes as the result of normal retention policies).

any load files to be preserved with the static images. *Cf. Jannx Med. Sys. v. Methodist Hosps. Ins.*, Case No. 2:08-CV-286-PRC, 2010 U.S. Dist. LEXIS 122574 (N.D. Ind. Nov. 17, 2010) (conversion of electronic documents to PDF format did not comply with Rule 34(b)(2)(E)(ii) requirement that the documents be produced in reasonably usable form).

Not all ESI may be conducive to production in either native or imaged format, and some other form of production may be necessary (*e.g.*, databases, legacy data). The Sedona Conference, *The Sedona Conference Glossary: E-Discovery & Digital Information Management* (3rd ed. September 2010) available at <http://www.thesedonaconference.org/dltForm?did=glossary2010.pdf>. Preservation should enable as wide a variety of production as feasible.

Advisory Committee Notes to Rule 37(g)

Case law on the standards for an appropriate remedy or sanction for spoliation is confused, particularly regarding what culpable state of mind is required to impose any particular sanction. *Compare Residential Funding*, 306 F.3d at 109 (negligence sufficient to impose sanctions terminating the litigation), with *Vick v. Tex. Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975) (negligence not enough to impose severe sanctions). Proposed Rule 37(g) seeks to correct this situation.

The proposed Rule sets out the different remedies and sanctions and then calibrates the severity of the remedy or sanction to minimum levels of culpability. Thus, the most severe sanctions of termination of an action or contempt may only be imposed upon a finding of willfulness for termination or bad faith for contempt. Further, for any sanction (not the remedies of further discovery or cost-shifting), there must be at least

negligence. See proposed Rule 37(g)(2)(C)(v). This changes current case law holding that, even if no one was at fault, the party losing the information may still be sanctioned. See *Residential Funding*, 306 F.3d at 109; *Pension Comm.*, 685 F. Supp. 2d at 478-79.

Under proposed Rule 37(g)(2)(C)(iv), a sanction under proposed Rules 37(g)(1)(B) or (C) may be imposed only if the person having a duty to preserve was negligent, meaning that the spoliator failed “to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.” *Victor Stanley*, 269 F.R.D. at 529 (quoting *Black’s Law Dictionary* 846 (Bryan A. Garner ed., abridged 7th ed., West 2000)).

Under proposed Rule 37(g)(2)(C)(iii), an adverse-inference jury instruction or direction establishing matters or facts may be imposed under proposed Rules 37(g)(1)(D), (E) or (F) only if the person was grossly negligent, meaning that the spoliator failed “to exercise even that care which a careless person would use.” *Pension Comm.*, 685 F. Supp. 2d at 464 (quoting *Prosser & Keeton on Torts* § 34 at 211-12 (5th ed. 1984)). Mere negligence would be insufficient.

Under proposed Rule 37(g)(2)(C)(ii), termination of the litigation may be imposed under Rules 37(g)(1)(G) or (H), if the person acted willfully, meaning that the spoliator engaged in “intentional or reckless conduct that is so unreasonable that harm is highly likely to occur,” *Pension Comm.*, 685 F. Supp. 2d at 464. Negligence or gross negligence would not be enough.

Finally, under proposed Rule 37(g)(2)(C)(i), a contempt may be found under Rules 37(g)(1)(I), only if the person violated a previous order in bad faith, meaning that the spoliator destroyed the evidence “for the purpose of depriving the adversary of the

evidence,” *Victor Stanley*, 269 F.R.D. at 530 (quoting *Powell*, 591 F. Supp. 2d at 820). Even willfulness, and certainly not negligence or gross negligence, would not result in a finding of contempt.

The severity of the remedy or sanction should still depend on the extent of the prejudice and the relevance of the lost information. For example, on one end of the continuum, a remedy of the cost of filing the motion may be imposed when the level of culpability is lowest, *Columbia Pictures*, 2007 U.S. Dist. LEXIS 97576, at *40;³¹ near the other end of the continuum, an adverse-inference instruction may be given to a jury “[w]hen a party is prejudiced, but not irreparably, from the loss of evidence that was destroyed with a high degree of culpability,” *Rimkus*, 688 F. Supp. 2d at 618; *see also Arista Records*, 608 F. Supp. 2d at 443 (same).

“Preservation of evidence may be particularly burdensome for non-parties, considering their interest in the litigation is minuscule, while the restrictions that can be imposed in a motion for preservation may be expensive and voluminous.” *Capricorn Power Co.*, 220 F.R.D. at 436. Therefore, only the less severe remedies or sanctions under proposed Rule 37(g) would apply to non-parties.

Relevance for purposes of determining an appropriate remedy or sanction is different than relevance of purposes of complying with the duty to preserve. In this context, relevant material is that which “would have clarified a fact at issue in the trial and otherwise would naturally have been introduced into evidence.” *Pension Comm.*, 685 F. Supp. 2d at 496.

³¹ For example, in *Sanders v. Kohler Co.*, 4:08CV00222 SWW/JTR, 2009 U.S. Dist. LEXIS 113803 (D. Ak. Nov. 20, 2009), the court declined to assess costs, but promised to revisit the issue if compliance was not forthcoming.

The proposed Rule also provides a limited “safe harbor” for compliance with a litigation hold. Such compliance is to be considered “due care,” absent exceptional circumstances, thereby avoiding any sanctions for spoliation, although further discovery could still be ordered. However, if an employee intentionally destroyed potentially relevant documents, electronically stored information or things despite his or her company’s timely preparation, dissemination and maintenance of a reasonable litigation hold, a court might be justified in finding such actions constituted exceptional circumstances that would eliminate the safe harbor. Best practices dictate that a “litigation hold” be issued and monitored for the duration of the litigation. This litigation hold should preferably be in writing, although it need not be so; should specify the nature and subject matter of the information to be retained and the time period covered; should state the necessity to preserve metadata or equivalent; and should be directed to the “key players” – those individuals most likely to have knowledge of the subject matter of the lawsuit or have institutional responsibility for managing and storing documents. *See Sedona Conference on Legal Holds*, at 3. However, the litigation hold should be tailored to the facts and circumstances of the specific situation and the actual or anticipated case, without being in a certain form or covering a maximum number of custodians.

Thus, the proposed Rule provides flexibility by which a court may calibrate the remedies or sanctions necessary to compel compliance and ensure justice. Further, the Rule provides for courts to consider “all relevant factors,” which might additionally include: (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable; (B) the reasonableness of the party’s efforts to preserve the information, including the scope of the preservation efforts; (C) the clarity

and reasonableness of any request for preservation; (D) whether there were any good-faith consultations regarding the scope of preservation; (E) the party's resources and sophistication in matters of litigation; (F) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and (G) whether the party sought timely guidance from the court regarding any unresolved disputes concerning preservation.³²

³² See Agenda, at 217-219, 229.

TAB 4

ORAL REPORT BY J. CECIL, FEDERAL JUDICIAL CENTER

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Article

TWOMBLY AND IQBAL'S MEASURE: AN ASSESSMENT OF THE FEDERAL JUDICIAL CENTER'S STUDY OF MOTIONS TO DISMISS

*Lonny Hoffman**

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* George Butler Research Professor of Law, University of Houston Law Center. Aaron Bruhl, Kevin Clermont, Scott Dodson, David Hoffman and Alexander Reinert provided comments on an earlier draft of this paper. The author was an invited Panel Discussant at the Conference on Empirical Legal Studies held at Northwestern University School of Law on November 4-5, 2011. The paper was also presented at the 2011 Southeastern Association of American Law Schools annual meeting in Hilton Head, South Carolina. This project was funded by the University of Houston Law Foundation.

INTRODUCTION

The most contentious battleground today in civil litigation concerns the pleading sufficiency standard in federal court. The Court's bold revision of the pleading test in *Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*² may have initially raised more questions than answers, but knowledgeable observers recognized immediately that much more was at stake than mere technical requirements for initiating suit. The "cornerstone" of the federal rules, as the architect of the entire structure called it,³ pleading is the entry point into the system. Deciding how wide or narrow to make the passageway necessarily means deciding how to strike the balance between access to justice, on the one hand, and operational efficiency, on the other.⁴

In *Twombly* and *Iqbal* the Court endorsed more robust filtering at the pleading stage to block certain cases that previously passed through unchecked from going further in the litigation process. The defense bar and business community have applauded the use of this less permeable sieve: from their vantage point, intercepting weak claims early in the case—that is, before onerous discovery burdens have to be borne—is vital to the efficient management of civil litigation. Others, including a majority of academics writing on the subject, have criticized the decisions for usurping the Rules Enabling Act process,⁵ for

¹ 550 U.S. 544 (2007).

² 556 U.S. ___, 129 S. Ct. 1937 (2009).

³ Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROBS., Winter 1948, at 144, 154 ("The cornerstone of the new reform is a system of simple, direct, and unprolonged allegations of claims and defenses by the litigants . . .").

⁴ *Has the Supreme Court Limited Americans' Access to Court?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 102 (2009) at 3 (prepared statement of Stephen B. Burbank, Professor, University of Pennsylvania Law School) ("The degrees of particularization and persuasiveness of a complaint's allegations that a system requires implicate the ability of putative plaintiffs to pursue adjudication of disputes on the merits. . . They thus also implicate the ability of those who have been injured to use litigation in order to secure compensation, and the ability of government to use private litigation for that purpose (i.e., in place of social insurance), and for the enforcement of social norms (i.e., in place of administrative enforcement)"); see also Lonny S. Hoffman, *Burn up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1222 (2008) (discussing whether *Twombly* "mark[s] a fundamental change in where courts strike the balance between access and efficiency"); see also *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3rd Cir. 2008) ("Few issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to the courts").

⁵ See, e.g., Burbank, *supra* note 4 at 15-16 (observing that "[i]n initiating change through its power to decide cases and controversies, however, the Court was forced to forego the informational, participatory and other benefits that the rulemaking process affords"); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Decisions*, 95 IOWA L. REV. 821, 850 (2010) (commenting that "[t]he rulemaking bodies

adding confusion and unpredictability into the test for pleading sufficiency;⁶ for lodging too much discretion in judges,⁷ which fosters inconsistency and arbitrariness;⁸ and for turning on its head the basic presumption of modern procedural law for resolving cases on their merits.⁹

Indeed, prompted by these criticisms of *Twombly* and *Iqbal*, several bills were introduced in Congress that would have reversed the Court's decisions out of concern that they overemphasized efficient case management at the expense of judicial access. From the start, however, those bills lacked political traction and, especially in the aftermath of the 2010 midterm elections, it is now clear that their prospects are dim.

If there is any meaningful possibility, then, that the pleading

should have hosted that discussion. *Twombly* and *Iqbal* short-circuited any such discussion. These cases worked their reform by a process—adjudication—that is hardly the preferred path to design change”).

⁶ See, e.g., Clermont & Yeazell, *supra* note 5 at 823 (“By inventing a new and foggy test for the threshold stage of every lawsuit, they have destabilized the entire system of civil litigation”); A Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1 (2009) (“*Twombly*’s ultimate message regarding pleading standards is unclear”); Hoffman, *supra* note 4 at 1258 (“ambiguity in the standard for determining which cases will receive greater scrutiny means imposing additional costs on everyone, thus carrying serious practical and social consequences.”).

⁷ See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L. J. 1, 30 (2010) (“Although judicial discretion normally is to be applauded, it should be constrained in the context of a threshold motion theoretically addressed solely to the notice-giving quality and legal sufficiency of the complaint”); Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 177 (2010) (noting that under *Twombly* and *Iqbal* courts “enjoy broad discretion to parse the complaint and individual allegations and to screen aggressively for a story that resonates with them”); Elizabeth Thornburg, *Law, Facts, and Power*, 114 PENN. ST. L. REV. PENN STATIM 1 (2010) (describing the doctrinal test in the Court’s cases as a “magic trick” that has “privileged judges over juries, appellate judges over trial judges, and put the Court firmly at the top of the heap”).

⁸ See, e.g., Miller, *supra* note 7 at 30 (observing that “inconsistent rulings on virtually identical complaints may well be based on individual judges having quite different subjective views of what allegations are plausible”); Hoffman, *supra* note 4 at 1258 (“Plausibility is not only an uncertain standard by which to measure when greater scrutiny is warranted, but it also, and more mischievously, invites a free-wheeling judicial judgment as to the legitimacy of claims. That should give cause for concern, especially given the anti-plaintiff influence [of *Twombly*] . . . and courts that want to exercise their newly-minted authority to dispose of those cases they perceive to be unwelcome will not miss it.”).

⁹ See, e.g., Miller, *supra* note 7 at 29 (observing that the *Twombly/Iqbal* “process is uncomfortably close to a weighing of the evidence and an invasion of the jury’s domain, suggesting that the Court’s decisions represent a potentially significant change in the division of functions between judge and jury. In other words, a trial-like scrutiny of the merits is being shifted to an extremely early point in the pretrial phase”); Kevin M. Clermont, *Three Myths About Twombly-Iqbal*, 45 WAKE FOR. L. REV. 1337, 1348 (2010) (“*Twombly-Iqbal* calls for a judge to weigh factual convincingness without any evidential basis and with few procedural protections. Such a practice, in the absence of emergency or other special circumstances, offends our fundamental procedural principles”); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010).

standard the Court has now set will be recalibrated to address judicial access concerns, it lies with rulemakers. One of the most critical policy questions, thus, for federal civil litigation is how judicial rulemakers should respond to the U.S. Supreme Court's decisions. However, while rulemakers have heard all of the theoretical arguments against *Twombly* and *Iqbal* they have not yet been persuaded that amendments to the pleading rules are necessary to counteract the Court's decisions, especially without convincing empirical evidence that the cases are impacting dismissal practice.¹⁰

The key modifier in the last sentence was *convincing* empirical evidence. Some prior studies had suggested *Twombly* and *Iqbal* were making it harder for at least some plaintiffs to overcome the new pleading barrier that had been erected, but it was not clear that these studies—which were drawn from the selected opinions found in electronic databases—were representative of dismissal practices generally. Whether or not such concerns were warranted, the rules committees commissioned the Federal Judicial Center to undertake a more comprehensive examination of dismissal activity.

Completed in March 2011, the FJC's study is now the authoritative empirical work on *Twombly* and *Iqbal*'s effects.¹¹ Evidence of the study's influence is already apparent in the rulemakers' deliberations. What that evidence shows is that the study is being cited as powerful support for the case against pleading rule reform. That is because the study seems to have found that *Twombly* and *Iqbal* have not altered dismissal practices or outcomes—or, at least, that is what most readers,

¹⁰ See, e.g., Civil Rules Committee Report to Standing Committee *in* Agenda Materials, January 2011 at 9 (at page 102 of Agenda Materials) (Tab 5) (noting that pleading standards remain under “active consideration” by the Civil Rules Committee but that “[a]ctive consideration does not imply a plan for imminent rules proposals. To the contrary, it is better to wait patiently while lower courts work through the ways in which pleading practice should be adjusted to meet the concerns expressed by the Supreme Court.”); Civil Rules Committee Report to Standing Committee *in* Agenda Materials, June 2011 Meeting of Committee on Rules of Practice and Procedure, at 54 (observing that the Civil Rules Committee’s “approach to pleading practice remains what it has been since 2007. The Committee will closely monitor developing practice, it will encourage and heed further rigorous empirical work, and it will listen carefully to the voices of bench, bar, and academy. Procedural ferment is exciting, but it does not justify an excited response.”). It should be said that the committees are still actively considering other reforms short of pleading rule reform, such as discovery rule amendments. Discovery rule reforms may be responsive to some concerns raised by *Twombly* and *Iqbal*, at least for some claimants, but it is not clear that they would be adequate to overcome all concerns. See *supra* text accompanying notes 5-9.

¹¹ JOE CECIL, ET AL., MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (Fed. Jud. Center, March 2011), available at http://www.fjc.gov/library/fjc_catalog.nsf.

including the rulemakers, have taken away from it.¹²

At its best, empirical study “can inform policymakers and the public ... by enhanc[ing] description and understanding of the legal system.”¹³ However, “[w]hile empirical scholars can shed light on certain aspects of the judicial process,” as Judge Harry Edwards and Michael Livemore recently observed, “uninitiated readers must understand where the light is shining and which areas remain unilluminated.”¹⁴ Indisputably, the FJC’s basic methodological approach in this study was sound but there is reason to worry that the uninitiated (and others) will forget the limits of this empirical enterprise and, more significantly, that the important evidence the FJC found of *Twombly* and *Iqbal*’s considerable effects on dismissal practices and outcomes will be overlooked.

Broadly stated, my argument is that in several key ways the study unintentionally confuses readers into missing *Twombly* and *Iqbal*’s consequential impacts. Read with care, the FJC’s study shows that the Court’s cases have substantively impacted dismissal practices and outcomes. As to the filing rate, the researchers found that after *Iqbal* a plaintiff was twice as likely to face a motion to dismiss. Of its many consequences, a higher filing rate means greater costs for those who have to gather additional information either in anticipation of or in response to a dismissal motion. Moreover, though the researchers do not say so, this sizeable increase in the filing rate represents a marked departure from the steady filing rate observed over the last several decades.¹⁵

¹² See e.g., Draft Minutes, Civil Rules Advisory Committee Meeting, April 2011, *in* Agenda Materials for June 2011 Meeting of Committee on Rules of Practice and Procedure, at Tab 5A (reflecting extended discussion of FJC’s *Iqbal* Study at April meeting of Civil Rules Committee). At the June 2011 meeting of the Standing Committee (the most recent meeting of rulemakers, as of this writing), the FJC study figured prominently in the report submitted to the Standing Committee by the Civil Rules Advisory Committee. See Civil Rules Committee Report to Standing Committee *in* Agenda Materials, June 2011 at 52-53 (at pp. 215-16 of Agenda Materials) (Tab 5A) (observing that “the lower-court decisions may suggest that not much has changed in actual practice” and that “[t]hat hypothesis finds support in the first detailed study done by the Federal Judicial Center...”); see also *id.* (noting that the FJC study—and the promise of its next study—“combines with the review of judicial decisions to suggest there is no urgent need for immediate action on pleading standards. The courts are still sorting things out. There is reason to hope that the common-law process of responding to and refining the Supreme Court’s invitation to reconsider pleading practices will arrive at good practices”).

¹³ Theodore Eisenberg, *Why Do Empirical Legal Scholarship*, 41 SAN DIEGO L. REV. 1741, 1746 (2004).

¹⁴ Harry T. Edwards and Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE LAW JOURNAL 1895, 1908 (2009).

¹⁵ See *infra* text accompanying notes 75-78.

As to the rate at which courts granted motions to dismiss post-*Iqbal*, the critical point the FJC researchers sought to convey to readers was that there was no statistically significant increase in the likelihood that a motion to dismiss would be granted post-*Iqbal* in any case category except for one outlier category. By focusing on statistical significance, the study unintentionally confuses the reader into missing *Twombly* and *Iqbal*'s impacts. As many distinguished critics of statistical significance testing have argued for many years (though largely to no avail), the real issue we should be concerned with is not statistical significance but substantive significance. Translated to the context of this study, focusing on substantive significance means what should interest us is whether it was more likely that motions to dismiss would be granted after *Iqbal* and, if so, how much likelier was it. Whether the findings were statistically significant or not, the answer to these substantively important questions is that overall, and in the three largest case categories (Other, Financial Instruments and Civil Rights), it was much more likely after *Iqbal* that a court would grant the motion to dismiss, while the other three categories (Employment Discrimination, Contract and Torts) all showed clearly increasing grant rates.

The paper proceeds as follows. Part I begins with a brief summary of the study's findings. Part II examines the evidence regarding the increase in the frequency with which motions to dismiss are being brought post-*Iqbal*. Part III, which focuses on the findings regarding dismissal orders, provides the primary critiques of the study. In this Part I raise three main criticisms of the FJC's findings regarding dispositions of dismissal motions, the most important of which is that instead of emphasizing the statistical significance of their results, the researchers should have conveyed the magnitude of the effect *Twombly* and *Iqbal* have had on dismissal practice so that those effects might be better understood by readers. Part IV then argues that beyond the evidence the FJC was able to detect of *Twombly* and *Iqbal*'s substantive impacts on dismissal practice, it is vital to realize that there are all sorts of other effects that the cases may be having that the FJC researchers would not have been able to observe because of inherent limitations in doing empirical work of this nature. Finally, in Part V, I explore the possibility that the data the FJC researchers gathered may be incomplete, particularly as to the filing rate. As a result, the study may be providing an incomplete picture of actual Rule 12(b)(6) activity. In sum, I argue that readers of this vital study, and policymakers

in particular, should carefully reassess the study's findings in light of the criticisms and assessments offered.

I. WHAT THE FJC STUDIED AND FOUND

A. Study Design

Several attempts have been made to study the effects of the Court's cases.¹⁶ Because of resource and informational constraints, most have focused exclusively on opinions found in electronic databases, such as Westlaw. The key difference between the FJC's study and prior empirical studies of *Twombly* and *Iqbal* is that the FJC looked at all dismissal activity, whether or not the orders appeared in Westlaw. Looking at actual activity in the district courts is a more comprehensive approach to gathering the sought-after data than limiting one's data collection efforts only to opinions published on Westlaw. The latter constitute less than all district court decisions and the concern is that relying on published opinions may not be representative of all dismissal orders.¹⁷

More precisely, the FJC study compared motion activity in 23 federal district courts before *Twombly* and after *Iqbal*.¹⁸ The database was generated by relying on codes entered by the court clerks of the individual districts into a file management system used by the federal courts called Case Management/Electronic Case Filings or CM/ECF as it is known. The CM/ECF codes entered by the clerks relate to motions filed by lawyers and orders issued by judges in individual cases.¹⁹ The basic construct

¹⁶ Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010); Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 118 (2010); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011; Kendall W. Hannon, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1813 (2008).

¹⁷ Cecil, *et. al*, *supra* note 11 at 2 and 37 n.47. Recent work by Patricia Hatamyar Moore shows that, at least as to orders relating to Rule 12(b)(6) motions, Westlaw may be more representative than previously thought. See Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, (forthcoming RICH. L. REV., 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1883650 (updating her prior study that had examined *Iqbal's* effects by looking at published decisions on Westlaw and finding a high degree of consistency between her findings and those in the FJC's *Iqbal* study).

¹⁸ The 23 federal district courts studied mostly included the two districts in each of the eleven circuits that had the largest number of case filings in 2009 (because it was not possible to collect the data in some of the largest districts, they had to be excluded). Together, the 23 district courts made up just over half of all civil cases filed in 2009. Cecil, *et. al*, *supra* note 11 at 5.

¹⁹ Cecil, *et. al*, *supra* note 11 at 5.

of the FJC study was to compare the pre-*Twombly* and post-*Iqbal* rate at which motions to dismiss for failure to state a claim were filed and the rate those motions were successful.

B. Findings Regarding the Filing Rate

Doing a straightforward comparison of filing rates, the FJC found that, overall, motions to dismiss for failure to state a claim were brought more often after *Iqbal* (that is, in cases filed from October 2009 to June 2010) than before *Twombly* (cases filed from October 2005 through June 2006). In the earlier period, the FJC found that defendants filed motions to dismiss for failure to state a claim in 4% of all civil cases. After *Iqbal*, the rate increased to 6.2%. The overall increase was reported as statistically significant.²⁰ It was also reported that there was a statistically significant increase in the filing rate for all individual categories of cases except Civil Rights cases. In this one category, the increase (it went from 9.7% to 10.1%) but, as the researchers noted, did not reach conventional levels of statistical significance.²¹ The statistical significance story gets a bit more nuanced here, however. In the civil rights category, three-fourths of the cases were non-prisoner civil rights alleging constitutional violations under 42 U.S.C. §1983 and this subset of all Civil Rights cases, the researchers noted, “showed a statistically significant increase in the likelihood that a motion to dismiss for failure to state a claim would be filed, up from 10.5% of cases in 2006 to 12.4% of cases in 2010.”²² Following is Table 1 from the FJC study, which illustrates the filing rate findings as to the six main case categories:

²⁰ *Id.* at 8 and Table 1.

²¹ *Id.*

²² *Id.* at 8-9 and Table 1.

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Table 1: Percentage of Civil Cases with a Motion to Dismiss for Failure to State a Claim Filed Within 90 Days of the Filing of the Case (Excluding Prisoner and Pro Se Cases)

| | 2005–2006 Percentage (and Number) of Cases | 2009–2010 Percentage (and Number) of Cases | Difference |
|---------------------------|--|--|------------|
| Total | 4.0% (49,443) | 6.2% (52,925) | +2.2%* |
| Contract | 5.6% (8,651) | 8.3% (9,139) | +2.7%* |
| Torts | 2.3% (10,604) | 4.1% (9,947) | +1.8%* |
| Employment Discrimination | 6.9% (3,795) | 9.0% (3,871) | +2.1%* |
| Civil Rights | 9.7% (4,214) | 10.1% (4,976) | +0.4% |
| Financial Instrument | 4.3% (1,524) | 9.6% (4,790) | +5.3%* |
| Other | 2.5% (20,657) | 4.1% (20,202) | +1.6%* |

* $p < 0.01$.

After regression analysis, the results of these straightforward comparisons were confirmed. The likelihood that a motion to dismiss would be filed in any individual case increased after *Iqbal*, as compared with a baseline that was constructed to measure changes in the filing rate over time and across different kinds of cases. In the post-*Iqbal* period it was twice as likely that a plaintiff would face a motion to dismiss.²³ The filing rate also trended up, on a monthly basis, in the post-*Iqbal* period, in contrast to the monthly trend line in the 2005-06 time period which remained essentially flat.²⁴

C. Findings Regarding the Grant/Denial Rate

In addition to looking at filings, the FJC also examined how often movants were successful in obtaining dismissal. The study found that, on average, motions to dismiss were granted more often post-*Iqbal* than pre-*Twombly*. Across all cases, the grant rate went from 66% in the earlier period to 75% in the latter period. The FJC researchers downplayed this finding, however, emphasizing that (i) the higher grant rate was only for grants with leave to amend and, (ii) except for financial instrument

²³ *Id.* at 9-10 and Table 2.

²⁴ *Id.* at 10-11 (noting that “the percentage of cases with one or more motions to dismiss for failure to state a claim was higher in each month of 2009–2010 than in each month of 2005–2006” and that “in 2009–2010 there appeared to be a modest increase over time in the percentage of cases with such motions”) and Figure 1.

cases, the change in the grant rate even with leave to amend was not “statistically significant” for any other case category.²⁵ Returning to their emphasis on statistical significance, the researchers summarized the grant rate findings this way:

After controlling for identifiable effects unrelated to the Supreme Court decisions, such as differences in caseload across individual districts, we found a statistically significant increase in the rate at which motions to dismiss for failure to state a claim were granted only in cases challenging financial instruments. ... We found no increase in the rate at which motions to dismiss were granted, with or without opportunity to amend, in other types of cases.²⁶

Several other grant rate findings bear brief mention. The researchers found that a motion that sought dismissal of an amended complaint had a better chance of being granted than if dismissal was sought of an original complaint.²⁷ Also observed were differences from one district to another as to orders granting dismissal motions, both with and without leave to amend.²⁸ Finally, the researchers reported no difference post-*Iqbal* in how speedily cases were terminated after an order of dismissal, noting that “if the district courts were interpreting *Twombly* and *Iqbal* to significantly foreclose the opportunity for further litigation in the case, we would expect to see an increase in cases terminated soon after the order” but that “we found no statistically significant increase in 2010 in the percentage of cases terminated in 30 days, 60 days, or 90 days after the order granting the motion.”²⁹

II. INTERPRETING STUDY TO FIND LITTLE EVIDENCE OF *TWOMBLY* AND *IQBAL*'S EFFECTS MISREADS KEY FINDINGS OF CASES' IMPACT: THE EVIDENCE REGARDING FILINGS

Those who interpret the study to suggest that *Twombly* and *Iqbal* are not impacting practice misread its findings. Read carefully, the FJC's study shows *Twombly* and *Iqbal* are having

²⁵ Cecil, *et. al*, *supra* note 11 at 13-14, Table 4, and 21.

²⁶ *Id.* at 21 (referencing results reported in Table 4).

²⁷ *Id.* at 19.

²⁸ *Id.* at 18 and Table 8.

²⁹ *Id.* at 16 and Table 6.

considerable substantive impacts on dismissal activity. In this Part, I examine the evidence regarding the increase in the frequency with which motions to dismiss are being brought post-*Iqbal*. The next part (Part III) examines the increases in orders granting dismissal motions.

The FJC's study confirms early predictions that *Twombly* and *Iqbal* would incentivize defendants to more frequently challenge the sufficiency of the plaintiff's complaint. The researchers found a 50% increase from before *Twombly* to after *Iqbal* in the rate at which motions to dismiss for failure to state a claim were filed. Regression analysis to control for differences across federal districts and across types of cases confirmed the straightforward findings: after *Iqbal*, a plaintiff was twice as likely to face a motion to dismiss.³⁰ This sizeable increase in the rate of Rule 12(b)(6) motion activity represents a marked departure from the steady filing rate observed over the last several decades.³¹ Recall further that the FJC also found an increasing month-to-month trend line in the post-*Iqbal* period, providing some (though perhaps weak) evidence to suggest that the filing rate may continue to rise over time.³²

Of course, the preceding discussion assumes the filing activity levels the FJC found are accurate. In Part IV, below, I discuss the possibility that the data the FJC researchers gathered may be incomplete, particularly as to the filing rate. If instead of the 4% pre-*Twombly* rate the FJC reported, the actual filing rate pre-*Twombly* was closer to 13-15% as prior FJC studies suggest it probably was, then applying the same 50% increase in the filing rate would mean that defendants after *Iqbal* may be filing motions, on average, in roughly one out of every five cases. Moreover, keep in mind that the above figures refer to the average filing rate across all cases. The FJC's 2011 study observed filing rates (both pre-*Twombly* and post-*Iqbal*) for employment discrimination and other civil rights (non-prisoner) cases that were well above the average rate.³³ Prior empirical study of motions to dismiss similarly recorded higher filing rates for these two important case types but at even higher rates than the FJC's 2011 study found.³⁴

³⁰ Cecil, *et. al*, *supra* note 11 at 10 and Table 2.

³¹ See *supra* notes 75-78.

³² Cecil, *et. al*, *supra* note 11 at 11 and Figure 1.

³³ Cecil, *et. al*, *supra* note 11 at Table 4 (reporting, *inter alia*, a pre-*Twombly* filing rate of 4% for all cases, as compared with 6.9% and 9.7% for employment discrimination and other civil rights (non-prisoner) cases, respectively).

³⁴ THOMAS E. WILLGING, USE OF RULE 12(b)(6) IN TWO FEDERAL DISTRICT COURTS (Fed. Jud. Ctr. 1989). See *infra* text accompanying notes ___ - ___ for a discussion of the

That more motions are being filed carries real consequences for litigants. It means added costs for those who have to gather additional information either in anticipation of or in response to these motions. It also means added costs in having to defend against these more frequently-filed motions, even those that ultimately are unsuccessful.³⁵ Writing before the FJC's study, Arthur Miller anticipated that "federal courts will be required to devote much more time to evaluating factual allegations than in the past—time that might be better spent appraising the merits of a well-developed record presented at summary judgment or trial, especially with regard to uncomplicated matters."³⁶ Moreover, none of these cost calculations take into account that some will be unable to bear the additional expenses, or will lack access to the information sought, and so either will be deterred from bringing suit or unable to stave off dismissal. All of these are additional consequences that flow directly from the greater willingness of defendants to bring motions to dismiss (but they are consequences that were invisible to the FJC researchers who were not looking for those effects, as discussed further in Part IV).

III. INTERPRETING STUDY TO FIND LITTLE EVIDENCE OF *TWOMBLY* AND *IQBAL*'S EFFECTS MISREADS KEY FINDINGS OF CASES' IMPACT: THE EVIDENCE REGARDING ORDERS

We turn now from the data regarding filings to the even more important evidence the study found regarding dispositions—that is, *Twombly* and *Iqbal*'s effect on dismissal rulings. In this Part I raise three main criticisms of the FJC's findings regarding dispositions. All three criticisms are premised on the concern that because of how the study's findings were presented the considerable evidence reported of *Twombly* and *Iqbal*'s effects on dismissal orders will be overlooked or misunderstood by policy makers and other readers.

1989 study.

³⁵ See Clermont & Yeazell, *supra* note 5 at 840 (predicting an increase after *Iqbal* in the number of motions to dismiss that are filed and observing that "many plaintiffs will bear the expensive burden of these motions, even if the motions fail").

³⁶ Miller, *supra* note 4, at 41-42.

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- A. Focusing on the grant rate, the study inadequately emphasizes that there were many more dismissal orders post-*Iqbal*

The FJC study is unintentionally confusing when it emphasizes the rate at which motions to dismiss were granted without giving adequate attention to the total number of orders granting dismissals. Table 4 of the FJC study reveals that there were more orders granting motions to dismiss post-*Iqbal*, both with and without leave to amend, in every case category. I have illustrated the increases more vividly in Figures 1A and 1B below:

Figure 1A: Total Number of Orders Granting Motions to Dismiss With Leave to Amend

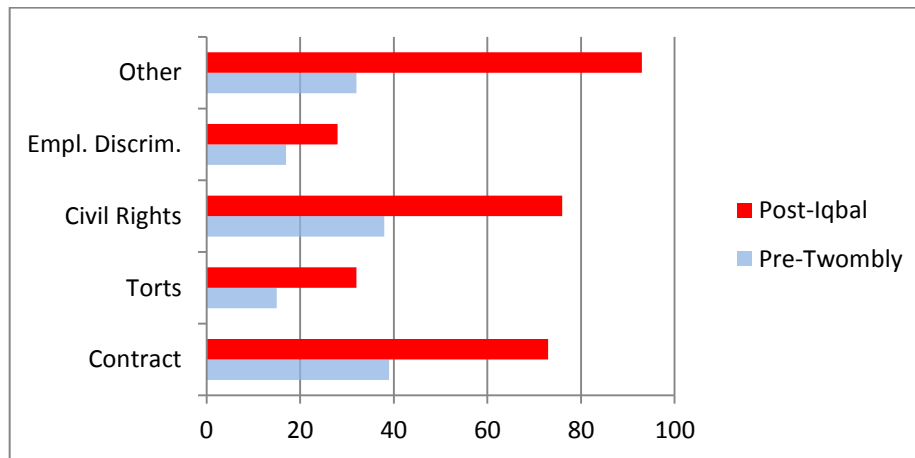


Figure 1A: Clustered bars depict the total number of orders granting dismissal with leave to amend. Figures for the Financial Instruments cases are omitted. All data are drawn from the FJC Study (at 12-14 and Table 4).

Figure 1B: Total Number of Orders Granting Motions to Dismiss Without Leave to Amend

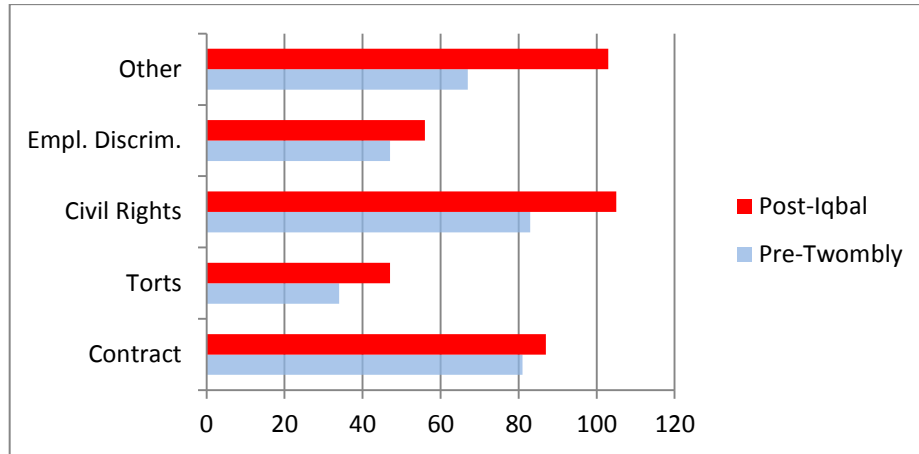


Figure 1B: Clustered bars depict the total number of orders granting dismissal without leave to amend. Figures for the Financial Instruments cases are omitted. All data are drawn from the FJC Study (at 12-14 and Table 4).

To be sure, in order to assess the relative increase in the total number of dismissal orders, we also need to know if there were changes in the case filing rate. Any change in dismissal orders from the earlier to later period must be measured against any relative increase in the number of cases filed. It turns out that the increase in case filings in the later period was not nearly as large as the increase in dismissal orders granted. The FJC study reports that civil case filings increased only 7% in the 23 federal district courts from which their data was drawn. Contrast this with the percentage increase in the total number of orders granting dismissal with leave to amend, the category given primary attention by the FJC researchers:

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Figure 1C: Percentage Rise after *Iqbal* in Total Number Of Orders Granting Dismissal With Leave to Amend

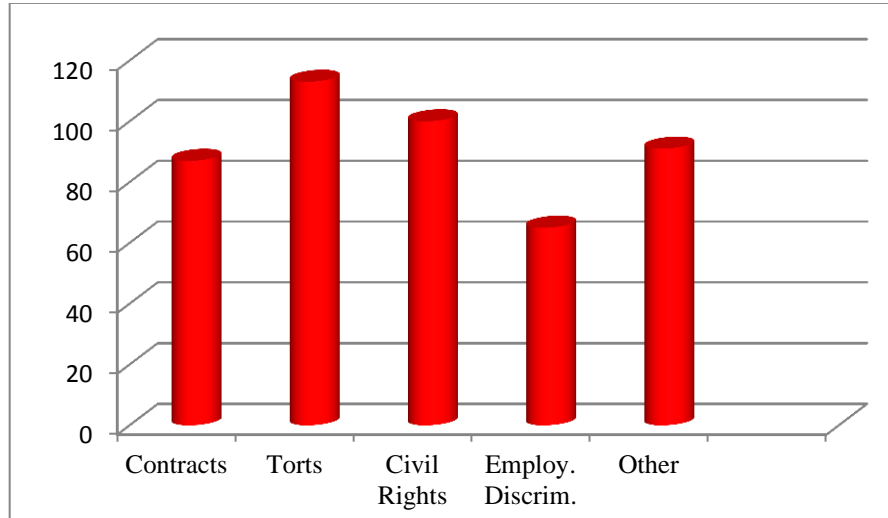


Figure 1C: Clustered cylinder columns depict the percentage rise in the total number of orders granting a defendant's motion to dismiss for failure to state a claim with leave to amend the complaint. Results are calculated from data reported in FJC Study at 12-14 and Table 4. Excluded are the findings for Financial Instruments cases.

As Figure 1C depicts, the 7% increase in case filings was dwarfed by the percentage increases in the number of orders granting dismissal in every case category. Regrettably, the proportionately higher number of dismissal orders post-*Iqbal* is almost entirely obscured by the researcher's emphasis on the grant rate. The study alludes to this increase in total grants but only obliquely, in a passage that suggests the increase was entirely hypothetical:

Even if the rate at which motions are granted remains unchanged over time, the total number of cases with motions granted *may* still increase. The 7% increase in case filings combined with the increase in the rate at which motions are filed in 2010 *may* result in more cases in recent years with motions granted, even though the rate at which motions are granted has remained the same.³⁷

Of course, it was not only possible that there would be more

³⁷ See Cecil, *et. al*, *supra* note 11 at 22 (emphasis added).

orders granting dismissal post-*Iqbal*; that is exactly what happened. Unfortunately, neither at this point—nor at any point—in the narrative description of the findings is the reader directed to the data in Table 4 showing that there were more orders of dismissal in every case category. Instead, the study’s descriptive emphasis was squarely on the grant rate, the subject to which we now turn.³⁸

B. If Statistical Significance to be discussed, findings regarding the grant rate should have been more transparent.

In conveying to readers their findings regarding the rate at which courts granted motions to dismiss in the post-*Iqbal* period, the FJC researchers emphasized throughout the study whether those findings were statistically significant. Most importantly, in the study’s narrative discussion section readers were advised that the grant rate increase was not statistically significant for any category except for Financial Instruments.³⁹ This emphasis on statistics over substance is the focus on my two remaining major critiques of the study’s discussion of the grant rate findings.

Whatever the benefits of a well-constructed empirical study, empirical research can also confound thinking if the chosen methodology is unsound or if even adequately collected findings are not communicated clearly.⁴⁰ Consequently, the critique I raise here is that, having decided to report whether their findings were statistically significant, the researchers should have made the information they reported more transparent. The researchers could have aided transparency and understanding in several ways.

For starters, they could have reported the actual test results. I discuss below in Part III(C) what a p-value denotes and it is calculated. For present purposes, the key point to keep in mind is that when a p-value is computed to be $\leq .05$, it is said to be

³⁸ The study might also have merged together for discussion purposes the filing and grant rate findings that were reported separately. Merging the two together could also have made it plain, even if one did not look at Table 4’s findings, that there were going to be a higher number of orders granting dismissal post-*Iqbal*. Combined with a grant rate that at least remained steady, the fact that there were more motions being filed post-*Iqbal* necessarily had to mean that there were more motions being granted, and that is exactly what the data shows happened.

³⁹ Cecil, *et. al*, *supra* note 11 at 21.

⁴⁰ See, *e.g.*, Lee Epstein and Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002); Lee Epstein, Andrew D. Martin & Matthew M. Schenider, *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 VAND. L. REV. 1811 (2006).

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statistically significant at this level; larger than .05 and the findings are deemed by conventional norms not to be statistically significant. The conventional practice in scientific journals is to report actual p-values, rather than merely reporting results as significant or not.⁴¹ In this context it certainly would have been preferable for the FJC researchers to report the p-values because that would have helped readers make better sense of the results.

To illustrate how summary declarations of significance or nonsignificance abet misunderstanding, consider how the findings were reported for Civil Rights cases. The researchers reported that the grant rate in Civil Rights cases increased 7.7 percentage points after *Iqbal* (as the excerpt from Table 4 shows, it went from 70.3% to 78%), but that this increase was not statistically significant at the .05 level:

Table 4: Outcome of Motions to Dismiss for Failure to State a Claim

| | | | | | | |
|-----------------|----------------------------|-------|-------|-------|-------|--------|
| Civil Rights | Denied | 27.9% | (51) | 22.0% | (51) | |
| | Granted All or Some Relief | 70.3% | (121) | 78.0% | (181) | +7.7% |
| | With Amendment | 21.1% | (38) | 32.8% | (76) | +11.7% |
| | Without Amendment | 48.3% | (83) | 45.3% | (105) | -3.0% |

* $p \leq 0.01$, relative to the likelihood that the motion will be denied.

† $p \leq 0.05$, relative to the likelihood that the motion will be granted without leave to amend.

Though the p-value was not reported, the researchers subsequently confirmed that they calculated it as .08.⁴² Debate over whether a statistically significant effect should be recognized when $P \geq 0.05$ is largely beside the point. At the least, reporting the actual magnitude of the result would have allowed readers to evaluate for themselves what to make of the increase of 7.7 percentage points in the grant rate for Civil Rights cases.

Moreover, and relatedly, because it is likely that most readers of the FJC's study will not possess background training in statistics, it would have aided understanding of the test results for the researchers to have acknowledged the limitations of statistical testing, including that any particular threshold of significance level is necessarily arbitrary.⁴³ Even Ronald Fisher,

⁴¹ David Kaye, Is Proof of Statistical Significance Relevant, 61 Wash. L. Rev. 1333, 1344 (1986).

⁴² Email correspondence from Joe Cecil to Lonny Hoffman, August 2, 2011 (copy on file with author).

⁴³ See generally Thomas W. Nix and J. Jackson Barnette, *The Data Analysis Dilemma: Ban or Abandon. A Review of Null Hypothesis Significance Testing* 5 RESEARCH IN THE SCHOOLS 3 (1998); Dominic Beaulieu-Prevost, *Confidence Intervals:*

who influenced more than anyone science's adoption of .05 as the conventional level of statistical significance, acknowledged the arbitrariness of the cut off and urged researchers to report the exact figures, rather than relying on summary declarations of significance.⁴⁴

To further aid understanding and transparency, the researchers also could have acknowledged that although they used an accepted test, known as a two-tailed test, to calculate the p-values, a justifiable argument certainly can be made in this context for using a different test (known as a one-tailed test) for evaluating statistical significance. Even though the two-tailed test usually will be the more appropriate test to conduct, there are certainly reasonable arguments to be made in favor of the one-tailed test in this context, since the effects of the Court's cases are likely to be unidirectional (that is, where it is difficult to believe a stricter pleading test would lead to fewer dismissals).⁴⁵ Had the one-tailed test been used, it would have yielded a p-value of 0.0391 for the increase in the rate at which motions to dismiss in Civil Rights cases were granted, which would make the increase statically significant even at the conventional five percent level. A one-tailed test also would have resulted in a lower p-value than the FJC researchers reported for cases in the "Other" category, the largest case category (cases in the "Other" category included antitrust, RICO, ERISA, copyright, patent, environmental, other statutory actions, and a number of other case types). The one-tailed p-value for the grant rate increase for Other is .0539. Not at the .05 level, but darn close. How close? Put it this way: if the researchers had miscoded even a single case, making the grant rate 197 instead of 196 (as reported), then $p=0.0448$ and it is significant at .05 (a graphic illustration of how the FJC's model was quite fragile to small changes in the data).

One final way, specific but important, that the study would have been more understandable is if the researchers had reported whether the overall grant rate increase was statistically

From Tests of Statistical Significance to Confidence Intervals, Range Hypotheses and Substantial Effects, 2 TUTOR. IN QUANT. METHODS FOR PSYCHOLOGY 11(2006).

⁴⁴ Kaye, *supra* note __ at 1344-45 (citing Fisher's work). For a marvelous discussion of Fisher's influence, see STEPHEN T. ZILIAK AND DIERDRE N. MCCLOSKEY, *THE CULT OF STATISTICAL SIGNIFICANCE: HOW THE STANDARD ERROR COSTS US JOBS, JUSTICE, AND LIVES* (2008).

⁴⁵ DAVID W. STOCKBURGER, *INTRODUCTORY STATISTICS: CONCEPTS, MODELS, AND APPLICATIONS* (1996) (noting that the "one-tailed t-test is performed if the results are interesting only if they turn out in a particular direction"); see also Alan O. Sykes, *An Introduction to Regression Analysis*, at 22 (2011) (Chicago Working Paper in Law & Economics, for *The Inaugural Coase Lecture*) (copy on file with author)

significant after removing the Financial Instruments cases. The study does not specifically report whether it would have been but the narrative description section of the study could be read to suggest that if the aberrant Financial Instrument cases were removed, the overall grant rate increase would not have been statistically significant at the five percent level.⁴⁶ However, this is not correct. If the Financial Instruments cases are removed, the overall grant rate increase becomes statistically significant at the .05 level, using the same two-tailed test the FJC employed.⁴⁷

Technicalities aside, the key point to be made here is that since the vast majority of readers of this study will probably lack a background in statistics, it would have been better for the researchers to have made the statistical significance findings more transparent and understandable, in the specific ways discussed above. By doing so, readers would have been less likely to ignore potentially important effects that the data show *Twombly* and *Iqbal* may be having on dismissal practices and outcomes.

C. Most Importantly, Researchers Should Have Emphasized Substantive Significance, Not Statistical Significance

Eclipsing all of these observations about how the statistical significance of the results should have been reported, the third and most important critique to be raised is that the emphasis by the FJC researchers on statistical significance is highly confusing. By fixating on statistical significance, the study unintentionally confuses the reader into missing *Twombly* and *Iqbal*'s consequential impacts.

To begin, if we are to appreciate the difference between statistical and substantive significance—and so better understand what the all-powerful p-value denotes (and what it does not denote)—we must first try to clarify why calculations of statistical significance are made. Stepping outside of the field of law, consider a researcher who is interested in determining

⁴⁶ Cecil, *et. al*, *supra* note 11 at 21 (“we found a statistically significant increase in the rate at which motions to dismiss for failure to state a claim were granted only in cases challenging financial instruments. . . . We found no increase in the rate at which motions to dismiss were granted, with or without opportunity to amend, *in other types of cases*”) (emphasis added).

⁴⁷ Other researchers have reached similar results. See Comment of Scott Dodson, posted to *Reports of Pleading's Demise May Have Been Exaggerated*, March 29, 2011, available at <http://prawnsblawg.blogs.com/prawnsblawg/2011/03/reports-of-pleadings-demise-may-have-been-exaggerated.html>.

whether a certain drug has an effect on people. The researcher conducts an experiment in which she gives a placebo to some subjects and the drug to be tested to others, the basic approach being to see whether the two groups react differently. Of course, the researcher recognizes that even if she does observe differences in the reactions of the two groups she cannot be certain that those differences were caused by the drug and not some other reason(s). For instance, even though the researcher would have tried to make sure the two groups of people were similar to one another, the two populations might be dissimilar in ways of which she was unaware. If they were, then one or more of these unknown variables, and not the drug, might explain the differences observed. Even if the two groups were identical in every way, it might also just be a matter of chance that the reactions of the two groups were different. That is, even if the two groups are similar to one another, it is always possible that they are not representative of the entire population.

Our drug researcher would like to be able to answer how unlikely it is that the differences she observes are the result of any of these other rival hypotheses, including the rival hypothesis chance. However, for reasons that are historical, complicated and not necessarily defensible, in biomedical research, as well as in the social sciences, the accepted practice is to begin by assessing the degree to which the researcher can be confident that the rival hypothesis chance is not the reason for the results.⁴⁸

Statisticians use what is called, rather confusingly, null hypothesis statistical testing (commonly shortened to NHST) to try to gauge the probability that mere chance explains the associations or differences found. Using more precise (if also more opaque) language, the purpose of doing null hypothesis significance testing is to gauge the probability that an association or difference between two variables would be found that is as or more extreme than the one observed if the association or difference existed only by chance.⁴⁹ The p-value that is computed by statisticians is the numerical value given to that probability.⁵⁰

⁴⁸ For a very readable historical account of the origins of statistical significance and its many controversies, see STEPHEN T. ZILIAK AND DIERDRE N. MCCLOSKEY, *THE CULT OF STATISTICAL SIGNIFICANCE: HOW THE STANDARD ERROR COSTS US JOBS, JUSTICE, AND LIVES* (2008).

⁴⁹ Lempert, *supra* note 20 at 232; see also Larry G. Daniel, *Statistical Significance Testing: A Historical Overview of Misuse and Misinterpretation With Implications for the Editorial Policies of Educational Journals*, 5 RESEARCH IN THE SCHOOLS 23, 27 (1998).

⁵⁰ See generally STANTON A. GLANTZ, *PRIMER OF BIO-STATISTICS* 103 (4th ed. 1997) (discussing the “meaning of P”).

The acronym is confusing because as a matter of statistical fact, one cannot use null hypothesis statistical testing to measure the probability that the tested hypothesis of no effect (the most commonly used null hypothesis) is true. The eminent psychologist Jacob Cohen famously put it this way in his paper, *The Earth is Round* ($p < .05$):

What's wrong with NHST? Well, among many other things, it does not tell us what we want to know, and we so much want to know what we want to know that, out of desperation, we nevertheless believe that it does! What we want to know is 'Given these data, what is the probability that H_0 is true?' But as most of us know, what it tells us is 'Given that H_0 is true, what is the probability of these (or more extreme) data?'⁵¹

Cohen is reminding us that because the p-value says something only about the *data*, not about the *hypothesis* being tested, it can only denote the probability of effects recurring in future experiments; and because it is based on an initial assumption that the null hypothesis is true, it cannot tell us the probability that the null hypothesis is actually correct or incorrect.⁵² In statisticians' parlance, $P(D | H_0) \neq P(H_0 | D)$.

If our drug researcher were to come up with a p-value of .05 or smaller, what that tells her is that the probability is one in twenty that she would have observed effects in the size (or even larger effects) if the drug were not truly causing those effects. That, however, would not prove a causal relation between the drug and the effects she detected. As Richard Lempert has put it, "[r]ejecting a null hypothesis is not the same as proving a favored one."⁵³ The p-value only tests the probability of obtaining similar data, assuming the rival hypothesis chance is true; thus, the p-value calculation tells her nothing about any other rival hypothesis. Indeed, as noted above, though we would like it at least to be able to tell us the probability of the null hypothesis, it cannot even do that, strictly speaking.⁵⁴ At best, a p value $>.05$

⁵¹ Jacob Cohen, *The Earth is Round* ($p < .05$), 49 AMERICAN PSYCHOLOGIST 997, 997 (1994).

⁵² *Id.* at __; see also Kaye, *supra* note __ at __.

⁵³ *Id.* at 235.

⁵⁴ Even if one sets aside the strict critique of significance testing, the most that a small p-value would let our drug researcher do is feel much more confident that she could rule out randomness as the explanation for the results. A small p-value is not proof that the null hypothesis is true.

would allow our researcher only to say that the null hypothesis cannot be rejected at that conventional significance level.

The failure to keep clear the limits of null hypothesis statistical testing has been the source of countless problems in the social sciences and biomedical fields.⁵⁵ Beyond the confusion, described above, over what a p-value denotes, the primary fallacy of NHST has been the persistent error among researchers and readers to mistake statistical significance for practical or substantive importance. Frank Yates, one of the leading statisticians of the last century (and even a follower of Ronald Fisher earlier in his career⁵⁶), sharply made the point more than a half century ago that null hypothesis significance testing “has caused scientific research workers to pay undue attention to the results of the tests of significance they perform on their data, and too little to the estimates of the magnitude of the effects they are investigating.”⁵⁷ In legal academia, there are many excellent sources to consider to gain a clear understanding of what statistical testing can do and what it cannot do.⁵⁸ Even the U.S. Supreme Court has gotten into the act, albeit as a latecomer, reminding us that (at least in the context of Rule 10b-5 securities actions) courts should not confuse statistical significance for substantive importance.⁵⁹ Still, as Stephen Ziliak and Deirdre

⁵⁵ Ziliak & McCloskey, *supra* note ____.

⁵⁶ *Id.* at 235.

⁵⁷ Frank Yates, *The influence of “Statistical Methods for Research Workers” On the Development of the Science of Statistics*, *Journal of the American Statistical Association*, 46, 32-33 (1951).

⁵⁸ *See, e.g.*, David H. Kaye, *Is Proof of Statistical Significance Relevant*, 61 WASH. L. REV. 1333 (1986); Lee Epstein and Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002); Lee Epstein, Andrew D. Martin & Matthew M. Schenider, *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 VAND. L. REV. 1811 (2006).

⁵⁹ *Matrixx Initiatives Inc. v. Siracusano*, __ U.S. __ (March 2011), Slip Op. at ____ (“A lack of statistically significant data does not mean that medical experts have no reliable basis for inferring a causal link between a drug and adverse events”) *id.* at ____ (“medical professionals and researchers do not limit the data they consider to the results of randomized clinical trials or to statistically significant evidence”). As it turns out, in the same decision that recognized the distinction between statistical and practical significance, the Court cited *Twombly* and *Iqbal* as authority for upholding the sufficiency of the plaintiff’s complaint. *See Matrixx*, at slip op. 18-19 (“We believe that these allegations suffice to “raise a reasonable expectation that discovery will reveal evidence” satisfying the materiality requirement, *Bell Atlantic Corp. v. Twombly*, and to “allo[w] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,” *Iqbal*. . . . Viewing the allegations of the complaint as a whole, the complaint alleges facts suggesting a significant risk to the commercial viability of Matrixx’s leading product”). It is hard to gauge which is more uncertain: that the lower courts will follow the Court’s explicit criticisms in *Matrixx* of overrelying on statistical significance or its more opaque reference to *Twombly/Iqbal* that might or might not suggest an intended softening of the pleading sufficiency standard. For more on *Matrixx*, *see* David Kaye H. Kaye, *Trapped in the Matrixx: the U.S. Supreme Court and the Need for Statistical Significance*, 39 PROD. SAFETY & LIAB. REPORTER 1007 (2011).

McCloskey have recently shown in a brilliant, scorching, and irreverent book, the “cult of statistical significance” persists.⁶⁰ It seems that the fallacies made with regard to statistical testing are very hard to correct.

Although significance testing is very often “considered to be an objective, scientific procedure for advancing knowledge,” a finding of statistical significance or no significance does not say anything about the size or importance of the results obtained.⁶¹ A statistically significant result (where $p \leq .05$) might be something that we care very little about—and it does not become substantively more significant as the value of p drops.⁶²

Correspondingly, and of particular relevance with regard to the FJC study of *Twombly* and *Iqbal*, saying a relationship between variables is not statistically significant certainly does not mean that the observed effects are unimportant. The ability to detect an effect depends on the size of the sample studied (as well as on the size of the effect and the variability in the population).⁶³ The larger the sample, the more likely it is that the researcher will be able to observe an effect and, by extension, the smaller the sample, the less likely it is that the effect will be detected.⁶⁴ As Stanton Glantz explains in his primer on biostatistics: “The distinction between positively demonstrating that a treatment had no effect and failing to demonstrate that it does have an effect is subtle but very important, especially in the light of the small number of subjects included in most clinical studies.”⁶⁵ Richard Lempert has made the same point for a law journal audience:

An even greater threat to science-based understandings is the problem of low power. Particularly when samples are small, even strong relationships may not be statistically significant. This may lead researchers to report finding of no relationship in the data when a relationship not only exists but is substantively

⁶⁰ Ziliak & McCloskey, *supra* note __.

⁶¹ Roger E. Kirk, *Promoting Good Statistical Practices: Some Suggestions*, 61 EDUCATIONAL AND PSYCHOLOGICAL MEASUREMENT 213, 214 (2001).

⁶² Cohen, *supra* note __ at __; *see also* Alan G. Sawyer & J. Paul Peter, *The Significance of Statistical Significance Tests in Marketing Research*, 20 J. OF MARKETING RESEARCH 122, 124 (1983) (referring to “the practice of interpreting p-values as a measure of the degree of validity of research results, i.e., p-value such as $p < .0001$ is “highly statistically significant” or “highly significant” and therefore much more valid than a p-value of, say, .05” and noting that “such a practice is inappropriate”).

⁶³ Glantz, *supra* note __ at __.

⁶⁴

⁶⁵ Glantz at 151-52.

important.⁶⁶

The culprit of small sample size is clearly part of the story with the FJC study as a quick scan of the individual case categories readily reveals. For example, look at the Torts cases. The total number of observed orders pre-*Twombly* and post-*Iqbal* was, respectively, 15 and 32. Employment Discrimination cases were even smaller (just 17 orders pre-*Twombly* and 28 orders post-*Iqbal*). With sample sizes this small, to say that the results were not statistically significant is not saying very much at all. It certainly does not mean that the Court's decisions are not responsible for the higher number of orders and higher grant rate in both of these categories (as we will discuss below). Nor does it say anything about the magnitude of the effects observed.

Yet, by emphasizing that they had no statistically significant findings to report, the FJC researchers unintentionally led readers—and here I am primarily referring to rulemakers—to assume that *Twombly* and *Iqbal* have not had any scientifically measurable effect on dismissal practices. This is the primary problem: by focusing on statistical significance, the study confuses the reader into missing *Twombly* and *Iqbal*'s consequential effects. As the evidence they collected demonstrates, both overall, and in the three largest case categories (Other, Financial Instruments and Civil Rights), it was much more likely after *Iqbal* that a court would grant a motion to dismiss with leave to amend. The rate at which motions to dismiss were granted with leave to amend increased 12.8, 30.5 and 11.7 percentage points, respectively. The remaining three categories (Contract, Torts and Employment Discrimination) show smaller but still clearly increasing grant rates. Figure 2 illustrates for every case category examined (excluding the Financial Instruments cases) the magnitude of increase in the percentage of orders granting dismissal with leave to amend after *Iqbal*:

⁶⁶ *Id.*

Figure 2: Percentage of Orders Granting Dismissal With Leave to Amend

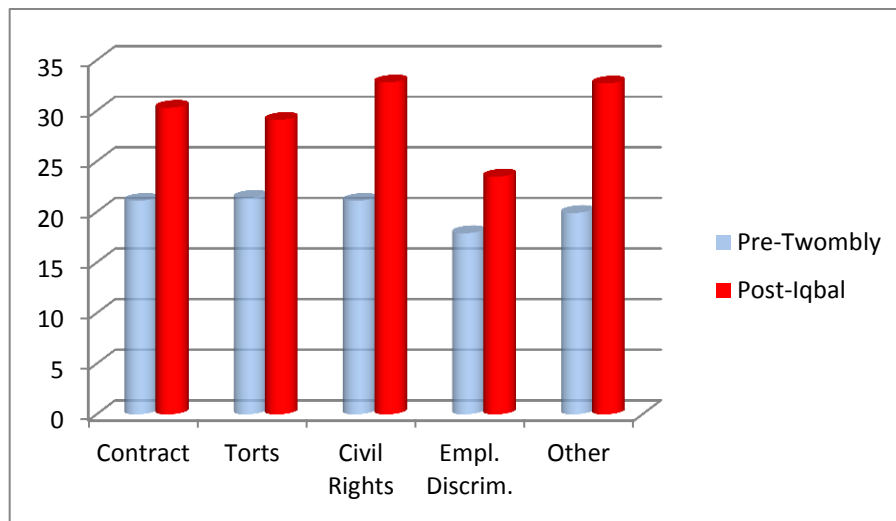


Figure 2: Clustered cylinder columns depict the percentage of orders granting a defendant's motion to dismiss for failure to state a claim with an opportunity to amend the complaint. All data are drawn from the FJC Study (at 12-14 and Table 4). Excluded are the findings for Financial Instruments cases.

Even more starkly put, this means there was a whopping 64% rise in the grant rate post-*Iqbal* for cases in the Other category and a still astonishing 55% rise in the grant rate for Civil Rights cases. Figure 3 depicts the percentage rises for all case categories:

Figure 3: Percentage Rise after *Iqbal* in Orders Granting Dismissal With Leave to Amend

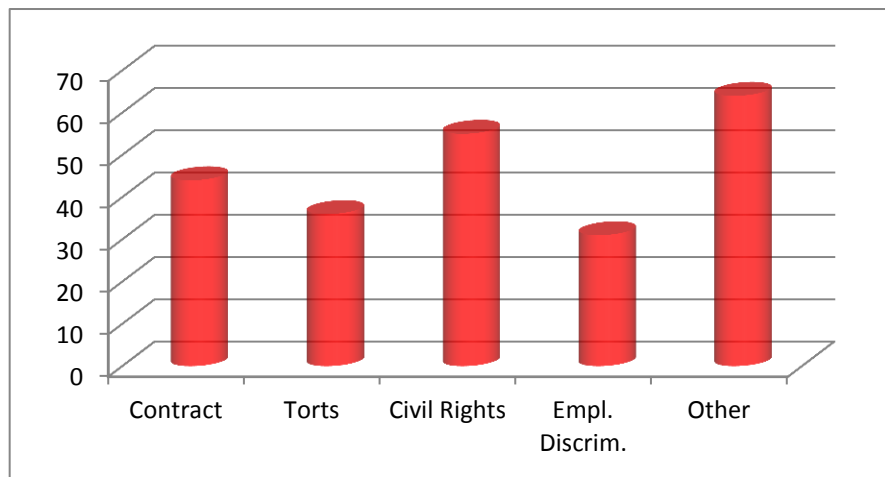


Figure 3: Cylinder columns depict the percentage rise in orders granting a defendant's motion to dismiss for failure to state a claim with an opportunity to amend the complaint. Results are calculated from data reported in FJC Study at 12-14 and Table 4. Excluded are the findings for Financial Instruments cases.

Figures 2 and 3 vividly show what an overemphasis on statistical significance makes it harder for the reader to discern: namely, that whether statistically significant or not, after *Iqbal* there was a higher likelihood a motion to dismiss would be granted with leave to amend in every case type examined.⁶⁷

⁶⁷ It might be said that these conclusions do not address the regression results the FJC reported in the appendices, principally in Table A-2, but this reads far too much into the results. The purpose of the regressions was to try to account for the effect of certain variables (such as differences among courts, differences in case mix between 2006 and 2010, and whether the order responded to an amended complaint). The results in the appendices only reveal valuable information if the variables really are independent of *Twombly* and *Iqbal's* effects; yet, it is not clear that they all are truly independent. For instance, why should we assume the district court is entirely independent of *Twombly* and *Iqbal's* effects? It is even less clear why it is appropriate to isolate out whether the court's order was in response to a complaint that had been amended. As noted earlier, an increase in the grant rate may be alarming even when leave to amend has been given, especially when the FJC's own data shows that the movant's success rate goes up

In addition to the problem of small sample size, there is another unique challenge that exists with studying dismissal orders. Kevin Clermont and Stephen Yeazell point out that not all Rule 12(b)(6) motions are alike and only some will be pure *Twombly/Iqbal* motions that challenge the factual sufficiency of allegations.⁶⁸ They submit that because pure *Twombly/Iqbal* motions will constitute only a percentage of all motions to dismiss for failure to state a claim, the effects of the cases will be masked by the non-*Twombly/Iqbal* motions.⁶⁹ In another paper published before the FJC study, Clermont further elaborates on the point:

[I]f one were to compile all dismissal decisions, the effects of *Twombly-Iqbal* would be hard to measure because these precedents apply to only a restricted subset of motions to dismiss (and result in final dismissal for a smaller subset). That is, *Twombly-Iqbal* will have its bite only in cases in which the plaintiff cannot plead more detail and the plaintiff nevertheless sues without the detail. The other cases will overwhelm and mask the subsets. In other words, the numbers of motions and dismissals might be high enough to conceal any effect of the new regime.⁷⁰

In other words, when the FJC reported that most of their findings on the grant rate were not statistically significant, it perhaps should have come as no surprise. Because pure *Twombly/Iqbal* motions are only one kind of Rule 12(b)(6) motion, Clermont and Yeazell predicted that it would be very hard to find

significantly after the plaintiff has had an opportunity to amend. *See supra* Part III(B)(1). Additionally, questions might also be raised about what the study is regressing from—that is, the baseline dismissal rate the researchers chose. *See Cecil, et. al, supra* note 11 at 15 n. 28 and 29. Finally and most fundamentally, the coefficients from multivariate regressions are meant to estimate each independent variable's effects by accounting for the other variables but the overemphasis on statistical significance can confuse understanding. The substantive effect of each independent variable's effects on the other variables cannot be understood by looking at statistical significance alone, as discussed extensively above in the text. *See, e.g., supra* Part III(B)(2) (evidence the FJC found that there were more orders granting motions to dismiss post-*Iqbal*, both with and without leave to amend, in every case category not contradicted by regression results); *see also e.g.*, text accompanying notes 79-80 (noting that although the FJC did not report whether the overall grant rate appears to have been statistically significant at the .05 level even when the Financial Instruments cases are excluded, using the same two-tailed test the FJC employed).

⁶⁸ Clermont and Yeazell, *supra* note 5 at 839 n. 66.

⁶⁹ *Id.*

⁷⁰ Clermont, *supra* note 9 at 1367 n. 140.

statistically significant evidence of *Twombly* and *Iqbal*'s effects through gross quantitative efforts like those the FJC undertook.⁷¹

Summing up, we may say the following: either in addition to or instead of reporting the statistical significance of their results, the researchers should have tried to convey the magnitude of the increase in the likelihood a motion to dismiss would be granted after *Iqbal* so that the substantive significance of the findings might be better understood by readers. Had the FJC presented its findings as suggested, the report's narrative description could have been very different. Certainly, one of the main conclusions would not have been that the increase in the grant rate was only statistically significant for one outlier category. Instead, one can imagine a rewritten discussion section that might have read something like this:

The data show that after *Iqbal* it was much more likely that a motion to dismiss would be granted with leave to amend both overall and in the three largest case categories examined (Civil Rights, Financial Instruments and Other). Moreover, the remaining three categories (Employment Discrimination, Contract and Torts) all clearly show a trend of increasing grant rates. Not only did the likelihood go up that a motion to dismiss would be granted after *Iqbal*, but there was also an increase in the absolute number of orders granting dismissal. This increase was in orders granted with and without leave to amend, and for every case category examined. Although some of the regression results may suggest that the differences found were due to factors unrelated to the Court's decisions, there is ample evidence of *Twombly* and *Iqbal*'s substantive effects on dismissal practices and outcomes for policymakers to consider. Whether statistically significant or not, the data show that more motions to dismiss were granted after *Iqbal* and there was a higher likelihood that they would be granted with leave to amend in

⁷¹ *Id.* (observing that "when I contemplate the possibility of a relatively noninflated numerator and an inflated denominator in the dismissal success rate, combined with the inevitable case-selection effect, I am left wondering whether any study looking at the numbers of motions and dismissals really could result in anything other than a showing of little impact.").

every case type examined.⁷²

IV. WHAT THE RESEARCHERS COULD NOT DETECT

I have argued that the FJC's study, when read with care, shows that the Court's cases have substantively impacted dismissal practices and outcomes. Apart from the primary critiques I have offered of the study's findings, it is equally vital to keep in mind what the researchers could not detect. To their credit, at various times in their deliberations rulemakers have recognized the limits of empirical study of *Twombly* and *Iqbal*'s effects.⁷³ The FJC researchers themselves likely understood the limits of their investigation; none of their findings are presented as policy recommendations. Nevertheless, it may be that the limits of empirical research into *Twombly* and *Iqbal*'s effects are too easily forgotten when a comprehensive study by distinguished researchers is presented in such a way that it unintentionally suggests the cases are not having the kind of serious, systematic changes in Rule 12(b)(6) activity that had been anticipated.

⁷²Alex Reinert has lodged a similar critique of the FJC study's deemphasis of its grant rate findings, noting that "[t]he fact that defendants have increased the rate at which they are filing MTDs, and increased their success rate (whether "statistically significant" or not), strikes me as quite important. Not only are defendants filing MTDs in cases in which they would not have filed pre-*Twombly* (because the predicted likelihood of success was too low), but they are having more success even after they have added a subset of cases which we might assume would not have been as amenable to dismissal pre-*Twombly*." Email from Alex Reinert to Joe Cecil and Andrea Kuperman, March 30, 2011 (copy on file with author).

Additionally, in a separate updated study that has just been released of published dismissal motions on Westlaw, Professor Patricia Hatamyar Moore found that *Iqbal* has had a significant effect not only on the rate of granting 12(b)(6) motions with leave to amend, as the FJC found, but also without leave to amend. Looking only at constitutional civil rights cases, Professor Hatamyar found the most dramatic results. Post-*Iqbal*, a court was 3.30 times more likely than it was pre-*Twombly* to grant a motion to dismiss without leave to amend, compared to the likelihood that the motion would be denied. See Hatamyar, *supra* note 29.

⁷³ See, e.g., Report to Standing Committee from Civil Rules Committee, in Agenda Materials, June 2011 Meeting of Committee on Rules of Practice and Procedure, at 53 (noting that "[o]ther questions elude the capacities of even the most careful docket studies. It is not possible to identify cases that would have been filed under earlier understandings of pleading standards but were not filed for fear of heightened pleading standards. . . . It is not possible to determine whether cases were dismissed for want of pleading facts that could be known only by discovering information available only by discovery from the defendant. It would be difficult to assess the quality of the differences between initially unsuccessful complaints and successful amended complaints, or to measure the advantages of an amended complaint in working toward ultimate resolution. And it is similarly difficult to distinguish pleadings that fail for want of factual sufficiency alone and those that fail in whole or in part for advancing an untenable legal theory").

A. The FJC Study Was Unable to Measure How Many Prospective Claimants Were Deterred by *Twombly* and *Iqbal* from Seeking Relief

One difficulty in assessing *Twombly* and *Iqbal*'s effects is that a study comparing pre-*Twombly* and post-*Iqbal* filing rates and movant success rates does not tell us how many prospective claimants were deterred from seeking legal relief because of the Court's more exacting pleading standard. Indeed, it is not clear how any empirical study could measure the deterrent effect of the Court's decisions. One suggestion that has been offered is that we might look at the total number of lawsuits filed. That approach, however, does not seem likely to shed much light on the deterrence problem since so many different variables influence the case filing rate.⁷⁴

Some empirical work that has been done with securities cases suggests that the Private Securities Litigation Reform Act's heightened pleading requirement has resulted in some meritorious cases not being filed. In their July 2007 study of securities class actions involving allegations of secondary market fraud, Stephen Choi, Karen Nelson, and A.C. Pritchard found the PSLRA's heightened pleading standard has had "screening effects," as they call it.⁷⁵ With respect to suits that would have settled for non-nuisance value (their shorthand for a meritorious case) pre-PSLRA, the authors found that

a substantial percentage of suits that would have resulted in a nonnuisance settlement prior to the PSLRA would not have been filed after Congress adopted the PSLRA, and, even if filed, would be less likely to produce a non-nuisance settlement. The screening effect is not observable, however, if we consider cases with 'hard evidence' of securities fraud – a restatement of earnings or revenues or an investigation by the SEC – or abnormal insider trading.⁷⁶

In other words, they ascertained a deterrence effect as a result of

⁷⁴ For a fascinating effort at trying to measure, *inter alia*, *Twombly*'s impact on the case filing rate see William Hubbard, *The Problem of Measuring Legal Change, With Application to Bell Atlantic v. Twombly*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1883831.

⁷⁵ Stephen Choi, Karen Nelson, and A.C. Pritchard, *The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. Emp. L. Stud. 35 (2009).

⁷⁶ *Id.* at __.

the heightened pleading requirement of the PSLRA which was most pronounced in cases in which access to hard evidence of wrongdoing is not as readily accessible to the plaintiff. In sum, as Choi, Nelson, and Pritchard observe, “there is no free lunch. Congress’s efforts to discourage frivolous litigation may have succeeded, but that success comes at the price of discouraging securities fraud class actions which would likely have been deemed meritorious prior to the PSRLA.”⁷⁷

Anticipating the problem, Arthur Miller underlined the danger concisely, keying in on concern about the kind of cases that might be deterred by *Twombly* and *Iqbal*:

[T]he plausibility pleading standard risks increased difficulty for many prospective claimants—some with claims that may well have merit and involve important public policies—to survive a Rule 12(b)(6) motion. In an unknowable number of instances, the increased risk of dismissal and the resources needed to defend against it may deter the institution of a potentially meritorious case. ... This is especially worrisome in cases involving important issues—such as constitutional values and the private enforcement of federally and state-created rights—and the concomitant shift in the allocation of the litigation-resource burden from defendants to plaintiffs these two decisions produce. The result is likely to operate in derogation of effectuating rights and policy norms established by Congress and state legislatures.⁷⁸

The FJC study was not designed to determine whether a similar deterrence effect was occurring among prospective claimants as a result of the Court’s decisions. The study, thus, cannot tell us whether *Twombly* and *Iqbal* are causing some who have been wronged not to file meritorious claims out of a concern they would not be able to meet the general pleading requirement of Rule 8.⁷⁹

⁷⁷ *Id.* at ___. Even among the group not deterred from filing suit, other adjustments may have to the new pleading regime may have to be made that would not be observable. For instance, more factual detail may be going into complaints, presumably causing at least some claimants to incur additional costs to gather the necessary additional detail perceived to be necessary to meet the Court’s new pleading requirements. See Elizabeth M. Schneider, *The Changing Shape of Federal Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. Pa. L. Rev. 517, 533 (2010) (“Plaintiffs are required to produce a considerable degree of factual detail at the very beginning of the lawsuit before they have been able to conduct any discovery”).

⁷⁸ Miller, *supra* note 4, at 47, 77.

⁷⁹ Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 852 (2010) (“*Iqbal* applies a thick

B. The FJC Study Was Unable to Measure How Often Meritorious Cases Have Dismissed Under the *Twombly/Iqbal* Test

Empirical study of Rule 12(b)(6) activity also cannot tell us how often cases are being dismissed at the pleading stage that, if allowed to proceed to discovery, would have been able to locate evidence to support a meritorious claim. This possibility could arise any time that the plaintiff lacks access to proof of wrongdoing that is solely in the defendant's possession. I drew attention to the problem of information asymmetry after *Twombly* was announced⁸⁰ and, although it remains difficult to determine how often this problem arises, it is one of the key policy questions that rulemakers must address. Discovery rule reform proposals currently being considered by rulemakers could help ameliorate the information asymmetry problem but they are necessarily only a partial and inadequate remedy for all of the concerns that *Twombly* and *Iqbal* trigger when imbalances in critical information exist. For now, the key point to be made is a study comparing grant rates pre-*Twombly* and post-*Iqbal* is unable to tell us how many meritorious cases have been dismissed under the *Twombly/Iqbal* standard. That information, critical to know before we can make any assessment of the Court's new doctrine, is undetectable by the empirical methods used in the FJC's study.

C. The FJC Study Cannot Detect Whether *Twombly/Iqbal* Have Significantly Increased Dismissals of Complaints for Being Factual Insufficient

Finally, the FJC's *Iqbal* study also does not tell us anything about the kinds of motions being filed and granted. More precisely, the FJC study cannot tell us whether the Court's decisions have significantly increased dismissals of complaints on the ground that they are factually insufficient. Obviously, even after *Iqbal*, courts are being asked to decide motions to dismiss on grounds that would have justified dismissal even before *Twombly* (such as a legal sufficiency challenge). At the same time, even before *Twombly* and *Iqbal* pure notice pleading was

screening model that aims to screen weak as well as meritless suits, whereas *Twombly* applies a thin screening model that aims to screen only truly meritless suits. The thick screening model is highly problematic on policy grounds").

⁸⁰ Hoffman, *supra* note 4, at 1260-64.

probably not practiced, at least not routinely, in the lower courts. That is, even before *Twombly*, defendants were seeking dismissals—and judges were granting dismissals—on factual insufficiency grounds at least akin to the factual sufficiency review the Court authorized in *Twombly* and *Iqbal*. Given these two realities, to really evaluate *Twombly* and *Iqbal*'s effects what we would need to know is how often (i) defendants are filing the kinds of motions to dismiss that they would not have filed pre-*Twombly* and *Iqbal* and (ii) courts are granting those motions when they would not have done so before. Counting noses does not get at any of these deeper evaluative needs.

For instance, assume that there has been a ten-fold increase in factual sufficiency challenges but, at the same time, a corresponding decrease in legal sufficiency challenges. A study that compares the total volume of Rule 12(b)(6) activity pre-*Twombly* and post-*Iqbal* could find total activity levels unchanged and entirely miss those dramatic changes actually taking place. If *Twombly* and *Iqbal* have increased the number of dismissals sought and/or granted because a claim was deemed to be factually insufficient, that would constitute a significant change in dismissal practice. Many academic commentators have argued that the central infirmity with the Court's decisions is that they empower judges to decide whether a case has merit at the pleading stage, confusing pleading sufficiency with the kind of evidentiary evaluation undertaken at summary judgment, routinely after discovery.⁸¹ The FJC study cannot tell us whether the Court's decisions have transformed the nature of Rule 12(b)(6) challenges in this manner. As it turns out, preliminary results from a recently completed separate study does seem to indicate that factual insufficiency dismissal rates are much higher post-*Iqbal* and, separately, that legal insufficiency challenges are down.⁸²

V. INCLUSIVENESS CONCERNS: DID THE FJC CAPTURE ALL OF THE RELEVANT ACTIVITY?

We have seen that the FJC's study, when read with care, evidences the substantial impacts the Court's cases are having on dismissal practice. Moreover, as the previous part showed, there are other important effects the cases may be having that the FJC

⁸¹ See *supra* note 9.

⁸² SCOTT DODSON, SLAMMING THE FEDERAL COURTHOUSE DOORS: NEW PLEADING IN THE TWENTY-FIRST CENTURY (Oxford Univ. Press, forthcoming 2013) (copy of draft on file with author).

researchers would not have been able to observe. I argued, therefore, that the researchers should have been clearer in reporting their findings to expressly describe the limits of their empirical investigation. In this final part, I set all of these other criticisms aside. Taking the study on its own terms, I explore the possibility that the data the FJC researchers gathered may itself be incomplete. Consequently, I argue there are reasons to be concerned that the study may be providing us an incomplete picture of actual Rule 12(b)(6) activity.

A. Discrepancies Between the Filing Rate Found in the 2011 Study and Two Prior Studies of Rule 12(b)(6)

We saw earlier that the FJC found that motions to dismiss for failure to state a claim were filed in 4% of all cases in the pre-*Twombly* period running from October 2005 through June 2006. This, perhaps, is one of the most startling findings in the study. The 4% filing rate is significantly lower than the rate found by two earlier studies of Rule 12(b)(6) from the 1980s, both also conducted by the FJC. The first, in 1980, found a 15% filing rate.⁸³ The second study, completed in 1989, observed that Rule 12(b)(6) motions were filed in 13% of all civil actions.⁸⁴ The 2011 study cited these prior studies, noting the discrepancies, but did not address them further.⁸⁵ Why would the filing rate have fallen so dramatically (a decline of approximately roughly 70%) from the 1980s to 2005-06? The explanation for the dramatic decline from one period to the other (keeping in mind that both periods, of course, were pre-*Twombly*) is not immediately apparent. Indeed, the decline in the filing rate is particularly puzzling since the prior evidence indicates that the Rule 12(b)(6) filing rate has held very steady over the several decades in which such data has been gathered.⁸⁶

The FJC's finding that the post-*Iqbal* filing rate was 6.2% across the 23 districts in all case types is equally surprising. In earlier work examining the *Twombly* decision, it was noted that the high published citation rate to the case just one year after the

⁸³ P. CONNOLLY & P. LOMBARD, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: MOTIONS (Federal judicial Center 1980).

⁸⁴ Willging, *supra* note 12.

⁸⁵ Cecil, *et. al*, *supra* note 11 at 10-11 n.21.

⁸⁶ See Willging, *supra* note 13 at 5 (noting that "empirical data show a modern, consistent use of such motions to dispose of cases and claims" and summarizing prior research on filing rates of motions to dismiss for failure to state a claim going back to 1975).

decision came out.⁸⁷ Even at that early date, the large number of citations suggested defendants were now more regularly urging judges to intercept complaints at the pleading stage.⁸⁸ Several other commentators similarly predicted that after *Iqbal* defendants would be more routinely challenging the sufficiency of the plaintiff's pleadings.⁸⁹ In this same connection, it is perhaps notable that the 6.2% post-*Iqbal* filing rate the FJC found seems at odds with survey results of lawyers with the National Employment Lawyers Association (NELA), in which nearly three quarters reported that they had responded to motions to dismiss they believe would not have been brought prior to *Twombly*.⁹⁰

B. Some Possible Explanations for the Discrepancies

1. The 90-Day Cut-Off

One explanation for the disparities found in the rate at which motions to dismiss for failure to state a claim were filed might be that in 2011 the FJC looked only at motions filed within ninety days of the case being brought. By contrast, the two older FJC studies catalogued motion to dismiss activity over the life of the cases examined. The researchers acknowledged that they may have missed some motion activity because of the cut-off date but were assuaged by a separate finding that the average time between case filing and filing of the first motion to dismiss was forty days—a figure that was basically the same both pre-*Twombly* and post-*Iqbal*.⁹¹ However, because they were looking only at a pool of motions filed within the first ninety days of a case's commencement, this finding means only that one who moves for dismissal within the first ninety days of a case will do so around the 40th day. While it is often strategic for a defendant to seek dismissal early in the case, there are also plenty of reasons why that might not happen within the first ninety days. A defendant might not be served promptly after commencement. A defendant might elect to waive service of process, thereby

⁸⁷ See Hoffman, *supra* note 4 at 1222-23.

⁸⁸ *Id.*

⁸⁹ See, e.g., Clermont & Yeazell, *supra* note 5 at 840 (observing that after *Iqbal* “any defendant’s lawyer, faced with a complaint employing the minimalist pleading urged by Rule 8’s wording and the appended Forms’ content, commits legal malpractice if he or she fails to move to dismiss with liberal citations to *Twombly* and *Iqbal*”).

⁹⁰ EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE, REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/\\$file/costciv2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf).

⁹¹ Cecil, *et. al*, *supra* note 11 at 8 n. 13.

extending the time to file her answer up to sixty days. The parties might agree to extend answer and motion deadlines. A defendant might also move to dismiss allegations in a complaint that has been amended more than ninety days after the case was initially filed. Perhaps most importantly, a defendant might seek dismissal—which she may do at any point in the case—if there has been a favorable change in the law. For any of these reasons, a substantial number of motions may have been brought more than three months after initial case filing.

The missing activity would be significant by itself, but the even more concerning question is whether the 90-day cut off may have biased the results in one direction. There is certainly reason to think it could have. After *Twombly* and *Iqbal*, many defendants might have concluded that the Court's decisions provided them an opportunity to seek dismissal that they previously did not have. As previously noted, several commentators predicted that that is exactly what defendants would conclude after *Iqbal*.⁹² It is possible, therefore, that a higher number of defendants may have been led post-*Iqbal* to seek dismissal of claims brought more than three months earlier, as compared to defendants who, pre-*Twombly*, had no similar incentive to seek dismissal if they had not already done so in the first ninety days.

2. Exclusion of Prisoner and *Pro Se* Cases

That the *Iqbal* study excluded prisoner and *pro se* cases seems a second likely explanation for at least some of the discrepancy in the filing rate found between this and the earlier studies. The key exclusion seems to have been prisoner and *pro se* cases.⁹³ Both the 1980 and 1989 FJC studies included them. While these cases are a relatively small percentage of the entire civil docket,⁹⁴ if prisoner cases have a higher incidence of Rule

⁹² See *supra* text accompanying notes 78-80.

⁹³ Most prisoner cases are *pro se*. See ROGER A. HANSON AND HENRY W.K. DALEY, BUREAU OF JUSTICE STATISTICS, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 21 (DOJ Dec 1994) (noting that nearly all 1983 suits brought by prisoners are *pro se* but also noting that many *pro se* cases are not brought by prisoners).

⁹⁴ For instance, in 2009 there were approximately 235,000 private cases filed, of which approximately 23,000 were prisoner petitions regarding conditions and other civil rights claims (which are the kinds of petitions that can trigger Rule 12(b)(6) activity). See Administrative Office of the U.S. Courts, Statistical Tables for the Federal Judiciary, December 31, 2009, at C-2. Habeas petitions made up another 17,000 cases in that year but Rule 12(b)(6) motions are rarely brought in habeas petitions. For a rare exception see *Hopkins v. Grondolsky*, 759 F. Supp. 2d 97 (D. Mass. 2010).

12(b)(6) activity than other civil cases then it is certainly possible that the exclusion of these cases, as well as the non-prisoner *pro se* cases, may explain some of the discrepancies in the filing rate between the 2011 study and the earlier FJC studies. Some prior research indicates that prisoner petitions, at least during the 1980s, had an above-average likelihood of involving Rule 12(b)(6) activity.⁹⁵

However, if the exclusion of prisoner cases provides part of the explanation for the significantly lower pre-*Twombly* filing rate the FJC's *Iqbal* study found, as compared with the earlier studies, it cannot explain all of the differences. There are discrepancies not only in the overall filing rate, but also with regard to every case category studied.⁹⁶ For instance, Willging's 1989 study found a filing rate of 9% for employment discrimination cases, as compared with only 6.9% in the 2011 study. Additionally, Willging observed motions to dismiss for failure to state a claim in 14% of other civil rights (non-prisoner) cases, as compared with just a 9.7% filing rate found by the 2011 study. The consistently higher rates found by the 1989 FJC study for all case categories strongly suggests that the exclusion of prisoner cases does not explain all of the disparities in observed filing rates between the studies.

3. Other Possible Explanations: Coding Errors and Search Term Limitations

If neither the 90-day window nor the exclusion of prisoner cases explains all of the discrepancy in filing rates, what other possible explanations exist? Two other factors may have led the 2011 researchers to miss some Rule 12(b)(6) activity. The first has to do with the study's reliance on the CM/ECF coding by the clerks of potentially relevant motions. Only motions coded by the clerk under the event subcategory code "motion to dismiss" made it into the filing rate cohort that was collected. If a court clerk did not code a motion correctly, it would not have been included in the dataset.⁹⁷ While it is not possible to know how often

⁹⁵ See Willging *supra* note 12 at 7.

⁹⁶ The 1980 study by Lombard and Connolly did not break out Rule 12(b)(6) activity by case type so the discrepancies noted in the text regarding case type are only between Willging's 1989 study and FJC's 2011 study.

⁹⁷ This might happen for sorts of reasons (*e.g.*, a motion asking for relief on multiple grounds might have been coded for the relief first sought; a motion for dismissal might have been brought as part of the defendant's answer and so might have been coded only as an answer; a motion to dismiss might have been misnamed by the movant; or the clerk simply might have coded the dismissal motion incorrectly).

miscodings may occur, a study that relies on the CM/ECF coding is susceptible to these sorts of errors. And it is worth noting that the miscoding problem does not go in both directions. That is, any coding errors that led to wrongful inclusions either would have been filtered out by the FJC's subsequent electronic filtering or discarded from the sample manually by the researchers when they looked at the related orders and discovered them not to concern a motion to dismiss for failure to state a claim. In other words, coding error problems in this context are unidirectional. The miscoding of a motion to transfer venue under the event code "motion to dismiss" would not have affected the study's findings; but the miscoding of a Rule 12(b)(6) motion under the event code "motion to transfer venue" would.

A second explanation for some of the discrepancies in the filing rate between the 2011 study and the prior studies may be the search terminology used by the FJC researchers to cull Rule 12(b)(6) motions from the undifferentiated larger pool of "motions to dismiss." As noted above, the FJC drew its initial cohort of filings from all motions coded by the district clerks under the event subcategory "motion to dismiss." Because this general code is inclusive of motions seeking dismissal on any basis, it was necessary to identify within the cohort only those that sought dismissal at the pleading stage for failure to state a claim. To do so, the FJC searched the entire set using these different terms and phrases: "facts sufficient"; "sufficient facts"; "plausible claim"; "fails to state a claim"; "failed to state a claim"; "failing to state a claim" and "12(b)(6)."⁹⁸ Though certainly a comprehensive search, it is possible that some motions to dismiss were missed that would have been found had broader search terms been tried.⁹⁹

⁹⁸ Cecil, *et. al*, *supra* note 11 at 5 n.9.

⁹⁹ Unfortunately, the database the FJC used is not publicly available so it is not possible to re-run the results. However, to illustrate how the FJC's search terminology may have led it to miss relevant motions a search was run of a database in Westlaw that is comprised of federal pleadings and motions ("FED-FILING-ALL"). The following search was run: CO(TX) & "12(B)(6)" "FACTS SUFFICIENT" "SUFFICIENT FACTS" "PLAUSIBLE CLAIM" "FAILS TO STATE A CLAIM" "FAILED TO STATE A CLAIM" "FAILING TO STATE A CLAIM" & da(aft 9/2005 & bef 7/2006) % PRELIM("AMENDED MOTION" "SUPPLEMENT!" OPPOSITION RESPONSE REPLY! RECONSIDERATION OBJECTION (STRIKE /5 AFFIRMATIVE DEFENSES)). The search was limited to the same pre-*Twombly* time period the FJC studied but further limited only to federal district courts in Texas. Trying to run the search in all district courts produces more results than the 10,000 maximum of search results that Westlaw shows so it is necessary to limit the search to less than all districts. No attempt was made to replicate the findings by looking at other districts.

Running the search using only the search terms and phrases the FJC used yielded 2,705 entries. The search was then run by adding these alternative terms: (FAIL! /5 STATE! /3 CLAIM! CAUSE! ACTION!). Broadening the search in this manner yielded

Even if the FJC missed filing activity equally (that is, both pre-*Twombly* and post-*Iqbal*), underinclusiveness would still be highly consequential. Given the approach of the researchers in the study, which was to compare the total quantum of filings pre-*Twombly* to the total amount, post-*Iqbal*, the size of the effect of the Court's cases turns on the amount of activity found. If there were twice as many motions actually filed as the FJC observed, then the size of *Twombly* and *Iqbal*'s effects would be twice as large as those that were reported, as noted above.¹⁰⁰

CONCLUSION

Three primary assessments have been made of the FJC's study. Taking the last first, it was observed that there are reasons to be concerned that the study may be providing us an incomplete picture of actual Rule 12(b)(6) activity, especially as to the filing rate. Some of the possible explanations for underinclusiveness (such as the choice to look at only a 90-day window to find motions that were filed) may have biased the results. Even if the failure to capture all relevant motion activity was a non-biased error, the inclusiveness problem is consequential. Because the study was designed to compare over time the filing and grant rate of Rule 12(b)(6) motions, the size of the effect of the Court's cases turns on the amount of activity found.

Even if concerns are set aside that the collected data may be incomplete, it misreads of the FJC's findings to conclude that the Court's decisions are having no effect on dismissal practice. Quite the opposite is true. As to the filing rate, the FJC found that defendants are more frequently bringing motions to dismiss at the pleading stage. After *Iqbal*, a plaintiff is twice as likely to face a motion to dismiss. This sizeable increase in rate of Rule 12(b)(6) motion activity represents a marked departure from the steady filing rate observed over the last several decades. The increased filing rate means, among other consequences, added

substantially more entries (another 538, or 20% more than the previous yield). The same search was run in the post-*Iqbal* time period used by the FJC (October 2009-June 2010) and yielded 10% more than was produced by using the FJC terms only, not as great of a difference as in the pre-*Twombly* period but still a substantial number of additional motions. While not all were motions to dismiss for failure to state a claim, subsequent review found that most were. Results on file with author. Whether a similar broadening of the search terminology would have identified more relevant motions in the dataset that the FJC used is not known.

¹⁰⁰ A third possibility is that some of the motions filed may not have been filed electronically or were otherwise not text-searchable. No further work has been done to determine how often this may occurred.

costs for plaintiffs who have to defend more frequently against these motions. Some plaintiffs (and prospective plaintiffs) will be unable to bear the additional expenses, or will lack access to the information sought, and so either will be deterred from bringing suit or unable to stave off dismissal.

The data regarding orders resolving dismissal motions perhaps even more dramatically shows the consequential impacts of the Court's cases. Even if the grant rate has remained unchanged, the fact that there are more motions being filed means that there are more motions being granted, and the data reflect this. There were more orders granting dismissal with and without leave to amend, and for every case category examined. That said, we need not accept the FJC's interpretation of the grant rate data. The data show that after *Iqbal* it was much more likely that a motion to dismiss would be granted with leave to amend, both overall and in the three largest case categories examined (Civil Rights, Financial Instruments and Other). Moreover, Employment Discrimination, Contract and Torts all show a trend of increasing grant rates. In sum, in every case type studied there was a higher likelihood after *Iqbal* that a motion to dismiss would be granted.

Even this is less than the entire story. Because of inherent limitations in doing empirical work of this nature, the cases may be having effects that the FJC researchers were unable to detect, as Part IV of the paper has shown. Comparing how many motions were filed and granted pre-*Twombly* to post-*Iqbal* cannot tell us whether the Court's cases are deterring some claims from being brought, whether they have increased dismissals of complaints on factual sufficiency grounds, or how many meritorious cases have been dismissed as a result of the Court's stricter pleading filter. Ultimately, then, perhaps the most important lesson to take away from this last assessment of the FJC's report is that empirical study cannot resolve all of the policy questions that *Twombly* and *Iqbal* raise.

TAB 5

**Civil Case Management Practices
of the
Eastern District of Virginia
Alexandria Division**

*Report to the Judicial Conference
Advisory Committee on Civil Rules*

Hon. Leonie M. Brinkema, United States District Judge
Hon. Thomas Rawles Jones, Jr., United States Magistrate Judge
Dennis C. Barghaan, Jr., Assistant United States Attorney
William D. Dolan, III
Craig C. Reilly

2011

The Advisory Committee has asked a panel of judges and practitioners to make a presentation on the civil case management practices of the Eastern District of Virginia, Alexandria Division. This report is intended as an introduction to that presentation, including a brief history of the Alexandria Division, the development of its case management practices, and a description of its current practices. There are several appendices to this report, including short biographies of the panelists (Appendix F).

A BRIEF HISTORY OF THE EASTERN DISTRICT OF VIRGINIA

There has been a federal court sitting at Alexandria, Virginia, since 1801. Originally, Alexandria was designated as the seat of the “District of Potomac.” Eventually, Congress established the Eastern and Western Districts in Virginia, with Alexandria as one of the seats in the Eastern District.

The modern contours of the Eastern District of Virginia (“EDVA”), Alexandria Division, were established by statute in 1948, and have changed little since then. 28 U.S.C. § 127(a) & (c) (identifying the counties and cities included and setting four locations where court shall be held). The boundaries of the four Divisions of the EDVA—Alexandria, Norfolk, Newport News, and Richmond—are defined by local rule. E.D.VA.CIV.R. 3(B). The four Divisions have one set of local civil rules, but the local practices for managing civil litigation vary by Division.

The EDVA is popularly known as “The Rocket Docket.” The EDVA frequently is first or near the top in such statistics as trials completed per judge, median time for criminal felony case disposition (from filing), median time for civil case disposition (from filing), and median time from filing to trial for civil cases.

Docket efficiency has not always been the hallmark of the EDVA. In 1954, when Hon. Walter E. Hoffman took the bench at Norfolk (as one of only three active judges in the entire

District), there was a backlog of over 1,300 cases just in the Norfolk Division. When Judge Hoffman became Chief Judge of the EDVA in 1962, he instituted a system for setting cut-off dates, pretrial conference dates, and trial dates. He reported that docket efficiency was finally attained in 1967, when two additional judges were authorized for the EDVA, increasing the number of active District Judges to five.¹

The system instituted by Chief Judge Hoffman became EDVA Local Rule 12, which included this directive:

[In all civil cases not exempt by local rule], as promptly as possible after suit has been filed, the resident judge of each division or his parajudicial personnel shall schedule an initial pretrial conference, docket call or take such other action as will enable the judge to enter an order fixing:

- (a) The cutoff dates for the respective parties to complete the processes of all discovery;
- (b) The cutoff dates for the respective parties to complete the taking of de bene esse depositions;
- (c) The date for a final pretrial conference with the court.

E.D.Va.Rule 12(3) (superseded) (the superseded rules hereafter cited as “EDVA Rule”). EDVA Rule 12 was one of the models for the major revisions to Federal Civil Rule 16 in 1983. *See* ADV. COM. NOTES, 97 F.R.D. 165, 207 (1983). For judges and lawyers alike, phrases like “as promptly as possible” and “enter an order fixing ... cutoff dates ... to complete the processes of all discovery” became ingrained in the culture of the EDVA—initially expressing an aspiration, but thereafter defining the norm.

THE ALEXANDRIA DIVISION: 1970 – 1995

The 1970 amendments to the discovery rules, which set the framework for contemporary discovery practice, constituted a sea-change in federal litigation. The original discovery rules

¹ This summary is drawn from the law review article, Heather Russell Koenig, *The Eastern District of Virginia: A Working Solution for Civil Justice Reform*, 32 U. RICH. L. REV. 799, 803 n.25 (1998) (quoting an interview with Judge Hoffman).

adopted in 1938 were themselves a “striking and imaginative departure from tradition,” the importance of which exceeded the drafters’ expectations. ADV. COM. NOTES, 48 F.R.D. 487, 487 (1970). The 1970 amendments were intended to expand upon the original principles of liberally allowing party-initiated discovery “with a minimum of court intervention.” *Id.* at 488. In the decade that followed, however, liberal discovery procedures were frequently used as “tactical weapons,” resulting in “excessively costly,” “time-consuming,” and “disproportionate” discovery. ADV. COM. NOTES, 97 F.R.D. 165, 216-17 (1983). The 1983 amendments were intended “to deal with the problem of over-discovery.” *Id.* at 217. Although the 1970 revisions had been designed to operate with a “minimum of court intervention,” since 1983, the amendments have trended towards more judicial control over the discovery process.

Even before the 1983 amendments, the EDVA met and overcame the “problem of over-discovery” with its own local practices. Among the four Divisions of the EDVA, the Alexandria Division developed some practices in the 1970s and 1980s that (most agree) fully realized the docket efficiencies called for by Local Rule 12. These practices were driven by a standard *Scheduling Order*, certain Division-specific motions practices, and (most agree) the disciplined judicial administration of Hon. Albert V. Bryan, Jr., resident at Alexandria, and later Chief Judge of the District. Many of the case management practices then instituted are still utilized today.

Scheduling Order: In Alexandria, the main gear in the Rocket Docket’s engine was the standard *Scheduling Order* (Appendix A). Such an order was routinely issued on the first court-day of the month after the defendant’s answer was filed.

That order allowed for ***two-and-one-half months*** of discovery, scheduled the pretrial conference ***one week after the discovery cut-off***, and the trial was set to commence within ***three to eight weeks*** of the pretrial conference. This could result in a schedule as short as ***five months***

from filing to jury trial. For example, if a case was filed and served in early May and answered within 20 days, then the *Scheduling Order* was issued on June 1, the discovery cut-off and pretrial conference were in mid-August, and the trial date would be set in September or October.

Continuances of trial dates and extensions of time for any pretrial event would not be granted on “mere agreement of counsel.” EDVA Rule 11(H) & (J). Rather, “good cause” was required. *Id.* In a complex civil case, short discovery extensions could be obtained, necessitating the setting of a later trial date. But it was very rare if a trial date, once set, was continued.

Discovery Practices: Discovery practices also facilitated the swift disposition of civil cases in Alexandria. Civil discovery began promptly after filing. Often the plaintiff’s written discovery requests were served together with the complaint, and just as often the defendant’s requests were served before its answer was filed.

Parties also were limited to 30 interrogatories and 5 non-party depositions. EDVA Rule 11.1(A) & (B). The limits on discovery imposed under EDVA Rule 11.1 emphasized that discovery is “a litigation tool which should be used with discretion,” and so those limits could not be exceeded without leave of court. *Lykins v. Attorney General*, 86 F.R.D. 318, 318-19 (E.D. Va. 1980). Nonetheless, discovery was even-handed and generally adequate.

Motion Practices: Discovery disputes were promptly resolved during the relatively short discovery period. Objections to discovery requests were required “within 15 days after service.” EDVA Rule 11.1(D). If objections were served, there was a mandatory meet-and-confer process. EDVA Rule 11.1(J). If objections remained unresolved, the requesting party was then enjoined to file a written motion to compel (EDVA Rule 11.1(E)), which under the *Scheduling Order* had to be noticed for “the nearest possible Friday and prior to the pretrial conference.”

The Alexandria Division then had (and still has) a regular Motion Day under Federal Civil Rule 78(a)—*every* Friday. Civil discovery motions were assigned on a rotating basis to the United States Magistrates resident at Alexandria. EDVA Rule 29(E). Discovery motions were handled on what could be as short as a 3-day cycle: The motion and notice of hearing were filed no later than Wednesday; the brief in opposition was filed on Thursday; and the hearing was on Friday. To ensure that the assigned United States Magistrate (who might not have handled any previous motions in the case) would be fully apprised of the issues for decision, a written motion and brief in support were required, as was a written brief in opposition. EDVA Rule 11(A) & (F); EDVA Rule 11.1(C), (E), (F) & (G). Rulings typically were made from the bench, with a short order thereafter being issued. By rule (EDVA Rule 11.1(H)), compliance with discovery orders was required within 10 days.

The 1990 amendments to Chapter 43 of the Federal Judicial Code, governing the appointment and duties of United States Magistrate Judges, resulted in further efficiencies. Eventually, the number of Magistrate Judges resident at Alexandria was increased to four. In addition to their considerable work on the criminal side of the docket, all four also heard (and still hear) civil motions (primarily involving discovery issues).

Master Calendar Scheduling: During this era, the Alexandria Division operated on a master calendar system—that is, cases were not individually assigned upon filing, and most often both motions and trials were assigned to whichever District Judges or Magistrates were then available. This was suitable for most cases, but in more complex cases, a single District Judge would handle the case. Moreover, continuances were so rarely granted that the culture of the practicing bar adjusted to that reality, which shaped planning and expectations. Once those expectations have become ingrained, civil cases can be moved quickly and fairly.

Finally, because of the case management practices it had already instituted, the EDVA made no changes as a result of the 1991 Civil Justice Reform Act, and it opted out of the 1993 amendments (*e.g.*, initial disclosures) adopted to streamline and speed up federal civil litigation.

THE ALEXANDRIA DIVISION: 1996 – 2000

In this era, the standard *Scheduling Order* was modified in several respects (Appendix B). Principally, the discovery period was enlarged to four months. To better accommodate the expert disclosure and discovery practices adopted by the 1993 amendments to Federal Civil Rule 26, expert discovery was scheduled by order and local rule during the final 60 days of the discovery period (unless modified by party agreement with court approval). And finally, discovery motions were put on a new cycle: motions were due by Monday; oppositions were filed on Wednesday; and the hearing was on Friday. (This was later enlarged again to a one-week cycle—that is, Friday-to-Friday.)

As patent infringement litigation exploded in the 1990s (nationwide, annual filings increased from about 800 in 1990 to nearly 1,600 in 1999), patent litigators “discovered” the EDVA Rocket Docket. Changes in venue and personal jurisdiction rules allowed patent suits to be filed virtually anywhere accused products were offered or sold.² The appeal of the EDVA Rocket Docket under these new rules was obvious: A patent case filed in EDVA might go to trial in five months, which is more quickly than a preliminary injunction motion to halt

² See *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990) (1988 amendments to 28 U.S.C. § 1391(c), which deemed corporations to “reside” wherever they were subject to personal jurisdiction, also expanded patent venue provisions under § 1400(b)); *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir. 1994) (systematic sales of infringing products in forum satisfied Virginia long-arm statute and constitutional minimum-contacts test for assertion of personal jurisdiction over out-of-state infringers).

infringing activities could be scheduled in many other Districts. In addition, the Alexandria Division was near to numerous IP law firms and in a locale serviced by two major airports.

By the mid-1990s, the Alexandria Division had become a forum-of-choice for many patent suits. This strained the docket enormously. As a result, in 1997, the EDVA instituted an intra-District reassignment system for all patent infringement actions filed in Alexandria: Those cases would be randomly reassigned among all four Divisions—with only about one-half remaining in Alexandria. (A version of this system is now in place for patent case filings in all four Divisions to even out case assignments.) Despite the recent popularity of the Eastern District of Texas, patent case filings continue to flow steadily into the EDVA.

THE ALEXANDRIA DIVISION: 2001 – Present
CURRENT CASE MANAGEMENT PRACTICES IN THE ALEXANDRIA DIVISION

In December 2000, amendments to Federal Civil Rule 26 removed the opt-out prerogative, and instituted certain uniform discovery practices nationwide. To implement those nationwide amendments, the Alexandria Division changed its initial scheduling practices, adopted a new standard initial scheduling *Order*, and implemented additional Rule 16(b) scheduling procedures.

In addition, the Alexandria Division switched from a master calendar system to individual calendars. That transition has not materially affected case management practices or overall performance statistics.

The Initial Scheduling Order: The initial scheduling *Order* is entered promptly after the parties are at issue, setting a four-month discovery period followed by a final pretrial conference. *See* E.D.VA.CIV.R. 16(B). The new *Order* (Appendix C) now directs the parties in every civil case to promptly convene a Rule 26(f) conference and submit a joint discovery plan by a date-certain, and sets a prompt Rule 16(b) conference to evaluate and approve the discovery plan

(certain cases, of course, are exempt from these requirements). The *Order* permits the parties to commence discovery immediately. The *Order* uses standardized provisions regardless of individual District Judge, ensuring predictability and regularity within the Division.

It should be noted that the new Alexandria initial scheduling *Order* is issued *in advance* of the Rule 26(f) and Rule 16(b) conferences. The *Order* sets the discovery cutoff, which the parties' discovery plan then must meet, and directs that discovery may commence immediately, even though initial disclosures have not yet been served. Although not occurring in the sequence envisioned by the nationwide amendments made in 2000, this reordering of the start-up events seems to be working in the Alexandria Division.³

Rule 26(f) and Rule 16(b) Conferences: These conferences are promptly scheduled—usually within 2-3 weeks after the initial scheduling *Order* has issued. *See* E.D.VA.CIV.R. 26(A)(1)(a). The parties' joint discovery plan is due one week before the Rule 16(b) conference. *See Id.* (A)(1)(b). A Magistrate Judge is individually assigned to each civil case upon filing to rule on discovery and other pretrial motions. That Magistrate Judge presides over the Rule 16(b) conference, at which discovery issues, overall case management, and prospects for settlement are discussed. *See Id.* (A)(2). A *Rule 16(b) Scheduling Order* is entered promptly after the conference (Appendix D).

Complex Civil Litigation: A standard initial scheduling *Order* will be entered even in complex civil cases; however, flexibility in pretrial scheduling will be allowed as warranted.

³ When the Rules were amended in 1993 (and implemented nationwide in 2000), entry of a scheduling order was intended *to follow* the parties' Rule 26(f) conference report, to permit the court to set the discovery schedule based on the parties' input. *See* ADV. COM. NOTES, 146 F.R.D. 501, 603, 642 (1993). Likewise, it was envisioned that party-initiated discovery generally would not commence before to the Rule 26(f) and 16(b) conferences. FED.R.CIV.P. 26(d)(1). In Alexandria, however, the Court sets the overall discovery period and discovery commences *before* both the Rule 26(f) conference report is filed and the Rule 16(b) conference is held.

The mere early identification of a civil case as “complex” will not necessarily warrant an enlargement of the discovery period at the outset, but the parties always may seek an enlargement of the discovery and pretrial period as needed for good cause. E.D.VA.CIV.R. 16(B). Nonetheless, in certain complex cases, case-specific scheduling is regularly undertaken. For example, in securities fraud class actions, the PSLRA requires that discovery be stayed while certain threshold events occur. *See* 15 U.S.C. § 77z-1(b)(1). Once those events have occurred, a class action is put on a schedule for discovery and trial much like any other case.

Patent Case Management: The EDVA does not have “local patent rules.” Instead, the Court implements four case management practices. *First*, as noted, to avoid burdening any one Division with patent cases, all patent infringement actions filed in the EDVA are randomly assigned a District Judge anywhere within the District. Thus, a case filed in Alexandria may be assigned to a District Judge in Richmond, and so on. While many cases stay where they are filed, enough are assigned to other Divisions to even the caseload among the four Divisions. *Second*, in patent cases litigated in Alexandria, the Court generally requires the parties to enter into a joint discovery plan that includes (i) early disclosure of detailed infringement and invalidity contentions, (ii) an exchange of other routinely requested documents and things (*e.g.*, financial data and sample accused devices), and (iii) a proposed schedule and procedure for claim construction. *Third*, claim construction is often conducted later in the case when the substantive issues have matured, thus avoiding the unnecessary construction of what later turn out to be unimportant terms. *Fourth*, like other complex civil cases in Alexandria, the discovery period may be enlarged in a patent infringement action for good cause (and often is enlarged).

Discovery Management: Unless modified in the plan and approved by the Court, the initial *Order* limits each party to 5 non-party (non-expert) depositions and 30 interrogatories.

Expert disclosures and deposition schedules are set by local rule, but, with Court approval, may be modified in the parties' discovery plan, in the *Rule 16(b) Scheduling Order*, or by other order. E.D.VA.CIV.R. 26(D). Discovery objections are due within 15 days after service. E.D.VA.CIV.R. 26(C). The 15-day objection rule interlocks with discovery motions practices.

Discovery Motions: The party serving a discovery request to which the other party has objected is responsible for promptly convening a meet-and-confer to resolve or narrow the dispute, and promptly filing a motion to compel if necessary. *See* E.D.VA.CIV.R. 37(A) & (E). Motions in civil cases are still heard ***every Friday***. *See* E.D.VA.CIV.R. 7(E). By rule, civil motions generally require 14-days notice, which notice-period may be shortened by court order. FED.R.CIV.P. 6(c)(1)(C). As set forth in the *Rule 16(b) Scheduling Order*, discovery motions and other non-dispositive motions in Alexandria are heard on a one-week cycle (Friday-to-Friday). Moreover, discovery motions must be noticed for hearing on the earliest permissible Friday and prior to the final pretrial conference. *See* E.D.VA.CIV.R. 7(E). Most discovery motions are ruled on from the bench, followed by a simple order. Any discovery motion taken under advisement is ruled upon promptly. Parties must comply with discovery orders within 11 days. E.D.VA.CIV.R. 37(C). When coupled with the 15-day objection rule, the time-tested practice of disposing of discovery motions each week keeps cases moving.

Dispositive Motions: Although not a formal case management procedure, it has long been the practice of the Court to rule promptly on dispositive motions—whether made under Rule 12 at the outset of an action, or under Rule 56 after discovery has been completed. The local rules set forth a briefing schedule and page limitations. E.D.VA.CIV.R. 7(A), (E), (F) & 56(A)-(C). Most importantly, the District Judges sit ***every Friday*** to hear such motions, and most often they are prepared to rule from the bench.

Settlement Conferences: While not mandatory, the parties in all civil cases are offered the opportunity to have formal mediation before the Magistrate Judge assigned to the case. Most litigants take advantage of this offer. The Magistrate Judge will be familiar with the case from motions, and is able to assist the parties in realistically evaluating the case, as well as formulating and formalizing a mutually acceptable settlement. *See* Leonie M. Brinkema, *Settlement Conferences in the Eastern District of Virginia*, THE JOURNAL OF THE VIRGINIA TRIAL LAWYERS ASS'N, 26 (Fall 1992) (describing the process). The Court considers this long-standing program to be very successful—as do participating litigants.

Continuances and Extensions: Continuances of hearings or trial, and extensions of time to conduct discovery or complete any other pretrial events, may only be granted by the Court for good cause shown, and “mere failure” to promptly commence and complete discovery “shall not constitute good cause for an extension or continuance.” E.D.VA.CIV.R. 7(G) & (I); 16(B); and 37(F). Trials generally are set 4-8 weeks after the final pretrial conference, depending on the District Judge’s calendar of other cases.

The Role of Local Counsel: Even if another attorney has been formally admitted *pro hac vice* to serve as lead counsel, attorneys admitted to practice before the EDVA must sign and file pleadings, motions, and other papers, and must personally appear for all hearings, motions, and trials. E.D.VA.CIV.R. 83.1(F). Local counsel truly serves as both an advocate and an officer of the court. This Local Rule is intended to ensure that in every case each party has an attorney “both knowledgeable about Virginia law and local rules of practice and readily subject to the Court’s discipline and authority.” *Northern Va. Law School, Inc. v. Alexandria*, 680 F. Supp. 222, 227 (E.D. Va. 1988). Thus, local counsel, like a harbor pilot, steers the litigation through the shoals and swift currents of the Alexandria courthouse.

CIVIL CASES INVOLVING THE FEDERAL GOVERNMENT

The Alexandria Division of the EDVA encompasses Northern Virginia, where many Government agencies, military installations, and federal parks and reserves are located. Thus, this region is home to many military personnel and government employees. In addition, the local population has been booming, including through immigration. These factors, and others, are reflected in the relatively large docket of civil cases involving the Government as a party. The principal components of the Government's civil docket are discussed separately below, as well as how each is handled under the EDVA case management practices.

One of the scheduling challenges common to almost all Government cases in the EDVA results from the policies governing how cases are staffed and how litigation decisions are made. In some matters, agency personnel have been involved in the administrative disposition—up to and including the handling of the administrative proceedings—before the cases are filed in the EDVA. Once filed, however, the matter is assigned to an Assistant United States Attorney (“AUSA”) in the EDVA's Civil Division, who must get up to speed. Moreover, at other stages of a case, the AUSA might have to coordinate with other components of “Main Justice” (*e.g.*, seeking permission to appeal an order denying qualified immunity to a Government official). In addition, the Government's docket often presents jurisdictional quandaries, often arising under the sovereign immunity doctrine. Some scheduling latitude may thus be warranted so that the Government can properly prepare its case and carefully consider its litigation positions through the prescribed intra-governmental deliberative process.

Administrative Procedure Act Cases: Actions for judicial review of agency actions under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.*, that do not need to be filed in a court of special jurisdiction, may be brought in federal court in the District where the

defendant resides, the action arose, or where the plaintiff resides. 28 U.S.C. § 1391(e). For example, a person aggrieved of an agency action of the Patent and Trademark Office (located in Alexandria) can sue in the EDVA, Alexandria Division.

APA cases are exempt from the initial disclosure and Rule 26(f) conference requirements. FED.R.CIV.P. 26(a)(1)(B)(i) & (f)(1). Nonetheless, the Court will issue an initial scheduling *Order*, and convene a Rule 16(b) conference. The Government may file threshold dispositive motions (*e.g.*, seeking dismissal for lack of ripeness or lack of standing), but if the agency action is properly presented for judicial review under an APA standard of review (*e.g.*, “abuse of discretion” or “arbitrary or capricious”), the Government usually negotiates an order setting dates for filing an answer, filing the administrative record, and briefing cross-motions for summary judgment. If possible, this order will be presented to the Court early enough to obviate the need for the Court to issue an initial scheduling *Order* because judicial review generally is on an administrative record, without the allowance of discovery to supplement that record. *See Tafas v. Dudas*, 530 F. Supp.2d 786, 794 (E.D. Va. 2008) (“discovery is typically not permitted” in APA actions). However, in APA cases, as any other, Rule 12(a)(1)(B)(2) & (3) provides the Government with a 60-day response time, which may result in a slightly longer period before that negotiation occurs between the parties.

Social Security Cases: Cases for judicial review of denial of Social Security benefits are handled by separate procedures and reviewed on an administrative record. They do not give rise to any problems under the EDVA case management practices.

Employment Discrimination Cases: The presence of numerous Government agencies and employees in Northern Virginia gives rise to numerous of Title VII and other similar employment-discrimination cases being filed in the EDVA. Although these cases often are

litigated based on the administrative record developed at the agency level (including proceedings before the EEOC), judicial review is *de novo*, and a trial may be requested. Subject to the aspects peculiar to this type of case, the litigation of them is scheduled under the EDVA's standard case management practices.

Tort Cases: The Government's tort docket has two major components: Cases filed under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) & 2671 *et seq.*, and "*Bivens* actions."⁴ FTCA cases are asserted against the Government and, leaving aside the numerous instances in which Congress has retained sovereign immunity under the FTCA (*see* 28 U.S.C. § 2680), they are handled much like a tort action against a private party. *Bivens* actions, however, present several scheduling challenges.

Bivens actions are asserted against a Government official in his or her individual capacity, who may assert the defense of qualified immunity. The qualified immunity that may be available in a *Bivens* action is immunity from the costs and burdens of litigation, not merely immunity from liability for damages; therefore, "until this threshold immunity question is resolved, discovery should not be allowed." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). If immunity is denied in a *Bivens* action, an immediate appeal may be taken before discovery commences.

Scheduling challenges also occur when FTCA and *Bivens* claims are joined. In such cases, the plaintiff's interest in promptly commencing discovery on his FTCA claims comes into conflict with the official's right to have his immunity defense ruled upon first. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (even allowing "cabin[ed] discovery" by other parties and on

⁴ *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing implied cause of action for money damages against a federal officer in his individual capacity for alleged violation of fourth amendment). Under *Bivens* and its progeny, an implied cause of action has been recognized for some other constitutional violations.

other issues while immunity qualified question is pending may improperly inflict “the burdens of discovery” on an individually sued official). While this conflict is not unique to the EDVA, it presents a challenge for the Court’s swift-paced docket management practices—especially if immunity is denied, and an interlocutory appeal is taken.

Pro se Cases: Many cases are filed in the EDVA by *pro se* plaintiffs seeking remedies for alleged violations of federal rights, including under the Privacy Act. Scheduling issues in these cases may arise simply due to the *pro se* litigant’s unfamiliarity with court procedure generally. Special practices for motions involving *pro se* parties are stated in the local rules. E.D.VA.CIV.R. 7(K). Other than that, these cases are litigated under the standard practices.

Immigration Cases: These civil cases may involve the delay or denial of benefits, FTCA and *Bivens* claims, or detention issues. These are frequently the subject of early dispositive motions. If not disposed of then, these cases are litigated under the standard case management practices.

FOIA Cases: The inherent asymmetry of FOIA cases presents scheduling challenges for the Government. As in APA litigation, generally, the plaintiff is fully prepared. The AUSA handling the case, however, must get up to speed because agency personnel would have handled the initial request and any other agency-level processes. And in certain instances, where no FOIA production has occurred administratively, a stay is often appropriate to allow the agency to make that production (which can be voluminous) and potentially dispose of the litigation at the threshold. A standard initial scheduling *Order* may be issued, but discovery, if permitted at all, is limited. *See, e.g., Thompson v. United States*, No. 1:09cv1246, 2010 U.S. Dist. LEXIS 4148, *7-8 (E.D. Va. Jan. 10, 2010). Frequently, these cases are resolved on dispositive motions, and so, the Government may propose a briefing schedule in lieu of the initial scheduling *Order*.

FCA Cases: There has been an increase in the number of *qui tam* cases filed in the EDVA Alexandria Division under the False Claims Act. 31 U.S.C. §§ 3729 *et seq.* These cases sometimes involve huge defense contractors and service providers, and the Government contracts at issue may be worth millions—even billions—of dollars. While the Government does not always intervene, obviously, the stakes are high: treble damages and attorneys’ fees may be awarded to the prevailing *qui tam* plaintiff and the Government. The litigation may be extraordinarily complex, consuming party and judicial resources, as well as straining the Court’s case management system. While FCA cases will receive an initial scheduling *Order* and go through the regular Rule 26(f) and 16(b) procedures, relief from the pretrial schedule often is sought and warranted.

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GENERAL PHILOSOPHY OF THE ALEXANDRIA DIVISION

The inscription above the public entrance to the Albert V. Bryan Courthouse in Alexandria states, “Justice Delayed Justice Denied.” The Court embraces that philosophy.

Ironically, the philosophical spirit of the case management system in Alexandria was best expressed by the Fourth Circuit, on interlocutory appeal, directing a District Judge (Hon. Oren R. Lewis) to “reappraise” the pretrial schedule in one exceptionally convoluted case:

A district court may, indeed it should, supervise and police its docket to the extent of assuring that cases are promptly and properly prepared for trial and are not allowed by the mutual indifference of opposing counsel to languish. A set rule limiting the time within which pretrial discovery may be had may be appropriate for routine cases, indeed, for most cases. . . . Delay should be avoided to the extent that it is unnecessary or unreasonable but adequate time must be allowed for discovery of the facts and assembly of the proof.

Freehill v. Lewis, 355 F.2d 46, 48 (4th Cir. 1966). Through its standard case management practices, the Alexandria Division makes a concerted effort to supervise and police its docket to

ensure that all cases (most of which are routine) are promptly and properly prepared for trial without unnecessary and unreasonable delay.

Moreover, when an “exceptional case” appears, the EDVA rules and practices accommodate the Fourth Circuit’s edict that “different treatment” may be needed:

The exceptional case requires different treatment, however, and the spirit of the rules does not require that completeness in the exposure of the issues in the pretrial discovery proceedings be sacrificed to speed in reaching the ultimate trial on the merits. ... [I]n the exceptional case, consideration may and must be given to the complexity of the issues and of the proof and of the amount of time reasonably required for the pretrial processes if pursued with reasonable dispatch. An initial determination of a reasonable time allowance must be subject to redetermination, however, for the results of the pretrial processes frequently will disclose that the issues and the proof are far more complex, or much less so, than the Court and counsel had foreseen.

Id. The current EDVA case management practices, which have been tested in an era of increasingly complex civil litigation, also abide by that philosophy in “exceptional” cases.

The virtues of the EDVA case management philosophy become even clearer in light of the Supreme Court’s condemnation of the dilatory and abusive tactics that lawyers may be tempted to use when not properly supervised during discovery:

Due to sloth, inattention, or desire to seize tactical advantage, lawyers have long indulged in dilatory practices. *Cf.* C. Dickens, *Bleak House* 2-5 (1948) [*sic*]. A number of factors legitimately may lengthen a lawsuit, and the parties themselves may cause some of the delays. Nevertheless, many actions are extended unnecessarily by lawyers who exploit or abuse judicial procedures, especially the liberal rules for pretrial discovery. The glacial pace of much litigation breeds frustration with the federal courts and, ultimately, disrespect for the law.

Roadway Express v. Piper, 447 U.S. 752, 757 n.4 (1980) (citations omitted). Thus, proper case management is important in every case not only because of the benefits to the litigants involved, but because it fosters respect for the law.⁵

⁵ The grindingly slow, painfully expensive, and ultimately fruitless chancery case of *Jarndyce v. Jarndyce* in Charles Dickens’ masterpiece, *Bleak House* (1853), has been frequently and pointedly used as an object lesson when federal litigation has become protracted or unreasonably

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The Alexandria civil case management practices, most of them tested over a generation during which the complexity of civil litigation and civil discovery have measurably increased, continue to result in statistics that lead the federal judiciary. The current case management statistics are attached (Appendix E). Plainly, the Rocket Docket system is still working.

To be sure, the EDVA case management practices rely upon disciplined judicial administration. The weekly adjudication of motions and prompt disposition of cases may run counter to the prevailing practices and culture of other district courts. That can be changed, however, as it was in the EDVA in the 1960s. Indeed, spurred by the EDVA's example, many prominent trial courts in the Virginia state court system now require that civil cases be set for trial within one year of the filing of the complaint and have frequent, periodic motions days to promptly resolve pleading, discovery, and dispositive motions (*e.g.*, City of Alexandria, City of Norfolk, and Fairfax County). Like the EDVA judges, those state trial courts now embrace justice-delayed-justice-denied philosophy.

expensive. *See, e.g., Stern v. Marshall*, 131 S. Ct. 2594, 2600 (2011); *Hartman v. Moore*, 547 U.S. 250, 256 (2006); *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 48 n.19 (1994); *Codispoti v. Pennsylvania*, 418 U.S. 506, 531 (1974); *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 393 (1973). Suffice it to say that even that case would have been handled with dispatch in the EDVA.

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JUN 07 1989

Board of Trustees, etc., et al.

v.

CA 89-435-A

A. Suna & Co., Inc.

SCHEDULING ORDER *

A pretrial conference will be held in this action on Thursday, August 17, 1989, at 10:30 a.m.

All discovery must be concluded by Friday, August 11, 1989.

Unless a later time has previously been allowed, any defendant who has not filed an answer must do so within ten (10) days from the date of this order.

All motions shall be noticed for hearing on the nearest possible Friday and prior to the pretrial conference. (See Local Rule 11.) Ten (10) working days notice is required for motions to dismiss, for summary judgment, and for judgment on the pleadings.

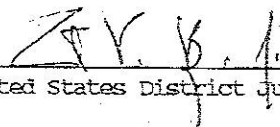
Counsel should bring to the pretrial conference a list of the witnesses proposed to be called, a list of exhibits, and the exhibits themselves, pre-marked and ready for filing. No witness or exhibits not so listed and filed will be permitted at trial except for impeachment or rebuttal purposes. Objections to exhibits must be noted (they will be ruled on at trial) at the conference; otherwise the exhibits shall stand admitted in evidence. In addition, counsel should meet prior to the conference, exchange the aforementioned lists and copies of the exhibits, and prepare and bring to the conference a written stipulation of all uncontested facts.

No witness, expert or otherwise, will be permitted to testify who, in response to a request for his identity, has not been identified in time to allow his deposition to be taken or the substance of his knowledge ascertained, or, in the case of an expert, to allow the facts relied upon and opinions held by him to be obtained by F. R. Civ. P. 26(b)(4)(A) or deposition prior to the discovery cutoff.

Depositions, interrogatories, requests for documents and admissions, and answers and responses thereto, shall not be filed except on order of the court or for use in this action in connection with a motion for summary judgment or at the pretrial as an exhibit. F. R. Civ. P. 5(d).

In non-jury cases counsel should file with the clerk at the beginning of the trial written proposed findings of fact and conclusions of law.

The trial of this case will be set for a day certain, not later than three to eight weeks from the date of the pretrial conference.

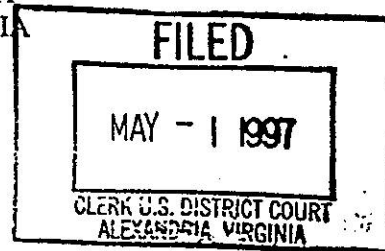

United States District Judge

Alexandria, Virginia
June 2nd, 1989

* This order is being mailed to local counsel only.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION



v.

Case No. CA 97- -A

SCHEDULING ORDER

A pretrial conference will be held in this action on Thursday, September 18, 1997,
at 10:05 a.m.

All discovery must be concluded by Friday, August 29, 1997.

Unless a later time has previously been allowed, any defendant who has not filed an answer must do so
within 11 days from the date of this order.

All motions, except for summary judgment, shall be noticed for hearing on the earliest possible Friday
before the pretrial conference. Ten working days notice is required for motions to dismiss, for summary
judgment, for patent claim construction, and for judgment on the pleadings. Non-dispositive motions must be
filed and delivered by the Monday before the Friday for which noticed, with responses due not later than the
Wednesday before the hearing.

Expert discovery shall be conducted as provided in Local Rule 26(D). Experts not properly identified, and
for whom a report has not been timely provided, shall not testify at trial for any purpose.

Fed.R.Civ.P. 26(a)(3) disclosures must be made before the pretrial conference, and the parties must bring
to the conference the disclosures and a list¹ of the exhibits to be used at trial, a list of the witnesses to be called
at trial and a written stipulation of uncontested facts. The exhibits themselves or a copy should be exchanged
with opposing counsel before the conference. Objections to exhibits must be filed within 10 days after the
conference; otherwise the exhibits shall stand admitted in evidence. The original exhibits shall be delivered to
the clerk as provided by Local Rule 79(A). Non-expert witnesses and exhibits not so disclosed and listed will
not be permitted at trial except for impeachment or rebuttal, and no person may testify whose identity, being
timely requested in discovery, was not disclosed in time to be deposed or to permit the substance of his
knowledge and opinions to be ascertained.

Depositions, interrogatories, requests for documents and admissions, and answers and responses thereto,
shall not be filed except on order of the court, or for use in this action in connection with a motion.

In non-jury cases, counsel should file with the clerk at the beginning of the trial written proposed
findings of fact and conclusions of law.

The trial of this case will be set for a day certain, within 4-8 weeks of the pretrial conference.

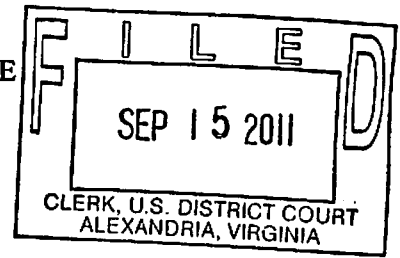

United States District Judge

May 1, 1997
Alexandria, Virginia
This order is being mailed to local counsel only.

¹This differs from prior scheduling order requirements. The original exhibits now
should not be brought to the conference, but filed with the clerk one business day before trial.

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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division



Sellerbid, Inc.,

Plaintiff,

v.

1:11cv768 (LMB/TRJ)

Groupon, Inc., et al.,

Defendants.

ORDER

A Fed. R. Civ. P. 16(b) PRETRIAL CONFERENCE will be held on Wednesday, October 5, 2011 at 11:00 a.m. before a magistrate judge. The parties shall confer before this conference to consider the claims, defenses, possibilities of a prompt settlement or resolution of the case, trial before a magistrate judge, to arrange for the disclosures required by Rule 26(a)(1), and to develop a discovery plan which will complete discovery by Friday, January 13, 2012. A party may not exceed five (5) non-party, non-expert witness depositions and may not serve on any other party more than thirty (30) interrogatories, including parts and subparts, without leave of court. Proposed discovery plans must be filed by the Wednesday one week before the Rule 16(b) pretrial conference.

Any party required to file an answer must do so within twenty (20) days.


The FINAL PRETRIAL CONFERENCE will be held on Thursday, January 19, 2012 at 10:00 a.m.

The parties must *electronically file on or before* the final pretrial conference the Rule 26(a)(3) disclosures and a list of the exhibits to be used at trial, a list of the witnesses to be called at trial and a written stipulation of uncontested facts. The exhibits themselves or a copy should be exchanged with opposing counsel before the conference. Objections to exhibits must be filed within 10 days after the conference; otherwise the exhibits shall stand admitted in evidence. The original exhibits shall be delivered to the clerk as provided by Local Rule 79(A). Non-expert witnesses and exhibits not so disclosed and listed will not be permitted at trial except for impeachment or rebuttal, and no person may testify whose identity, being subject to disclosure or timely requested in discovery, was not disclosed in time to be deposed or to permit the substance of his knowledge and opinions to be ascertained. The trial of this case will be set for a day certain, within 4-8 weeks of the final pretrial conference.

Discovery may begin as of receipt of this Order.

PERSONAL IDENTIFIERS MUST BE REDACTED FROM ALL PUBLICLY FILED PLEADINGS AND EXHIBITS IN ACCORDANCE WITH LOCAL RULE 7(C).

September 15, 2011
Alexandria, Virginia

lsl 

Leonie M. Brinkema
United States District Judge

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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

| | | |
|---------------------------|---|---------------------|
| GUIDEWIRE SOFTWARE, INC., |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil No. 1:11cv678 |
| |) | |
| ACCENTURE PLC, et al. |) | |
| |) | |
| Defendants. |) | |
| <hr/> | | |
| ACCENTURE PLC, et al., |) | |
| |) | |
| Counterclaim Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| GUIDEWIRE SOFTWARE, INC., |) | |
| |) | |
| Counterclaim Defendant. |) | |
| <hr/> | | |

RULE 16(B) SCHEDULING ORDER

1. Upon consideration of the representations made by the parties at the Rule 16(b) Conference, the court makes the following rulings:

a. **Parties shall deliver to my chambers (not to the Clerk’s office) a copy of every non-dispositive motion and every document relating to such a motion within one business day of filing it.**

b. Rule 26(a) disclosures, depositions, interrogatories, requests for documents and admissions, and answers thereto shall not be filed except on order of the court, or for use in a motion or at trial.

c. The Rule 26(f) report filed by the parties is approved (except as modified at the conference), and shall control discovery to the extent of its application unless modified by the court herein or hereafter.

d. Except to preserve claims of privilege and work product protection, general objections may not be asserted to discovery demands. Where specific objections are asserted to a demand, the answer or response must not be ambiguous as to what if anything is being withheld in reliance on the objection.

e. Each party must designate an attorney who, for purposes of conferring on discovery disputes, will be reasonably available at all times and readily available on Wednesdays, Thursday, and Fridays.

2. *Sealing of Documents.* Filings under seal are disfavored and discouraged. See Virginia Department of State Police v. The Washington Post, et al., 386 F.3d 567, 575-76 (4th Cir. 2004). Counsel's attention is directed to U.S. ex rel Carter v. Halliburton Company, et al., No. 1:10cv864 (document no. 44)(E.D. Va. 2011). Any motion to file documents under seal, including a motion for entry of a protective order containing provisions for filing documents under seal, must comply with Local Civil Rule 5 and must be docketed for a hearing or made in open court. The motion must state sufficient facts supporting the action sought, and each proposed order must include specific findings.

3. All motions, except for summary judgment, shall be noticed for hearing on the earliest possible Friday before the final pretrial conference. Non-dispositive motions must be electronically filed by 5:00 p.m. on the Friday before the Friday for which noticed, with responses due not later than 5:00 p.m. on the Wednesday before the hearing. Any reply should be filed as early as possible on Thursday. Dispositive motions and motions for patent claim

construction shall be filed and briefed on the schedule set in Local Civil Rule 7(F)(1), which read together with Fed. R. Civ. P. 6(d) requires that an electronically filed motion be filed twenty-one (21) days prior to the hearing date.

4. All Fed. R. Civ. P. 12 issues shall be raised in one pleading unless leave of court is first obtained. All summary judgment issues shall be presented in the same pleading unless leave of court is first obtained.

5. All motions must adhere to the page limits set in Local Rule 7(F)(3). No pleading shall be in type less than ten (10) pitch or twelve (12) point.

6. Depositions, interrogatories, requests for documents and admissions, and answers thereto shall not be filed except on order of the court, or for use in a motion or at trial.

7. In non-jury cases, counsel shall file with the clerk at the beginning of trial written proposed findings of fact and conclusions of law. In jury cases, instructions shall be filed five (5) days prior to trial in accordance with Local Rule 51. Violation of this rule will constitute a waiver of objections to any instructions given.

It is so ORDERED.

/s/
Thomas Rawles Jones, Jr.
United States Magistrate Judge

Date: August 31, 2011
Alexandria, Virginia

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U.S. DISTRICT COURT - JUDICIAL CASELOAD PROFILE

| VIRGINIA EASTERN | | | 12-MONTH PERIOD ENDING | | | | | | Numerical Standing | | |
|-----------------------------|--|------------------------------------|------------------------|--------------|-------|-------|-------|-------|--------------------|---------|---|
| | | | March 31 | September 30 | | | | | | | |
| | | | 2011 | 2010 | 2009 | 2008 | 2007 | 2006 | | | |
| OVERALL CASELOAD STATISTICS | Filings* | | 5,116 | 4,906 | 4,949 | 4,985 | 5,091 | 5,636 | U.S. | Circuit | |
| | Terminations | | 4,899 | 4,716 | 4,778 | 5,034 | 4,828 | 5,623 | | | |
| | Pending | | 3,045 | 3,027 | 2,846 | 2,761 | 3,038 | 3,059 | | | |
| | % Change in Total Filings | Over Last Year | | 4.3 | | | | | | 35 | 4 |
| | | Over Earlier Years | | | | 3.4 | 2.6 | .5 | -9.2 | 78 | 7 |
| Number of Judgeships | | | 11 | 11 | 11 | 11 | 11 | 11 | | | |
| Vacant Judgeship Months** | | | 12.5 | 12.0 | 12.0 | 24.7 | 20.0 | 9.0 | | | |
| ACTIONS PER JUDGESHIP | FILINGS | Total | 465 | 446 | 451 | 453 | 462 | 513 | 39 | 2 | |
| | | Civil | 312 | 298 | 295 | 288 | 294 | 354 | 49 | 4 | |
| | | Criminal Felony | 101 | 102 | 110 | 120 | 123 | 112 | 21 | 2 | |
| | | Supervised Release Hearings** | 52 | 46 | 46 | 45 | 45 | 47 | 15 | 1 | |
| | Pending Cases | | 277 | 275 | 259 | 251 | 276 | 278 | 76 | 7 | |
| | Weighted Filings** | | 497 | 476 | 463 | 474 | 474 | 474 | 38 | 3 | |
| | Terminations | | 445 | 429 | 434 | 458 | 439 | 511 | 46 | 4 | |
| | Trials Completed | | 32 | 33 | 35 | 32 | 28 | 34 | 12 | 3 | |
| MEDIAN TIMES (months) | From Filing to Disposition | Criminal Felony | 4.9 | 4.9 | 5.2 | 5.4 | 5.1 | 5.4 | 5 | 1 | |
| | | Civil** | 5.0 | 4.9 | 4.6 | 4.8 | 4.8 | 5.9 | 3 | 1 | |
| | From Filing to Trial** (Civil Only) | | 11.5 | 9.3 | 10.2 | 9.8 | 9.0 | 9.3 | 1 | 1 | |
| OTHER | Civil Cases Over 3 Years Old** | Number | 59 | 59 | 29 | 64 | 12 | 240 | | | |
| | | Percentage | 3.1 | 3.1 | 1.7 | 4.1 | .7 | 12.1 | 21 | 3 | |
| | Average Number of Felony Defendants Filed Per Case | | 1.3 | 1.2 | 1.2 | 1.2 | 1.2 | 1.3 | | | |
| | Jurors | Avg. Present for Jury Selection | 50.84 | 40.99 | 50.21 | 45.89 | 44.12 | 50.42 | | | |
| | | Percent Not Selected or Challenged | 41.5 | 37.4 | 33.3 | 37.2 | 36.5 | 36.4 | | | |

2010 CIVIL AND CRIMINAL FELONY FILINGS BY NATURE OF SUIT AND OFFENSE

EDVA Report Appendix E

559

| Type of | TOTAL | A | B | C | D | E | F | G | H | I | J | K | L |
|-----------|-------|----|-----|-----|-----|-----|-----|-----|-----|-----|-----|----|-----|
| Civil | 3433 | 91 | 169 | 980 | 35 | 56 | 334 | 449 | 263 | 174 | 447 | 1 | 434 |
| Criminal* | 1108 | 15 | 279 | 296 | 130 | 192 | 40 | 52 | 5 | 13 | 11 | 23 | 52 |

* Filings in the "Overall Caseload Statistics" section include criminal transfers, while filings "By Nature of Offense" do not.

** See ["Explanation of Selected Terms."](#)

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PANEL BIOGRAPHIES

Hon. Leonie M. Brinkema, District Judge

Education: Rutgers University, B.A., 1966; Rutgers University, M.L.S., 1970; Cornell Law School, J.D., 1976.

Professional Career: Trial attorney, Public Integrity Section, Criminal Division, U.S. Department of Justice, 1976-1977; Assistant U.S. Attorney, Eastern District of Virginia, 1977-1983; Trial Attorney, Office of International Affairs, Criminal Division, U.S. Department of Justice, 1983-1984; Part-time legal instructor, Northern Virginia Criminal Justice Academy, 1984-1985; Private practice, Alexandria, Virginia, 1984-1985.

Judicial Service: U.S. Magistrate Judge, EDVA, 1985-1993; District Judge, 1993 –.

Hon. Thomas Rawles Jones, Jr., Magistrate Judge

Education: University of Virginia, B.A., 1970; University of Virginia School of Law, J.D., 1973.

Professional Career: Law Clerk, Hon. Albert V. Bryan, Jr., Eastern District of Virginia, 1973-1974; Assistant Commonwealth's Attorney, Alexandria, Virginia, 1974-1983; Private practice, Alexandria, Virginia, 1983-1994.

Judicial Service: U.S. Magistrate Judge, EDVA, 1994 –.

Dennis C. Barghaan, Jr., Assistant United States Attorney

Education: University of Richmond, B.A., 1996; College of William and Mary, Marshall-Wythe School of Law, J.D., 1999.

Professional Career: Law Clerk, Hon. Leonard I. Garth, U.S. Court of Appeals for the Third Circuit, 1999-2000; U.S. Department of Justice, Civil Division (Constitutional Torts), 2000-2003; Assistant U.S. Attorney, Civil Division, EDVA, 2003 –.

William D. Dolan, III

Education: Marquette University A.B., 1967; Catholic University of America, Columbus School of Law, J.D., 1972 (Member, Law Review).

Professional Career: Private practice, 1972— (currently, partner, Venable LLP, Tysons Corner, Virginia).

Craig C. Reilly

Education: Amherst College, B.A., 1976; University of Virginia School of Law, J.D., 1981.

Professional Career: Law Clerk, Supreme Court of Virginia, 1982-1983; Private practice, 1981, 1983— (currently, solo practitioner, Alexandria, Virginia).

TAB 6

DUKE CONFERENCE SUBCOMMITTEE

The Duke Conference Subcommittee continues to work on implementing many of the ideas presented at the Conference. From the beginning, it has been clear that revising the Civil Rules is only one among many promising means of advancing the suggestions for reducing cost and delay. A reminder of the work under way is offered here, followed by some possible rule revisions that will be studied. At the end, the Subcommittee recommends that a "mail box" suggestion to amend Rule 33 be rejected.

Among the many ideas presented at the conference, three prescriptions were offered many times, in many voices. What is needed can be described in two words and one phrase: Cooperation; Proportionality; and Sustained, active, hands-on case management. Much can be done to advance these goals within the framework of present rules. The Federal Judicial Center has undertaken several projects to emphasize the advantages of active case management in their programs and materials for judicial education. Members of the Advisory Committee have drafted sections on pretrial management for a handbook for judges. A group of plaintiffs' and defense employment lawyers have made great progress in developing a protocol for discovery, working with the help of the Institute for the Advancement of the American Legal System and Judge Koeltl. When the work is brought to the expected successful conclusion, it will be offered as a model for adoption by individual judges. Experience in those courts may encourage general adoption, and may inspire other groups to develop similar discovery protocols for other frequently encountered subjects of litigation.

Empirical work continues to build on the empirical work undertaken for the Conference. The Federal Judicial Center has concluded the first phase of work on the impact of the Twombly and Iqbal decisions on federal pleading, looking to the rates of making and granting motions to dismiss for failure to state a claim. Work is under way on the second phase, exploring the steps that follow dismissal with leave to amend. A separate project is examining the frequency and timing of initial case-management orders, and a related project on Rule 26(f) discovery conferences will be launched early next year. These subjects also will be included in a study of complex case management in the Southern District of New York. The information gathered by these projects will be made available on Federal Judicial Center and Administrative Office web sites to facilitate outside work with the information.

Organizations outside the Federal Judicial Center are also doing empirical work that will bear on pretrial practices. Close attention will be paid to this work, with the help of the Judicial Center.

Pilot projects provide another form of empirical information. Information is being gathered about pilot projects around the

country with the hope that the Federal Judicial Center will be able to help with the design in ways that enable development of rigorous information. The Seventh Circuit project on electronic discovery was presented at the Duke Conference and will continue to provide valuable lessons. Examples of other projects include an expedited trial program adopted in the Northern District of California and a complex-case project approved for adoption in the Southern District of New York. A description of each project is attached. These and other pilot projects will provide important information for ongoing study of ways to make the rules work better.

The list of rules being considered for possible revision continues to shift, adding some new topics and winnowing out some earlier topics. The current Subcommittee agenda is attached to illustrate the possibilities that command the most attention.

The frequent calls for early, hands-on case management invite consideration of integrated provisions that are scattered throughout the rules. It might have been desirable to rearrange the rules to achieve readier connections – Rule 16 pretrial procedures, for example, might have been placed immediately before the discovery provisions, and still greater integration might be achieved. This possibility was briefly considered and rejected during the Style Project. So it is that Rule 26(f) requires the parties to confer no later than 21 days before a scheduling conference is to be held or a scheduling order is due. The conference is designed to supplement the pleadings by directing that the parties consider the nature and basis of their claims and defenses. It is more obviously designed to plan discovery. The parties are to make or plan for the Rule 26(a)(1) initial disclosures at the conference (but if the case is exempt from the initial disclosure requirement, the Rule 26(f) conference is excused). Although it may be less obvious, the conference is also designed to be a prelude to the scheduling order – the "discovery plan" is to state the parties' views and proposals on many explicit discovery topics, and also on "any other orders that the court should issue * * * under Rule 16(b) and ©." The parties' discovery plan is to be submitted to the court within 14 days after the conference. Applying those deadlines first requires reference to Rule 16(b)(1), which directs that a scheduling order issue after receiving the Rule 26(f) report or after consulting with the attorneys or unrepresented parties "at a scheduling conference or by telephone, mail, or other means." The next step is Rule 16(b)(2) – the scheduling order must issue "as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared." Rule 26(d) relates all of this to discovery by barring discovery before the parties have conferred, with several exceptions.

Several questions have been raised as to these provisions. The time periods work backward from the time set for the scheduling

order or conference. Setting the time at the earlier of 120 days after any defendant is served, or 90 days after any defendant appears, may be too late. Shorter periods might well expedite litigation without any real cost. The "rocket docket" practice in the Eastern District of Virginia will be explored in a panel discussion at this meeting. This practice inspired Rule 26(f)(4), which recognizes that a court that has an "expedited schedule for Rule 16(b) conferences" may adopt a local rule that accelerates the times for the Rule 26(f) conference and report. Timing issues will be considered, with as much help as the FJC study can provide.

Apart from timing, scheduling-order practices present other questions. One question is whether scheduling orders in fact issue in all cases, apart from "categories of actions exempted by local rule." If any substantial patterns of noncompliance are found, it will be important to understand the reasons. A distinct question is whether the rule should require direct communication among court and counsel, either in person or by telephone or video conference, in framing the scheduling order. And if there is to be a real conference, it might be asked whether Rule 26(f) should be bolstered by focusing it even more explicitly as a pre-scheduling-conference conference of the attorneys.

Rule 26(f) presents puzzles of its own. There are some indications that rule 26(f) conferences are not always held in cases that are not exempt. Even if a conference is held, again there are some indications that it may amount to a "drive-by" gesture. The Subcommittee, again with the help of the FJC survey, will seek to learn more about actual practice. If Rule 26(f) is disregarded with any frequency, or is honored only in form, it will be important to learn the reasons. Is the conference often less useful than hoped? Is the burden too great for simple cases? Is disregard only another sign of hyper-adversariness?

Timing questions arise in another way. We regularly hear the question whether discovery should be suspended pending disposition of Rule 12 motions, although many of the statements are offered by judges who say they are often asked to stay discovery and refuse to do so with almost equal frequency. One possible issue is the relationship between motions to dismiss and scheduling-order practice. It may seem wasteful to attempt to issue a scheduling order when it is not clear whether the action will be dismissed, whether the pleadings will be substantially amended, or when these issues will be decided. But if there is formal action to direct that the scheduling order is not due before it is useful, the time for the Rule 26(f) conference may be postponed – again not unreasonably – and the Rule 26(d) bar on discovery remains in effect until there is a Rule 26(f) conference.

The interplay between Rule 26(f) and the discovery bar in Rule 26(d) also is open to change. It has been suggested that the parties should be allowed to propound specific discovery requests

before the conference, but to defer the obligation to answer to a time after the conference. That approach would provide a specific focus for the conference.

Still other discovery questions remain on the agenda, recognizing the need to allocate responsibility with the Discovery Subcommittee. The scope of discovery may better be left untouched, but the concept of proportionality could be integrated into Rule 26(b)(1) even more directly than the integration accomplished by the explicit cross-reference at the end of (b)(1) to the cost-benefit provisions in (b)(2)[©]. Cost-sharing has been explored in the past, and may deserve renewed attention. Rule 26[©] expressly authorizes orders to protect a party against undue burden or expense, supporting an order that conditions discovery on payment by the inquiring party of part or all of the costs of response. (Remember also the authority in Rule 26(b)(2)(B) to impose conditions when the court orders discovery of electronically stored information that is not reasonably accessible because of undue burden or cost.)

A duty to cooperate also could be incorporated in the discovery rules, bolstering whatever duty is implicit in the frequent requirements to meet and confer before making a motion. Rule 1 also might be amended to make clear the obligation of the parties to participate in using the rules "to secure the just, speedy, and inexpensive determination" of an action or proceeding.

Evasion in responding to discovery requests is an opposite of cooperation. Daniel C. Girard, until recently an Advisory Committee member, joined with Todd I. Espinosa in a Duke Conference paper suggesting three amendments to reduce evasion. Rule 26(g) would be amended to provide that signing a discovery request, response, or objection certifies that it is "not evasive." Rule 34 would be amended in places to impose an express obligation to produce, not merely to state that production or inspection will be allowed. A further Rule 34 amendment would require a party who both objects and responds to state whether responsive documents have been withheld under the objections. These proposals have been challenged by Lawyers for Civil Justice. The challenge and a reply are attached. The Subcommittee will take seriously both the proposals and the challenge.

Recommendations continue to be made for presumptive numerical limits on the numbers of discovery requests. Until recently, the recommendations have focused on adding limits to Rule 34 – perhaps 25 requests to produce, even with specific time limits or limits on the numbers of sources that need be consulted – and to Rule 36 requests to admit, again perhaps to 25. Recently suggestions have been made that the presumptive limits that appear in Rules 30, 31, and 33 might be lowered. The idea seems to be that many cases fall well short of the present limits, but that the limits may act at times as magnets rather than ceilings. Reducing the presumptive

number of depositions to 5 per side, and possibly reducing the presumptive length from 7 hours to 4, might teach lawyers to live comfortably with less discovery in some of the cases that now have disproportionate discovery. So of reducing the number of requests for admission, or creating a presumption that they should be allowed only after the completion of other discovery. (Comparable limits might be placed on contention interrogatories.)

Finally, some courts have found it useful to require a conference with the court before a discovery motion is filed. The purpose is to seek resolution of the dispute by informal discussion. If resolution is not achieved, the motion could be made without any requirement for the court's permission. The success of this practice in courts that use it warrants consideration as a possible rule provision, although best-practices advice also may be a useful next step.

Duke II?

Continuing work, research, and pilot projects will lead to the development of specific proposals to amend the Civil Rules. The Duke Conference was enormously useful in inspiring this work. It may well be that a follow-up conference can be equally useful in focusing and improving more focused proposals. One model would be similar to the miniconferences that have proved so useful with many past proposals – a project is developed to the point of drafting rules amendments, perhaps with draft Committee Notes, and a group of knowledgeable people is assembled for reactions. For this work, the groups may be larger, and the time longer. Depending on the number of proposals and scheduling, it could also be useful to include opportunities – most probably by panels – to renew the "big picture" question whether new and perhaps more daring subjects should be added to the agenda.

Although nothing definite has been resolved, it seems likely that the earliest time for a useful conference would be in late winter or early spring, 2013. That would allow time to develop current FJC research projects, to learn from ongoing pilot projects, and to develop initial drafts of specific proposals. The lead time required for actually assembling a conference will depend on the final shape. Experience with past miniconferences suggests that reactions to specific proposals can be sought within a relatively short time frame, perhaps three months. Those considerations remain for future evaluation.

Recommendation for Action: Proposed Rule 33(e)

Daniel J. DeWit has written to propose that a new Rule 33(e) be added, modeled on a form approved by the Judicial Council of California. Rule 33(e) would provide that a party who serves a request to admit under Rule 36 can simultaneously serve an interrogatory that asks several questions addressed to each Rule 36

response that is not an unqualified admission: state all facts on which the response is based; identify each person who has knowledge of those facts; and identify all documents or other tangible things that support the response. The text of the proposal is attached.

The Subcommittee recommends that this proposal be rejected. It does not seem likely that such interrogatories would add useful information that could not be sought more directly, whether by interrogatory or other discovery devices. The interrogatories, however, might be attempted as a short-cut to direct discovery, shifting still further the burden of preparation to the adversary. Conscientious responses to such interrogatories could easily take on the detailed alignment of issues and facts called for by "point-counterpoint" summary-judgment practices. And they easily could elicit objections and disputes, adding corresponding cost and delay.

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(e) Special Interrogatory for Use with Request for Admission.

In addition to the interrogatories that may be served pursuant to this Rule, whenever a party serves one or more requests for admission under Rule 36, that party may also serve, along with the request(s) for admission, alone or in addition to other interrogatories served pursuant to this Rule, and without prejudice as to any numerical limitation herein, the following interrogatory:

"Is your response to each request for admission served with this interrogatory an unqualified admission? If not, for each response that is not an unqualified admission: (a) state the number of the request; (b) state all facts upon which you base your response; (c) state the name, address, and telephone number of each person who has knowledge of those facts; and (d) identify all documents and other tangible things that support your response and state the name, address, and telephone number of the person who has each document or thing."

Proposed addition to Federal Rules of Civil Procedure, Rule 33 (Interrogatories).

In California, the Judicial Council of California approved a set of form interrogatories for use in civil cases, which contain an interrogatory (No. 17.1) nearly identical to the one here. Practitioners have found that this interrogatory, combined with a well-drafted set of requests for admission, can be a powerful tool to root out baseless claims and dispose of them on summary judgment. In essence, this interrogatory in conjunction with requests for admission served under Rule 36, can provide sufficient grounds in some cases to dispose of claims and causes of action even before depositions or other, more expensive forms of discovery and investigation need take place.

Whereas this tool may be most effective in exposing weaknesses in a plaintiff's case, it is also a powerful tool to bring out weaknesses in a defendant's defenses or alternative theories of the case.

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GENERAL ORDER NO. 64

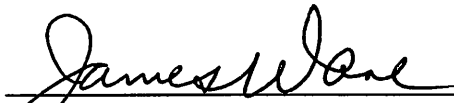
EXPEDITED TRIAL PROCEDURE

An Expedited Trial offers an abbreviated, efficient and cost effective litigation and trial process. The Northern District of California adopts the following Expedited Trial Procedure as a General Order of the Court:

- | | |
|--------------|---|
| Attachment A | Procedure for Expedited Trials |
| Attachment B | (Form) Agreement For Expedited Trial And Request for Approval |
| Attachment C | (Form) Standing Order For All Judges of the Northern District of California – Contents of Joint Case Management Statement |
| Attachment D | (Form) Standing Order For All Judges of the Northern District of California – Joint Expedited Case Management Statement |

Adopted: June 21, 2011

For the Court:



JAMES WARE
Chief Judge

GENERAL ORDER NO. 64 — ATTACHMENT A

PROCEDURE FOR EXPEDITED TRIALS

1. Expedited Trial Procedure.

The court encourages parties to agree to an expedited trial. The Expedited Trial Procedure is meant to offer an abbreviated, efficient and cost-effective litigation and trial alternative. Subject to the approval of the assigned judge, the following procedures shall govern. “Expedited Trial” means a consensual, binding trial before a jury or before a judge with limited discovery and limited rights to appeal.

2. Effective Date.

The parties shall file a written agreement, using the court form titled “Agreement for Expedited Trial and Request for Approval.” Neither the agreement nor its existence shall be disclosed to the jury. The time schedule for expedited procedures and trial shall begin on the date the agreement is approved by the court.

3. Termination of Agreement.

The agreement may be terminated by the court upon a showing that one or more parties have not participated in good faith with the provisions of this General Order or that previously undisclosed facts have been discovered that make it inappropriate to proceed pursuant to the agreement.

4. Applicable Rules.

The provisions of the Expedited Trial Agreement, as approved by the court, shall supersede and govern over any inconsistencies or conflicts that arise between it and the Federal Rules of Civil Procedure or the Local Rules of this Court. Otherwise, all Federal Rules of Civil Procedure, Rules of Evidence, and Local Rules of this Court shall apply.

5. Initial Disclosures.

If initial disclosures have not been exchanged, or if they are not yet due, the disclosures required by Rule 26(a) (1) (A) shall be exchanged within seven (7) days after the agreement is approved by the court.

6. Expedited Trial Conference.

Immediately upon the filing of the agreement, plaintiff shall contact the courtroom deputy for the assigned judge and request an initial expedited trial conference. The conference shall occur no later than thirty (30) days after the filing of the agreement. Upon request of any party, the court shall permit counsel to appear by telephone. A Joint Expedited Trial Statement shall be filed seven (7) days before the conference addressing all of the topics set forth in the

Standing Order for All Judges of the Northern District of California — Joint Expedited Case Management Statement, found on the Court’s website: www.cand.uscourts.gov.

A case management order shall be issued following the conference. Unless otherwise ordered by the court, the order shall require the parties to exchange the documents described in Rule 26(a) (3) of the Federal Rules of Civil Procedure no later than fifteen (15) days before the pretrial conference and shall require the parties to complete all discovery no later than ninety 90 days after the expedited trial conference. All Rule 12 and pleading issues shall be resolved by the court at the expedited trial conference, except as provided in section 10 of this General Order. The court may determine the extent, if any, that previous case management orders on matters subject to the expedited rules shall supersede or be combined with any previous orders.

7. Pretrial Conference.

The pretrial conference shall be held no later than one hundred fifty (150) days after the agreement is approved by the court.

8. Discovery.

Unless otherwise ordered by the court or by agreement of the parties, discovery shall be limited to ten (10) interrogatories per side, ten (10) document requests, ten (10) requests for admission, and fifteen (15) hours of depositions, per side. The parties may agree or the court may order, that the time for response to written discovery be shortened. Deposition time limits are inclusive of fact witnesses and expert witnesses.

9. Expert Witnesses.

No party shall call more than one expert witness to testify, unless permitted by the court or by agreement of the parties.

10. Pretrial Motions.

No pretrial motion shall be filed without leave of court, which shall be sought by a letter not to exceed one page. If leave is granted, the motion shall be in letter form, filed with the clerk, unless otherwise ordered. The response to the motion shall be by letter filed with the clerk not later than seven calendar days after receipt of the motion.

Unless otherwise permitted, no letter shall exceed three pages. A letter reply, not to exceed one page may be filed within three days after receipt of opposition. The court may decide the motion without a hearing. If the court finds that a hearing is necessary, it may establish a briefing schedule and order further briefing. Pendency of a dispositive motion shall not stay any other proceedings.

11. Trial Date.

Unless otherwise ordered, trial shall be held no later than six months after the agreement is approved by the court.

12. Trial.

Jury trial will be before six jurors and may proceed before a five-person jury if a juror is unable to serve through conclusion of trial and deliberations. The court shall conduct all voir dire and shall determine time limits for opening statements and closing argument. Each side shall have three hours to present evidence, not including time for opening statement and time for closing argument. There shall be no findings of fact or conclusions of law in non-jury trials. In multi-party trials, plaintiffs shall divide the three hours among themselves, and defendants shall divide the three hours among themselves. If the parties cannot agree to a division of trial time, the judge shall order a division.

13. Post-trial Motions

(a) Post-trial motions shall be limited to determination of costs and attorney's fees, correcting a judgment for clerical error, conforming the verdict to the agreement, enforcement of judgment and motions for a new trial.

(b) Within ten (10) court days after notice of entry of a jury verdict, a party may file with the clerk and serve on each adverse party a notice of intention to move for a new trial on any of the grounds specified in section 13(c) of these procedures. The notice shall be deemed to be a motion for a new trial.

(c) Grounds for motions for a new trial shall be limited to: (1) judicial misconduct that materially affected the substantial rights of a party; (2) misconduct of the jury; (3) corruption, fraud, or other undue means employed in the proceedings of the court or jury.

14. Judgment.

Judgment shall be entered within 30 days after a bench trial, except as ordered by the court for good cause.

15. Appeal.

Before filing an appeal, a party shall make a motion for a new trial pursuant to paragraph 13 of these procedures. If the motion for a new trial is denied, the party may appeal the judgment and seek a new trial only on grounds specified in subsection 13(c). All other grounds for appeal shall be waived and are not permitted, unless the parties agree otherwise.

GENERAL ORDER NO. 64 – ATTACHMENT B

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

) Case Number: C 11-xxxx

) **AGREEMENT FOR EXPEDITED TRIAL
) AND REQUEST FOR APPROVAL**

Plaintiff(s),

vs.

Defendant(s).

The parties agree that all litigation in the above captioned matter shall be governed by General Order No. 64, Procedure for Expedited Trials of the United States District Court for the Northern District of California (“the Expedited Trial Procedure”). This Agreement, when approved by the court, shall be binding on the parties and on the court, subject to the Termination of Agreement provision set forth in paragraph 3 of Attachment A to General Order No. 64.

In addition to the terms set forth in General Order No. 64, the parties elect and agree to the following:

- 1. That regardless of the ultimate decision of the jury or the court, plaintiff will receive no less than \$_____ in damages from defendant(s), and defendant will pay no more than \$_____ in damages to plaintiff. (The floor/ceiling amounts may be kept under seal by filing this document in accordance with General Order 62.)
- 2. That plaintiff will receive no less than \$_____ in attorney fees and defendant will pay no more than \$_____ in attorney fees. The judge shall determine attorney fees within the range agreed by the parties. (The floor/ceiling amounts may be kept under seal by filing this document in accordance with General Order 62.)

- 1 3. That the judge may order equitable relief consistent with and within the options agreed to by the
2 parties, *e.g.*, injunctive relief, promises to implement policies or practices, etc.
- 3 4. That the following trade-offs to reduce the scope of the litigation and the trial be adopted (*e.g.*, to
4 forego pretrial motions, such as motions to dismiss, motions for summary judgments, etc., in
exchange for limitations on damages, including waiver of punitive damages): _____.
- 5 5. That the following limitations on Pre-Trial Conference obligations to the extent permitted by the
6 court be
adopted: _____.
- 7 6. That the number of peremptory challenges will be reduced to _____ per side.
- 8 7. That limits on evidentiary matters (*e.g.*, allow hearsay, limit objections in deposition to form and
9 reserving all others) will be altered as follows:
10 _____
- 11 8. Other: _____.

12
13 The parties agree that any and all rights to appeal from the judgment are waived by all parties,
14 except as provided in section 15 of Attachment A to General Order No. 64.

15
16 Dated: _____

17 Counsel for plaintiff

18
19 Dated: _____

20 Counsel for defendant

21
22 **IT IS ORDERED** that the forgoing Agreement is approved. The parties shall request an Initial
23 Expedited Trial Proceeding and file a Joint Expedited Trial Statement.

24
25 Dated: _____

26 UNITED STATES DISTRICT JUDGE

GENERAL ORDER NO. 64 – ATTACHMENT C

**STANDING ORDER FOR ALL JUDGES
OF THE NORTHERN DISTRICT OF CALIFORNIA**

CONTENTS OF JOINT CASE MANAGEMENT STATEMENT

Commencing July 1, 2011, all judges of the Northern District of California will require the identical information in Joint Case Management Statements filed pursuant to Civil Local Rule 16-9. The parties must include the following information in their statement which, except in unusually complex cases, should not exceed ten pages:

1. **Jurisdiction and Service**: The basis for the court's subject matter jurisdiction over plaintiff's claims and defendant's counterclaims, whether any issues exist regarding personal jurisdiction or venue, whether any parties remain to be served, and, if any parties remain to be served, a proposed deadline for service.
2. **Facts**: A brief chronology of the facts and a statement of the principal factual issues in dispute.
3. **Legal Issues**: A brief statement, without extended legal argument, of the disputed points of law, including reference to specific statutes and decisions.
4. **Motions**: All prior and pending motions, their current status, and any anticipated motions.
5. **Amendment of Pleadings**: The extent to which parties, claims, or defenses are expected to be added or dismissed and a proposed deadline for amending the pleadings.
6. **Evidence Preservation**: Steps taken to preserve evidence relevant to the issue reasonably evident in this action, including interdiction of any document-destruction program and any ongoing erasures of e-mails, voice mails, and other electronically recorded material.
7. **Disclosures**: Whether there has been full and timely compliance with the initial disclosure requirements of Fed. R. Civ. P. 26 and a description of the disclosures made.
8. **Discovery**: Discovery taken to date, if any, the scope of anticipated discovery, any proposed limitations or modifications of the discovery rules, and a proposed discovery plan pursuant to Fed. R. Civ. P. 26(f).
9. **Class Actions**: If a class action, a proposal for how and when the class will be certified.
10. **Related Cases**: Any related cases or proceedings pending before another judge of this court, or before another court or administrative body.

11. Relief: All relief sought through complaint or counterclaim, including the amount of any damages sought and a description of the bases on which damages are calculated. In addition, any party from whom damages are sought must describe the bases on which it contends damages should be calculated if liability is established.
12. Settlement and ADR: Prospects for settlement, ADR efforts to date, and a specific ADR plan for the case, including compliance with ADR L.R. 3-5 and a description of key discovery or motions necessary to position the parties to negotiate a resolution.
13. Consent to Magistrate Judge For All Purposes: Whether all parties will consent to have a magistrate judge conduct all further proceedings including trial and entry of judgment.
14. Other References: Whether the case is suitable for reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.
15. Narrowing of Issues: Issues that can be narrowed by agreement or by motion, suggestions to expedite the presentation of evidence at trial (e.g., through summaries or stipulated facts), and any request to bifurcate issues, claims, or defenses.
16. Expedited Trial Procedure: Whether this is the type of case that can be handled under the Expedited Trial Procedure of General Order No. 64 Attachment A. If all parties agree, they shall instead of this Statement, file an executed Agreement for Expedited Trial and a Joint Expedited Case Management Statement, in accordance with General Order No. 64 Attachments B and D.
17. Scheduling: Proposed dates for designation of experts, discovery cutoff, hearing of dispositive motions, pretrial conference and trial.
18. Trial: Whether the case will be tried to a jury or to the court and the expected length of the trial.
19. Disclosure of Non-party Interested Entities or Persons: Whether each party has filed the "Certification of Interested Entities or Persons" required by Civil Local Rule 3-16. In addition, each party must restate in the case management statement the contents of its certification by identifying any persons, firms, partnerships, corporations (including parent corporations) or other entities known by the party to have either: (i) a financial interest in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding.
20. Such other matters as may facilitate the just, speedy and inexpensive disposition of this matter.

GENERAL ORDER NO. 64 – ATTACHMENT D

**STANDING ORDER FOR ALL JUDGES
OF THE NORTHERN DISTRICT OF CALIFORNIA**

CONTENTS OF JOINT EXPEDITED CASE MANAGEMENT STATEMENT

Commencing July 1, 2011, all judges of the Northern District of California will require the following information in Joint Expedited Case Management Statements filed pursuant to General Order No. 64, which should not exceed five pages:

1. Expedited Trial Approval: Date Expedited Trial Agreement approved by the Court.
2. Motions: All prior and pending motions, their current status, and any anticipated motions.
3. Disclosures: Whether there has been full and timely compliance with the initial disclosure requirements of Fed. R. Civ. P. 26 and General Order No. 64 Attachment A, ¶ 5.
4. Discovery: Discovery taken to date, if any, the scope of anticipated discovery, any proposed limitations or modifications of the discovery rules, and a proposed discovery plan pursuant to Fed. R. Civ. P. 26(f) and General Order No. 64, Attachment A, ¶ 8.
5. Settlement and ADR: Whether the parties wish a settlement conference before a magistrate judge or some other form of ADR.
6. Consent to Magistrate Judge For All Purposes: Whether all parties will consent to have a magistrate judge conduct all further proceedings including trial and entry of judgment.
7. Narrowing of Issues: Issues that can be narrowed by agreement or by motion, suggestions to expedite the presentation of evidence at trial (e.g., through summaries or stipulated facts), and any request to bifurcate issues, claims, or defenses.
8. Scheduling: Proposed dates for designation of experts, discovery cutoff, hearing of motions permitted by General Order No. 64, Attachment A, ¶ 10, pretrial conference, and trial.
9. Trial: Whether the case will be tried to a jury or to the court.
10. Such other matters as may facilitate the just, speedy and inexpensive disposition of this matter.

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LAWYERS FOR CIVIL JUSTICE
COMMENT
To
THE CIVIL RULES ADVISORY COMMITTEE

August 18, 2011

**A Prescription for Stronger Discovery Medicine:
The Danger of Tinkering Change and the Need for Meaningful Action**

As has now been widely acknowledged, the “discovery system is broken” and the civil justice system is “in serious need of repair.”¹ This is not a new problem, however, and significant effort has been expended to address long standing problems of “skyrocketing costs, over-discovery, and discovery abuse”² which have haunted the discovery process for many years.³ Indeed, “[t]he history of rule amendments since 1970 is largely a history of trying to put the discovery genie back in the bottle. . . .”⁴ In that time, many different approaches have been adopted in an attempt to address the problems.⁵ In large part, though, those changes have done little to stem the tide of expanding discovery and have been particularly ineffective in addressing electronic discovery and its magnification of the problems of abuse, misuse, and cost.⁶

While the problems of discovery have long been acknowledged, the explosion of electronic discovery has only served to worsen the trouble and has created an untenable situation which threatens the availability of a “just, speedy, and inexpensive determination” for civil actions

¹ AM. COLLEGE OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYST., FINAL REPORT, 9, 2 (2009).

² INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYST., AMERICA’S AILING CIVIL JUSTICE SYSTEM, THE DIAGNOSIS AND TREATMENT OF THE FEDERAL RULES OF CIVIL PROCEDURE, 4 (2009).

³ *See Id.* (“Some of the earliest criticisms of the FRCP related to the cost and abusive practice of discovery, although those criticisms were not immediately acknowledged. As early as 1968, studies were being undertaken addressing the relationship between discovery practices and cost increases in civil litigation.”).

⁴ *Id.* (Discussing the explosion of discovery in the 1970’s “when the volume of available information and the scope of permitted discovery both expanded simultaneously.”).

⁵ *See* LAWYERS FOR CIVIL JUSTICE, A PRESCRIPTION FOR STRONGER MEDICINE: NARROW THE SCOPE OF DISCOVERY (Sept. 2010) [hereinafter “STRONGER MEDICINE”], available at <http://www.lfcj.com/articles.cfm?articleid=1> and LAWYERS FOR CIVIL JUSTICE, DRI, FEDERATION OF DEFENSE & CORPORATE COUNSEL, INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, WHITE PAPER, RESHAPING THE RULES OF CIVIL PROCEDURE FOR THE 21ST CENTURY: THE NEED FOR CLEAR, CONCISE AND MEANINGFUL AMENDMENTS TO KEY RULES OF CIVIL PROCEDURE (May 2, 2010) [hereinafter “RESHAPING THE RULES”], available at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/888E977DFE7B173A8525771B007B6EB5/\\$File/Reshaping%20the%20Rules%20for%20the%2021st%20Century.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/888E977DFE7B173A8525771B007B6EB5/$File/Reshaping%20the%20Rules%20for%20the%2021st%20Century.pdf?OpenElement) .

⁶ *See, e.g.*, AM. COLLEGE OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYST., INTERIM REPORT, A-4 (2008) (“Only 34% of Fellows think that the cumulative effect of changes to the discovery rules since 1976 has significantly reduced discovery abuse; and 45% of Fellows still think discovery is abused in every case.”).

before the courts.⁷ After only a few years, electronic discovery is already being described as a “nightmare”⁸, a “disaster”⁹, and “the biggest problem with the system.”¹⁰ Coupled with the long-standing problems of discovery abuse, misuse and in particular rising cost, electronic discovery has pushed the civil justice system to the brink and decisive action is necessary to pull it back.

As history has shown, numerous modest amendments to the discovery Rules have done little to address the problems which have long-plagued the discovery process. Indeed, the prediction of Justice Powell has proven true, and acceptance of “tinkering changes” has “delay[ed] for years the adoption of genuinely effective reforms.”¹¹ Now, in the midst of a major discovery paradigm shift from paper to electronic evidence, the danger of tinkering changes is all the more present, particularly where the problems of discovery will continue to grow and expand until they are addressed head on.

As we advocated in our White Paper *RESHAPING THE RULES* and Comment *STRONGER MEDICINE*, decisive action should come in several specific ways:

First, Rule 26 should be amended to narrow the scope of discovery by limiting discovery to “any nonprivileged matter that would support proof of a claim or defense” subject to a “proportionality assessment” as required by Rule 26(b)(2)(C).¹²

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.¹³

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.¹⁴

These steps would serve to address a myriad of discovery problems by reducing the volume of information and evidence subject to discovery (a major contributor to cost), providing a clearer standard of relevance, lessening the likelihood of satellite litigation on discovery issues and,

⁷ See, e.g., *Id.* at B-3 (“Discovery rules and Rule 26 add significantly to cost of litigation, therefore diminishing access to justice.”).

⁸ *Id.* at B-1.

⁹ *Id.* at B-3.

¹⁰ *Id.* at B-2.

¹¹ Amendments to the Rules of Civil Procedure, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting).

¹² See *RESHAPING THE RULES*, supra note 5, at 23.

¹³ See *RESHAPING THE RULES*, supra note 5, at 25-26.

¹⁴ See *RESHAPING THE RULES*, supra note 5, at 31-32.

consequently, limiting the skyrocketing costs for litigants seeking fair and efficient resolution of claims.¹⁵

It bears repeating that similar proposals have been proffered for the Committee's consideration on numerous occasions in the last 34 years and have been widely acknowledged to constitute appropriate action to reduce discovery costs, misuse, and abuse and increase its efficiency¹⁶

The "Sanctions Tort" Proposals

The modest proposals of Rules Committee member Dan Girard¹⁷ currently being considered by the Subcommittee are insufficient to address the major problems of discovery. First, the proposed amendments are a perfect example of the type of tinkering changes which have repeatedly proven ineffective in making any substantive headway in addressing the real problems of discovery and which have long served as a justification for deferring meaningful action on necessary reforms. Second, the proposed amendments fail to address a major cause for the problems of discovery, namely the breadth of discovery *requests*. Third, the proposed amendments will not only fail to meaningfully address the problems of discovery, they will worsen them.

¹⁵ For a broader discussion of the benefits of these proposals, *See* RESHAPING THE RULES, *supra* note 5; STRONGER MEDICINE, *supra* note 5.

¹⁶ *See* STRONGER MEDICINE, *supra* note 5, at 4-6, 11 (discussing support from the American Bar Association and the American College of Trial Lawyers for narrowing the scope of discovery).

¹⁷ *See* Daniel C. Girard & Todd I. Espinoza, *Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules*, 87 Denv. U. L. Rev. 473 (2010). These Proposed Amendments were summarized as follows in the December 6, 2010 Report of the Civil Rules Advisory Committee:

(1) Evasive responses: This proposal draws from concern that discovery responses often are evasive, and the process often transforms from the intended "request-response" sequence to "an iterative, multi-step ordeal" in which the pre-motion conference requirement itself serves as an invitation to overbroad requests that anticipate over-narrow responses, negotiation, and eventual responses that may or may not be evasive. Rule 26(g) implicitly forbids evasive responses, but it should be made explicit by adding just two words to Rule 26(g)(1)(B)(i): signing a discovery request, response, or objection certifies that it is "not evasive, consistent with these rules and * * *."

(2) Rule 34: Production added to Inspection: Rule 34(a)(1) refers to a request "to produce and permit the requesting party * * * to inspect, copy * * * "documents. Rule 34(b)(1)(B) directs that the request "specify a reasonable time, place, and manner for the inspection and for performing the related acts." 34(b)(2)(B) directs that for each item or category, the response must "state that inspection and related activities will be permitted as requested," or object. "Producing" enters only in (b)(2)(D), referring to electronically stored information, and then again in (b)(2)(E), specifying procedures for "producing documents or electronically stored information." Rule 34(c) invokes Rule 45 as the means of compelling a nonparty to "produce documents and tangible things." Girard observes that the common practice is simply to produce, rather than make documents available for inspection and copying. This leaves gaps in the language of the rules. Rule 37(a)(3)(B)(iv) should be amended to include "fails to produce documents" -a motion to compel may be made if "a party fails to produce documents or fails to respond that inspection will be permitted or fails to permit inspection -as requested under Rule 34." In addition, a new provision should be added to Rule 34(b)(2)(B): "If the responding party elects to produce copies of documents or electronically stored information in lieu of permitting inspection, the response must state that copies will be produced and the production must be completed no later than the date for inspection stated in the request."

1. These “Sanctions Tort Proposals” will merely tinker with the rules and will not serve to fix our broken discovery system. Indeed, the authors describe their proposals as “modest” and admit that evasive conduct, the primary problem sought to be addressed, is “already prohibited” by the rules. Such tinkering amendments have been repeatedly adopted with little success. Consider, for example, the bifurcation of attorney-managed and court-managed discovery in 2000. Despite the *appearance* of decisive change, in practice, the amended rule did not affect the scope of discovery and, consequently, did little (or nothing) to make discovery less costly or more efficient. In fact, the changes are widely recognized as being, essentially, ignored.¹⁸

Beyond being ineffectual, however—a very real possibility as evidenced by the track record of such changes so far—is the danger that the acceptance of tinkering changes, such as those offered by these proposals, will once again justify a delay in taking meaningful action. While past delay (more than 30 years worth) has no doubt resulted in substantial and unacceptable hardship to those suffering from abusive discovery tactics, to delay again could be disastrous. Now, unlike any time in the Rules’ history, major changes in how evidence is created and stored (namely through electronic means) are changing the face of the litigation landscape, and are affecting in particular the realities of discovery. Moreover, those changes are occurring at a rapid and steadily accelerating pace and illustrate clearly the need for serious reconsideration of the discovery paradigm, and in particular the proper scope of discovery in this electronic age. Accepting the placebo of tinkering changes now will unnecessarily delay adoption of effective amendments for years. Meanwhile, the problems of discovery will *inevitably* worsen (as they have continued to do in years past), creating an even larger morass to be cleaned up in future.

2. The proposals fail to address the major problem of overly broad discovery *requests*, which encourage broad responses. As acknowledged by Magistrate Judge Grimm in, *Mancia v. Mayflower*, “kneejerk discovery requests served without consideration of cost or burden to the responding party” are “one of the most prevalent of all discovery abuses.”¹⁹ He went on to explain that “lawyers customarily serve requests that are far more burdensome than necessary to obtain sufficient facts to enable them to resolve the case through motion, settlement, or trial.”²⁰ The authors of the Girard Proposals themselves acknowledge that “the problems often begin with overbroad, poorly crafted ‘kitchen sink’ style document requests”²¹ and that the current rules may “encourage propounding parties to serve broader discovery requests that they otherwise would in order to leave themselves room to bargain”²² which “encourage similarly broad objections, in turn leading to further bargaining and significantly driving up costs.”²³ The authors attempt to minimize this problem by opining that “[c]ourts have shown little hesitation in paring back or restricting these overzealous or insufficiently focused discovery requests”²⁴ when, in fact, courts have instead clung to the tradition of very broad and liberal discovery which has

¹⁸ See STRONGER MEDICINE, *supra* note 5, at 7-8.

¹⁹ *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358 (D. Md. 2008).

²⁰ *Id.*

²¹ See Girard & Espinoza, *supra* note 17, at 474-475.

²² See Girard & Espinoza, *supra* note 17, at 477.

²³ See Girard & Espinoza, *supra* note 17, at 477.

²⁴ See Girard & Espinoza, *supra* note 17, at 475.

contributed greatly to the problems.²⁵ It falls to the Rules Committee, then, to finally take the necessary action to address the problem at its root and to narrow the scope of discovery.

3. More serious than merely delaying the adoption of meaningful reform, adoption of these Proposals would likely worsen the problems of discovery. For example, despite acknowledging that evasive discovery is prohibited under the current rules, the first proposal contemplates the addition of a specific prohibition against evasiveness in Rule 26(g) by requiring that counsel certify that the responses to discovery are “not evasive.” Such language would likely serve to increase the frequency of motions for sanctions which arguably result from the common *misunderstanding* of many parties that their opponent is obligated to produce ALL potentially responsive information in their possession—a nearly impossible task²⁶—and that failure to do so must result from an attempt to evade discovery. Even now, without specific language prohibiting “evasive” responses, the courts are inundated with motions to compel additional discovery and motions for sanctions based upon speculation that responsive material is being withheld with nefarious intent. The addition of a specific prohibition against evasion would only serve to embolden accusations of discovery violations, particularly where the notion of what constitutes evasive behavior is open to interpretation and likely to encourage disagreement amongst the parties. Moreover, where courts are also known to fall prey to the myth of full and complete disclosure, the danger of more frequent instances of unjust sanctions is great, and a major threat to the administration of justice.

Practitioners have long feared what has come to be known as the “sanctions tort” or “litigation by sanction.” At its most dramatic, the “sanctions tort” has been described as discovery gamesmanship in which one party purposefully seeks impossibly broad discovery or, alternatively, discovery of the same information from multiple sources, and when mistakes are inevitably uncovered, moves for terminating sanctions.²⁷ The result of the moving party’s success is not only to win their motion, but to deny the responding party’s opportunity for a trial on the merits. Of course, “litigation by sanction” need not result in terminating sanctions to deprive a party of the opportunity for fair adjudication of their claims or defenses; sanctions short of default judgment or dismissal can also be devastating to a case and are becoming increasingly common in the modern age.

²⁵ See STRONGER MEDICINE, *supra* note 5, at 7-9.

²⁶ See *Hopson v. The Mayor and City Council of Baltimore*, 232 F.R.D. 228, 245 (D. Md. 2005) (“The days when the requesting party can expect to ‘get it all’ and the producing party to produce whatever they feel like producing are long gone. In many cases, such as employment discrimination cases or civil rights cases, electronic discovery is not on a level playing field. The plaintiff typically has relatively few electronically stored records, while the defendant has an immense volume of it. *In such cases, it is incumbent upon the plaintiff to have reasonable expectations as to what should be produced by the defendant.*” (emphasis added)); *Report of the Advisory Committee on Civil Rules 4* (May 1998) available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-1998.pdf> (“As we continue to adapt to this information age, the notion of having all information on a subject is almost unattainable. We are going to have to move increasingly to a notion that although disclosure must be fair and full, it does not necessarily require that every copy of every document that relates to a particular proposition be introduced. You need only think about the amount of material on every desktop computer in a large corporation to visualize what that entails.”). Cf. *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 217 (2003) (“Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, ‘no’”. Such a rule would cripple large corporations, like UBS, that are almost always involved in litigation”).

²⁷ Charles F. Herring, Jr., *The Rise of the Sanctions Tort*, TEXAS LAWYER, Jan. 28, 1991, at 3-4.

The Sanction Tort Proposals, by creating additional obligations for responding parties (despite widespread agreement that the burden of discovery is already threatening the administration of justice), would only serve to create more “discovery related ‘traps’ to trigger sanctions.”²⁸ For example, a corporate defendant that produced large volumes of responsive material and whose counsel made the requisite certifications could be subject to a motion for sanctions for “evasion” or false certification upon discovery of even one email that was produced by a third party but not the defendant. Perhaps even more probable is a scenario in which the parties disagree regarding what constitutes responsive evidence, resulting in accusations of evasion against the responding party. This likelihood is all the more probable in light of many practitioners’ misunderstanding of the difficulties of responding to discovery in the modern age. Indeed, in arguing for their proposals, the authors opined that “it is usually relatively clear whether a document is responsive to a particular request”—a premise that if true would have precluded the need for many of the discovery motions before the courts today. Even where sanctions are ultimately denied, the resources expended by a responding party to defend itself can never fully be recouped nor the accusations erased.

The second Proposal, like the first, would not meaningfully address any of the major problems of discovery and would likely serve to worsen them. Specifically, the proposal to require that parties choosing to produce electronically stored information (rather than allowing inspection) state that production will be completed “no later than the date for inspection stated in the request”²⁹ will only serve to *encourage* the sort of discovery motions that result in the costs and delay which the Committee seeks to fix. It is inevitable that disputes will arise regarding the reasonableness of the timeframe laid out by the requesting party, particularly in cases where individual litigants seek discovery from large corporate entities and (as discussed above) misunderstand the difficulty of their requests. Indeed, the authors acknowledge that parties “seeking to compel compliance with wide-ranging requests without giving the producing party adequate time ... can expect to be met with a motion for a protective order.”³⁰ Consequently, rather than discouraging the need for judicial intervention (which inevitably results in delay and added cost), the proposed amendment would encourage it.

Moreover, despite the express acknowledgement by the authors of the Proposals that the amendments to Rule 34 were “not meant to create a routine right of access to a party’s electronic information system,” (as expressed in the Advisory Committee’s notes) the language of their proposed amendment nonetheless implicitly relies on the premise that responding parties may avoid the timeline trap by simply choosing to allow inspection.³¹ This “choice” fails to address the difficulties of creating an inspection protocol for ESI that does not first require its production³² (thus rendering the choice a fiction) or require the acceptance of the incredible risk

²⁸ Brief for Chamber of Commerce of the United States of America et al. as Amici Curiae Supporting Respondent, *Bahena v. Goodyear Tire & Rubber Co.*, No. A503395, at 11 (Nev. July 26, 2010).

²⁹ Girard & Espinoza, *supra* note 17, at 481.

³⁰ Girard & Espinoza, *supra* note 17, at 481.

³¹ See Girard & Espinoza, *supra* note 17, at 481 (providing the proposed language to be incorporated in Rule 34: “**If** the responding party elects to produce copies of documents or electronically stored information **in lieu of permitting inspection**, the response must state that copies will be produced and the production completed no later than the date for inspection stated in the request.” (Emphasis added.)).

³² E.g., by printing the ESI for review by opposing counsel or by loading responsive information into a review platform for use by opposing counsel.

and considerable expense of allowing direct access to a responding party's information systems. In short, because "inspection" of ESI is not a practical or realistic alternative to its production, the proposed amendment would only serve to trap responding parties into unreasonable timelines or require expensive and time consuming satellite litigation to resolve disagreement surrounding production, as discussed above.

Additionally, the authors argue that under the current discovery processes parties are left without a "specific timeframe for production" while at the same time acknowledging that parties are subject to a standard of reasonableness (a widely used and accepted standard in legal jurisprudence) and altogether ignore the discovery cut off date present in every case. Once again, the proposed amendment has shown itself to be nothing more than tinkering, a strategy that will not bring about the necessary changes to discovery and, meanwhile, worsen discovery problems.

The third proposed amendment would also serve to fuel existing discovery problems rather than dampen them. The creation of yet another discovery obligation, particularly coupled with a heightened threat of accusations of evasion, would only serve to add to the burden of discovery, which in turn results in additional delays and inevitable disagreements regarding compliance. Moreover, the adoption of such an amendment creates for requesting parties yet another "sanctions trap" in which to snare their opponents. As proposed, the amendment would also negate the premise in at least one jurisdiction that where a discovery request is overly broad on its face, the respondent need not "provide specific detailed support" for its objection.³³ Facially overbroad requests often seek information "relating to" or "concerning" a "broad range of items"³⁴ and are quite common in modern discovery practice. Even requests which cannot be reasonably characterized as overly broad *on their face*, but which are nonetheless likely to result in undue burden to the responding party, would create an unfair obligation under the proposed amendment. Responding parties should not be required to first determine what if anything is responsive or not responsive to such a request in a manner sufficient to state whether information is being withheld. To require an objecting party to nonetheless determine the existence of responsive material for purposes of identifying it as being withheld would render moot the original objection—an absurd result.

Conclusion

Meaningful solutions to the problems of discovery will only come from decisive action to narrow the scope of discovery. No amount of tinkering will do. While the Girard Proposals are no doubt a good faith attempt to address long-recognized problems, they will only succeed in making them worse. Time after time meaningful action has been avoided. Now, with the rise of electronic discovery, the comfort of small change can no longer take priority over the need for

³³ *Contracom Commodity Trading, Co. v. Seaboard Corp.*, 189 F.R.D. 655, 665 (1999) ("A party resisting facially overbroad or unduly burdensome discovery need not provide specific, detailed support." (citing *Mackey v. IBP, Inc.*, 167 F.R.D. 186, 197 (D.Kan. 1996))).

³⁴ *Cardenas v. Dorel Juvenile Group, Inc.*, 232 F.R.D. 377 381-382 (D. Kan. 2005).

decisive action. Indeed, “the process of change” can be “tortuous and contentious” but the consequences of failing to change will be worse.³⁵

Respectfully Submitted,

Lawyers for Civil Justice

³⁵ Amendments to the Rules of Civil Procedure, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting).

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October 4, 2011

By Electronic Mail

Honorable John G. Koeltl, Chair
Duke Conference Subcommittee
Advisory Committee on Civil Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
One Columbus Circle, NE
Washington, D.C. 20544

Re: Response to August 18, 2011 Comment by Lawyers for Civil Justice

Dear Judge Koeltl:

In our article, *Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules*, 87 Denv. U. L. Rev. 473 (2010), we proposed three targeted amendments to the Federal Rules of Civil Procedure. These amendments propose to reduce the cost of discovery by closing gaps in the Rules that facilitate evasive behavior. In an August 18, 2011 comment to the Advisory Committee, Lawyers for Civil Justice (“LCJ”) argues that the proposed amendments would implement a new “sanctions tort” regime under which litigation would be decided not on the merits, but on a party’s compliance with the discovery rules. The authors further contend that our proposals are mere “tinkering” and fail to address “the myriad problems that have continued to fester despite many earlier efforts to reduce the costs of discovery and increase its efficiency.” The authors urge the Advisory Committee to take up four Rules amendments previously proposed by LCJ, which would restrict the scope and availability of discovery by modifying Rules 26(b)(2) and 34.

This response is directed to LCJ’s criticisms of our three proposals. We do not address LCJ’s contention that its proposals would fundamentally reform discovery while our proposals amount to mere tinkering. We would of course expect to offer our views on the merits of LCJ’s proposals in due course should they advance in the rule-making process.

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First Proposal: Express Prohibition of Evasive Discovery Responses Under Rule 26(g)

Our first proposal is to modify Rule 26(g)(1) to provide that by signing a discovery response an attorney certifies that the response is “not evasive.” The form of certification currently required by Rule 26(g) requires the signer to certify that the request, response or objection is consistent with existing law or a non-frivolous extension of existing law, not interposed for an improper purpose, and neither unreasonable nor unduly burdensome or expensive. The certification does not expressly prohibit evasive behavior. LCJ believes the proposed amendment would impose unreasonable “additional obligations for responding parties” and “embolden accusations of discovery violations.” The prohibition on evasive responses is not new, however. As noted in our article, since at least 1983, the Advisory Committee has stated that evasive responses violate Rule 26(g). *See* Fed. R. Civ. P. 26(g) Advisory Committee Notes to 1983 Amendment. Our proposed amendment would simply make explicit what the Rules already require. *See* Fed. R. Civ. P. 37(a)(4) (“[A]n evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.”). Evasive responses serve no legitimate purpose and lead to increased delay and expense. Evasive responses also detract from the resolution of controversies on their merits by encouraging gamesmanship and sharp practices.

The purpose of Rule 26(g), like Rule 11, is to encourage the attorney signing the discovery to “pause and consider the reasonableness of his request, response, or objection,” and also to give a party seeking to enforce a discovery request the means to do so. *See* Fed. R. Civ. P. 26(g) Advisory Committee Notes to 1983 Amendment (“Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions.”). Both of these ends are served by making the prohibition against evasive discovery explicit.

Second Proposal: Clarification of Rules 34(b)(2) and 37(a)(3) Where Copies of Documents Are Produced in Lieu of Inspection

The second proposal in our article would amend Rules 37(a)(3)(B) and Rule 34(b)(2) to clarify the time by which a responding party must produce documents in response to a document request. We point out in our article that the Rules currently contemplate that the responding party will make requested documents available for inspection at a specified time and place. In current practice, however, hands-on inspection of original records rarely occurs, especially for electronically stored information. *See* Fed. R. Civ. P. 34(a) Advisory Committee Notes to 2006 Amendment (noting potential intrusiveness of the inspection of a party’s electronic information systems). Instead, a responding party typically responds to a request stating that it will produce copies of records. The provisions in the Rules regarding deadlines and enforcement, however, all remain keyed to the “inspection” of original records. This disconnect between the language of the Rules and current practice leads to uncertainty in the enforcement of requests where the responding party states that it will produce responsive documents but fails to do so, fails to complete its production, or fails to state one way or the other whether production is complete. As currently drafted, Rule 37(a)(3)(B) does not provide

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for a motion to compel under such circumstances. *See* Fed. R. Civ. P. 37(a)(3)(B)(iv) (authorizing a motion to compel where “a party fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34”).

LCJ’s contention that clarifying procedures regarding deadlines for the production of documents will multiply litigation and “trap” responding parties is illogical. The Rules already provide for deadlines where documents are made available for inspection, as opposed to copied and produced. *See* Fed. R. Civ. P. 34(b)(1)(B). The proposed amendment creates no hidden pitfalls or surprises, it would simply update the Rules to reflect current discovery practices, practices that LCJ insists are the only “practical or realistic” alternative for many parties.

The proposed amendment will not decrease the amount of time afforded to the responding party to gather, review and produce documents. The amendment would simply place an end date on the process of collecting and reviewing documents for production. Any concerns with the timing of document production can and should be discussed and planned for during Rule 26(f) discovery conferences and throughout the litigation. *See* Fed. R. Civ. P. 26(f)(3)(B). As with other aspects of discovery, the proposed amendment would not suspend the need for the parties to act in good faith, cooperate, and use common sense.

LCJ argues that specific timeframes for production are not necessary because of the “discovery cut off date present in every case.” But if the requesting party cannot expect to receive a document production until at or about the cutoff date, when no further requests may be propounded, the requesting party has little reason to serve narrowly drawn document requests. To the contrary, the requesting party must cast a wide net, because there will be no chance to serve follow-up requests.

LCJ also ignores the timing problems faced by the requesting party if production is keyed to the discovery cut-off date. The requesting party must obtain a relatively complete production from the producing party before beginning depositions. To obtain a complete production, however, the requesting party often needs to move for one or more orders compelling production of documents. These motions are almost invariably preceded by lengthy and often contentious “meet and confer” negotiations. The lack of a firm deadline for production gives the producing party an incentive to delay production as long as possible to minimize the requesting party’s ability to enforce its initial requests, serve follow-up requests, and complete depositions.

Third Proposal: Specific Disclosure Under Rule 34(b)(2) Where Respondents Withhold Documents Based on Objections

Our third and final proposal is intended to address the widely criticized practice of asserting lengthy boilerplate objections, sometimes a dozen or more, to document requests. We have proposed an amendment to Rule 34(b)(2)(C) to require a responding party to specify, with regard to each objection asserted, whether documents are being withheld on the basis of that

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objection. LCJ argues that the amendment is another “sanctions trap” that would unfairly require a responding party to “provide specific detailed support” for its objection. But our proposal would not require any detailed support or explanation for any objection asserted — or provide for any new sanctions. The proposal is to require responding parties to identify to propounding parties which objections are actually operative with regard to particular requests. Under current practice, the requesting party is often unable to obtain from the responding party an unambiguous statement as to whether documents are being withheld pursuant to an objection. (We would be pleased to supply the Committee with examples of the kinds of vague and confusing discovery responses we typically receive, if appropriate.)

We acknowledge in our article the significant effort and resources parties and courts devote to the civil discovery process. Our proposals are intended to reduce this burden by addressing a small number of openings in the Rules that facilitate evasive and dilatory practices. In its comment, LCJ focuses its attention entirely on overly broad discovery and the potential for sanctions. LCJ does not even acknowledge that evasive tactics and discovery gamesmanship are improper and has nothing to say about the waste, delay and unfairness that such tactics cause. Evasion and gamesmanship represent a deadweight litigation cost that serves no legitimate end and is directly contrary to the “just, speedy, and inexpensive” determination of civil litigation that the Rules are designed to promote. *See* Fed. R. Civ. P. 1. If small adjustments to the Rules can curb some abusive discovery practices, those adjustments should be made.

We appreciate the opportunity to respond to the LCJ comment and thank you for considering our proposals.

Respectfully submitted,



Daniel C. Girard
Todd I. Espinosa

cc: Honorable David G. Campbell
Honorable Mark R. Kravitz
Professor Edward H. Cooper
Professor Richard L. Marcus
Barry Bauman, Executive Director, Lawyers for Civil Justice

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Practitioners' View

***473 LIMITING EVASIVE DISCOVERY: A PROPOSAL FOR THREE COST-SAVING AMENDMENTS TO THE FEDERAL RULES**

[Daniel C. Girard](#)

Todd I. Espinosa [\[FN1\]](#)

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Introduction

Discovery accounts for the majority of the cost of civil litigation—as much as ninety percent in complex cases, according to some estimates. [\[FN1\]](#) While the simplest and most effective way to control litigation costs would be to restrict or eliminate discovery, any savings would come at a high price. The truth-seeking and fairness values implicit in the American civil justice system depend on the right to develop proof in the hands of one's adversary, particularly in “asymmetrical” cases where individual citizens square off against well-funded corporate adversaries. The challenge remains one of balancing the imperative of controlling costs against the need to preserve the core values underlying our justice system.

Central to the problem of cost efficiency is the adversarial nature of discovery in modern litigation. In an effort to reduce the impact of gamesmanship and promote a more collaborative approach to discovery, civil rule amendments since at least 1993 have emphasized cooperation among parties and counsel. Rule 26(a) initial disclosure requirements, Rule 26(f) discovery conference requirements, the pre-motion conference requirement of Rule 37(a)(1), and, most recently, various aspects of the amendments governing discovery of electronically stored information (“ESI”) mandate voluntary exchanges of information and cooperative ***474** efforts to identify and resolve the contentious issues that arise during discovery. [\[FN2\]](#)

Rules that depend on cooperation between opposing counsel function well, to the extent that professionalism or the relative parity of the litigants leads the parties and their counsel to approach their obligations in good faith. [\[FN3\]](#) As a number of courts have observed, however, a party who elects to obstruct or manipulate the discovery process can impose extraordinary costs on the court system and opposing parties. [\[FN4\]](#) A determined litigant will exploit every available means of thwarting an adversary's efforts through delay, distraction, confusion, and obfuscation. Discovery in high-stakes litigation appears to be growing ever more contentious, with collateral proceedings over discovery compliance becoming commonplace.

The most contentious and costly battleground in civil discovery surrounds the production of documents in response to requests propounded under Rule 34. To be sure, the problems often begin with overbroad, poorly crafted “kitchen sink” style document requests served by the requesting ***475** party. Courts have shown little hesitation in paring back or

restricting these overzealous or insufficiently focused discovery requests. [\[FN5\]](#)

In many cases, however, evasive or incomplete responses leave the requesting party unable to determine whether the responding party has agreed to produce all of the requested documents, when production will be made and, once made, whether the production is complete. The responding party gains an immediate tactical advantage by serving an evasive or incomplete response—the ability to prevent, or at least delay, the production of damaging documents, and to shift to the requesting party the obligation of enforcing the responding party's discovery obligations.

The Federal Rules prohibit evasive responses and provide mechanisms to shift fees to compensate requesting counsel for the cost of enforcing compliance. [\[FN6\]](#) In practice, however, these rules are not enforced. [\[FN7\]](#) Service of evasive discovery responses has become a routine—and rewarding—litigation tactic. Litigants who lack the sophistication or the resources to detect evasive behavior and successfully move for relief bear the cost of non-compliance, despite the Rules' express prohibition on evasive conduct.

This essay proposes three amendments to the Federal Rules to promote efficient discovery by dissuading evasive conduct: (1) an express prohibition on evasive responses in Rule 26(g); (2) a clarification of “production” and “inspection” in Rules 34(b) and 37(a)(3); and (3) a requirement in Rule 34(b)(2)(C) for specific disclosure of withheld documents. While the proposed amendments are an admittedly modest step, the cost of implementing them should be equally modest. They should ⁴⁷⁶ also be non-controversial, as evasive conduct is already prohibited and there is no defensible countervailing interest in encouraging evasive conduct. The remaining Parts of this essay discuss the proposed amendments in detail.

I. The Bargaining Problem

Under the current Rules, parties and their counsel are motivated to treat discovery requests and responses as merely their first offers in what will often be a protracted series of bargaining sessions. On their face, the Rules do not suggest that this should be the case. The scope of discovery is well established under Rule 26(b)(1) and it is usually relatively clear whether a document is responsive to a particular request.

The bargaining occurs for two reasons. First, the mechanism by which a propounding party may seek to compel compliance with its discovery requests is typically slow, cumbersome, and costly. A noticed motion or equivalent procedure is often not enough; some courts also require appendices, separate statements, or other lengthy documents in support of the usual motion papers. [\[FN8\]](#) Second, the pre-motion conference requirement of Rule 37(a)(1) provides incentive to bargain. [\[FN9\]](#) In practice, this requirement removes nearly any deterrent to evasive or incomplete initial responses to discovery requests. Because of this Rule, the responding party is guaranteed at least one opportunity to cure its responses, no matter how deficient, before the matter is brought to the court's attention.

Without doubt, different cases involve different questions of privilege, relevance, and related issues, some more open to debate than others. In most instances, however, an experienced attorney will recognize an evasive discovery response almost immediately. The tactics are all too familiar, and include: unilaterally narrowing the scope of the discovery request, such as by redefining terms used in the request; agreeing to provide documents “subject to” specified objections without stating whether responsive documents are being withheld on the basis of the objections; agreeing to provide documents without stating when the production will be made; and so forth. With the advent of electronic discovery, a whole new array of possibilities has arisen, ranging from burying the propounding⁴⁷⁷ party in millions of pages of irrelevant or duplicative documents, to playing games with key word searches, to producing data that is so riddled with technical problems that it is essentially unusable. [\[FN10\]](#)

In short, the actual operation of the Rules and the incentives they create for parties and their attorneys almost automatically turn what should be a two-step process of discovery requests followed by responses into an iterative,

multi-step ordeal, in which responses are followed by conferences, then amended responses, then further conferences, and so on. All of this haggling and negotiation over what should largely be well-settled matters not only drives up costs, it may even encourage propounding parties to serve broader discovery requests than they otherwise would in order to leave themselves room to bargain. Such unnecessarily broad requests encourage similarly broad objections, in turn leading to further bargaining and significantly driving up costs. [\[FN11\]](#)

II. Amending the Federal Rules to Discourage Evasive Discovery Responses

Three relatively narrow amendments to the discovery rules would help to clarify parties' discovery obligations and minimize gamesmanship: (1) revising Rule 26(b)(1)(B) to explicitly require the party or attorney to certify that the responses are not evasive; (2) amending Rule 34(b)(2)(B) and Rule 37(a)(3)(B)(iv) to address the now-common practice of producing rather than permitting inspection of documents; and (3) adding a provision to Rule 34(b)(2)(C) that requires the responding party to specify whether documents are being withheld on the basis of any asserted objection.

A. Rule 26(g): Express Prohibition of Evasive Responses

Rule 26(g)(1)(B) provides that a party or attorney who signs a discovery response or objection is certifying that, “to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry,”*478 the response or objection is: (i) “consistent with” the Federal Rules of Civil Procedure and other applicable law, (ii) “not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation,” and (iii) “neither unreasonable nor unduly burdensome or expensive.” [\[FN12\]](#) This Rule is essentially the discovery counterpart to Rule 11’s requirements for representations made to a court, which do not apply in the discovery context. [\[FN13\]](#)

Rule 26(g) was intended to discourage evasive discovery practices. As the Civil Rules Advisory Committee emphasized in its note to the 1983 amendments, the Rule “provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection.” [\[FN14\]](#) While the text of the rule would seem to be sufficient to deter evasive conduct, it has not operated that way, likely because of the general reluctance of courts to impose sanctions for discovery abuse. [\[FN15\]](#)

A lack of specificity may also be a contributing factor. Evasion of discovery obligations is, of course, an “improper purpose,” but it is not one of the three listed in subsection (g)(1)(B)(ii). [\[FN16\]](#) Similarly, to the extent that subsection (g)(1)(B)(i) requires compliance with the federal rules, it incorporates Rule 37(a)(4)’s provision that “an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.” [\[FN17\]](#) Nonetheless, Rule 26(g) does not explicitly require a responding party to certify that it is not attempting to evade its obligation to produce non-privileged documents and information that are responsive to the propounding party’s discovery requests.

This absence of express language gives responding parties room to maneuver. Only a handful of district court decisions, and no reported *479 appellate decisions, appear to have squarely held that evasiveness itself is a violation of Rule 26(g). [\[FN18\]](#) Given the lack of established authority, the Rule would benefit from greater clarity on this point. If the purpose of the Rule is to awaken the conscience of attorneys about evasive discovery responses, the Rule should do so with express language. This could be accomplished simply by amending Rule 26(g)(1)(B)(i) to provide that by signing a discovery response or objection the signer is certifying that the response or objection is “not evasive,” in addition to being consistent with the federal rules and applicable law. The revised Rule 26(g)(1)(B)(i) would read as follows:

\$Unot evasive,\$O consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

B. Rule 34(b) and 37(a)(3): Clarification of “Production” and “Inspection”

The provisions of the discovery rules governing requests for documents and other records contemplate an arrangement under which the responding party makes the requested documents available to the propounding party for inspection and copying. [\[FN19\]](#) The rules are largely silent regarding the more common practice today where the responding party's counsel simply produces copies of documents to the propounding party's counsel.

The practice of producing copies rather than permitting inspection has attained quasi-official status, at least for ESI, since 2006. The 2006 ESI amendment to Rule 34(b)(2) refers to “producing electronically stored information.” [\[FN20\]](#) The Advisory Committee's note regarding the *480 2006 amendment specifically discourages inspection of ESI storage systems:

The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems. [\[FN21\]](#)

The immediate problem that this situation creates is uncertainty about timing requirements. Rule 34's provisions regarding time are all keyed to inspection, not production. Rule 34(b)(1)(B) states that the propounding party is required to “specify a reasonable time, place, and manner for the inspection and for performing the related acts” in its record request. [\[FN22\]](#) Under Rule 34(b)(2), the responding party must provide a written response within thirty days of the service of the request, in which it must state whether “inspection and related activities will be permitted as requested.” [\[FN23\]](#) Thus, Rule 34 currently contemplates a date by which the propounding party will get its documents, at least if the inspection procedure is used. But where the responding party states that it will produce documents in response to a request, Rule 34 provides no direction as to when the production is to be made and completed.

This disconnect between the language of the rule and current practice also leads to uncertainty in the enforcement of requests. Rule 37(a) contemplates the inspection of documents by a propounding party, not the production of copies by the responding party. The Rule authorizes a propounding party to move to compel a discovery response where the responding party “fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.” [\[FN24\]](#) Rule 37 does not specifically address the situation where a responding party states that it will produce responsive documents but fails to produce them, fails to complete the production, or fails to state one way or the other whether production is complete. So-called “rolling productions,” where a party periodically doles out documents over the course of many months with no set completion date, are now commonplace. [\[FN25\]](#)

*481 The solution is to bring the provisions of Rules 34 and 37 in line with current discovery practices. First, Rule 37(a)(3)(B)(iv) should be amended to specifically authorize a motion to compel when a responding party “fails to produce documents.” Second, a new provision should be added to Rule 34(b)(2)(B) to read:

If the responding party elects to produce copies of documents or electronically stored information in lieu of permitting inspection, the response must state that copies will be produced and the production must be completed no later than the date for inspection stated in the request.

This proposal is not intended to minimize the burden of producing documents or the very real need for cooperation among parties and their counsel in discovery, as currently provided for in the rules. The collection and pre-production review of documents is unquestionably a difficult and time-consuming logistical feat. A party who seeks to compel compliance with wide-ranging requests without giving the producing party adequate time to search for and produce documents can expect to be met with a motion for a protective order under Rule 26(c). Large-scale review and production of documents has, however, been made somewhat less burdensome by the recent amendment of [Federal Rule of Evidence](#)

[502\(b\)](#) strengthening and clarifying protections against inadvertent waiver of attorney-client privilege and work-product protection, [\[FN26\]](#) as well as the related amendments to Rule 26(b)(5)(B) setting forth procedures for making claims of privilege and protection. [\[FN27\]](#)

In contrast, a propounding party has very few options when a responding party insists that it is acting in good faith, yet delays document production for months. [\[FN28\]](#) Without some specific timeframe for production—recognizing that current Rule 34(b)(1)(B) already expressly requires*482 that the time specified in an inspection request be “reasonable”—the propounding party’s ability to demonstrate that production has been unduly delayed will nearly always be uncertain. As a practical matter, it is difficult to say when delay becomes unreasonable in the absence of a deadline.

C. Rule 34(b)(2)(C): Specific Disclosure of the Withholding of Documents

While courts have repeatedly criticized the routine use of “boilerplate” objections to document requests, the practice remains common. [\[FN29\]](#) Parties routinely (and seemingly indiscriminately) object to virtually every request on the same grounds, including broad relevancy objections, objections that requests are unduly burdensome, harassing, or assume facts not in evidence, privacy objections, and attorney-client privilege/work-product objections.

A typical set of discovery responses begins with a list of “general objections” that run the gamut from ambiguity, undue burden, overbreadth and irrelevance, to objections that the requests seek confidential, proprietary, or trade secret information, work product, or attorney-client communications. Rarely tailored to the actual requests or the facts of the case, the objections often appear to be the responding law firm’s state-of-the-art boilerplate insert.

The responses to specific requests usually incorporate the litany of “general objections” in its entirety, add some additional (or sometimes even duplicative) objections, and then state that “subject to and without waiving the foregoing objections,” the responding party will produce documents in response to the request. Alternatively, the response may state that “based upon the foregoing objections” the responding party will not produce documents in response to the request.

It is not unusual for a single discovery request to be met with a dozen or more objections, regardless of whether the responding party agrees to produce responsive documents. The propounding party cannot determine whether any documents are actually being withheld on the basis of any of the objections, or even the specific objections relied upon. [\[FN30\]](#) Compounding*483 the problem is the common practice of asserting general objections “to the extent” they may apply to a particular request. [\[FN31\]](#) The upshot is that the propounding party is unable to assess the extent to which the responding party has complied with a discovery request.

The rules should be amended to conform to the judicial consensus against generalized and boilerplate objections by adding the following provision to Rule 34(b)(2)(C): “Each objection to a request or part thereof must specify whether any responsive documents are being withheld on the basis of that objection.”

Requiring that the responding party specify whether documents have been withheld in response to a request would discourage the use of boilerplate objections. More importantly, the amendment would help the requesting party and the court determine what objections are actually “in play” for purposes of any motion for relief. Limiting the range of disputed issues should promote efficiency and control discovery costs.

Conclusion

The reluctance of courts to impose sanctions under Rule 37 has encouraged the use of evasive and dilatory behavior in response to discovery requests. Such behavior serves no purpose other than to increase the cost and delays of litigation. The amendments proposed in this Essay would discourage evasive and dilatory behavior without materially adding to the burden of discovery on the party producing documents. By requiring the responding party to certify that

its responses to discovery requests are not evasive, state when responsive documents will be produced and whether documents will be withheld in response to any of its *484 objections, the amendments seek to reduce expense and delay while ensuring that meritorious claims that depend on discoverable facts are fairly and promptly adjudicated.

[FNd1]. Mr. **Girard** is a partner with **Girard Gibbs LLP**. He is a member of American Law Institute and serves on the Federal Civil Rules Advisory Committee, where he has participated in the Committee's recent drafting of amendments governing electronic discovery, summary judgment, and discovery of expert witnesses.

Mr. Espinosa is an associate with the firm. He is a former law clerk with the United States District Court for the Northern District of California and a former research attorney with the Superior Court of California. The authors thank Amanda Steiner and Dena C. Sharp, also with **Girard Gibbs LLP**, for their editorial assistance and comments.

[FN1]. Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Hon. Anthony J. Scirica, Chair, Comm. on [Rules of Practice and Procedure \(May 11, 1999\)](#), 192 F.R.D. 340, 357 (2000) (“[T]he cost of discovery represents approximately 50% of the litigation costs in all cases, and as much as 90% of the litigation costs in the cases where discovery is actively employed.”); see also Navigant Consulting, *The State of Discovery Abuse in Civil Litigation: A Survey of Chief Legal Officers* 8 (Oct. 29, 2008), <http://law.northwestern.edu/searlecenter/uploads/The%20State%20of%20Discovery%20Abuse%20in%20Civil%20Litigation%20A%20Survey%20of%20Chief%20Legal%20Officers.ppt> (“On average, 45-50 percent of respondents' civil litigation costs in 2007 related to discovery activities.”).

[FN2]. [FED. R. CIV. P. 26\(f\)\(2\)-\(3\)](#). Civil Rule amendments have also addressed a wide range of other issues. The 2000 amendment to [Rule 26\(b\)\(1\)](#), for example, limited the scope of discovery to matters relevant to parties' claims and defenses, where previously the Rule had permitted discovery into any matter reasonably calculated to lead to admissible evidence without prior leave of court. See, e.g., [In re Subpoena to Witzel](#), 531 F.3d 113, 118 (1st Cir. 2008) (“In 2000, [Rule 26\(b\)\(1\)](#) was amended to distinguish between discovery regarding matters that are relevant to a party's claim or defense and discovery of a broader scope encompassing ‘any matter relevant to the subject matter involved in the action.’” (quoting [FED. R. CIV. P. 26\(b\)\(1\)](#))). Similarly, the 2006 ESI amendments added new provisions for cost shifting and new procedures for the assertion of claims of privilege or work-product protection. See [FED. R. CIV. P. 16\(b\)\(3\)\(B\)\(iv\)](#); *id.* 26(b)(2), (b)(5)(B), (f)(3)(D).

[FN3]. See, e.g., [Bd. of Regents of Univ. of Neb. v. BASF Corp.](#), No. 4:04CV3356, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007):

The overriding theme of recent 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. If counsel fail in this responsibility—willfully or not—these principles of an open discovery process are undermined, coextensively inhibiting the courts' ability to objectively resolve their clients' disputes and the credibility of its resolution.

(citations omitted); [In re Sept. 11th Liab. Ins. Coverage Cases](#), 243 F.R.D. 114, 125 (S.D.N.Y. 2007) (“Discovery is run largely by attorneys, and the court and the judicial process depend upon honesty and fair dealing among attorneys.”).

[FN4]. See, e.g., [Gipson v. Sw. Bell Tel. Co.](#), No. 08-2017, 2009 WL 790203, at *21 (D. Kan. Mar. 24, 2009):

The costs associated with adversarial conduct in discovery have become a serious burden not only on the parties but on this Court as well. While the Court is well aware of counsel's obligations to act as advocates for their clients and to use the discovery process for the fullest benefit of their clients, those obligations must be balanced against counsel's duty not to abuse legal procedure.

[Network Computing Servs. Corp. v. Cisco Sys., Inc.](#), 223 F.R.D. 392, 395 (D.S.C. 2004) (“Hardball discovery is costly to our system and consumes an inordinate amount of judicial resources.”); [In re Spoonmore](#), 370 B.R. 833, 844 (Bankr. D. Kan. 2007):

Discovery should not be a sporting contest or a test of wills, particularly in a bankruptcy case

where the parties' resources are limited and the dollar value of the stakes is often low [The parties'] conduct in the discovery phase of this matter ha[s] significantly multiplied its burdens, both on the Trustee and the Court.

[FN5]. See, e.g., [Regan-Touhy v. Walgreen Co.](#), 526 F.3d 641, 650 n.6 (10th Cir. 2008):

[A]t the end of the day, it is the parties' obligation to frame their own discovery requests and to seek to narrow any disputes with opposing counsel; the district court is obliged only to rule on the requests for enforcement or protection eventually presented to it, not to do the parties' work for them by editing discovery requests until they comply with the Federal Rules of Civil Procedure.

See also [Surles v. Greyhound Lines, Inc.](#), 474 F.3d 288, 305 (6th Cir. 2007) (holding that the district court properly narrowed document requests because "district courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce"); [Imnaedaft, Ltd. v. Intelligent Office Sys., LLC](#), No. 08-cv-01804-LTB-KLM, 2009 WL 1537975, at *6 (D. Colo. May 29, 2009) (characterizing overbroad discovery requests as "a fishing expedition, or more probably, a search for ammunition to use in this particular war. 'Ammo recon' missions, like fishing expeditions, are rarely appropriate and uniformly discouraged").

[FN6]. See [FED. R. CIV. P. 34\(b\)\(2\)\(B\)](#) ("For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons."); id. 37(a)(4) ("For purposes of this subdivision (a) [authorizing a motion to compel], an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond."); id. 37(a)(5) (providing for payment of moving party's reasonable costs).

[FN7]. According to a recent study by the Institute for the Advancement of the American Legal System, discovery sanctions are sought in only about 3 percent of cases. Of the motions that are filed, only 26 percent are granted in whole or in part. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS 46 (2009), <http://www.du.edu/legalinstitute/pubs/PACER%20FINAL%201-21-09.pdf>.

[FN8]. See, e.g., C.D. CAL. R. 37-2.1 (requiring a joint stipulation that sets forth verbatim all requests and responses in dispute along with argument from both parties as to each request and response); N.D. GA. R. 37.1(A) (requiring a motion to compel to set forth verbatim all requests and responses and provide separate argument for each).

[FN9]. Some courts impose special audio-visual or stenographic recording requirements in the pre-motion conference process. See, e.g., Jason Krause, *Rockin' Out the E-Law*, A.B.A. J., July 2008, at 48, 52, available at http://www.abajournal.com/magazine/rockin_out_the_e_law (describing videotape practice employed by Magistrate Waxse of the District of Kansas); see also *Sullivan v. Kelly Servs.*, No. C07-2784 CW (BZ), slip op. at 1 (N.D. Cal. Jan. 31, 2008) (directing, in an initial discovery order by Magistrate Zimmerman, that for pre-motion conferences, the "parties shall make a contemporaneous record of their meeting using a tape recorder or a court reporter). While these types of requirements may deter some forms of discovery misconduct, they also present a further procedural hurdle to parties seeking relief.

[FN10]. See [In re Seroquel Products Liab. Litig.](#), 244 F.R.D. 650, 665 (M.D. Fla. 2007) (sanctioning party for production that "had load file, metadata, page break and key word search problems, making the 10 million pages of documents inaccessible, unsearchable, and unusable as contemplated under the Rules"); see also [Capitol Records, Inc. v. MP3tunes, LLC](#), No. 07 Civ. 9931(WHP)(FM), 2009 WL 2568431, at *2 (S.D.N.Y. Aug. 13, 2009) (relating that, in a music copyright infringement case, counsel directed his client to search emails using "design" as the sole search term); [Bray & Gillespie Mgmt. v. Lexington Ins. Co.](#), No. 6:07-cv-222-Orl-35KRS, 2009 WL 546429, at *23-24 (M.D. Fla. Mar. 4, 2009) (sanctioning party and counsel for misrepresentations to court about the gathering and production of ESI and manipulation of ESI to withhold requested information, including metadata); *ReedHycalog UK, Ltd. v. United Diamond Drilling Servs., Inc.*, NO. 6:07 CV 251, 2008 U.S. Dist. LEXIS 93177, at *5, 9 (E.D. Tex. Oct. 3, 2008) (In a patent dispute, a production of 750 gigabytes of data that "allegedly included baby pictures, audio folders, and pornography" amounted to "a data dump with an instruction to 'go fish.' That this fishing is done electronically is of no consequence." (citations omitted)).

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[FN11]. See, e.g., [Network Computing Servs. Corp. v. Cisco Sys., Inc.](#), 223 F.R.D. 392, 395 (D.S.C. 2004) (“Judges often find themselves in a position similar to NFL referees, who have to peel the players off of each other in an effort to find the player in the middle who started the melee.”).

[FN12]. [FED R. CIV. P. 26\(g\)\(1\)\(B\)](#).

[FN13]. *Id.* 11(d) (“[Rule 11] does not apply to disclosures and discovery requests, responses, objections, and motions under [Rules 26](#) through [37](#).”).

[FN14]. [FED. R. CIV. P. 26\(g\)](#) advisory committee notes to 1983 amendment (emphasis added) (“Because of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, [Rule 26\(g\)](#) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from [Rule 37](#), [28 U.S.C. § 1927](#), and the court’s inherent power.” (citations omitted)).

[FN15]. See Scott A. Moss, [Reluctant Judicial Factfinding: When Minimalism and Judicial Modesty Go Too Far](#), 32 [SEATTLE U. L. REV.](#) 549, 562-63 (2009). Professor Moss notes that the reasons given by courts for reluctance to impose sanctions for discovery disputes include:

a distaste for becoming involved in discovery disputes that litigants should be able to resolve themselves; a feeling that litigants should seek sanctions against an adversary only when they have been without fault in complying with discovery; and a feeling that the imposition of a sanction embarrasses or humiliates the attorney or party and should thus be resorted to only in extreme situations.

(internal quotation marks omitted) (quoting Georgene Vairo, [Rule 11 and the Profession](#), 67 [FORDHAM L. REV.](#) 589, 595 (1998)).

[FN16]. [FED R. CIV. P. 26\(g\)\(1\)\(B\)\(ii\)](#).

[FN17]. See *id.* [26\(g\)\(1\)\(B\)\(i\)](#); *id.* [37\(a\)\(4\)](#).

[FN18]. See, e.g., [Gibbs v. Union Pac. R.R. Co.](#), No. 08-cv-00355-JPG, 2009 WL 2143772, at *5 (S.D. Ill. July 15, 2009) (finding that the plaintiff’s “evasiveness and possible deceit warrant sanctions under [Rule 26](#) because he certified that he was giving specific and complete information”); [Kiobel v. Royal Dutch Petroleum Co.](#), No. 02 Civ. 7618(KMW)(HBP), 2009 WL 1810104, at *2 (S.D.N.Y. June 25, 2009) (“[Rule 26\(g\)](#) is intended to deter and curb discovery abuses, including evasive responses, by ‘explicitly encouraging the imposition of sanctions.’”); [Covad Commc'ns Co. v. Revonet, Inc.](#), 258 F.R.D. 17, 20 (D.D.C. 2009) (noting that an evasive interrogatory response “hardly comports with the obligation imposed by [Rule 26\(g\)\(1\)\(A\)](#)”); [Aecon Bldgs., Inc. v. Zurich N. Am.](#), No. C07-832MJP, 2008 WL 3927797, at *4 (W.D. Wash. Aug. 21, 2008) (“[Rule \[26\(g\)\]](#) allows the court to impose sanctions on the signer of a discovery response when the signing of the response is incomplete, evasive or objectively unreasonable under the circumstances.” (internal quotation marks omitted) (quoting [St. Paul Reinsurance Co. v. Commercial Fin. Corp.](#), 198 F.R.D. 508, 515 (N.D. Iowa 2000))); [Wagner v. Dryvit Sys., Inc.](#), 208 F.R.D. 606, 609-10 (D. Neb. 2001):

The parties have a duty to provide true, explicit, responsive, complete and candid answers to discovery, and their attorneys have a continuing duty to advise their clients of their duty to make honest, complete, non-evasive discovery disclosures, as well as the spectrum of sanctions they face for violating that duty.

(citation omitted); see also [United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.](#), 182 F.3d 930 (9th Cir. 1999) (unpublished table decision) (noting that [Malautea v. Suzuki Motor Co.](#), 987 F.2d 1536, 1545 (11th Cir. 1993), upheld [Rule 26\(g\)](#) sanctions for a “pattern of conduct” that included partial answers to discovery questions that were evasive and misleading).

[FN19]. See, e.g., [FED. R. CIV. P. 34\(a\)\(1\), \(b\)\(1\)\(B\)](#).

[FN20]. *Id.* [34\(b\)\(2\)\(D\)-\(E\)](#).

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[FN21]. *Id.* 34 advisory committee's notes (2006).

[FN22]. *Id.* 34(b)(1)(B).

[FN23]. *Id.* 34(b)(2)(A)-(B).

[FN24]. *Id.* 37(a)(3)(B)(iv).

[FN25]. See, e.g., [Tierno v. Rite Aid Corp., No. C 05-02520 TEH, 2008 WL 3287035, at *4 \(N.D. Cal. July 31, 2008\)](#). In response to plaintiff's motion to compel production of documents Rite Aid had agreed to produce, Rite Aid "protested that it would produce the documents on a rolling basis," but the court ordered production on a date certain. *Id.*; see also [Race Tires Am., Inc. v. Hoosier Racing Tire Corp., No. 02:07cv1294, 2008 WL 2487835, at *2 \(W.D. Pa. June 16, 2008\)](#) (observing that the party producing documents on a "rolling basis" refused to specify a date when the production would be complete).

[FN26]. See [FED. R. EVID. 502\(b\)](#):

When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the 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, including (if applicable) following [Federal Rule of Civil Procedure 26\(b\)\(5\)\(B\)](#).

[FN27]. See [FED. R. CIV. P. 26\(b\)\(5\)\(B\)](#):

If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

[FN28]. See, e.g., [U & I Corp. v. Advanced Med. Design, Inc., 251 F.R.D. 667, 675 \(M.D. Fla. 2008\)](#) (responding party "repeatedly delayed the production of responsive documents" resulting in a "sporadic and incomplete document production" after four motions to compel); [In re Seroquel Products Liab. Litig., 244 F.R.D. 650, 661 \(M.D. Fla. 2007\)](#) (noting party's "purposeful sluggishness" in production of electronic documents).

[FN29]. See, e.g., [Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 358 \(D. Md. 2008\)](#) (collecting cases: "[B]oilerplate objections that a request for discovery is 'overbroad and unduly burdensome, and not reasonably calculated to lead to the discovery of material admissible in evidence,' persist despite a litany of decisions from courts, including this one, that such objections are improper unless based on particularized facts." (citation omitted)); [Burkybile v. Mitsubishi Motors Corp., No. 04 C 4932, 2006 WL 2325506, at *6 & n.6 \(N.D. Ill. Aug. 2, 2006\)](#) (collecting cases: "Despite court [s] repeated admonitions that these sorts of 'boilerplate' objections are ineffectual, their use continues unabated, with the consequent institutional burdens, and the needless imposition of costs on the opposing party." (citations omitted)).

[FN30]. See, e.g., [Cason-Merenda v. Detroit Med. Ctr., No. 06-15601, 2008 WL 4901095, at *4 \(E.D. Mich. Nov. 12, 2008\)](#):

Plaintiffs could reasonably be uncertain about precisely what information these Defendants would ultimately produce and what would be withheld. Although Defendants' complaints of overbreadth, undue burden, and irrelevance

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were included among their objections to the specific discovery request at issue, as opposed to in the section of their responses labeled ‘general objections,’ they presumably would concede that these objections also were ‘general,’ in the sense that they did not alert Plaintiffs to any specific information that would be withheld.

[IO Group, Inc. v. Veoh Networks, Inc., No. C06-03926 HRL, 2007 WL 1113800, at *1 \(N.D. Cal. Apr. 13, 2007\)](#):

Here, Veoh asserted a number of General Objections which it, in boilerplate fashion, purported to incorporate into its specific responses—whether or not those objections were actually raised in response to a particular request. This practice obscures the extent to which Veoh is withholding information and does not satisfy the requirement for specificity under [Fed. R. Civ. P. 34\(b\)](#).

[\[FN31\]. Swackhammer v. Sprint Corp. PCS, 225 F.R.D. 658, 660-61 \(D. Kan. 2004\)](#):

This Court has on several occasions disapproved of the practice of asserting a general objection ‘to the extent’ it may apply to particular requests for discovery. This Court has characterized these types of objections as worthless for anything beyond delay of the discovery. Such objections are considered mere hypothetical or contingent possibilities, where the objecting party makes no meaningful effort to show the application of any such theoretical objection to any request for discovery. Thus, this Court has deemed such ostensible objections waived or [has] declined to consider them as objections.

(alteration in original) (internal quotation marks omitted) (quoting [Sonnino v. Univ. of Kan. Hosp. Auth., 221 F.R.D. 661, 666-67 \(D. Kan. 2004\)](#)).

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Draft Agenda, October 2011

I have set out below a current outline of issues to be pursued by our subcommittee relating to possible changes in the Rules as a result of the Duke Conference. The outline builds on our prior discussions and eliminates various proposals for which there was little or no support. It has been prepared following our September 28, 2011 Conference Call. The Agenda from our prior discussions will record the history of those proposals that have not been pursued. This Agenda also adds some recent suggestions.

Rule 1: Rule 1 might be amended to emphasize lawyers' duty to cooperate. See Rule 26, item (3) below.

Rule 7: Pleadings and Motions

1. There is some enthusiasm for promoting pre-motion conferences before discovery motions. The Rules currently include the requirement for a "meet and confer" before discovery motions, see Rule 37(a)(1), but do not require a conference with the Court, and there are reports of judges being inundated with such motions. Discovery disputes often can be disposed of at such conferences, forestalling a motion. **I respectfully suggest the SDNY Rule: "No motion under Rules 26 through 37 inclusive of the Federal Rules of Civil Procedure shall be heard unless counsel for the moving party has first requested an informal conference with the court and such request has either been denied or the discovery dispute has not been resolved as a consequence of such a conference." However, there are some views that this issue is best dealt with through best practices.**

2. There have been suggestions that pre-motion conferences should be required before other types of motions, such as motions to dismiss, or motions for summary judgment. There is something to be said for pre-motion conference, but there is little support for a national rule and the AO research indicates that few judges require such conferences.

Rule 16: Pretrial Conferences; Scheduling; Management.

Because there was consensus at Duke that judicial management should be encouraged, this Rule warrants substantial attention. The FJC is studying what is actually happening with Rule 26 conferences and Rule 16 conferences. The SDNY Draft Pilot Project also deals with these issues. Rules proposals should await the results of further research which is expected shortly.

1. The Rule requires the District Judge or the Magistrate Judge to issue a scheduling order. But the Rule does not require that the judicial officer confer with the parties - even by phone;

only "consulting" is required. Failing to confer with the parties together prevents judicial interaction and possible control of the case at the outset. We also know from the FJC survey that in many cases an order setting a cutoff of discovery is not in fact issued. **Consider adding a requirement to Rule 16(b)(1) that the scheduling order is to be issued after a conference with the judicial officer, whether in person or by telephone, unless the judicial officer waives the requirement of a conference for good cause.**

2. **Consider setting a date by which the parties must abandon any claims or defenses that can no longer be asserted in good faith. This could be added to Rule 16(b)(3)(B) as a permitted subject of a scheduling order.**

3. **The timing of the scheduling order is 120 days after any defendant has been served or 90 days after any defendant has appeared, whichever is earlier. This builds delay into the process, particularly for cases that could be resolved promptly at the outset. See Rule 16(b)(2). This is related to the timing of the initial Planning conference of the parties and the submission of their Rule 26(f) report to the Court, although those timing requirements can be excused by the Court. See Rule 26(f)(1), (2), (4). Consider shortening the time limits in Rule 16(b)(2). Perhaps also consider scheduling the conference before a responsive pleading is scheduled to be filed so that the Court can consider any question of amendments to moot motions to dismiss. The SDNY Draft Pilot Project requires that the Rule 16 Conference be held within 45 days of service on any defendant, or 60 days if the Government is a party. Practices in the Eastern District of Virginia provide a general model of expedited pretrial scheduling; they will be explored in a panel discussion at the November Advisory Committee meeting.**

Discovery Issues. The Discovery Subcommittee under Judge Grimm has primary responsibility for discovery issues and any discovery proposals must be coordinated with that subcommittee. Our subcommittee will work with Judge Grimm on any proposals that merit further pursuit. The issue of E-Discovery, and particularly any rule with respect to preservation and sanctions, was a major subject of the Duke Conference and is already being pursued by Judge Grimm and his Subcommittee. Therefore, that major subject will not even be discussed in this Agenda. However, there were other subjects that could be part of our Agenda but which must be coordinated with Judge Grimm's subcommittee. They are discussed in the November 2010 Agenda Materials (NAM) at 355-58. I have highlighted some of the issues below, but welcome any other suggestions.

Rule 26: Duty to Disclose: General Provisions Governing Discovery

1. Scope of Discovery: Rule 26(b)(1): The bar is divided on whether there should be a change in the scope of discovery, and this may not be a subject on which there is consensus, to the extent that the Rule includes the possibility of discovery with respect to "any matter relevant to the subject matter" after a showing of good cause. However, **we should consider whether the concept of proportionality should be included in the scope of discovery.**

2. **Include a requirement of cooperation in the Rules. Rule 37 is entitled "Failure to Make Disclosures or to Cooperate in Discovery; Sanctions." But there is no substantive requirement to cooperate in the Rule. The duty of cooperation could be included in Rules 16, 26(b), (f), and (g).**

The duty of cooperation could be emphasized by amending Rule 1. There is some support for making it clear that Rule 1 applies to parties as well as to judges, obliging parties and their lawyers to use the Rules to serve the just speedy and inexpensive determination of every action. (There have been other proposals to change the scope of Rule 1, but there has been no support for those changes.)

3. Timing of Discovery: Rule 26(d): Discovery cannot be propounded until the parties have met and conferred at their Rule 26(f) conference. This may delay the progress of discovery. **It may be useful to allow discovery to be propounded prior to the Rule 26(f) conference, and to allow disputes with respect to initial discovery to be raised with the Court at the Rule 16 Conference. The Rule could provide that initial discovery requests could be propounded, but no responses are required before the initial conference with the Court. The timing of the initial proceedings should be examined.**

4. Cost shifting. There are various proposals for cost-shifting. **There is some support for making it clear that the Court can order conditions - including the payment of costs as a condition of any discovery. This could be placed in Rule 26(b)(2). The possibility of conditions already appears in connection with ESI in Rule 26(b)(2)(B).**

5. **The three Girard proposals (NAM 356-57):**

a) **Amend Rule 26(g)(1)(B)(I) to specify that signing a discovery request, response, or objection represents that the document is "not evasive, consistent with these rules and..."**

b) **Clarify Rules 37 and 34 to make it clear that sanctions may be imposed if a party fails to produce documents as well as if the party fails to respond that inspection will be permitted.**

c) Discourage boilerplate responses to Rule 34 Requests by making it clear whether documents are being withheld on the basis of objections.

Lawyers for Civil Justice has opposed these proposals (August 18, 2011 submission), and Dan Girard has prepared a Reply.

6. Should there be any Rule that stays discovery pending a decision on a motion to dismiss. There is a division on this subject and it relates to the *Iqbal/Twombly* issues. **The SDNY Draft Pilot Project allows only documentary discovery to proceed unless the Court orders otherwise.**

7. Contention Interrogatories: There are some cases where interrogatories are useful, but they can be abused. The question is whether there should be further limits. Contention interrogatories are permitted now, but the court can order that they await the completion of designated discovery. The presumption could be reversed and require that contention interrogatories only be served after the conclusion of discovery, unless the court otherwise orders.

8. The numerical limits for discovery methods and the subjects of discovery could be changed. See NAM p. 358. **In view of the findings of the FJC closed case survey that found that discovery was in fact limited in the majority of cases, there is some support for lowering the presumptive numerical limits of discovery mechanisms without court approval and establishing limits where none currently exist. Therefore, there are suggestions to reduce the number of depositions without court approval from 10 to 5 (Rule 30(a)(2)(A)) and to reduce the number of Interrogatories from 25 to 15 (Rule 33(a)(1)).**

There is particular support for considering an initial limit on requests to produce under Rule 34. Lawyers for Civil Justice has proposed a limit of 25 requests to admit, covering a period of two years before the date of the complaint, and limited to no more than ten custodians. Some judges now include at least a numerical limit in routine Rule 16 orders - perhaps 25, and in some cases fewer.

9. There is support for numerical limits on Rule 36 Requests to Admit. The SDNY Draft Pilot Project limits requests to admit to 50 requests of 25 words or less, not including Requests to Admit pursuant to Rule 36(a)(1)(B) relating to the genuineness of documents. And here too, some judges now adopt numerical limits in routine Rule 16 orders - again, 25 is a representative number.

TAB 7

RULE 84 OFFICIAL FORMS

An inter-advisory committee subcommittee chaired by Judge Pratter has been formed to study the role of the forms used to illustrate the Appellate, Bankruptcy, Civil, and Criminal Rules. The subcommittee began its formal deliberations with a conference call on October 17. An oral report will be provided.

For the Civil Rules, several questions have been framed by earlier Advisory Committee discussions. The most immediate concern has stemmed from uncertainty as to the role of the pleading forms. Rule 84 states that the forms suffice under the rules. Several lower courts have struggled with a perceived tension between the simplicity of the pleading forms and the Supreme Court's recent pleading decisions. Research done over the summer shows that most of the attention has focused on the Form 18 complaint for patent infringement. A broader set of questions focuses on the apparently eccentric selection of topics chosen to be addressed by the forms, which fall far short of a comprehensive illustration of all central rule topics.

A more pressing set of questions addresses the process for adopting and revising the Forms. It is fair to say that the Committee has not lavished much attention on the forms in the last couple of decades. Forms 5 and 6, addressing waiver of service, were worked out carefully in conjunction with the adoption of Rule 4(d) – Rule 4(d)(1)(D) directs that the text prescribed in Form 5 be used. Form 52, a report of a Rule 26(f) conference, was carefully amended in conjunction with recent discovery rules amendments. But these examples are few and far between. Even in the Style Project, the forms were revised with less anguish than pervaded the rules text revisions. It may be asked whether the Committee should devote more of its finite capacities to maintaining the forms if they are to carry forward under the imprimatur of Rule 84.

Alternative procedures for maintaining the forms are possible. Bankruptcy forms become official when adopted by the Judicial Conference. The Administrative Office prepares Criminal procedure forms, with advice from the Criminal Rules Committee. The Administrative Office also prepares a large number of civil procedure forms, relying on occasional and informal consultation with the Advisory Committee chair and perhaps the reporter.

In the end, it seems likely that decisions about the Rule 84 forms will depend on considerations unique to the Civil Rules. But learning from the experiences of other advisory committees will inform the decisions. The Subcommittee's immediate task is to develop information about these experiences.

TAB 8

CIVIL-APPELLATE RULES SUBCOMMITTEE

Two matters remain on the subcommittee's agenda. Neither warrants action at this time.

The first issue, raised by the Appellate Rules Committee, involves the relationship between Appellate Rule 4(a)(4) and Civil Rule 58(a). The concern is that in some limited circumstances, it is possible that the time for filing a notice of appeal under Rule 4(a)(4) could expire before a final judgment is entered. The principal example offered was an order that conditionally grants a new trial if the plaintiff does not accept a reduced award within a period of time (e.g., 40 days) that exceeds the 30 days allowed for filing a notice of appeal. Deliberations have suggested that the concern can be addressed within the existing rules – for example, by filing a notice of appeal on Day 30 or by seeking an extension of time from the district court. For that matter, it is not clear that there is any problem: there is no final judgment until acceptance of the remittitur supersedes the order for a new trial, and the order may not “dispos[e] of” the new trial motion until the remittitur is accepted. Various possible amendments to the rules have been considered, but each has potential negative consequences that may outweigh the benefits. The Appellate Rules Committee has this matter on its agenda for Fall 2011. The Subcommittee will await further input from the Appellate Rules Committee before deciding whether the matter should be pursued or dropped.

The second issue, also raised by the Appellate Rules Committee, involves “manufactured finality.” One question has been whether the rules should be amended to address whether a final judgment may be achieved through dismissal of claims with “conditional prejudice.” The Second Circuit allowed this procedure in one case; two other circuits have rejected it. The subcommittee has reached no consensus that action is warranted, and given the few reported occasions on which the matter has arisen, it seems prudent to leave the matter dormant unless the Appellate Rules Committee shows further interest. A second question has been whether the rules should be amended to address whether a final judgment may be achieved through dismissal of claims *without* prejudice. Most circuits disapprove of this procedure, but one or two circuits appear to allow it. The subcommittee has not reached consensus on whether the matter is significant enough to warrant an amendment to the rules. It also may be difficult to address the second question without addressing the first.

TAB 9

CLASS ACTIONS: AGAIN?

The great revision of Civil Rule 23 in 1966 was followed almost immediately by cries of anguish and confusion. The Advisory Committee, implicitly or explicitly, determined to let class-action practice develop without attempting further amendments. The topic was restored to the agenda in 1991 at the suggestion of a Judicial Conference ad hoc committee on asbestos litigation. Work continued for several years, culminating in the amendments that took effect in 2003. Along the way, more than one "firestorm" of controversy was provoked, at times engaging the academy as well as bench and bar. Equally robust debate would likely be generated by renewed consideration of Rule 23, whether it involve fundamental matters or matters less than fundamental.

Eight years is not twenty-five years, but it may not be too early to take up Rule 23 again. A distinguished panel will discuss current Rule 23 practice at the Standing Committee meeting next January. For the time being, it will be useful to gather reactions from the Advisory Committee. Are there aspects of Rule 23 practice that deserve study now? What are they, and why might study show opportunities for improvement through new rule text? Reactions will be useful not only to shape the discussion in January but also to help set priorities for the Advisory Committee agenda. Many topics compete for attention. Almost any class-action topic will require careful work. But even if other topics seem likely to dominate Committee work for the next year or two, it remains useful to consider now the possible place of Rule 23. Several possible issues would benefit from empirical research, work that takes time. An investment now in helping to shape a strong research project would pave the way for more intensive work later on, or might show that it is better to put aside even the issues that originally seemed the most promising opportunities for rule changes.

At least three factors prompt the inquiry. The Supreme Court has recently decided several class-action cases. The Class Action Fairness Act has been in effect for a few years; the FJC has provided a valuable survey of its early effects, but the time may have come to start considering the possible effects of this new source of business on all aspects of managing putative class actions. And, whether or not it makes sense to attempt to trace particular developments to CAFA, it may be time to explore the emergence of practices that lead at least some observers to conclude that it has become increasingly difficult to win class certification. Increased difficulty may be good or not so good; if there has been any change, the reasons should be explored.

Supreme Court Decisions

Two of the recent Supreme Court decisions do not seem likely subjects for Rule 23 work. *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), ruled that § 2 of the Federal Arbitration Act

preempts state law that finds unconscionable an arbitration provision in a consumer contract of adhesion that limits arbitration to individual claims, barring class arbitration. The decision does not rest on Rule 23. The Court does say some things about class proceedings, identifying characteristics that make them incompatible with arbitration. Class arbitration "makes the process slower, more costly, and more likely to generate procedural morass than final judgment." Binding nonparties by a class award "presumably" would require at least the protections identified for judicial class proceedings in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985): "class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class." And the risk of error is multiplied by class proceedings, and "will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of 'in terrorem' settlements that class actions entail * * *." 131 S.Ct. at 1751-1752. These are not words of affection.

Smith v. Bayer Corporation, 131 S.Ct. 2368 (2011) also does not seem a likely subject for Rule 23 revision. Two unrelated actions seeking certification of the same class of West Virginia plaintiffs were brought in West Virginia courts. One could not be removed. The other was removed and transferred for consolidated proceedings. The federal court refused to certify the West Virginia class because individual issues of fact predominated over common issues. Then it enjoined certification of the same class by the West Virginia courts. The Supreme Court reversed, relying on the Anti-Injunction Act, 28 U.S.C. § 2283. The Court relied on all of the traditional reasons for denying preclusion. Perhaps the most prominent are that the certification issue under West Virginia law is not the same as the certification issue under federal law, and that "[n]either a proposed class action nor a rejected class action may bind nonparties." The Court noted and put aside the protest that a regime that permits serial relitigation of class certification forces defendants to buy peace by settling. The result is frustrating. It also is familiar. Several years ago the Advisory Committee explored the possibility of amending Rule 23 in ways that might impede successive efforts to win certification of a class following denial of certification by a federal court. Resistance based on Enabling Act limits and on the anti-injunction act proved overwhelming. The Class Action Fairness Act is designed to reduce these problems, making it still more difficult to pursue them through Rule 23. And it is difficult to find much encouragement in footnote 12, 131 S.Ct. 2382. The note suggests that nothing in the decision "forecloses legislation to modify established principles of preclusion should Congress decide that CAFA does not sufficiently prevent relitigation of class certification motions. Nor does this opinion at all address the permissibility of a change in the Federal Rules of Civil Procedure pertaining to this question. Cf. n. 7, *supra* (declining to reach [the] due process claim." Footnote 7, p 2376, in turn, observes

that decision rests on § 2283, so the Court does not consider the argument drawn from the Shutts case that the injunction violated the Due Process clause. Even a veiled hint that due process may forbid extending a denial of certification by issue-precluding a different representative of the same putative class is a powerful deterrent.

Going back a year, *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 130 S.Ct. 1431 (2010), offers more intriguing possibilities. Strong arguments can be made that the Court got it wrong – that there is no federal purpose to be served by certifying a federal class action to enforce a state-law claim when state law explicitly forbids enforcing the claim through a class action. Revising Rule 23 need not be difficult. A pair of possible amendments, sketched out as an amusing exercise in 2010, are attached to illustrate the possibilities. But it remains to decide whether the possible value of an amendment is worth the potential costs, either as a stand-alone venture into Rule 23 or as part of a broader reconsideration.

Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011), is the fourth and most general of the recent decisions. A brief reminder should suffice for the purpose of asking whether this decision should prompt a rulemaking response. The Court unanimously reversed certification of a Rule 23(b)(2) class of "about one and a half million plaintiffs" complaining that Wal-Mart's personnel practices discriminated against women in pay and promotions. Although there was a "disparate treatment" claim, the focus seemed to be on "disparate impact." The practice claimed to have an adverse disparate impact on women was the delegation of broad discretion to local managers. To support class certification the plaintiffs offered statistical evidence showing disparate pay and promotion impact; anecdotal evidence; and an expert's "social framework analysis" showing a culture vulnerable to gender discrimination. The opinion for the Court rejected class certification for want of the common question required by Rule 23(a)(2); four Justices disagreed on that point. All agreed that claims for backpay could not be certified as part of a (b)(2) action for class injunctive and declaratory relief.

The majority's "common question" analysis is difficult to reduce to short compass. The class members must have suffered the same injury. The claims "must depend upon a common contention" that "is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." The common questions must "'generate common answers apt to drive the resolution of the litigation.'" Merely pleading a common question will not do. A party seeking certification "must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." Rigorous analysis is required. Often rigorous analysis will overlap the merits; "that cannot be helped." So here, "proof of commonality

necessarily overlaps with respondents' merits contention that Wal-Mart engages in a *pattern or practice* of discrimination." The plaintiffs "wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." For this case, the alleged common policy of allowing discretion was seen as a policy against having uniform practices. Some supervisors may exercise discretion in discriminatory ways. Others will not. "[D]emonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." Indeed "it is quite unbelievable that all managers would exercise their discretion in a common way without some common guidance." Statistics showing disparities at a regional level do not show disparities at the level of the individual stores where discretion is exercised. "Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice."

It is difficult to disentangle this common-question analysis from substantive Title VII concerns. It is easy enough to formulate a question common to all class members: Does it violate Title VII to adopt a company-wide policy conferring discretion to make employment decisions on individual managers if the collective effect, company-wide, is an identifiable disparate impact on women? The Court appears to be resisting that level of generality. Answering that very general question would not of itself lead immediately to relief for any class member. Instead it would in effect be decision of an "issue class" question, providing a foundation for further proceedings in individual actions, better focused class actions, or perhaps broader class actions with subclasses.

More generally, it is difficult to know what will come of the requirement that the common question be one that will generate a common answer "apt to drive the resolution of the litigation." These words do not require that the common answer leave nothing more to be done. How much more can be left open is not addressed, at least not in any way that enables confident administration. It may be that Rule 23(a)(2) has been stiffened in ways that will make it considerably more difficult to win certification. It may be that all the rhetoric will be confined, to become a rationale for avoiding sprawling classes that will generate vast amounts of individualized determinations after the only common question has been resolved. And if it seems likely that large numbers of individual actions will be brought if no class is certified, even sprawling class actions may seem better than vast numbers of individual actions subject only to MDL coordination.

In short, there is good reason to monitor developing interpretation of the "common question" provision in Rule 23(a)(2). Whether there is a need to begin immediate consideration of

possible amendments – and what they might be – is less clear.

The (b)(2) analysis by the majority is captured in the statement that (b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." Along the way the majority explains that "(b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process clause." Whether these words constitute an ominous hint that (b)(2) must be revised is unclear. The Court also rejected an argument that monetary relief can be part of a (b)(2) class certification if the money claims do not predominate over injunctive or declaratory relief. For this case, the Court suggested a perverse incentive – to win certification, the plaintiffs sought only backpay, excluding any claim for compensatory damages. If the judgment were that a particular class member was not entitled to backpay because her pay or loss of a promotion was not the result of discrimination, preclusion on the discrimination issue might defeat a separate action for compensatory damages. Close to the end, however, the Court left open the possibility that monetary relief may be sought in a (b)(2) class if the money is only "incidental" to the declaratory or injunctive relief. Finally, the Court rejected the suggestion that the burden of a million or more individual determinations of discrimination could be avoided by trying a sample of individual claims. The sample-trial prospect was characterized in this way: "The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery – without further individualized proceedings." The Enabling Act does not authorize this type of class proceedings. "[A] class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."

This cursory taste of the majority Wal-Mart opinion only hints at the difficulty of predicting what next. Strict application of the common-question formulas could easily forestall any inquiry into the predominance and superiority requirements for certifying a (b)(3) class. Even if the subdivision (a) thresholds are met, interpretation of the predominance – and perhaps also the superiority – requirement in (b)(3) could be affected. Attempts to avoid the (b)(3) requirements by tacking damages claims onto (b)(2) certifications, a matter of disagreement among the circuits in the past, seem doomed.

As with the Court's recent interpretations of notice pleading, the Wal-Mart opinion may come to be confined to the peculiar circumstances of the case. Or it may become the source of widespread constrictions on class certification. Whether any

generalized effects are desirable will be open to debate. What was decided is less likely to be important than the ways in which the decision was explained. And the impact of the opinion will likely play out over a long period.

Other General Developments

Lower-court practices may be more important than the recent Supreme Court decisions. Here the question is so broad-gauged as to be put with very little illustration: Is class-action practice developing well? Are there broad trends that justify consideration of possible Rule 23 revisions? If general practice seems about as good as could be achieved by rule text, are there nonetheless particular practices that should be corrected? At this point, all that is asked is a sense of group experience and impressions.

One focal point might be noted. The decision in *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir.2008), demands a "rigorous analysis" of class-certification elements. It has had a significant impact. Overall, is this a source of reassurance that things are going well?

Old Questions

Pursued very far, abstract theory can identify many questionable features of class-action practice. However rough the answers, we have come to accept both the basic concept and many of the elaborations. The most enthusiastic proponents of present approaches have asserted that any significant retrenchment would impermissibly abridge or impair substantive rights, indeed that Congress legislates new rights on the assumption that they will be made real by class-action enforcement. There may be no reason to ask the first questions – the basic phenomenon need not be reexamined. But smaller questions abound.

Past struggles with Rule 23 have dealt with many issues that were eventually put aside. More than a few had champions to the end. Others were never formally interred – they were carried forward into a future that never materialized. Still others were simply rejected. One way to stimulate new ideas may be to recall some of these old ideas. It may be that one or another of them deserves fresh consideration. Or it may be that recalling them will suggest new paths of inquiry. The following set is incomplete, and is not intended to suggest that any of the buried bodies be exhumed. Still, there may be some interest here.

The most pervasive approach to Rule 23 came at the beginning in the 1991-1993 period. All class actions became subject to a new (a)(5) prerequisite: certification could be ordered only if "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The separate (b)(1), (2), and (3) categories became matters pertinent in deciding whether a class action is superior to other methods of

adjudication. For any class, it would be asked whether difficulties in managing a class would be significantly reduced if the controversy were adjudicated by other means. The court could make any class an opt-in class. Or it could make any class mandatory. Or it could allow exclusion from any class, and could impose conditions on the right to exclude that either prohibited any opt-out member from maintaining a separate action or barred any attempt to use the class judgment in a separate action. Class actions could be maintained not only with respect to separate issues but also with respect to separate claims or defenses. After some development, this approach was abandoned in favor of exploring smaller changes.

Many of the changes that were later explored and abandoned address concerns that still seem familiar. Among them are these:

(a) (4) would require that both class representatives and their members "discharge the fiduciary duty to protect the interests of all persons while members of the class until relieved by the court from that fiduciary duty."

A (b) (3) class could be certified only if common questions predominate over individual questions included in the class action, a hint that issues classes should be favored. But it also must be found that a class action is "necessary" for the fair and efficient disposition of the controversy.

The merits of the class claims, issues, or defenses must be considered in the (b) (3) certification question at the request of a party opposing certification. One formulation required a finding that the class positions "are not insubstantial on the merits." An alternative was that the prospect of success on the merits "is sufficient to justify the costs and burdens imposed by certification." Matters pertinent to the (b) (3) superiority and related findings included "the probable success on the merits of the class claims, issues, or defenses." These provisions were initially supported by defense interests. They were abandoned, however, as both plaintiff and defense interests coalesced in opposing them. Concerns focused on the burdens of preliminary discovery, the ensuing mini-trial, and the impact a finding favorable to certification would have on settlement negotiations and even on stock prices. Even if practice in addressing manageability is evolving toward a deeper preliminary look at the merits – something that seems to be approved in the Wal-Mart opinion – an explicit appraisal of the probable outcome, rather than the available modes of trial, would be a real change.

The "merits" also were approached in a different way, in a (b) (3) factor that came to be known as "just ain't worth it." With variations, the court would ask whether "the public interest in – and the private benefits of – the probable relief to individual class members justify the burdens of the litigation." This factor took dead aim at the theory that class actions are necessary as a

means of public enforcement when small injuries are inflicted on many victims. Addressing concerns still heard today, the draft Note observed that when "there is no prospect of meaningful class relief, an action nominally framed as a class action becomes in fact a naked action for public enforcement maintained by the class attorneys without statutory authorization and with no support in the original purpose of class litigation" to provide relief to class members. This factor proved decidedly unpopular in many quarters. The central arguments were plain: the wrongdoer should be forced to restore ill-gotten gains; Congress has relied on Rule 23 enforcement in enacting many statutes; discretionary determinations of the public interest would be too far dependent on the views of a particular judge.

Settlement classes were addressed by another (b)(3) factor, looking at "the opportunity to settle on a class basis claims that could not be litigated on a class basis or could not be litigated by [or against?] a class as comprehensive as the settlement class." Certification of a plaintiff class commonly is followed by settlement. Settlement has virtues, including some that are subject to theoretical challenge. Choice-of-law problems can be passed over. Formulas or claim procedures can alleviate the problems of administering a remedy. And a settlement-only class also poses obvious risks. It remains fair to ask whether rule text should make separate explicit provisions for settlement-only certification.

One of the consequences of settlement may be provisions for "fluid" or "cy pres" recovery. These provisions may provide an indirect means of delivering remedies to at least some class members, or achieve other seemingly worthy goals. But the question was framed by observing that express rule provisions governing such remedies "would severely test the limits of the Rules Enabling Act, particularly if used to enforce statutory rights that do not provide for such relief." If it would be difficult to justify explicit approval and regulation in Rule 23, is it easier to permit such recoveries under the general aegis of Rule 23?

The early suggestion that opt-in classes should be available in the court's discretion was followed by various provisions for opt-in classes to supplement the familiar (b)(3) opt-out class. The subject was formally left open, but ultimately put aside for future consideration. One version provided that the conditions for an opt-in class could include a requirement that class members bear a fair share of litigation expenses incurred by the representative parties. An alternative might be to revise Rule 24 to authorize an open-ended invitation to intervene, perhaps including conditions that would subordinate the role of intervenors to primary representation by the initial parties.

Another provision, addressing a question underscored by the Wal-Mart decision, recognized the opportunity to certify both (b)(2) and (b)(3) classes in the same proceeding.

In the end, notice requirements were adjusted for mandatory classes by providing in present Rule 23(c)(2)(A) that "the court may direct appropriate notice to the class." For opt-out classes, (c)(2)(B) carries forward the familiar requirement of "individual notice to all members who can be identified through reasonable effort." Earlier proposals were more pointed for mandatory classes – the means of notice must be "calculated to reach a sufficient number of class members to provide effective opportunity for challenges to the class certification or representation and for supervision of class representatives and class counsel by other class members." Some civil-rights groups opposed this provision as unnecessarily burdensome. Still, the rather ambiguous comment about (b)(2) class notice in the Wal-Mart opinion might suggest further consideration of this question. For opt-out classes, on the other hand, a more relaxed approach was considered: "but individual notice may be limited to a sampling of class members if the cost of individual notice is excessive in relation to the generally small value of individual members' claims." The Supreme Court's recent quotation of the Shutts statement that class members must be afforded notice may stand in the way of sampling notice, but there may be room to explore the possibility. Internet notice will not reach everyone, but coupled with other means of general notice, sampling notice could be sensible. Significant numbers of opt outs, whether from the sample of individual notices or from the general notice, could become a basis for reconsidering the means of notice or even certification.

The status of class members as "parties" has been a source of some confusion. Can discovery devices available only as to a party be addressed to any class member? Is a class member an opposing party for purposes of counterclaims, a coparty for crossclaims, or a nonparty for purposes of Rule 14 impleader? Some help may be found in *Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005 (2002), which ruled that a class member who objects to a proposed settlement can appeal approval of the settlement because the class member is a "party" for purposes of the rule that generally allows only a party to appeal a judgment. The Court clearly held back from any general pronouncement: "The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." Is there any reason to attempt to address some of these questions, perhaps discovery and counterclaims, even if others are put aside? (The prospect of crossclaims among class members, for example, raises manifest questions whether there is any proper class at all, whether conflicting interests might be adjusted by subclassing, and so on.) As with other of these questions, the first inquiry should be whether significant problems persist in practice.

A central aspect of class-action practice is the premise that the class judgment binds class members by way of *res judicata*. Both claim-preclusion and issue-preclusion rules should be tailored to the class context, but the questions are complex and the

prospect of crafting explicit res judicata provisions for Rule 23 is daunting. But the deeper premise remains open: how far should res judicata depend on an independent determination whether the representative parties in fact discharged, throughout the litigation, the (a)(4) duty to "fairly and adequately protect the interests of the class"? Is there any reason to attempt to address this question in Rule 23?

Finer-grained questions also can be imagined. One example: Courts seem to be doing fairly well in rejecting attempts to defeat class certification by offering full individual relief that moots representative plaintiffs' individual claims before a ruling on a motion to certify. Are there still problems with attempts to moot certification or review of a certification denial that deserve attention – whether in Rule 23 or, perhaps, Rule 68? For present purposes, it seems better to ask what they might be than to attempt to illustrate them. The basic question remains: are there good reasons sufficient to justify taking on Rule 23 as a project in the near-term future?

Appendix: Shady Grove Undone

Rule 23: Fix Shady Grove

Version 1

(b) Types of Class Actions. A court may certify a ~~A~~ class action ~~may be maintained~~ if Rule 23(a) is satisfied and if: * * *

COMMITTEE NOTE

In *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 130 S.Ct. 1431 (2010), the Court interpreted the former language of Rule 23(b): "A class action may be maintained * * *." The Court found these words "create[] a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action. (The Federal Rules regularly use 'may' to confer categorical permission * * *.)" "The discretion suggested by Rule 23's 'may' is discretion residing in the plaintiff. He may bring his claim in a class action if he wishes."

The Court's focus on the representative plaintiff could find root in the original language of Rule 23(a) providing that a class member "may, on behalf of all, sue or be sued" when the rule's requirements were satisfied.

Rule 23(b) is amended to emphasize the court's control of the certification decision. It is commonplace that a court has some measure of discretion in determining whether the prerequisites of Rule 23(a) are met, and considerable discretion in determining whether certification is justified under one of the categories set out in Rule 23(b). A party seeking class certification should not be empowered to insist on a certification that the court, in its best judgment, believes unwise.

Recognition of a procedural "right" is particularly dangerous when it conflicts with underlying substantive doctrine. The distinction between substance and procedure drawn in the Rules Enabling Act, 28 U.S.C. § 2072, is notoriously elusive. The line must be drawn with sensitivity to context and purpose. The *Shady Grove* decision illustrates the difficulty of this chore. New York law created the claim for penalty interest; without the New York right, there would be nothing for a federal court to enforce. New York law prohibited recovery of penalty interest in a class action.

That choice by New York dramatically affects the character of the penalty New York created and simultaneously limited. The federal courts should not be backed by a happenstance drafting choice into the position of expanding the New York-created right. The new language frees federal courts to decide this and similar questions without the pressure of a seeming linguistic mandate to certify no matter whether there is any federal interest in expanding the state-created claim beyond the limits set by state law.

This amendment does not change the measures of discretion in certification that have been recognized in applying Rule 23. Neither is it intended to affect evolution of certification practices in light of experience and changing substantive law. It does no more than remove the effects of an unintended drafting choice made at a time when it was impossible to foresee the class action practice that has grown out of the 1966 Rule 23 revisions.

Version 2

(b) Types of Class Actions. Unless prohibited by the law that governs the claim, a class action may be maintained if * * *.

COMMITTEE NOTE

Rule 23(b) is amended to bar certification of a class action to enforce a claim when class-action enforcement is prohibited by the law that governs the claim.

In *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 130 S.Ct. 1431 (2010), the Court interpreted the former language of Rule 23(b): "A class action may be maintained * * *." The Court found these words "create[] a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action. (The Federal Rules regularly use 'may' to confer categorical permission * * *.)" "The discretion suggested by Rule 23's 'may' is discretion residing in the plaintiff. He may bring his claim in a class action if he wishes."

The *Shady Grove* decision illustrates the reasons to respect a prohibition on class-action certification imposed by the law that governs the claim. New York law created the claim for penalty interest; without the New York right, there would be nothing for a federal court to enforce. New York law prohibited recovery of penalty interest in a class action. That choice by New York dramatically affects the character of the penalty New York created and simultaneously limited. There is no federal interest in providing class-action enforcement in defiance of the New York determination that this remedy does not deserve to be magnified in this way. The federal courts should not be backed by a happenstance drafting choice into the position of expanding the New York-created right.

The prohibition on class-action enforcement contemplated by the amendment must be directed to the particular claim. Several federal statutes, noted by the Court in the *Shady Grove* opinion, provide examples. The New York prohibition involved in that case was somewhat less direct, adopted as part of the New York Civil Practice Law and precluding use of a class action to enforce a "penalty." But it was clear that New York courts regard the interest sanction involved in the action as a penalty that could not be enforced by a class action. Other systems may be less clear. A state's failure to adopt any class-action procedure would

not count as a prohibition. Neither would differences of general certification criteria between state and federal law. Application should depend on looking for a state practice so directly identified with the state-created claim that class-action enforcement would thwart the state's purposes in creating but also limiting the claim.

TAB 10

CIVIL RULES MAILBOX DOCKET: OCTOBER 2011

A number of "mailbox" suggestions have accumulated on the Civil Rules docket. These notes provide a brief description of the suggestions from 2009, 2010, and 2011 that remain pending without yet having come on for Committee consideration. The occasional suggestions are tentative. The purpose is to generate observations on the proper next steps to be taken for each suggestion.

09-CV-D

Judge Eric Melgren expresses concern about the interplay of Time Project changes in Rule 62(a) and (b) as they relate to changes in Rules 50, 52, and 59. Before the Time Project, the time for motions under Rules 50, 52, and 59 was set at "ten days" after the entry of judgment. Even as extended to 14 days or more by the "dies non" approach to counting time, that period seemed too short. It was extended to 28 days, a deadline 2 days ahead of the 30 days set for civil appeals by Appellate Rule 4. Rule 62(a) and (b) times were changed from 10 days to 14 days. Rule 62(a) provides an automatic 14-day stay after entry of judgment, with exceptions. Rule 62(b) provides that the court may stay execution or other enforcement proceedings "pending disposition of any of the following motions" – listing Rules 50, 52(b), 59, and 60. Judge Melgren asks what happens if a party seeks to continue a stay beyond the automatic 14-day stay by a motion made before filing a Rule 50, 52, 59, or 60 motion. The party represents that it plans to file the motion within 28 days, but needs the remaining time to prepare the motion. The question is whether this is a motion "pending disposition of [a] motion" that has not yet been made.

A common-sense approach would say that at least if the party represents that it plans to make a timely motion, the court has authority to grant a stay. The motion has not yet been disposed of. The court has authority to deny the stay for all sorts of reasons, including doubt whether a motion for relief from the judgment will be timely filed. The question may reduce itself to this: is this reading sufficiently uncertain to undertake revision of Rule 62(b)?

09-CV-B

Attorney Mark Estes suggests a number of highly detailed provisions for agreements governing e-service among counsel. The provisions include such matters as requiring a case name and number in the subject line (so as to attract attention); identification of specific e-mail addresses, including those used to send messages so messages from unidentified sources need not be opened; sending test pages to make sure the system works; identifying the types of attachment formats that are authorized; setting limits on file size; and allowing withdrawal of consent.

It is fair to ask whether any of these provisions addresses matters too detailed to be included in a national rule.

The time will soon come to take another look at e-service in general. These issues have commonly involved coordination with other Judicial Conference committees. Revision of the Civil Rules may well be based on recommendations from the other committees. It may make sense to hold this proposal for consideration in the next round of general e-service study.

09-CV-A

Professor Paul Carrington, the prior Civil Rules Committee Reporter, recounts the history that accounts for limiting the Rule 4(d)(2) sanctions for failure to waive service to "a defendant located within the United States." The process was, by Enabling Act standards, informal. He believes it may be desirable to strike "located within the United States." Foreign defendants, on his view, are not so much incensed by an affront to local sovereignty as anxious to increase the costs of suing them in the United States. Failing extension of 4(d)(2) sanctions to defendants in other countries, he wonders whether unspecified improvements might be made in the Rule 4(f) provisions for serving an individual in a foreign country.

These are sensitive topics. It would be good to get informed advice on the advantages of facilitating service in foreign countries or encouraging waiver of service.

10-CV-G

This proposal by attorneys Setnam-Burland and Stitham takes aim at the Form 18 complaint for patent infringement. They note the intrinsic inadequacies of the form and the apparent tension between the form and the pleading practices evolving out of the Twombly and Iqbal decisions. They offer a more elaborate form.

This suggestion should be remitted to the Forms Subcommittee. It will provide a useful starting point if the Subcommittee decides

to recommend general retention of pleading forms, and to include a patent-infringement form complaint in the mix.

10-CV-E, 10-CV-F

These two proposals by attorney Carol Dalenko address Rule 15.

The first proposal is to amend the Rule 15(a)(1)(B) right to amend once as a matter of course within 21 days after service of a motion under Rules 12(b), (e), or (f). The perceived problem is that the time to respond to the motion may be set beyond 21 days. It is not apparent that the right to amend once should be joined directly to the time to respond; 21 days may be a good limit to keep things moving. And an extension of the time to amend once as a matter of course can be sought independently or as part of whatever process sets the time to respond to the motion, cf. Rule 12(I).

The second proposal elaborates the first by specifying that in a multiparty action, the time to amend once as a matter of course runs from the first responsive pleading or the first motion filed by any party. That seems to be what Rule 15(a)(1)(B) means now.

The second proposal also would amend Rule 12(f) by extending the motion to strike to include a motion under Rule 12(b) as well as a pleading. The question is whether these motions present the same need to strike redundant, immaterial, impertinent, or scandalous matter.

10-CV-D

Attorney Gregg R. Zegarelli offers multiple proposals to amend Rule 68. The most interesting addresses complaints for nominal damages. The plaintiff sues for vindication, not for a dollar. The Rule 68 offer is for \$1.01, or perhaps \$10. The offer of money alone does not reach the value of the declaratory ruling implicit in an award of nominal damages. This problem is similar to the problem of comparing offers to judgments in actions that explicitly seek declaratory or injunctive relief. The Committee has wrestled with these problems in its most recent adventure into Rule 68 lands. They are difficult.

The other proposals need not be detailed at present. Collectively, the proposals seem better considered when – and if – Rule 68 is again taken on for overall study. They do suggest problems with Rule 68 that have not figured in the most recent reviews. But they also have a common thread in concerns about the tactical uses that can be made of Rule 68.

10-CV-C

Judge Virginia M. Morgan suggests that Rule 41(a)(1)(A) be amended to allow a plaintiff to dismiss an action without prejudice

"by filing: (I) a notice of dismissal before the opposing party files either an answer or a motion for summary judgment responsive pleading; * * * ." The question appears to be inspired by a motion to dismiss filed with attachments that, if considered, would convert the motion into a motion for summary judgment. Part of the concern also appears to be that the plaintiff may dismiss after a defendant has filed a notice of removal and paid a filing fee.

The question seems to relate generally to the effect of a motion to dismiss on the plaintiff's unilateral right to dismiss early in the proceedings. Rule 15(a)(1) was recently amended to add a motion under Rule 12(b), (e), or (f) to the acts that cut off the right to amend once as a matter of course; the long-standing original version cut off the right only on service of a responsive pleading. Perhaps Rule 41(a)(1)(A) should be amended in the same way. The most likely variations would begin with something that simple: "before the opposing party files either an answer, a motion under Rule 12(b), (e), or (f), or a motion for summary judgment * * * ." More complicated variations would cut off the right to dismiss only if the motion is filed in a form that triggers the Rule 12(d) duty to exclude matters outside the pleadings or to treat the motion as one for summary judgment, or cut off the right only if the court in fact treats the motion as one for summary judgment.

10-CV-B

Attorney John Vail suggests that Rule 23 be amended by adding a provision similar to 15 U.S.C. § 15(d), which authorizes state attorneys general to file a parens patriae action for pricefixing in which

damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

This amendment is advocated as a cure to the problems arising from several decisions requiring as a condition of class certification that plaintiffs establish that "each and every class member is harmed in the same way."

This proposal was included in the initial "menu" of rules proposals prepared for the Duke Conference Subcommittee but has not made its way to the Subcommittee agenda. It is bound to be controversial, and will inevitably be challenged as abridging, enlarging, or modifying substantive rights in ways forbidden by the Enabling Act. It belongs with the recently opened inquiry whether the time has come to revisit Rule 23, either in general or in some specific aspects.

10-CV-A

Attorney Amy M. Smith proposes adoption of a rule authorizing interlocutory appeals by permission from discovery orders that either grant or deny discovery of information claimed to be protected by the attorney-client privilege. The proposal is bolstered by pointing to the Court's reference to this possibility in ruling that collateral-order doctrine does not support appeal from an order compelling discovery and rejecting an attorney-client privilege claim. *Mohawk Industries, Inc. v. Carpenter*, 103 S.Ct. 599 (2009).

Appeals by permission could be rationed much more carefully than collateral-order appeal would have permitted, and are likely to be more freely granted than the extraordinary writ of mandamus. The question obviously overlaps the interests of at least the Appellate, Civil, and Evidence Rules Committees. If the idea seems attractive, the next step will be to consult with those Committees.

11-CV-C

Pro se litigant James Andrew Polt suggests that Rule 26 is "challenging and exciting," but also requires "time, effort, and thought process to try to grasp the legal particularity involved." He urges that pro se litigants be given an extra 7 days to submit the 26(f) report to the court.

The rules often reflect the role of pro se parties by referring alternatively to the party or the attorney for a represented party. They have not yet been shaped to provide separate procedures for pro se litigants. Even the early consideration of "simplified" procedure proposals did not provide separate treatment for pro se litigants. If distinctions are to be made, it may be better to undertake a broader project.

11-CV-A

Attorney Gregg R. Zegarelli proposes that Rule 55 be amended to provide more clearly for cases in which a default judgment is entered as to part of an action. The cases may involve multiple parties, at least one of whom is defaulted as to all claims, or multiple claims against a single party. His concerns seem to relate to coordination between court and clerk when the clerk is authorized to enter default judgment as to one part, while action by the court is required as to another part. He also seems to be worried about opportunities of immediate execution, and default judgments on claims for declaratory or injunctive relief.

The first question is whether there have been enough general problems in practice to take up Rule 55. Rule 55 has not been the subject of active consideration in many years, and has not been the subject of many – if any – formal or informal complaints.

NON-DOCKET ITEM: FAILED COURT NOTICE – RULES 77 (D), 5 (B)

A Judicial Conference Committee is designing the Next Generation CM/ECF system. They face a design question framed by Civil Rules 77(d) and 5(b) when an e-notice of entry of an order or judgment bounces back. It is not too early to begin thinking about the problem, but it may be better to defer consideration of possible Civil Rules amendments until the design has been set. That approach would facilitate design of the optimal system to be followed by supporting rules amendments. On the other hand, if doubts arise as to the design questions, it may be better to take up the question now.

Rule 77(d) provides:

(1) *Service.* Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. * * *

Most courts make service by electronic means, reflecting Rule 5(b)(2)(E), which authorizes service by:

(E) sending [a paper] by electronic means if the person consented in writing – in which event the service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served * * *.

The incorporation of Rule 5(b)(2)(E) in Rule 77(d) means that if the e-notice bounces back, the clerk knows that the Notice of Electronic Filing did not reach the person to be served. Most, but not all, clerks' offices monitor their systems for notices of failed delivery. When a no-delivery message appears, these offices believe that because the notice is "not effective" they have to attempt to deliver the entire notice again by a different method.

It seems to be agreed on all sides that some renewed effort should be made when the clerk receives notice that attempted e-service failed. The proposal being studied would provide a second message, but the potential burden on the clerks' offices would be reduced. The system would require all users to provide a secondary address – it could be a different e-mail address, a postal-mail address, a text-message address, or some still different address. The system would be designed to respond to a notice that the original service failed by sending a simple "alert" message to the secondary address. The alert would state that there has been docket activity, leaving it to the attorney to go to the docket to find out what happened. It might also be designed to alert the recipient to the need to address the reasons that caused the initial failure, whether an over-full e-mail box, a changed e-address, defective hardware, an overactive spam filter, or whatever else might impede messages from the court.

One rule question would be whether the eventual system design, whatever it may be, satisfies the policies that underlie rules notice requirements. That question may be better answered when a reasonably firm design plan is in hand. But if there is a sense that the system should be designed to provide an actual resending of the full original notice, including either the actual order or judgment or a link to the docket entry, it may be better to raise the question now before the system design proceeds further.

A separate question will be whether to distinguish between notices of events that originate with the court – does "order or judgment capture all of them? – and events that originate with a party and are served through the court system, or directly between the parties. If a party has permission to "use the court's transmission facilities" to serve notice under Rule 5(b)(3), it may make sense to simplify the system design – most likely to provide notice of failed service directly to the party who attempted the service. That way the clerk need not get involved. If a party attempts to make e-service directly (does this happen very often?), a different approach might be taken.

An underlying theme is the long tradition that parties and lawyers have an obligation to check the docket no matter whether they expect notice of all events from the court. Compare the provisions of Civil Rule 77(d)(2) and Appellate Rule 4(a)(6), providing that lack of notice of entry does not affect appeal time, nor authorize relief from appeal time, except as the court grants permission within defined time limits. It is much easier to check an electronic docket than to rely on legal newspapers or visits to the courthouse. But perhaps people become so reliant on e-communication and so trusting in it that the old tradition is not as persuasive a justification for reducing court efforts as once it was. For example, if it is just as easy to design and operate the system to automatically resend the full text of the order or provide a link, designing it to send only an alert of failed notice may not be as attractive as it sounds.

Pro se litigants present another and recurring question. Both system design and court rules may need to take separate account, particularly for those who do not have reliable means of e-communication.

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Judge Melgren

12/28/2009 12:22 PM

09-CV-D

Lee Rosenthal

Mark Kravitz

Question on new civil rules

Colleagues:

The interplay of some of the changes to the Civil Rules has confused me, in the context of matters filed Christmas Eve in a case of mine, and after discussion with some of my colleagues here they have encouraged me to inquire of you for any insight you might be able to provide.

Previously, Rule 62(a) provided a 10 day automatic stay for execution of judgment, and Rule 62(b) permitted a stay of execution pending disposition of motions filed under Rules 50 and 59 (as well as others). Motions filed under those rules were also required within 10 days, which allowed a defendant/judgment debtor to seamlessly segue from one stay to the other, upon the filing of the appropriate motion.

Under the Rules as amended December 1, the automatic stay under Rule 62(a) has been extended to 14 days, after which a party must seek stay under 62(b). But the time for filing motions under Rules 50 and 59, which would authorize a Rule 62(b) stay, has been extended to 28 days. The times are no longer coterminous, leaving a judgment debtor without authorization to obtain a stay of execution from days 15 to 28. Of course, the judgment debtor could file its Rule 50 and 59 motions earlier than allowed, and if filed within 14 days it could still segue immediately to Rule 62(b) protection. But requiring the judgment debtor to file its Rule 50 or 59 motions within 14 days, in order to take advantage of the stay offered by Rule 62(b), is in conflict with the Committee Note that "[E]xperience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays."

My judgment debtor has asked me to issue a Rule 62(b) stay pending the disposition of Rule 50 and 59 motions *which it plans to file*, but I'm not persuaded that Rule 62(b) allows me to stay execution pending disposition of motions which have not yet been filed. What was the committee's thought regarding this gap in the availability of a stay of execution.

Sorry to trouble you this holiday week, but these matters have arisen quite abruptly, as is their nature.

Eric F. Melgren

United States District Judge
District of Kansas
United States Courthouse #423
401 N. Market
Wichita, Kansas 67202
316.269.6110

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"mark estes"
<MESTES1@SAN.RR.COM>
06/21/2009 05:58 PM

To <Rules_Support@ao.uscourts.gov>

cc

09-CV-8

bcc

Subject Agreements to Accept Service by e-mail among counsel -
requirements needed to minimize disputes re: e-service

History: This message has been forwarded.

Issue - Required Information for e-mail service among counsel - email service is qualitatively different than mail service

The following will prevent/minimize disputes about whether e-service was properly made.

Without identifying the specifically authorized email accounts an attorney who has his secretary send documents under a different email address

may be sent to a spam folder of the recipient or just ignored - especially if containing an attachment)

When counsel agree (in writing) to accept email service of document (i.e. discovery) it is important that:

- 1 the agreement requires the short Case name and number to be disclosed in the E-mail subject line
2. **the agreement identify the specific email address to be used by each party - limit to no more than 3 for each side unless otherwise agreed (accommodates secretaries email) - an intended recipient should not be required to open emails from unknown sources, especially if a file is attached**
3. a test page be sent and received by each counsel - (to make sure a spam or filtering program is not sending email to trash)
- 4 the rules should provide a caution to the effect that a party who has their secretary or paralegal sending documents by email must be sure the particular email is one of the authorized emails
- 5 the agreement should identify the type of files authorized as attachments - "pdf" and "tiff" files should always be authorized

6. the agreement may state the maximum size of each file (default to x) -
maximum size of related files (default to y)

7 the rules should provide that a party may withdraw consent upon 7
days notice - (stops harassing emails or abuse of email service)

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"Edward H. Cooper"
04/06/2009 11 29 AM

To Peter_McCabe
cc "Paul Carrington"
Subject Fwd: Re Rule 4

Date: Mon, 06 Apr 2009 10:54:42 -0400
From: "Paul Carrington" <pdcc@law.duke.edu>
To: <coopere@umich.edu>
Subject: Re: Rule 4

> I have once again been (after some years) teaching an International
> > Litigation course and pondering Rule 4. You will recall that we
> > re-wrote Rule 4 in 1993 in part to connect it with the international
> > conventions and in part to internationalize the wonderful California
> > rule that a defendant who refuses to accept cheap service must bear
> > the cost. In 1990, I explored the issue with several small groups
> > of Europeans and detected a low level of dissatisfaction based
> > wholly on their satisfaction that translation costs made it
> > costly for Americans to sue European firms in our courts. An
> > effort was otherwise made in the new draft to respond to their hopes.
> We sent a copy over to the State Department at the time the draft was
> > published and got no objection from them. We then published our
> > draft for public comment. It went through the standing committee
> > and the Judicial Conference without a beep.
> >
> > So our draft was in the Supreme Court awaiting publication to
> > Congress when the British Embassy hired Erwin Griswold to tell the
> > Court that they objected to the application of the California rule
> > to the Queen's subjects. Erwin detected that his client was moved
> > to speak by other EU members who aspired to keep translation costs
> > on American plaintiffs. He communicated the objection to the Chief
> > Justice. No hearing was held. No public statement was
> > made. I do not know whether other Justices were consulted.
> Unbeknownst to anyone engaged in the rulemaking process
> > except Sam Pointer, then chair of the Civil Rules Committee, the
> > rule was fixed so that the California rule did not apply to
> > foreigners. Sam achieved this without public discussion or
> > committee review of the revision, as the Chief preferred. Quite
> > reasonably under the circumstances, Sam made the least change
> > possible that achieved the desired result, by adding the phrase
> > "located within the United States" to Rule 4(d). But without the
> > benefit of 4(d), the complexities of 4(f) are more of a burden than we
> > reckoned they would be. I suggest that 4(f) might deserve a little
> > attention. Or even better, maybe we could consider deleting the
> > phrase Sam erased at the direction of the Chief. What would the
> > State Department say today?

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January 13, 2011

BY ELECTRONIC MAIL

Secretary of the Committee on Rules of Practice and Procedure
 Administrative Office of the United States Courts
 One Columbus Circle, NE
 Washington, D.C. 20544

Re: Form 18 to the Federal Rules of Civil Procedure

Dear Secretary,

We write with a suggested amendment to Form 18 to the Federal Rules of Civil Procedure (“Form 18”), in the form of the enclosed draft. By way of background, we provide the following comments.

Form 18 sets forth a sample complaint for patent infringement. The existing form is undeniably barebones—beyond a statement of jurisdiction, it requires only an assertion of patent ownership, a claim of infringement, an allegation of marking (if applicable), and a demand for relief.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), the Supreme Court emphasized that a properly-pled complaint “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 555). In the wake of the intensified pleading standards of *Twombly* and *Iqbal*, the minimalist boilerplate of Form 18 has come under increasing fire from courts around the country. See *Elan Microelectronics Corp. v. Apple, Inc.*, 2009 WL 2972374, *2 (N.D. Cal. Sept. 14, 2009) (noting that Form 18 “requires essentially nothing more than conclusory statements” and “is not easy to reconcile ... with the guidance of the Supreme Court in *Twombly* and *Iqbal*”) (ellipsis added); accord

Secretary of the Committee on Rules of Practice and Procedure

Administrative Office of the United States Courts

January 13, 2011

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Sharafabadi v. University of Idaho, 2009 WL 4432367, *3 n.5 (W.D. Wash. Nov. 27, 2009). See also *Colida v. Nokia, Inc.*, 347 Fed. Appx. 568, 571 n.2 (Fed. Cir. Oct. 6, 2009) (noting that Form 18 “is not tailored to design patents and was last updated before the Supreme Court’s *Iqbal* decision”).

In the past, Form 18 has been challenged for not addressing complex infringement claims involving multiple or different types of products. See *Hewlett-Packard Co. v. Intergraph Corp.*, 2003 WL 23884794, *1 (N.D. Cal. Sept. 6, 2003) (“In light of these facts, Plaintiff’s claim must be read as follows: one or more of Defendants’ 4000-plus products directly infringes, contributorily infringes, or induces infringement of at least one claim in each of the patents-in suit. Form 16 [now Form 18] simply does not address a factual scenario of this sort.”). It is also notably silent on any theory of patent infringement besides direct infringement. See, e.g., *Halton Co. v. Streivor, Inc.*, 2010 WL 2077203, *3 (N.D. Cal. May 21, 2010); accord *Eolas Techs, Inc. v. Adobe Sys., Inc.*, 2010 WL 2026627, *3 (E.D. Tex. May 6, 2010).

Despite the limitations of Form 18, and mounting concern that, where applicable, the form is found wanting under *Twombly* and *Iqbal*—under Rule 84 of the Federal Rules of Civil Procedure, a court must accept as sufficient any pleading made in conformance with its terse requirements. *Id.* This has been troubling not only to district court judges, but to Judge Dyk of the United States Court of Appeals for the Federal Circuit (the court through which all patent appeals must pass, and certainly an experienced body to weigh in on this debate). In a separate opinion filed in *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007), Judge Dyk—noting the limitations of a form which originated before the Second World War—commented that: “One can only hope that the rulemaking process will eventually result in eliminating the form, or at least in revising it to require allegations specifying which claims are infringed, and the features of the accused device that correspond to the claim limitations.” *Id.* at 1360 (Dyk, J., concurring in part and dissenting in part).

While troubling enough to provide fair notice of a would-be plaintiff’s claim when the allegation is one that a particular product (e.g. the electric motors used as an exemplar in the form) infringes a product patent, Form 18’s limitations are immediately apparent when the template is used—as is frequently the case—to accuse an entire website or channel of commerce of infringing, in some unspecified manner, a method or software patent. In such instances, Form 18 may regrettably “unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” *Iqbal*, 129 S.Ct. at 1950.

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This brings us to our present proposal, which is informed by Judge Dyk's admonition that a revised Form 18 should require "allegations specifying which claims are infringed, and the features of the accused devices that correspond to the claim limitations." *McZeal*, 501 F.3d at 1360 (Dyk, J., concurring in part and dissenting in part).

Very truly yours,

BRANN & ISAACSON

/s/ David Swetnam-Burland

David Swetnam-Burland
dsb@brannlaw.com

/s/ Stacy O. Stitham

Stacy O. Stitham
sstitham@brannlaw.com

Enclosures

PROPOSED REVISED FORM 18 OF THE FEDERAL RULES OF CIVIL PROCEDURE

UNITED STATES DISTRICT COURT
[NAME OF DISTRICT]
[NAME OF DIVISION]

[PLAINTIFF’S NAME],)
)
Plaintiff,)
)
v.) Case No.
)
[DEFENDANT’S NAME],)
)
Defendants.)

COMPLAINT

- 1. This is a complaint for patent infringement.
- 2. [Statement of Jurisdiction. See Fed. R. Civ. P. App., Form 7.]
- 3. On [Date], the United States Patent and Trademark Office issued U.S. Patent No.

[Number] (“Patent”) for [description of invention]. Plaintiff owned the patent throughout the period of Defendant’s infringing acts, and still owns the patent. A copy of Patent is attached as Exhibit [#].

[DIRECT PATENT INFRINGEMENT]

4. The defendant has infringed, and is still infringing, claim [Number(s)] of Patent by making, selling, and using [Accused Product(s)/Device(s)/Process(es)/Method(s)/Act(s)/Instrumentality(ies)].

5. Defendant has infringed Claim [Number] by making, selling, and using [Accused Product(s)/Device(s)/Process(es)/Method(s)/Act(s)/Instrumentality(ies)]. A chart identifying specifically where each element of Claim [Number] is found within each [Accused Product/Device/Process/Method/Act/Instrumentality] and whether that element is infringed literally or under the doctrine of equivalents is attached as Exhibit [#].

[Repeat for additional asserted claims.]

[INDUCED PATENT INFRINGEMENT]

6. [Third Party] has directly infringed Claim [Number] by making, selling, and using [Accused Product(s)/Device(s)/Process(es)/Method(s)/Act(s)/Instrumentality(ies)]. A chart identifying specifically where each element of Claim [Number] is found within each [Accused Product/Device/Process/Method/Act/Instrumentality] and whether that element is infringed literally or under the doctrine of equivalents is attached as Exhibit [#].

7. At or before the time of Third Party's infringement of Claim [Number] of Patent, Defendant knew of Patent/deliberately disregarded a known risk that Patent existed.

8. Defendant purposely caused, urged, or encouraged [Third Party]'s to take certain acts that infringed Claim [Number] of Patent.

9. Defendant knew that causing, urging, or encouraging [Third Party] to take these acts would result in infringement of Claim [Number]

[Repeat for additional asserted claims.]

[CONTRIBUTORY PATENT INFRINGEMENT]

10. [Third Party] has directly infringed Claim [Number] by making, selling, and using [Accused Product(s)/Device(s)/Process(es)/Method(s)/Act(s)/Instrumentality(ies)]. A chart identifying specifically where each element of Claim [Number] is found within each [Accused Product/Device/Process/Method/Act/Instrumentality] and whether that element is infringed literally or under the doctrine of equivalents is attached as Exhibit [#].

11. Defendant offered to sell or sold within the United States or imported into the United States [Component/Material/Apparatus] that constituted a material part of the Accused Product(s)/Device(s)/Process(es)/Method(s)/Act(s)/ Instrumentality(ies).

12. Defendant knew that [Component/Material/Apparatus] was especially made or adapted for use in infringement of Patent.

13. [Component/Material/Apparatus] is not a staple article or commodity of commerce suitable for a substantial non-infringing use.

[Repeat for additional asserted claims.]

[JOINT PATENT INFRINGEMENT]

14. Defendant and [Third Party] together directly infringed Claim [Number] by making, selling, and using [Accused Product(s)/Device(s)/Process(es)/Method(s)/Act(s)/Instrumentality(ies)]. A chart identifying specifically where each element of Claim [Number] is found within each [Accused Product/Device/Process/Method/Act/Instrumentality] and whether that element is infringed literally or under the doctrine of equivalents is attached as Exhibit [#].

15. Defendant directed or controlled the activities of [Third Party] that constituted its contribution to the direct infringement of Claim [Number] of Patent.

16. In performing the acts that constituted its contribution to the direct infringement of Claim [Number] of Patent, [Third Party] acted on behalf of Defendant as Defendant's agent/pursuant to a contract with Defendant.

[Repeat for additional asserted claims.]

17. Defendant has been harmed by the infringement of Patent described above.

18. Defendant will continue to engage in conduct that infringes Patent unless enjoined by this Court.

19. Plaintiff's [Product(s)/Device(s)/Process(es)/Method(s)/Act(s)/Instrumentality(ies)] embodies Claim [Numbers] of Patent.

20. Plaintiff has complied with the statutory requirement of placing a notice on all [Product(s)/Device(s)/Process(es)/Method(s)/Act(s)/ Instrumentality(ies)] it manufactures and sells, and has given Defendant written notice of infringement.

PRAYER

Based on the foregoing, Plaintiff demands:

- A. A preliminary and final injunction against continuing infringement of Patent;
- B. Damages in an amount to be determined at trial;
- C. Interest and costs; and
- D. Any other and further relief ordered by the Court.

Dated: January 13, 2011

Respectfully

submitted,

/s/
[Counsel of Record]
[Address]
[Telephone number]
[E-mail address]

Attorneys for [Plaintiff]

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Greetings.

I propose that the committee consider revising Rule 15(a)(1)(B) of the Federal Rules of Civil Procedure to REMOVE the second occurrence of "21 days after service of" and REPLACE it with "before the time to respond to", to read as follows:

Rule 15. Amended and Supplemental Pleadings (effective, 1 Dec 2009)

(a) Amendments Before Trial.

(1) Amending as a Matter of Course.

A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B): if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or [*21 days after service of*] before the time to respond to a motion under Rule 12(b), (e), or (f), whichever is earlier.

This revision encompasses the situation where the court grants a motion to enlarge time to respond to a Rule 12(b,e,f) motion, but the party had not contemplated a correspondingly request to enlarge the time to amend the pleading. The intent of the Rule remains in tact, to amend a pleading once as a matter of course up until the time to respond to a Rule 12 motion.

Carol Dalenko
Wake County, NC
(919) 632-7700
E-mail: cd2008@bellsouth.net

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Greeting ~ Please consider the following recommendations for amendments to Rules 15(a)(1) and 12(f).

The proposal below for Rule 15(a) incorporates my prior recommendation for the Rule at 15(a)(1)(B) to accommodate court-ordered extensions of time to respond to a Rule 12 motion. This also adds a new proposed Rule 15(a)(1)(C) to accommodate multiple responding parties.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) Amending as a Matter of Course.

A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or ~~21 days~~ **the time to**

respond after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(C) if responsive pleadings are required from multiple parties, 21 days after service of a responsive pleading from the first party to respond or the time to respond after service of the first motion under Rule 12(b), (e), or (f), whichever is earlier.

The proposal below for Rule 12(f) contemplates dilatory and frivolous motions under Rule 12(b) in response to a pleading.

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(f) Motion To Strike.

The court may strike from a pleading **or a motion under Rule 12(b) in response to a pleading** an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

- (1) on its own; or
- (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

=====

Thank you for this opportunity.

Carol Dalenko, 1709 Horton Rd, Knightdale, NC 27545-8577
(919) 632-7700, e-mail: cd2008@bellsouth.net

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10-CV-D

| | | |
|----------------------|--|------------------------|
| "Gregg R. Zegarelli" | Dear Secretary of the Committee on Rules of... | 12/08/2010 10:21:54 AM |
|----------------------|--|------------------------|

From: "Gregg R. Zegarelli" <gregg.zegarelli@zegarelli.com>
To: <Rules_Support@ao.uscourts.gov>
Date: 12/08/2010 10:21 AM
Subject: Rule 68 Offer of Judgment

Dear Secretary of the Committee on Rules of Practice and Procedure:

I suggest a change to the Rule 68 Offer of Judgment. I will explain the scenario briefly. I am generally available to testify to the Committee as appropriate.

I represented Aaron and Christine Boring in a case against Google in the Western District of Pennsylvania 2:08-cv-00694-CB, now resolved by consent judgment against Google for nominal damages. This was a proverbial mom and pop versus behemoth company. The case arose from a trespass to land by Google and claimed invasion of privacy from Google's Street View service, past signage. The claim for damages was an important part of the case, since the case was dismissed for failing to plead nominal damages and the trial court holding as a matter of law that compensatory damages were not available without physical injury to land. That issue was reversed by the Third Circuit, with reinstatement of the trespass count and the availability of the compensatory damage claim with or without physical damage to land. [The dismissal of the punitive damage claim was upheld by the Third Circuit, with asserted logic that yet defies me, but Certiorari was not granted. You may want to visit <http://www.zegarelli.com/Cases/Borings%20v%20Google/Borings%20v%20Google%20Certiorari%20Petition.pdf>]

When back at the trial court, plaintiffs then added a nominal damage claim for relief, as belt and suspenders. Compensatory damages could be proved in two ways, fact testimony such as costs and time associated with removal of improper Street View pictures, and expert testimony such as the value of the pictures acquired by Google in its hands and use of the land. Because of Google's power, and in light of the then-current magistrate judge's apparent inclinations, a Google Daubert might eliminate (rightly or wrongly) our expert. The risk of losing the expert testimony without a supportive nominal damage claim might actually bait Google to file a Daubert motion on that basis alone. Therefore, a nominal damage claim could keep plaintiffs in the game for a trial, even if plaintiffs could not prove compensatory damages.

In light of this posture, Google sent us a Rule 68 Offer for \$10. I will state some conjecture, but it is relevant to your consideration. I believe that Google read Rule 68 with the interpretation that it could not be filed and/or publicized. Therefore, as a matter of strategy, Google could send the notice, which I would have to show to the client, and it would scare the client into conceding the case for the risk of having to pay all the costs a \$34B company could accrue — and as if they need the money. At the same time, Google could do so without being publicly accountable for such a mean harassing head game. Just play out the attorney-client conversation in committee: you sue for nominal damages of \$1 to prove an important point of right v. wrong (in the traditional American sense), and you receive a \$10 or \$1.01 offer. You win your \$1 and still have to pay.

I interpreted the act by Google to be an improper use of Rule 68. I filed it with the trial court for a purpose other than intended by Rule 68 itself, that being to prove a point related to the merits of the stay, that is, as an item of supportive public evidence like any other. I can tell this Committee, that my intention in filing was in good faith, because we researched diligently and could not find controlling authority that the *recipient* could not file for a tangential purpose. I also openly raised the issue in my Petition to the

Supreme Court.

In any case, Google took the position that a Rule 68 Offer cannot be filed, and possibly that it is confidential. Our position was that Rule 68 must still be used by a defendant for a proper purpose and not to harass. Also, that the offer is able to be filed with the Court for some reasons other than the primary purpose intended by the Rule itself; otherwise, you could not file a Rule 11 motion resulting from a bad faith use of Rule 68. In any case, the trial court never ruled on Google's related sanction motion.

<http://www.zegarelli.com/Cases/Borings%20v%20Google/Brief%20in%20Support%20of%20Motion%20to%20Stay%2020100406W.pdf>

<http://www.zegarelli.com/Cases/Borings%20v%20Google/Google%20Response%20to%20Motion%20web.pdf>

<http://www.zegarelli.com/Cases/Borings%20v%20Google/Reply%20Motion%20to%20Stay%20Web.pdf>

Again, please watch how the Rule works with nominal damages: You sue with a non-frivolous case. The law provides only nominal damages of \$1 for the proper symbolic purpose of vindication of the legal right itself. You properly recover nominal damages of \$1. However, \$1 is by formula less than the \$10 offer of judgment; therefore, defendant gets costs. In other words, a \$1.01 offer of judgment could always be used in a nominal damages case to harass a proper plaintiff vindicating its right. It vitiates the concept of nominal damages, which is a proper symbolic victory and vindication.

As a result of the above posture and strategic use of Rule 68, I believe the Rule should not be applicable if nominal damages are awarded, or if punitive damages are awarded. Confidentiality and filing issues should also be clarified. E.g.:

(e) Offers of judgment are not settlements, nor are offers confidential settlement communications, as such. [This clarifies that a proponent of the offer may make the offer, but will not escape any public scrutiny that is appurtenant to the act itself. Offers can lead to a settlement discussion, but the offer itself is not confidential settlement communication. Offers of judgment are a "cram down," not an inspired settlement discussion.]

(f) Offers of judgment are not applicable to nominal damages or punitive damages. A judgment granting nominal or punitive damages nullifies the effectiveness of an unaccepted offer. [Nominal damages are \$1 and symbolic; therefore, it is not appropriate for an offer of judgment. Punitive damages are not calculable and are socially imposed in discretion, and therefore not subject to offers. An award in such other categories must nullify the offer otherwise the limitation would be ineffective.] (It might be better to state that offers are applicable only to damages otherwise reasonably calculable. The point for nominal damages is distinct from punitive damages, but punitive damages exist for a reason, and it is not fair to make a recipient try to calculate punishment value. Offers should be for "rational" damages, not symbolic, exemplary, punitive, etc.)

(g) Attorneys fees reimbursements are not within the scope of offers.

(h) Nothing prevents the filing or admissibility of an offer for a purpose other than to constrain the liability otherwise determined, as provided above in Sections (c)-(d).

I appreciate your consideration in this regard and offer the suggestion for the purpose of clarifying applicability of a rule that goes directly to the heart of all federal lawsuits. If I can be of further assistance, please contact me.

Very truly yours,
s/Gregg Zegarelli/

Gregg R. Zegarelli

Direct Dial: 412.765.0401
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Z E G A R E L L I

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From: Virginia Morgan/MIED/06/USCOURTS
To: Rules_Support@ao.uscourts.gov
Date: 11/30/2010 11:35 AM
Subject: Suggestions for Amendment to Rule 41, FR Civil P

Dear Rules Committee:

First, thank you for this easy method of submitting suggestions for amendments to the Rules.

I would like to ask for consideration regarding an amendment to Rule 41(a) in light of some recent experience. I would like to request that the rule be amended to change Rule 41(a)(1)(A) *Without a Court Order* as follows: strike "motion for Summary Judgment" and substitute "responsive pleading." Alternatively, perhaps the rule should exclude removal actions where it is the defendant who has paid the filing fee.

The circumstances are these: Pro se plaintiff files an action in state court which is removed by the defendant. The complaint is very difficult to understand but appears to challenge a mortgage foreclosure action. Service is probably not correct but the defendant bank removes the case to federal court. So, defendant pays the filing fee. It then files a motion to dismiss attaching various documents, which if considered would clarify the complaint and convert the M/Dismiss to one for Summary Judgment. Relief sought by bank includes dismissal with costs and with prejudice. In what appears to be a response to the motion and in a notice which appears to be copied from a website or another case, pro se plaintiff files a Notice of Voluntary Dismissal without prejudice and without costs and the Clerk's office closes the case with no contact with the judge or chambers staff.

Perhaps this is a local procedure issue and the Clerk should not close the case. If so, please advise. I think the situation is exacerbated by the CMECF system where reaction is instantaneous.

Please do not hesitate to contact me if you need more information.

Sincerely,

Virginia M. Morgan
United States Magistrate Judge
200 E. Liberty
Ann Arbor, MI 48104
734-741-2378

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Proposal to amend Rule 23 regarding proof of “common impact” as a criterion of class certification

In certain circuits a requirement that plaintiffs adduce, as a prerequisite to class certification, sufficient evidence to establish that each and every class member is harmed in the same way is giving rise to burdensome mini-trials and is impeding the just determination of claims.

This “common impact” requirement, imposed by cases such as *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 6 (1st Cir. 2008), *In re Initial Public Offering Securities Litigation*, 471 F.3d 24 (2d Cir. 2006), and *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008), has no grounding in substantive or procedural law and no justification in policy. See *Kohen v. Pac. Inv. Mgmt. Co., L.L.C.*, 571 F.3d 672, 677 (7th Cir. 2009), *cert. denied*, *Pac. Inv. Mgmt. Co. L.L.C. v. Hershey*, 2010 U.S. LEXIS 1072 (U.S. Feb. 22, 2010), (Posner, J.) (That “a class will often include persons who have not been injured” is “almost inevitable” and “does not preclude class certification”). A single-minded focus on a preliminary showing of uniform “common impact” is inconsistent with the language of Rule 23, which requires only that common issues “predominate.” Rule 23 does not require a complete absence of individual issues.

The common impact requirement unwarrantedly impedes use of a procedure vital to the public interests of assuring fair competition and providing redress for harms. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Keating v. Superior Court*, 31 Cal.3d 584, 609 (1982) (“Denial of a class action in cases where it is appropriate may have the effect of allowing an unscrupulous wrongdoer to ‘retain[] the benefits of its wrongful conduct.’”). We propose to amend Rule 23 to restore its original purpose and effect.

Conventional pattern jury instructions and special verdict forms applicable to class action trials do not address “common impact” at all. Generally, no effort is made at trial to allocate that aggregate recovery among individual class members, or to determine whether the class includes some subset of members who lack the requisite form of injury. The primary concern of the parties and attorneys in a class action, after liability has been found, typically is and should be the accuracy of the aggregate damages awarded.

Division of that award among class members nearly always is handled through post-trial administrative procedures in which the defendants have little, if any, genuine economic interest. As Judge Hornby recognized in one of his decisions in *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 235 F.R.D. 127, 143 n. 55 (D. Me. 2006), *reversed in part, vacated in part and remanded*, 522 F.3d 6 (1st Cir. 2008), “[i]f the plaintiffs have an adequate model to award aggregate damages, the defendants’ concern that some class members may be overcompensated at the expense of other class members seems a little suspect. Under the guise of fairness, the defendants’ real objective is to avoid recovery by anyone.” Defendants are not prejudiced if potentially unharmed class members are included in the class.

Because common impact generally is not even addressed at trial, it makes no logical sense to make it the lynchpin of whether a class should be certified. Doing so has burdened district courts with lengthy evidentiary hearings and resolution of complex disputes between expert economists on an issue which should make no difference in a case at all. It has little, if any, genuine relevance to fair resolution on the merits.

Nonetheless, some courts have found that Rule 23 requires rigorous proof of “common impact” before a class can be certified. Perversely, this creates higher evidentiary burdens for class certification than for the class to prevail at trial. The “common impact” requirement is inconsistent with the mandate of Rule 1 that the rules be construed “to secure the just, speedy, and inexpensive determination of every action or proceeding.”

In re New Motor Vehicles Canadian Export Antitrust Litigation illustrates the problem. There, a class of new car purchasers alleged a horizontal conspiracy among major automakers to choke off the flow of cheaper Canadian exports to the U.S. market. A district court judge with prior MDL class action experience controlled the litigation with the stated goal of moving as quickly as possible toward trial. *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 229 F.R.D. 35, 38 (D. Me. 2005). But the litigation bogged down in class certification. Six years after filing, with four years devoted to the question of “common impact,” the district court assayed the conspiracy evidence, concluded that it was worthy of going to a jury, but granted summary judgment to defendants because plaintiffs could not meet the preliminary burden, under Rule 23, “to prove impact by common proof that applies to every member of the putative class.” *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 632 F. Supp. 2d 42, 47-51 (D. Me. 2009). At trial, it is never the requirement in a class action that plaintiffs prove injury-in-fact as to “every member” of the class.

To a limited extent, the non-utility of “common impact” proof has been recognized in 15 U.S.C. §15(d), which makes proof of “common impact” unnecessary in *parens patriae* cases brought for price-fixing by state Attorneys General. That statute provides that in *parens patriae* cases in which price-fixing is found:

damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

We propose adding to Rule 23 a similar provision that would apply in all civil class actions. Such a step would greatly alleviate heavy and unwarranted burdens on the trial courts, would contribute to fair and sensible treatment of litigants, and would be entirely consistent with the primary purpose of Rule 23, which is to make certain, both substantively and procedurally, that results reached through representative litigation under Rule 23 are “fair, reasonable and adequate.”

This amendment would address only the need for such proof as a matter of class certification, and would not affect any individualized right to jury trial on a particular issue, in light of the right of all class members to receive notice of any class action settlement or judgment and to “opt out” under Rule 23 to pursue their individual rights.

John Vail
Vice President and Senior Litigation Counsel
Center for Constitutional Litigation, PC
777 6th Street, NW, Suite 520
Washington, DC 20001
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john.vail@cclfirm.com

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March 5, 2010

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

10-CV-A

Re: Suggestion and Recommendation

Dear Mr. McCabe:

Pursuant to the Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, I am writing to make a suggestion and recommendation with respect to the Federal Rules of Civil Procedure. This suggestion and recommendation would require an amendment to Federal Rule of Civil Procedure 37 to authorize discretionary interlocutory appeals from a district court's order granting or denying a motion to compel discovery of information claimed to be protected by the attorney-client privilege.

On December 8, 2009, the Supreme Court decided *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009). In that case, the Court held that disclosure orders adverse to the attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine because postjudgment appeals, together with other review mechanisms, suffice to protect the rights of litigants and preserve the vitality of the attorney-client privilege. *Id.* at 603. The Court bolstered its conclusion with reference to Congress's amendment in 1990 of the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, to authorize the Court to adopt rules "defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291," *id.* 2072(c), and its subsequent enactment of 28 U.S.C. § 1292(e), which empowered the Court to prescribe rules in accordance with the Rules Enabling Act to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under Section 1292. Indeed, this is the *only* portion of the opinion in which Justice Thomas joined. *See id.* at 609-10.

In 1998, the Supreme Court employed the rulemaking authority in Section 1292(e) in promulgating Federal Rule of Civil Procedure 23(f). Rule 23(f) permits an interlocutory appeal from an order granting or denying class certification at the sole discretion of the court of appeals. The current version of Rule 23(f), which was amended in December of 2009, provides that a petition for permission to appeal must be filed with the circuit clerk within fourteen days after the order is entered. An appeal does not stay proceedings in the district court absent an order to that effect entered either in the district court or court of appeals.

Note that also in 1998, Federal Rule of Appellate Procedure 5, which governs appeals by permission, was similarly amended to accommodate new rules such as Rule 23(f) authorizing additional interlocutory appeals. Rather than add a separate rule governing each such appeal, it was believed preferable to amend Rule 5 so that it would govern all such appeals.

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Peter G. McCabe, Secretary

March 5, 2010

Page 2

Please consider my suggestion and recommendation to promulgate an amendment to Rule 37 to add a new subsection similar to the amendment in Rule 23(f) permitting an interlocutory appeal from a district court's order granting or denying a motion to compel discovery of information claimed to be protected by the attorney-client privilege at the sole discretion of the court of appeals, and providing that a petition for permission to appeal must be filed with the circuit clerk within fourteen days after the order is entered. Similar to the practice under Rule 23(f), an appeal under any amendment to Rule 37 should not stay proceedings in the district court absent an order to that effect entered either in the district court or court of appeals.

Thank you for your attention to this matter.

Very truly yours,



Amy M. Smith

AMS/jw

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8-23-2016

Dear, Secretary, of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts.

Dear, Representative Body stated above, and Secretary thereof.

I write this letter to suggest a "Rule additive", and/or a footnote addendum *example*, like the just previous example of one.

And my suggestion goes as follows.

If a Pro Se Party is involved in a federal lawsuit then in all (legal language) that comes from any particular federal court by any form, be it on computer generated articles or on paper. And if any legal language put forthright by the court in any paper from the court that has legal language pertaining to Rule 26 (F). Then it should be written out like the following, I propose.

* Rule 26 (F)

And I propose that the footnote and/or "Rule Additive" be related to giving Pro Se litigants who are participants in federal court cases an extra week, or 7 days, to submit a scheduling and planning report between parties. And so extending from 28 days, to 35 days. The time allowed for the Pro Se litigant to file the report. Thus helping Pro Se litigants to better prepare the report that so may be submitted.

* Pro Se litigants shall be afforded an extra 7 days to prepare the report between parties.

Supporting Statement from I the Proposant.

I am a Pro Se Plaintiff litigant involved in a Court Case at the U.S. Courthouse in Anchorage, Alaska 99501 and the Court Case is James Andrew Polt V. Alaska Housing Finance Corporation Case # 3:11-cv-00055-JWS. Document 13 relates to the Federal Rule 26(F) and the scheduling and planning report between parties.

In general, after reading and learning the entire scope of Rule 26. I find federal Rule 26 to be challenging and exciting. And in being challenging and exciting, I also found Rule 26 to take time, effort, and thought process to try to grasp the legal particularities involved in Rule 26. And I did have "difficulties" in filling out the report of the scheduling and planning between parties that I submitted to the Court. With an extra 7 days. I would of had the extra time to go over the report I filed. And thus doing so, I could of presented to the Court a better prepared document than the one I submitted in its "Rough Draft" form.

Thank You! above previous said Committee on Rules for your considerations in the proposal I presented above.

sincerely, from:

James Andrew Polt

James Andrew Polt
dated August 23rd, 2011.

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**Suggestion for Amendment to Civil Rule 55(b)** 

James Ishida to: Gregg R. Zegarelli
 Cc: Peter_McCabe, Jeffrey Barr, LiAnn Shepard, Gale Mitchell

05/16/2011 08:46 AM

Follow Up: Urgent Priority.

Dear Mr. Zegarelli,

Thank you for your email, suggesting an amendment to Civil Rule 55(b). I am forwarding your suggestion to the chair of and reporters to the Advisory Committee on Civil Rules for their consideration. We will post updates on the status of your suggestion on the Federal Rulemaking web site. You may also contact our office via email or telephone at 202-502-1800 for further information.

We will send you shortly a letter formally acknowledging receipt of your suggestion.

Thank you very much for your suggestion, and for your interest in the federal rulemaking process.

Best,

James Ishida

"Gregg R. Zegarelli" | I note that the gist of the suggestion is guided... 05/13/2011 10:28:03 AM

From: "Gregg R. Zegarelli" <gregg.zegarelli@zegarelli.com>
 To: <Rules_Support@ao.uscourts.gov>
 Cc: <James_Ishida@ao.uscourts.gov>
 Date: 05/13/2011 10:28 AM
 Subject: RE: Rule 55(b)

I note that the gist of the suggestion is guided but not resolved by Rule 54. The issue is the nature of why the Court should be interposed for matters that are summary in nature, whether or not the basis of the relief is a declaration or a sum certain. It seems that 60(b) would make it naturally a final order (in part) such as otherwise provided in substance in Rule 54. If the defendant does not show under 60(b), it bears the risk of any remain counts in that context. Otherwise, the plaintiff is stuck in the middle: it has a default, it's primary objective is the equitable remedy, but it does not want to eliminate the money counts unless the default judgment become non-appealable. This can all be resolved by the Court, of course, but the goal is to free the docket under 55(b) while providing a full and fair opportunity to defend.

Gregg R. Zegarelli

Z E G A R E L L I

Technology & Entrepreneurial

Ventures Law Group, P.C.

gregg.zegarelli@zegarelli.com

v.412.765.0401 c.412.559.5262

From: Gregg R. Zegarelli
Sent: Friday, May 13, 2011 10:07 AM
To: 'Rules_Support@ao.uscourts.gov'

Cc: 'James_Ishida@ao.uscourts.gov'

Subject: Rule 55(b)

Dear Rules Committee:

My suggestion regards clarification to Rule 55(b). Conceptually, default judgments can be entered by the Clerk or by the Court pursuant to (b)(1) and (b)(2), respectively.

Rule 55(b) tends to deal in damage calculations. I understand the distinction for sum certain liquidated damages versus damages that must be determined by court determination and judgment. There are two issues: multiple parties and multiple claims, more particularly in the context of non-monetary damage, and when this can be managed by the Clerk pursuant to (b)(1). A plaintiff, of course, (and with the purpose of the Rule in mind) prefers any default which is summarily entered by the Clerk, and the Court's schedule may prefer this as well for a dilatory defendant.

I do not have full electronic research. I have found cases, by the court, whereby entire cases were dismissed against one party only and cases for equity defaults. However, the precise question is whether the Clerk can enter an order for default judgment for certain claims against one party not dismissing the entire case. That is, allowing an optional two-step process, whereby the default is entered by the Clerk for less than all counts.

I have an experience in the Pa.WDC where the Clerk was not sure whether it could be done, and I could not locate (so far) authority either way. The presiding judge's law clerk did not know the answer, defaulting to the 55(b)(2) rule. Presumably the question escapes appeal determinations, but nevertheless the Rule remains unclear in text and intention.

For example, assume a trademark infringement case, 3 counts, one defendant: I. Declaratory Relief (declaring a registration valid and/or application invalid); II. Injunction (on further infringement); III. Unfair competition for unliquidated money damages (for passing off). Defendant defaults with an entry pursuant to 55(a). A Rule 55(b)(1) Request for Judgment by the Clerk is filed on Counts I and II, for which there is no money at issue. As a practical matter, a summary default on Counts I and II is divided just as a Court might do it on motion practice, so it would appear consistent with judicial efficiency. Then, plaintiff could move the court for a hearing on any unliquidated counts which would play out in due course, or safely voluntarily withdraw the remaining count having possibly achieved the primary goal on the trademark rights declaration by default. If a plaintiff withdraws counts to acquire the default or easy court order, there is a practical risk.

I suggest a new 55(b)(3), such as, "Subject to the requirements of (b)(1) and (b)(2) hereof, as the case may be, default judgment may be entered by the Clerk or the Court: i) on all counts or less than all counts; ii) for all or less than all parties; and/or c) counts for which money is not the relief sought." Although it is not my suggestion, an express inverse provision, in substance, would also clarify the overall text and intention of the Rule.

Thank you for your consideration.

s/Gregg Zegarelli/

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