RAND CORPORATION

1776 MAIN STREET
P.O. BOX 2138
SANTA MONICA, CA
90407-2138

TEL 310.393.041
FAX 310.393.481

September 7, 2011

Honorable David Campbell
Advisory Committee on Civil Rules
Standing Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Sandra Day O'Connor U.S. Courthouse
401 W. Washington Street, Suite 130, SPC 1
Phoenix, AZ 85003-2118

Honorable Mark Kravitz
Standing Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Richard C. Lee United States Courthouse
141 Church Street
New Haven, CT 06510

Honorable Lee H. Rosenthal
Standing Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Bob Casey U.S. Courthouse
515 Rusk, 11th Floor
Houston, TX 77002

Dear Judges Campbell, Kravitz, and Rosenthal:

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

RAND RESEARCH AREAS
CHILD POLICY
CIVIL JUSTICE
EDUCATION
ENERGY AND ENVIRONMENT
HEALTH AND HEALTH CARE
INTERNATIONAL AFFAIRS
NATIONAL SECURITY
POPULATION AND AGING
PUBLIC SAFETY
SCIENCE AND TECHNOLOGY
SUBSTANCE ABUSE
TERRORISM AND HOMELAND SECURITY
TRANSPORTATION AND INFRASTRUCTURE

OFFICES
SANTA MONICA, CA
WASHINGTON, DC
PITTSBURGH, PA
NEW YORK, NY
DOHA, QA
RAND EUROPE:
BERLIN, DE
CAMBRIDGE, UK
LEIDEN, NL

www.rand.org

OBJECTIVE ANALYSIS. EFFECTIVE SOLUTIONS.

Summary of Preliminary Findings

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

Discussion

Background

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

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

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

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

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

Results of Qualitative Interviews

Metrics

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

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

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

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

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

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

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

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

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

How the Costs of Preservation are Believed to Compare to Production

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

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

---

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

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

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

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

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

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

Uncertainty Surrounding Preservation Duties

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

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

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

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

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

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

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

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

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

The Sources of Uncertainty

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

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

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

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

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

A Need for Guidance

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

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

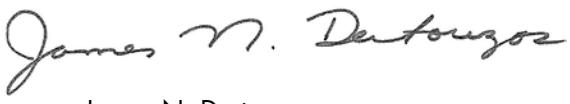
report that affirmative steps are needed to encourage the increased use of automated approaches to help reduce the considerable costs of examining electronic documents for relevancy and privileged communications, the organizational litigants we contacted report few uncertainties about what the law requires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

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

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

Sincerely,

Nicholas M. Pace



James N. Dertouzos

cc: Professor Edward H. Cooper
Professor Richard Marcus