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**Preservation and Spoliation Revisited: Is it Time for
Additional Rulemaking?**

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I. Introduction

Spoliation of evidence includes “the destruction or significant alteration of evidence or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.”² In order to avoid this result, courts have fashioned a common law duty to preserve which, with rare exceptions, is addressed in federal courts through exercise of a court’s inherent power, not the provisions of the Federal rules.³ In *Chambers v. NASCO*,⁴ the Supreme Court held that lower courts have the power to

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² *West v. Goodyear Tire & Rubber Co.*, 167 F. 3d 776, 779 (2nd Cir. 1999).

³ *Rinkus Consulting v. Cammarata*, 2010 WL 645353 at *4 (S.D. Tex. Feb. 19, 2010)(“Allegations of spoliation, including the destruction of evidence in pending or reasonably foreseeable litigation, are addressed in federal courts through the inherent power to regulate the litigation process if the conduct occurs before a case is filed or if, for another reason, there is no statute or rule that adequately addresses the conduct [citing *Chambers*].”).

⁴ 501 U.S. 32 (1991).

“fashion an appropriate sanction for conduct which abuses the judicial process,”⁵ but “the exercise of the inherent power of lower federal courts can be limited by statute and rule, for ‘[t]hese courts were created by act of Congress.’”⁶

The 2006 Amendments principally addressed preservation concerns by adding preservation to a list of optional items for discussion at the Rule 26(f) conference and by adopting [then] Rule 37(f) to mitigate rule-based sanctions. The Committee peppered its Committee Notes with observations about preservation⁷ in hopes that parties would “get the message” and reach voluntary resolution without court involvement.⁸ However, draft Committee Note language suggesting that preservation obligations rarely applied to inaccessible sources falling within Rule 26(b)(2)(B)(the “two-tiered approach”) was dropped from the final draft.⁹

Unfortunately, the expectation that contentious preservation issues would be avoided by early party agreement has encountered serious barriers. Many preservation

⁵ *Id.* at 44.

⁶ *Id.* at 48.

⁷ FINAL REPORT at pages 15, 16, 36, 42, 73-76 and 78.

⁸ Rule 26, Committee Note, Subdivision (f)(2006)(“The parties’ discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party’s routine computer operation could paralyze the party’s activities. [citation omitted] The parties should take account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps.”).

⁹ The draft Committee Note initially provided that “[I]n most instances, a party acts reasonably by identifying and preserving [only] reasonably accessible electronically stored information.” *See* REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, May 17, 2004 (Rev. Aug. 3, 2004)(hereinafter “REPORT (2004)”), p. 34, available at <http://www.uscourts.gov/rules/comment2005/CVAug04.pdf>. However, the quoted language was deleted from the final version to “clarify that the rule does not undermine or reduce common-law or statutory preservation obligations.” REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, May 27, 2005 (Rev. July 25, 2005)(hereinafter “FINAL REPORT (2005)”), p. 36, available at http://www.uscourts.gov/rules/supct1105/Excerpt_CV_Report.pdf.

issues are neither ripe for discussion at the time of the Rule 26(f) conference¹⁰ nor are all counsel prepared or willing to deal with them at that time, for what ever reason. According to the 2009 *FJC National, Case-Based Civil Rules Survey* (“FJC Survey (2009)”), the topic of “retention” was discussed in only about 17% of the cases surveyed.¹¹ Potential producing parties, in the absence of agreement, must often undertake unilateral preservation decisions, guided only by an assessment of idiosyncratic common law decisions.¹² Parties typically are advised by their counsel to “preserve everything,” which can be very expensive and inconsistent with Rule 1.¹³

This paper evaluates the merits of a shift away from reliance on inherent power and towards a rule-based provision describing preservation obligations. In essence, we suggest revisiting the issue that the Committee was unwilling to face at the time of the 2006 Amendments. Preservation obligations could be “broken” out of the spoliation doctrine and incorporated in the Rules in parallel to and support of discovery requirements, with an appropriate indication of the standard of care required to accomplish both tasks. Rule 37 sanctioning authority could also be extended to preservation violations. This could have several beneficial results. First, it would

¹⁰ Kenneth J. Withers, “*Ephemeral Data*” and the Duty To Preserve Discoverable Electronically Stored Information, 37 U. BALT. L. REV. 349, 377 (Spring 2008)(“By the time the parties sit down at the Rule 26(f) conference, the preservation issues surrounding ephemeral data may be moot and the fate of the responding party may already be sealed, if sanctions are later found to be warranted”).

¹¹ Retention was listed as discussed in only 35% of the cases where ESI was discussed, which constituted about 50% of the cases surveyed. See *FJC Civil Rules Survey*, pps. 15- 24. There were no questions asked about the extent to which preservation agreements were reached.

¹² ADVISORY COMMITTEE MINUTES, April 14-15, 2005, at p. 41, lns. 1735-1738 (litigants “feel obligated to tailor their preservation behavior to the most demanding standard identified by any reported case or known practice for fear that that standard may be applied to them.”), available at <http://www.uscourts.gov/rules/Minutes/CRAC0405.pdf>.

¹³ The fear of spoliation sanctions for those who “guess wrong” can also force case-dispositive settlement decisions. See, e.g., *TIG Insur. Co. v. Giffin Winning*, 444 F.3d 587, 392 (7th Cir. 2006)(settlement occurred only after expending \$1.2M in defending spoliation motion).

promote uniformity and enhance predictability, thereby increasing the possibility of reaching early agreements and reducing the need for judicial oversight. Second, it would enhance the role of Rule 37(e), which applies only to rule-based sanctions,¹⁴ so as to enable it to become more effective in its application. Finally, by using rulemaking to establish a consensus on the resolution of competing concerns about trigger, scope and limitations in the world of ESI, the result become more representative of best practices.¹⁵ As the Supreme Court recently noted in *Mohawk Industries, Inc. v. Carpenter*,¹⁶ “the rulemaking process . . . draws on the collective experience of bench and bar [to facilitate] the adoption of measured, practical solutions.”

This would not be the first time that rulemaking has superseded court-developed common law. In 1983, the Supreme Court acted to provide rule-based guidance in order “to obviate dependence upon” the “court’s inherent power to regulate litigation.”¹⁷ However, as in the case of all rulemaking, the “devil is in the details,” and great care must be taken not to exacerbate the very trends which have made preservation such a problem in the world of modern discovery.

II. The Duty to Preserve

Under the current state of the law, remedies for spoliation are treated as “a rule of evidence” which are “administered at the discretion of the trial court.”¹⁸ Violation of a

¹⁴ As Judge Posner has noted, “when a domain of judicial action is covered by an express rule, such as Rules 26 and 37 of the civil rules, the judge will rarely have need or justification for invoking his inherent power.” *Fidelity National Title Insurance Co. v. Intercounty National Title*, 412 F.3d 745, 752 (7th Cir. 2005).

¹⁵ *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980)(because inherent powers are shielded from direct democratic controls they must be exercised with restraint).

¹⁶ 130 S. Ct. 599, 609 (2009).

¹⁷ Rule 16, Committee Note, Subdivision (f)(1983)(dealing with failure to comply with Rule 16).

¹⁸ *Hodge v. Wal-Mart Stores*, 360 F.3d 446, 449 (4th Cir. 2004).

duty to preserve is a pre-requisite for imposition of sanctions by the court.¹⁹ In the absence of breach of the duty to preserve, the sanction inquiry ends.²⁰

However, the failure to meet a preservation obligation does not furnish the aggrieved party with the basis for an independent claim in tort for individual damages when the basis for the rule of decision is a federal one.²¹ The duty is said to attach once litigation is initiated or is reasonably foreseeable which may occur before commencement of litigation.²² The duty continues, however, throughout the litigation,²³ often blending seamlessly into discovery issues relating to the failure to produce information and tangible things sought in discovery, including electronically stored information which may be lost through the operation of information systems. As a result, Rule 37(b)²⁴ and Rule 37(e) are also implicated in some preservation disputes.

A. Rulemaking

A preservation rule designed to promote the retention of evidence for purposes of discovery and for use at trial would be required to pass muster under the Enabling Act²⁵

¹⁹ See, e.g., *Silvestri v. General Motors*, 271 F.3d 583, 592(4th Cir. 2001)(failure to preserve an automobile for inspection or to give timely notice of claim to GM of its planned destruction breached duty not to spoliage evidence under federal law).

²⁰ Steffen Nolte, *The Spoliation Tort: An Approach to Underlying Principles*, 26 ST. MARY'S L. J. 351, 366 (1994)(noting that the "duty to preserve evidence is premised on the imposition of court sanctions; without sanctions, the duty does not exist.")

²¹ *Silvestri v. General Motors*, 271 F.3d 583, 590 (4th Cir. Nov. 14, 2001)("the acts of spoliation do not themselves give rise in civil cases [in federal court] to substantive claims or defenses"). Certain states have, however, developed and applied a cause of action analogous to the tort of intentional interference with prospective business advantage. 86 C.J.S. TORTS § 91 (2009).

²² It can also arise from an explicit court order compelling such action or from statutes or regulations deemed to be applicable. Rule 37, Committee Note, subdivision (f)(2006).

²³ See *Preferred Care v. Humana*, 2009 WL 982460 at *14-17 (S.D. Fla. April 9, 2009)(imposing monetary sanctions for decision to print and purge electronic information prior to trial).

²⁴ *WRT Energy Securities Litigation*, 246 F.R.D. 185, 194 (S.D. N.Y. Sept. 28, 2007)("Where a party fails to comply with an order compelling discovery because it has destroyed the evidence in question, it is subject to sanctions under Rule 37(b)").

²⁵ 28 U.S.C. § 2072 (a-b)(The Supreme court shall have the power to prescribe "general rules of practice and procedure" provided they do not modify "substantive" rights).

and satisfy federalism concerns which might arise under *Erie v. Tompkins*.²⁶ This would be fairly easy to accomplish if the rule were to apply only to pending litigation, thus avoiding the concerns about pre-litigation rulemaking. In *Business Guides, Inc. v. Chromatic Comm. Enterprises, Inc.*,²⁷ for example, the Supreme Court upheld the enactment of Rule 11 because it would have only an incidental impact on substantive rights given its “main objective” to “deter baseless filings and curb abuses.”²⁸ In *Burlington Northern Railroad Co. v. Woods*,²⁹ the Supreme Court classified a pending rule as “procedural” and held that it was entitled to a presumption of constitutional and statutory validity.³⁰

The primary impediment to rulemaking, however, would be the long-standing concern that pre-litigation obligations should not be regulated by rulemaking. The conventional wisdom is that the Enabling Act does not authorize rulemaking applicable to conduct during the period before commencement of litigation, a situation which is particularly complex when federal jurisdiction rests in diversity.³¹ Similarly, there is authority questioning the exercise of inherent authority to govern pre-litigation conduct.³² These complexities may well have been the concerns which caused the Advisory

²⁶ 304 U.S. 64 (1938).

²⁷ 498 U.S. 533 (1991).

²⁸ *Id.* at 553.

²⁹ 480 U.S. 1 (1987).

³⁰ *Id.* at 5, citing to *Hanna v. Plumer*, 380 U.S. 460, 471-474 (1965).

³¹ *Ward v. Texas Steak Ltd.*, 2004 WL 1280776 (W.D. Va. May 27, 2004)(refusal to apply federal spoliation principles in diversity action where the failure to preserve occurred before suit was filed); *State Farm v. Broan Mfg.*, 523 F. Supp. 2d 992, 995 (D. Ariz. Nov. 13, 2007)(“in diversity cases, state law determines a party’s duty to preserve evidence when it is outcome-determinative, but federal rules govern sanctions for breach of that duty”).

³² *EEOC v. Lakeside Building Maintenance, Inc.*, 2004 WL 816418, at *3 (N. D. Ill. March 12, 2004)(“pre-litigation delay may not be a basis for imposing sanctions” since “inherent power sanctions are limited to the judicial process”).

Committee to pull back from preservation rulemaking during the process leading to the 2006 Amendments.³³

However, these concerns should not bar a carefully drafted rule which defines the onset or trigger of the duty to preserve in terms of its relationship to discovery during litigation. Courts imposing spoliation sanctions routinely ignore the fact that the underlying preservation failures occurred prior to commencement of litigation, focusing, instead, on their impact on discovery and trial. Thus, in *Silvestri v. General Motors*,³⁴ a damaged automobile was disposed of before a lawsuit was filed and in *Goodman v. Praxair Services*,³⁵ ESI was deleted prior to suit being commenced yet, in both cases, the courts found the pre-litigation conduct improper and issued sanctions to ameliorate the impact on the pending litigation. The Supreme Court in *Chambers v. NASCO*³⁶ explicitly affirmed lower court sanctions despite the fact that some activity may have occurred before suit was commenced, albeit with a tight connection to the commencement of the lawsuit.³⁷ This implies that rulemaking involving pre-commencement activity is appropriate so long as it is linked to the discovery in the

³³ ADVISORY COMMITTEE MINUTES, April 14-15, 2005, at p. 39-40, copy available at <http://www.uscourts.gov/rules/Minutes/CRAC0405.pdf>. (“As much as many litigants would welcome an explicit preservation rule, the Committee has concluded that the difficulties of drafting a good rule would be so great that there is no occasion even to consider the question whether a preservation rule would be an authorized or wise exercise of Enabling Act authority.”).

³⁴ 271 F. 3d 583, 590 (4th Cir. 2001).

³⁵ 632 F. Supp. 2d 494, 505 (D. Md. July 7, 2009).

³⁶ 501 U.S. 32 (1991).

³⁷ The majority in *Chambers* approved the use of inherent sanctioning power in that case, while denying that it addressed pre-litigation conduct, arguably by focusing on the impact in the litigation itself. *See* 501 U.S. at 55, n. 17 (“[a]lthough the fraudulent transfer of assets took place before the suit was filed, it occurred after *Chambers* was given notice, pursuant to court rule, of the pending suit. Consequently, the sanctions imposed on *Chambers* were aimed at punishing not only the harm done to *NASCO*, but also the harm done to the court itself”). Justice Kennedy refused to accept this approach. *See* Kennedy, J., dissenting, at 74 (“By exercising inherent power to sanction pre-litigation conduct, the District Court exercised authority where Congress gave it none.”).

foreseeable litigation, much as is the case with Rule 27 (“Depositions to Perpetuate Testimony”).³⁸

However, given the historical reluctance of the Standing Committee to directly confront the issue³⁹ and the ability to continue to utilize common law principles, it may be more logical to limit the Federal Rule to post-commencement conduct, and allow the relevant precedent which develops under those rules serve to inform the evolution of pre-litigation case law. A common law duty to preserve would continue to be “triggered” when a party knew or should have known that potential discoverable evidence may be relevant to foreseeable litigation.”⁴⁰ By virtue of the “supersession” clause of the Rules Enabling Act, which gives primacy to “national rules of procedure,” courts would be obligated to exercise their inherent powers in “harmony” with the Federal Rule when assessing that conduct.⁴¹

This is, after all, the successful tactic adopted in regard to the 2006 adoption of what is now Rule 37(e).⁴² Rule 37(e) was never designed to directly regulating conduct which occurred prior to institution of litigation.⁴³ Courts are not obligated to apply Rule

³⁸ Rule 27 does not “require an independent basis for federal jurisdiction” as long as the contemplated action for which the information is being perpetuated is itself authorized by statute. Jay E. Grenig, *Taking and Using Depositions Before Action or Pending Appeal in Federal Court*, 27 AM. J. TRIAL ADVOC. 451, 454-55 (Spring, 2004).

³⁹ STANDING COMMITTEE MINUTES, June 17-18, 2004, pp. 28-29, copy available at <http://www.uscourts.gov/rules/Minutes/ST06-2004-min.pdf> (Rule 37(f) “does not address the actions of a party before a case is filed”).

⁴⁰ *Ciacciarella v. Bronko*, 2009 WL 4878723, at *2 (D. Conn. Dec. 11, 2009)(duty to preserve triggered when plaintiff made audio recording of conversation well in advance of filing suit).

⁴¹ *Kovilic Construction Co. v. Missbrenner*, 106 F.3d 768, 773 (7th Cir. 1997)(reversing sanctions imposed based on use of court’s inherent powers as abuse of discretion).

⁴² Rule 37, Committee Note, Subdivision (f)(2006)(“The protection provided by Rule 37(f) applies only to sanctions ‘under these rules.’ It does not affect other sources of authority to impose sanctions”).

⁴³ The draft Committee Note (2004) stated that the rule “does not address the loss of electronically stored information that may occur before an action is commenced.” REPORT (2004), p. 34.

37(e) when the “conduct giving rise to [an] action was not in violation of any discovery order governed by Rule 37.”⁴⁴

Accordingly, a preservation rule incorporated in the Federal Rules would include a presumptive trigger upon commencement of the action or receipt of a summons or upon service of a subpoena.⁴⁵

B. Defining the Obligation

There is an emerging consensus that the appropriate standard of conduct in executing preservation duties should be one of reasonableness and good faith. Principle Five of the *Sedona Principles*⁴⁶ emphasizes that “reasonable and good faith” efforts are required, but it is “unreasonable” to expect every conceivable step.⁴⁷ Similarly, the Seventh Circuit Pilot Program on E-discovery⁴⁸ emphasizes the need to undertake “reasonable and proportionate steps” in carrying out preservation obligations.⁴⁹ This is consistent with the recommendations of the American College of Trial Lawyers at the

⁴⁴ *Johnson V. Wells Fargo Home Mortgage*, 2008 WL 2142219, at *3, n. 1 (D. Nev. May 16, 2008)(refusing to apply Rule 37(e) to mitigate sanctions).

⁴⁵ See proposed Rule, Appendix. Professor Martin Redish has argued for a similar approach, but with the trigger fixed at the time of service of a discovery request or, if opposed, issuance of a discovery order. See Martin R. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 624-25 (2001)(advocating that trigger of the duty to preserve be upon receipt of discovery requests unless destruction took place before time when otherwise normally scheduled for destruction).

⁴⁶ Principle 5, THE SEDONA PRINCIPLES (2nd Ed. 2007)(“The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information.”).

⁴⁷ See, e.g., *In re Flash Memory Antitrust Litigation*, 2008 WL 1831668, at *1 (N. D. Cal. April 22, 2008)(requiring parties to take reasonable steps to preserve potentially relevant documents, data, and tangible things and undertaking reasonable efforts to identify and notify parties).

⁴⁸ SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM (October, 2009), copy available at <http://www.ilcd.uscourts.gov/Statement%20-%20Phase%20One.pdf>.

⁴⁹ *Id.*, p. 21 (“Every party to litigation and their counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control.”).

time of the 2006 Amendments⁵⁰ and is analogous to the obligations imposed under Rule 26(g) in response to discovery requests.⁵¹ Indeed, the concept of reasonableness is implicit in all mandatory provisions of the discovery rules.

In undertaking the task of definition, the Advisory Committee should be careful to avoid over-reliance on tort-based culpability analogies, especially those involving strict liability. A culpability analysis based on degrees of harm to others does not fit here, where the issue is applying an objective standard of care that best effectuates a balanced result for the litigation system. Assessment of individual culpability is best reserved for evaluating the type of sanctions, if any, to be applied once the threshold of permissible conduct has been exceeded. Culpability should play no role in assessing whether or not conduct is reasonable and proportional.⁵² In *Rimkus Consulting v. Cammart*,⁵³ for example, Judge Rosenthal held 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.”⁵⁴

⁵⁰ See, e.g., Letter, Robert L. Byman, American College of Trial Lawyer Lawyers, to Peter G. McCabe, Secretary, Rules Advisory Committee, *Proposed Amendments To the Federal Rules of Civil Procedure*, January 25, 2005 (“[i]t would enhance . . . the entire body of the Federal Rules” if the Rules were amended “to state a standard of care for production and preservation - which we think should be reasonableness.”).

⁵¹ Rule 26(g) requires certification, made after a “reasonable inquiry,” that a discovery “request, response or objection” is not “unreasonable or unduly burdensome” considering the type of case and the “prior discovery in the case.” See Committee Note, Subdivision 26(g)(1983)(the duty involves application of an “objective standard” which is satisfied if the conclusions drawn are “reasonable” based “on the totality of the circumstances”).

⁵² Compare, e.g., *Palsgraf v. The Long Island Railroad*, 248 N.Y. 339, 341, 162 N.E. 99 (1928)(refusing to find a duty to respond in tort owed to a party because ‘proof of negligence in the air , so to speak, will not do’).

⁵³ 2010 WL 645353 (S.D. Tex. Feb. 19, 2010).

⁵⁴ *Id.* at *6 (S.D. Tex. Feb. 19, 2010)(noting the difficulties in drawing “bright-line distinctions between acceptable and unacceptable conduct in preserving information . . . either prospectively or with benefit (and distortion) of hindsight”).

In contrast, *Zubulake v. UBS Warburg (Zubulake IV)*⁵⁵ and its progeny⁵⁶ leave little or no room for assessing the objective reasonableness of preservation conduct and conflate conduct with culpability. Those cases assert that “[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 the preservation of relevant documents.”⁵⁷ A failure to do so in writing is automatically classified as “gross negligence.”⁵⁸ While the litigation hold conduct espoused is useful as guidance, it is not an exaggeration to see the gross negligence doctrine as applying a form of strict liability, in the tort sense, to the implementation of preservation.

The better view is that the use of a litigation hold is simply one reasonable method of executing preservation obligations, not the only one. In *Kinnally v. Rogers Corporation*,⁵⁹ for example, a District Court refused to order a spoliation inference based on “absence of a *written* litigation hold”⁶⁰ because the party had taken “the appropriate actions to preserve evidence.”⁶¹ The Sedona Conference© *Commentary on Legal Holds: The Trigger & the Process* (Public Comment Version, Aug. 2007)(“Sedona Legal Hold

⁵⁵ 220 F.R.D. 212, 218 (S.D. N.Y. 2003).

⁵⁶ *Magette v. BL Development Corp*, 2009 WL 4346062, at *1- 2 (N.D. Miss. Nov. 24, 2009)(requiring parties to hire expert to inform court whether producing party has met the standards for preservation of electronic evidence based on *Zubulake* opinions).

⁵⁷ The Committee Note to Rule 37(e) provides that “[w]hen a party is under a duty to preserve information because of pending or reasonably anticipate litigation, intervention in the routine operation of an information system is one aspect of what is often called a ‘litigation hold.’”

⁵⁸ *Pension Committee v. Banc of America Securities, LLC*, 2010 WL 184312 at *3 (Jan. 15, 2010)(“after July, 2004, when the final relevant *Zubulake* decision was issued, the failure to issue a *written* litigation hold constitutes gross negligence”)(emphasis in original).

⁵⁹ 2008 WL 4850116, at *7 (D. Ariz. Nov. 7, 2008).

⁶⁰ *Id.* *6 (“the absence of a written litigation hold . . . does not in itself establish [a violation]” (emphasis in original).

⁶¹ *Id.* at *7 (noting that documentation at issue had been was earlier at the same time a verbal litigation hold was issued).

Commentary”)⁶² explains that “[w]hen a duty to preserve arises, *reasonable steps should be taken to identify and preserve relevant information as soon as is practicable*” (emphasis added) and the need for written legal hold depends on the circumstances.⁶³

Similarly, reference to proportionality has emerged as an essential element of preservation.⁶⁴ This approach was adopted by The Sedona Conference© *Commentary on Preservation, Management and Identification of Source of Information That Are Not Reasonably Accessible*,⁶⁵ which suggests that it is “reasonable to decline to preserve” such inaccessible sources if the party concludes that the “burdens and costs of preservation are disproportionate to the potential value of the source of data.”⁶⁶

C. Other Possibilities

The Subcommittee on Discovery of the Advisory Committee worked on preservation proposals during 2003⁶⁷ and, by the time of the Fordham Conference on E-Discovery in 2004, had defined a duty to preserve applicable to both electronically stored information and tangible things. As part of that approach, the draft sought to evaluate a need for a prior court order for preservation of ESI found in inaccessible sources.⁶⁸

⁶² Copy available at <http://www.thesedonaconference.org>.

⁶³ Sedona Conference© LEGAL HOLD COMMENTARY, Guideline 6, comment at p. 13.

⁶⁴ The Hon. Paul W. Grimm et. al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV 381, 388 (2008)(it would be “anomalous to sanction a party” for failure to preserve information that is later determined by the court not to be discoverable under Rule 26(b)(2)(C)).

⁶⁵ 10 SEDONA CONF. J. 281 (2009); copy also available at <http://www.thesedonaconference.org>.

⁶⁶ Commentary, pps. 14-15 (proposing a “decision tree” form of analysis under which the burdens and costs of accessing and preserving are balanced against the “reasonably anticipated need and significance of the information”).

⁶⁷ Memo, Marcus to Advisory Committee, Sept. 15, 2003, p. 1, 41-45, copy available at <http://www.kenwithers.com/rulemaking/civilrules/marcus091503b.pdf>.

⁶⁸ FORDHAM E-DISCOVERY CONFERENCE PARTICIPANT MEMO (2004), at p. 35 (“Upon [notice of] commencement of an action, all parties must preserve documents and tangible things that may be required to be produced pursuant to Rule [26(a)(1)and] Rule 26(b)(1), [except that materials described by Rule 26(h)(2) need not be preserved unless so ordered by the court or good cause]),” copy available at http://www.uscourts.gov/rules/E-Discovery_Conf_Agenda_Materials.pdf.

Support for that approach remains a possible option to consider as a supplement to general rule on the subject.

Another approach would be to provide presumptive limitations on preservation analogous to those already imposed on discovery.⁶⁹ For example, the Seventh Circuit's Electronic Discovery Pilot Program is currently experimenting with a list of categories of ESI which are deemed "generally" not discoverable. Any party participating in that pilot program that intends to request preservation or production must discuss the contents of the list "at the meet and confer or as soon thereafter as practicable."⁷⁰ Another approach would be to frame the presumptive limits in terms of the total number of "key custodians" and information systems whose relevant information must be preserved absent agreement or a showing of good cause.

Yet another option would be to require that participants in asymmetric cases, which occupy a surprisingly disproportionate volume of litigation,⁷¹ should participate in good faith on attempts to reach a maximum "budget" for preservation expenses which a potential producing party might be required to incur. Absent agreement on such a

⁶⁹ Fed. R. Civ. P 30(a)(2)(A)(no more than 10 depositions); Rule 33(a)(no more than 25 written interrogatories); *see also* Rule 30(d)(1)(deposition limited to 1 day of 7 hours unless otherwise stipulated or ordered by the court).

⁷⁰ *Id.* SEVENTH CIRCUIT PILOT PROGRAM, *supra*, Section 2.04 (d)(Scope of Preservation)(2009)(providing six categories of information, largely based on existing precedent and best practice recommendations, including Sedona Principles and Commentaries, concluding with a "catch-all" reference to "other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.").

⁷¹ Employment related litigation comprises approximately 75 percent of all litigation in state and federal civil courts with the defendants having discovery obligations that are generally more burdensome and expansive. Gregory B. Reilly and Katy Shi-Klepper, *Employers Beware: Pitfalls and Promise of Electronic Information in Employment Litigation*, 252-JUN N.J. Law. 14, 15 (2008).

budget, the court could order restrictions on the scope of preservation or require a shifting of incremental costs.⁷²

The purpose of presumptive limitations would be to enhance the existing Rule 26(f) discussion requirement by promoting a timely exchange about the preservation burdens which may be involved.⁷³ This would require additional willingness by courts to become involved should agreement be impossible. Presumptive limitation would also help reduce the risk of “sandbagging” a party which did not see the issue in time to make the adjustments needed to retain the information.⁷⁴ All of these options, however, carry the additional risk of imposing rigidity and inflexibility should parties be unwilling or unable to deal with the topic at an appropriate early point.

III. Spoliation Sanctions

The entitlement to spoliation sanctions traditionally requires a showing that the party with control over the evidence knew or anticipated that the evidence was to be used in discovery or at trial; that the failure to preserve or safeguard the evidence took place with a “culpable” state of mind; and, finally, that the evidence was sufficiently relevant to support a claim or defense.⁷⁵ Courts also take into account the degree of prejudice suffered and the perceived effectiveness of lesser sanctions.

⁷² SEVENTH CIRCUIT PILOT PROJECT RULES, *supra*, § 8.1 (referring to potential of court for shifting “any or all costs associated with the preservation, collection and production of [ESI] if the interests of justice and proportionality so require.”)

⁷³ *Columbia Pictures v. Bunnell*, 2007 WL 2080419, at *14 (C.D. Cal. May 29, 2007)(denying sanctions for failure to preserve information temporarily stored in RAM where no “specific request” had been made), *aff’d* 245 F.R.D. 443, 446 (C.D. Cal. Aug. 24, 2007).

⁷⁴ *See Healthcare Advocates v. Hardin, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627 (E.D. Pa. July 20, 2007)(finding no duty to preserve contents of cache files where preservation letter did not alert them to the need to do so).

⁷⁵ Principle 14, THE SEDONA PRINCIPLES (2nd Ed. 2007).

In most cases, a federal court imposes sanctions for failure to preserve under its inherent power to protect its integrity and prevent abuses of judicial process. Traditional analysis treats the matter as primarily a matter of case management, with violation of a duty to preserve merely one of the triggering elements.⁷⁶ One court, however, has recently cautioned that when exercising a power to sanction under the authority of *Chambers v. NASCO*, a court “may be limited to a degree of culpability greater than negligence.”⁷⁷

However, in a limited class of cases, some courts have rested their authority to sanction spoliation on Rule 37(b) when the failure to preserve has clearly culminated in violation of a prior court order.⁷⁸ Courts applying Rule 37 must determine if the sanctions are “substantially justified”⁷⁹ or were not “unjust.” There is thus some authority for the observation that Rule 37 violations do not require the type of analysis of the degree of culpability.⁸⁰ However, courts agree that the same “considerations are appropriate”⁸¹ in determining entitlement. However, as in the case of preservation obligations, rule based actions may be preferable, since sanctions issued under inherent power rest on a “relatively unstructured analysis” and are “broad and powerful tool[s].”⁸²

⁷⁶ *Adkins v. Wolever*, 554 F.3d 650 (6th Cir. Feb. 4, 2009)(authority to sanction for spoliation does not arise from substantive law but from inherent power to control the judicial process).

⁷⁷ *Rimkus Consulting v. Cammarata*, 2010 WL 645353 at *5 (S.D. Tex. Feb. 19, 2010).

⁷⁸ *APC Filtration v. Becker*, 2007 WL 3046233, at *3-4 (N.D. Ill. Oct. 12, 2007)(disposing of computer in Dumpster at time duty to preserve exits violates Rule 37(b) because it prevented producing party from complying with order to produce documents).

⁷⁹ *Devaney v. Continental American Insurance*, 989 F.2d 1154, 1163 (11th Cir. May 5, 1993)(determination turns on whether “reasonable people could differ as to the appropriateness of the contested action.”).

⁸⁰ See *Stanphill v. Health Care*, 2008 WL 2359730, at *1-2 (W.D. Okla. June 3, 2008)(consciousness of a weak case is immaterial under Rule 37 sanctions).

⁸¹ *Id.* at 971, n. 15.

⁸² *Sentis Group, Inc. v. Shell Oil Company*, 559 F.3d 888, 900 (8th Cir. March 24, 2009)(courts should “first turn to specific rules tailored for the situation at hand”).

Rule 37 may be uniquely positioned to address preservation sanctions because of the close relationship between preservation and discovery. Rules 37(b) and (c) already contain sanctions which address the needed punitive, remedial and deterrent aspects of spoliation. Rule 37(b)(2)(A) authorizes issuance of orders establishing or opposing “designated facts,” the striking of “pleadings in whole or in part” as well as dismissing an action “in whole or in part” or the entering of a “default judgment.” Similarly, Rule 37(c) bars use of information or a witness to supply evidence on a motion, at a hearing, or at a trial and mandates payment of reasonable expenses, including attorney’s fees, under many circumstances.

From a rulemaking standpoint, therefore, it would only be necessary to clarify that violations of preservation obligations were included within the scope of the Rule.⁸³ Rule 37 would become the principal source of sanctioning authority for failures to preserve arising during litigation, with Rule 37(e) providing a tempering standard for “routine, good faith” operations resulting in ESI losses. As the Supreme Court explained in *Chambers v. NASCO*,⁸⁴ there would rarely be a need to rely on inherent powers, since the Rules would be “up to the task.”⁸⁵ In *Clearvalue, Inc. v. Pearl River Polymers, Inc.*,⁸⁶ for example, the Federal Circuit held that there was no need to resort to inherent powers to impose sanctions in light of the remedies available under Rule 37. These amendments would not diminish the usefulness of the inherent authority of courts to invoke spoliation

⁸³ See Appendix.

⁸⁴ 501 U.S. 32 (1991); *Degen v. United States*, 517 U.S. 820, 823 (1996)(reversing sanctions based on use of inherent power in light of ample authority under Federal Rules to manage discovery in civil suits).

⁸⁵ *Id.* at 50.

⁸⁶ 560 F.3d 1291 (Fed. Cir. June 12, 2009).

sanctions when needed to “fill in the gaps,” such as when the focus is on the pre-litigation period.⁸⁷

IV. Rule 37(e)

In *Residential Funding Corp. v. DeGeorge Financial Corp.*, the Second Circuit held that negligent destruction of potential evidence is sanctionable “because each party should bear the risk of its own negligence.”⁸⁸ The arbitrariness of this formulation in the ESI context prompted advocacy by the author and others for a showing of willfulness as a prerequisite to the imposition of spoliation sanctions involving ESI.⁸⁹ However, the Civil Rules Advisory Committee selected an “intermediate” culpability standard of “good faith”⁹⁰ at the post-Public Hearing meeting of April 14-15, 2005.⁹¹

In its final form, Rule 37(e)⁹² “does not set preservation obligations,” but it does tell judges that a spoliation claim involving ESI “cannot be analyzed in the same way as

⁸⁷ Thomas E. Baker, *The Inherent Power to Impose Sanctions: How a Federal Judge is Like An 800-pound Gorilla*, 14 REV. LITIG. 195, 201 (Winter 1994)(“The general scheme of authorizations under statutes and rules does not displace the inherent power that precedes it”).

⁸⁸ 306 F. 3d 99, 108 (2nd Cir. Sept. 26, 2002).

⁸⁹ Comments, U.S. Chamber Institute for Legal Reform and Lawyers for Civil Justice, February 15, 2005, p. 10 (recommending that sanctions should apply only if the party acted intentionally or recklessly), available at <http://www.uscourts.gov/rules/e-discovery/04-CV-192.pdf>.

⁹⁰ FINAL REPORT (2005), *supra*, “Changes Made After Publication and Comment,” p. 78 (“The published rule barred sanctions only if the party who lost electronically stored information took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action. A footnote invited comment on an alternative standard that barred sanctions unless the party recklessly or intentionally failed to preserve the information. The present proposal establishes an intermediate standard, protecting against sanctions if the information was lost in the ‘good faith’ operation of an electronic information system.”).

⁹¹ See ADVISORY COMMITTEE MINUTES, April 14-15, 2005, *supra*, at p. 43 (Ins. 1848 - 1854) (showing evolution of rule adopted by a vote of “9 yes and 2 no”).

⁹² Fed. R. Civ. P. 37(e)(2007) provides: “Electronically stored information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine good-faith operation of an electronic information system.”

similar claims involving static information.”⁹³ In *Southeastern Mechanical Services v. Brody*,⁹⁴ sanctions for losses due to automatic overwriting of backup tapes were deemed to be “inappropriate” under rule 37(e) since “there [was] no evidence that the system was operated in bad faith.” As the court noted, “while [the producing party] may have failed to implement a proper litigation hold,” there was no specific evidence that the party had “intentionally destroyed the backup tapes in bad faith.”⁹⁵ In this context, “good faith” involves the absence of bad faith, which is “when a thing is done dishonestly and not merely negligently.”⁹⁶

Nonetheless, many⁹⁷ courts decline apply Rule 37(e) once a duty to preserve attaches in light of the reference in the Committee Note that “intervention in the routine operation of an information system is one aspect of what is often called a ‘litigation hold.’” One District Judge noted during a 2009 Fordham Conference that “it can’t be routine and good-faith not to suspend your process once you know there is litigation.”⁹⁸ This is an unfortunate misinterpretation of the intermediate culpability standard. As noted in one article,⁹⁹ “if the party cannot avail itself of the safe harbor because it had a

⁹³ Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 YALE L. J. POCKET PART 167, 174 (2006).

⁹⁴ 2009 WL 2242395 (M.D. Fla. July 24, 2009). The court relied on *Escobar v. City of Houston*, 2007 WL 2900581, at *18 (S.D. Tex. Sept. 29, 2007) and contrasted its interpretation of Rule 37(e) with the decision in *Peskoff v. Faber*, 244 F.R.D. 54, 60 (DDC 2007), where sanctions were imposed “without finding bad faith.”

⁹⁵ *Id.* at *3-4.

⁹⁶ *Cache La Poudre Fees v. Land O’ Lakes*, 244 F.R.D. 614, 635 (D. Colo. March 2, 2007).

⁹⁷ See, e.g., *KCH Services v. Vanaire*, 2009 WL 2216601 at *1 (W.D. Ky. July 22, 2009)(oral instruction to delete software that might evidence violation of law “falls beyond the scope of ‘routine, good faith operation’” of Rule 37(e).

⁹⁸ Panel Discussion, *Sanctions in Electronic Discovery Cases: Views from the Judges*, 78 FORDHAM L. REV.1, 30-31 (October, 2009)(“what this toothless thing [Rule 37(e) really tells you is the flip side of a safe harbor. It says if you don’t put in a litigation hold when you should there’s going to be no excuse if you lose information.”).

⁹⁹ Emily Burns, Michelle Greer Galloway and Jeffrey Gross, *E-discovery: One Year of the Amended Federal Rules of Civil Procedure*, 64 NYU Law Rev. 201, 217 (2008).

duty to preserve data in the first instance, then Rule 37 does little to change the state of the pre-existing common law.”¹⁰⁰

One way to redress the balance would be to amend Rule 37(e) so that covered sanctions would be available only in the event of intentional or reckless conduct, fairly attributable to the entity. This would be consistent with the decisions by Congress to limit sanctions for negligent preservation failures in actions covered by the Private Securities Litigation Act (the “PSLRA”).¹⁰¹

V. Case Management Enhancements

As noted earlier, Rule 26(f) was amended in 2006 to encourage parties to meet prior to the Scheduling Conference to discuss “issues relating to preserving discoverable information,” thereby ratcheting up expectations for what has typically been a perfunctory meeting of counsel.¹⁰²

The 2006 Amendments did not, however, require that courts monitor the results of early party discussions of preservation mandated in Rule 26(f), apparently to reduce the temptation for requesting parties to seek and courts to issue broadly worded preservation orders.¹⁰³ The result, however, is a flawed process that misses an opportunity to address burdensome preservation demands at a time when redress would be significant. Neither

¹⁰⁰ *Id.* at 217.

¹⁰¹ *Danis v. USN Communications*, 2000 WL 1694325, at *32, n. 20 (N.D. Ill. Oct. 23, 2000)(noting that the PSLRA [15 U.S.C. §78u-4(b)(3)(C)(i)] requires a defendant in a securities action to preserve evidence, but “sanctions may be imposed under the PSLRA only for willful document destruction.”).

¹⁰² Moze Cowper and John Rosenthal, *Not Your Mother’s Rule 26(f) Conference Anymore*, 8 SEDONA CONF. J. 261, 262 (Fall 2007)(“[h]istorically,” such conferences of counsel “have been pro forma, accomplishing little if anything of significance in terms of the conduct of the case”).

¹⁰³ FINAL REPORT (2005), *supra*, “Changes Made After Publication and Comment,” at p. 78 (“As published, the rule included an express exception that denied protection if a party ‘violated an order in the action requiring it to preserve electronically stored information.’ This exception was deleted for fear that it would invite routine applications for preservation orders, and often for overbroad orders.”).

Form 52¹⁰⁴ nor the Committee Note to Rule 26(f), dealing with the joint report by the parties to the court, suggest, as did the original draft Committee Note, that the court be informed about preservation so that the topic could be addressed in the “Rule 16(b) order.”¹⁰⁵ Amended Rule 16(b), dealing with the Scheduling Conference and resulting order also does not list preservation issues as a possible topic. This approach contrasts sharply with the treatment of open e-discovery and privilege issues. Under amended Rule 26(f), parties must discuss and under Rule 16(b) the court should inquire about unresolved e-discovery issues and potential agreements relating to privileged information. Absent successful discussions leading to agreements, courts are expected to resolve any open issues.¹⁰⁶

The decision to downplay court involvement in preservation leaves the heavy lifting to cooperation by counsel, as promoted by the Federal Rules and the judicially-endorsed Sedona Conference® “Cooperation Proclamation.”¹⁰⁷ Rule 16(f) requires parties to “participate in good faith” in a scheduling or other pretrial conference and parties or counsel may be sanctioned under Rule 37(f) for failing “to participate in good faith in developing and submitting a proposed discovery plan.”

¹⁰⁴Form 52, *Report of the Parties’ Planning Meeting*, effective December 1, 2007.

¹⁰⁵ See Draft Committee Note, Rule 26(f)(2004), providing that the report to the court should include aspects of the Rule 26(f) discussions which “call for court actions, such as . . . directions on evidence preservation [so that the] [c]ourt may then address the topic in its Rule 16(b) order.” REPORT (2004), *supra*, p. 18.

¹⁰⁶ *Dahl v. Bain Capital Partners*, 2009 WL 1748526, at *1 (D. Mass. June 22, 2009)(resolving dispute over failure to agree on form of production of ESI).

¹⁰⁷ Associate Justice Stephen G. Breyer, in his invited preface to the Sedona Conference Journal® Supplement (2009), endorsed as a “laudable goal” the suggestion that “if participants in the legal system act cooperatively in the fact-finding process, more cases will be able to be resolved on their merits more efficiently, and this will help ensure that the courts are not open only to the wealthy.” Preface, THE SEDONA CONFERENCE JOURNAL SUPPLEMENT, 10 SEDONA CONF. J. ____ (Fall 2009.).

While the overriding theme of the 2006 Amendments is the open and forthright sharing of information to remove contentiousness as much as possible, reliance on the good will of counsel may not be sufficient.¹⁰⁸ As a minimum, it would be appropriate to highlight opportunities for resolution of open preservation issues by timely court consideration. Rule 26(c) could be amended to provide that unduly burdensome preservation demands justify issuance of an appropriate protective order.¹⁰⁹ The discovery plan for which counsel are jointly responsible under Rule 26(f) could include a description of any disputed preservation issues. The list of topics for discussion at Rule 16(b) could explicitly require discussion of open preservation topics, thus enabling courts to address them as appropriate. As a former Magistrate Judge has noted, “[t]he more subjects you have to cover, the more you do cover in your 16(b) conference and in your pretrial orders.”¹¹⁰

Finally, Rule 26(c) or an appropriate Committee Note should acknowledge the availability of cost-shifting in the preservation context, given the potential for high costs.¹¹¹ While there is a presumption that a producing party must pay for the costs of production, and, by analogy, preservation, the underlying logic of Rule 26(c) supports

¹⁰⁸ Steven S. Gensler, *A Bull's-Eye View of Cooperation In Discovery*, 10 THE SEDONA CONF. J. 1, 2 (2009)(describing the debate at the Sedona Conference Mid-Year meeting on whether to narrowly define cooperation as limited to activities mandated by the Federal Rules).

¹⁰⁹ See Appendix. The Advisory Committee has already noted in connection with Rule 26(b)(2)(B) that parties “may wish to determine [their] search and potential preservation obligations” by motion in the context of discussion of inaccessible sources of information. See FINAL REPORT (2005)(“CHANGES MADE AFTER PUBLICATION AND COMMENT), *supra* at p. 42.

¹¹⁰ *Panel Seven: Rulemaking and E-discovery: Is There a Need to Amend the Civil Rules?*, 73 FORDHAM L. REV. 119, 123 (2004)(Former Magistrate Judge Heckman, quoted in response to question about the need for an amendment to the list of Rule 16(b) topics).

¹¹¹The costs of preservation (including collection) can easily run up to \$6,000 - \$10,000 per gigabyte, involving intensive work in identifying and managing systems and “key custodians.” It may be necessary to purchase or reallocate storage media and there can be substantial costs of outside counsel, consulting experts and the like. Communication, December 13, 2009, from E-Discovery Director, US based Corporation (copy on file with author).

mitigation of undue burden by requiring payment of some or all of the incremental costs.¹¹² One court has already suggested that cost shifting might be available for preservation of marginally relevant information which “is costly to retain.”¹¹³

VI. Conclusion

Allegations of failure to preserve relevant evidence, and the related requests for sanctions, especially in the form of electronically stored information (“ESI”) are now routinely filed in many cases and the number of reported decisions in WESTLAW has increased from an average of 10 or less per year prior to 2005 to over 90 in 2009.¹¹⁴ This has had serious implications.

It is almost impossible, for example, to do meaningful preservation planning even when parties seek in good faith to meet their preservation obligations.¹¹⁵ A uniform federal preservation rule – provided it is practical and effective – might help unlock the full potential of voluntary agreements and, over time, reduce the burden of collateral disputes on both the judiciary and the litigants. In addition, improved case management rules and acknowledgment of uniform culpability standards for sanctions would go a long way to reducing the current confusion and uncertainty that is the hallmark of preservation in 2010.

¹¹² *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978)(a party may invoke the district court’s discretion under Rule 26(c) to protect him from ‘undue burden or expense’”).

¹¹³ *Treppel v. Biovail (“Treppel IV”)*, 233 F.R.D. 363, 372-373 (S.D. N.Y. Feb. 6, 2006).

¹¹⁴ (Copies on File with Author). There undoubtedly are many more that have escaped the author’s unscientific tracking methods. See also *Symposium on Ethics and Professionalism in the Digital Age*, 60 MERCER L. REV. 863, 899 (2009)(high volumes of spoliation motions were almost unheard of before e-discovery).

¹¹⁵ The FJC Survey (2009) indicates the parties are voluntarily taking steps to freeze the destruction of ESI. *FJC Rules Survey* (2009), *supra*, p. 21- 22 (Figure 9 and text)(at least 50% of potential producing parties - and perhaps more - initiated a litigation freeze).

APPENDIX

Summary of Possible Rule Amendments

(New matter in italics)

Rule 16(b)(3)(B) Contents of the [Scheduling] Order; Permitted Contents. The scheduling order may: [iii] provide for *resolution of issues involving preservation, disclosure or discovery of electronically stored information, documents or tangible things.*

Rule 16(c)(2) Attendance and matters for Consideration at a Pretrial Conference; Matters for Consideration. At any pretrial conference, the court may consider and take appropriate action on the following matters: [F] controlling and scheduling *preservation* and discovery, including orders affecting disclosures, *preservation* and discovery under Rule 26 and Rules 29 through 37;

Rule 26(b)(2)(C) Limitations on Frequency and Extent; When Required. On motion or its own, the court must limit the frequency or extent of discovery, *including any preservation steps required in anticipation of discovery*, otherwise allowed if . . . (i) the *discovery or preservation steps* are unreasonably cumulative or duplicative . . . (ii) the party seeking *discovery or preservation* has had ample opportunity or (iii) the burden or expense of *the proposed preservation* or discovery outweighs its likely benefit, considering . . .”

Rule 26(b)(2)(D). Preservation and Discovery.[NEW] “*Upon receipt of a summons issued under Rule 4 or a subpoena under Rule 45, parties or persons shall undertake reasonable and good faith efforts, subject to the considerations of Rule 26(b)(2)(C), if applicable, to preserve relevant and discoverable evidence which is known, or should be anticipated, to be sought in discovery in the action.*

Rule 26(c) Protective Orders. (1) In General. A party or any person, *including persons subject to subpoena, upon whom preservation demands are made or from whom discovery is sought* may move for a protective order [and a court may order for good causes an order] to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including one of more of the following: [A] forbidding the *preservation, disclosure or discovery*; [and] [B] specifying terms, including time and place, for the *preservation, disclosure or discovery*; [and] [D] limiting the scope of *preservation, disclosure or discovery* to certain matters.”

Rule 26(f)(3) Conference of the Parties; Planning for Discovery; Discovery Plan. A discovery plan must state the parties views and proposals on: [C] any *unresolved* issues about *preservation, disclosure or discovery* of [electronically stored information], including the form or forms in which *electronically stored information* should be produced.

Rule 37(a)(1) In General. On notice to other parties and all affected persons, a party may move for an order compelling *preservation*, disclosure or discovery.

Rule 37(b)(2)(a) For Not Obeying a *Preservation or a Discovery Order*. [If a party] fails to obey an order to *preserve evidence or provide or permit discovery*,” [the court may issue further “just” orders].

Rule 37(c)(1) Failure to *Preserve, Disclose or Supplement*. If a party fails to *preserve or provide information as required by these rules, including but not limited to, information required by Rule 26 (a) or (e) or fails to identify a witness as required by Rule 26(a) or (e)*. . . .

Rule 37(e) Exemption from Sanctions. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide [documents or] electronically stored information lost as a result of the routine good-faith operation [. . .] *of a system or process in the absence of a showing of intentional or reckless actions designed to avoid known preservation obligations*.

Rule 45 (c)(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to a subpoena, *including obligations to preserve relevant and discoverable electronically stored information or tangible things related thereto*.

Rule 45 (c)(2)(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney . . . a written objection to “*preserving, inspecting, copying, testing or sampling*.”

Rule 45 (c)(3)(A)(iv) Quashing or Modifying a Subpoena. On “timely motion, *including a motion filed pursuant to Rule 26(c)*, the issuing court must quash or modify the subpoena if it (iv) subjects a person to undue burden *arising from preservation or compliance*.