

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.

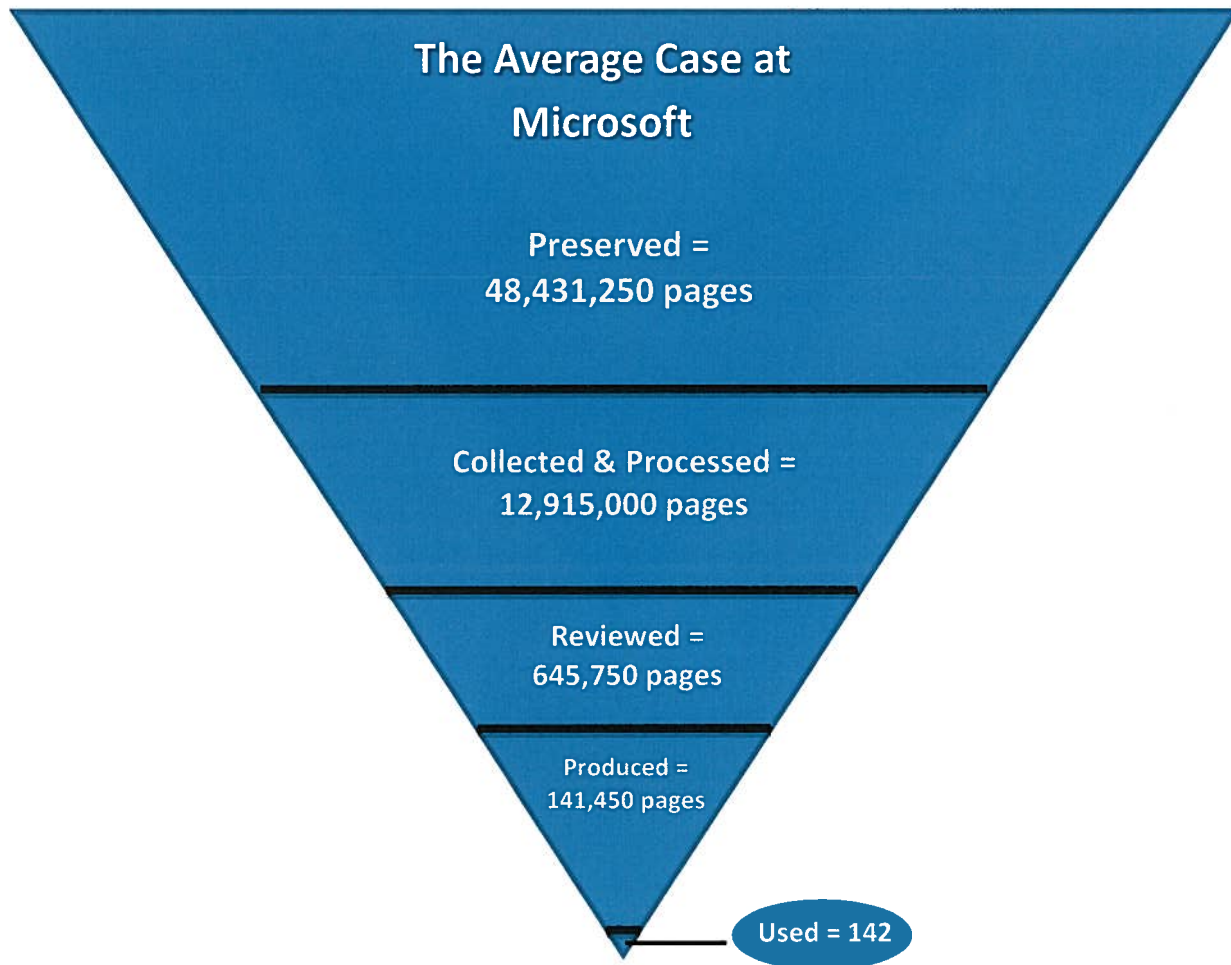
The amount of data stored in this dedicated datacenter greatly understates the *total* volume of documents under preservation at any one time. This is clear for at least two reasons. First, it represents only those materials related to *on-going* litigation matters. As mentioned above, holds for on-going 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


Page 7

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
Microsoft Corporation
Legal & Corporate Affairs – Litigation



Jonathan Palmer
Senior Attorney
Microsoft Corporation
Legal & Corporate Affairs – Litigation



Joe Banks
Director, E-Discovery
Microsoft Corporation
Legal & Corporate Affairs – Litigation

cc: Hon. Mark R. Kravitz
Hon. Lee H. Rosenthal
Prof. Edward H. Cooper
Prof. Richard L. Marcus
Mr. Peter McCabe