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 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 Internacionale* 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.

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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.