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October 24, 2011

Honorable David G. Campbell
Chairman, Advisory Committee on Civil Rules
United States District Court
623 Sandra Day O'Connor United States Courthouse
401 West Washington Street
Phoenix, AZ 85003-2146

Re: *Restoring the Balance:* An Expanded Proposal Concerning Preservation

Dear Judge Campbell:

I very much appreciated the opportunity to attend and speak at the Discovery Subcommittee's mini-conference on preservation and sanctions held in Dallas on September 9, 2011. I respectfully make this submission[1] in order elaborate on the points and the specific proposal I made there.[2]

Summary. Our current common law preservation regimen is flawed, primarily because from its beginnings it has rested on the unproven assumption that without extensive affirmative preservation steps, massive quantities of ESI would be lost and numerous litigation outcomes unfairly affected. Its imprecision is a plague on everyone, and its inconsistency across jurisdictions is a particular problem for entities that litigate nationally. It imposes daunting

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[1] I wish to thank Tom Allman, John O'Tuel, David Kessler, Jon Palmer, and John Rosenthal for their very helpful comments on prior drafts of this submission. I bear responsibility for any errors or dumb opinions contained herein.

[2] My proposal was described in the Committee's notes as follows:

> (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
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> (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."

Discovery Subcommittee's Posted Notes on the Mini-Conference ("Mini-Conference Notes") at 19-20. http://tinyurl.com/mini-conference-notes (last visited Oct. 22, 2011). The purposes of this letter submission are to expand upon that proposal and respond to the hypothetical concerns posed by Judges Campbell and Facciola.

expenses disproportionate to the benefits obtained, and aspires to a level of perfection that is not justified in a civil litigation system where the standard of proof is preponderance of the evidence.

Balance should be restored to the preservation regimen by (i) forbidding intentional destruction of material still within its retention period in order to deprive others of its use in litigation, (ii) abandoning the "reasonable anticipation of litigation" standard, and instead requiring that affirmative preservation efforts begin when a complaint is duly filed, and (iii) amending Rule 27 to provide for pre-filing preservation orders on a showing of good cause. Punitive sanctions should be limited to instances of bad faith destruction only, whereas negligent loss of data should be addressed with remedial measures, including more discovery. As we reconsider the right balance to strike between preservation costs and benefits, we must remember that trials remain available to resolve civil disputes even where the written records are imperfect, as they always have been.

* * *

My submission is divided into three parts. In Point I, I discuss the profound flaws in the current preservation regimen. In Point II, I briefly examine (i) the most prominent arguments against any preservation rules reform and (ii) the several alternative approaches to reform proposed by the Subcommittee and others. In Point III, I elaborate on my own alternative proposal and respond to the objections and questions raised about it at the conference.[3]

I. THE LAW ON PRESERVATION IS DEEPLY FLAWED

The current preservation regime is materially flawed. It is inconsistent across jurisdictions (Point A, *infra*); imprecise (Point B); unjustified by empirical evidence or indeed any showing (Point C); radical in its new assumption that affirmative steps to preserve suddenly became legally required (Point D); grossly asymmetric in its effect on plaintiffs and defendants (Point E); expensive far out of proportion to its benefits (Point F); and a substantial source of litigation disputes ancillary to the merits (Point G). I respectfully submit that these flaws, individually and cumulatively, require that the current legal requirements around preservation be substantially changed.

A. Inconsistent. *The current judge-made regimen produces different outcomes in different jurisdictions, leading to confusion and unfairness. Companies operating nationally must adhere to the requirements of the most extreme cases.*

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[3] For the benefit of any public readers of this letter, the Committee has created a website containing the materials prepared for the mini-conference and letters, papers and studies submitted to the Committee. http://tinyurl.com/Mini-Conference-Website (last visited Oct. 22, 2011).

Federal law on preservation affects the conduct of innumerable individual and corporate citizens every day, yet it is constantly in a state of flux and has evolved in fits and starts. This is so primarily because our present preservation regimen is the common law result of individual decisions rendered in singular cases at the district court level. Rulings are inconsistent from circuit to circuit, even within single districts.[4] There are no Supreme Court cases on preservation, Circuit Court cases are rare, and because of the nature of discovery disputes, this condition is unlikely to change in the future.

Consequently, companies subject to suit all over the country are left in untenable circumstances. They face disparate requirements from court to court. For obvious reasons some of those who face litigation nationally adhere to the most stringent interpretation of the preservation obligation, even though it may appear only in a single case by a single district judge.[5]

Not only has the decisional evolution of preservation law produced inconsistent requirements, it has often produced unpredictable standards which, when applied retroactively, have produced inequitable results. *Zubulake III* through *V* imposed new, affirmative obligations on parties, potential parties and even their counsel, many of which were not foreshadowed in prior decisions nor, of course, sanctioned by rulemaking bodies or state ethics panels. I was advising two global corporations on preservation at the time those decisions were handed down, and I can personally attest that they were shocking and unsettling to many upstanding corporate organizations. They spurred considerable anxiety and then massive expenditures of money and effort in good faith attempts to conform to the new requirements. The anxiety and expenditures continue to this day.

Because of its general impact, the law on preservation is especially unsuited to development via the common law. A single case does not present the court with information on the effects its decision will have on thousands or millions of other litigants, and so those possible

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[4] For example, one decision holds that standing alone the failure to issue a written litigation hold notice is "at a minimum, grossly negligent," *Pension Committee,* 685 F. Supp.2d 456, 477 (S.D.N.Y. 2010), while another decision in another court sanctions oral litigation hold notices, *Steuben Foods, Inc. v. Country Gourmet Foods, LLC,* No. 08-CV-561S(F), 2011 WL 1549450, at *4 (W.D.N.Y. Apr. 21, 2011)("Nor will the court find that the failure to issue a written litigation hold justifies even a rebuttable presumption that spoliation has taken place."). Judge Scheindlin herself has stated publicly that "there are enormous differences" among the federal circuits and as between state and federal courts. "Panel Urges Caution on Sanctions for Failure to Preserve Data," New York Law Journal, Oct. 13, 2010, available at http://tinyurl.com/NYLJ-Sanctions (last visited Oct. 22, 2011). That the law on preservation is inconsistent across the country is by now not even arguable.

[5] Just prior to the mini-conference, a senior lawyer from a top tier insurance company (whom I will identify to the Committee upon request and with his consent, which I believe will be given) told me that after a lunch meeting with a single district judge, their in-house lawyers concluded the company had no choice but to archive every single email sent or received by persons connected to their company, at great current and future expense. Is this really the result we want, in a time when costly measures such as those affect a company's ability to expand its workforce?

effects are left to be foreseen, if at all, through the judge's individual predilections and predispositions. Ideally, amicus briefs would provide the court with some different perspectives, but outside parties can rarely know about individual cases, and can never know that a district judge is about to issue a bell-ringing decision with effects that will reach them and their practices.

Thus, the inconsistency of the current preservation regimen is a strong reason for the Committee to take decisive action now, rather than to abide the further uneven evolution of the law under the guise of "allowing the law to develop."

B. Imprecise. *The law on preservation affords little definitive guidance to potential litigants Companies seeking in good faith to avoid the shame, cost and prejudice of a spoliation charge under the current regimen inevitably over-preserve.*

In order to be just in its application, the law must be clear to those whose actions it regulates.

The current law on preservation requires parties and potential parties to take "reasonable" steps to preserve evidence when they "reasonably" anticipate litigation. While this sounds good, parties can take no comfort, because what is "reasonable" is in the eye of the beholder, and a "reasonable" standard affords litigants no safe harbors, no bright lines, and little protection from judges who, in hindsight, are brought to see the litigants' actions as having been careless, or even intentionally done in bad faith. Thus, a law which at its core requires parties to take "reasonable" steps is very much a two-edged sword. The absence of clear guidelines in this important area does a great injustice to the companies and their counsel who are attempting in good faith to comply.

Two of the in-house lawyers who spoke at the mini-conference made the same point: a charge of spoliation and, perforce, an opinion finding that spoliation had been committed, are anathema to American corporations.[6] Their companies, indeed all public companies, cannot afford the public relations damage and the sullying of their brands that could result, nor can the individuals take the risk to their careers and reputation. For the same reason they cannot risk an award of monetary sanctions, or an adverse inference instruction and the resulting litigation prejudice that can turn a sound case on the merits into a loser. And so without clear guidance as to what they must do, the companies over-preserve. Not knowing exactly what the speed limit is, they drive 20 mph more slowly than they need to do, thus damaging productivity and impairing efficiency.

The current preservation regimen is imprecise in four significant ways: trigger, scope, manner of preservation, and duration. I discuss each in turn.

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[6] Mini-Conference Notes at pp. 4, 8-9, 17.

Trigger. The uniformly accepted trigger rule is easy to state. A party must preserve when it "reasonably anticipates litigation." But this rule offers litigants no bright line as to when they must launch preservation efforts. For the reasons of reputation, brand protection, and career protection discussed above, companies take no chances with this standard by the simple, if expensive, step of over-preserving. What rational person would decide otherwise and take chances? Representatives of the larger companies who spoke at the mini-conference stated that their organizations do not have a big problem with knowing when to preserve, and that sentiment is also found in the RAND survey submitted to the Committee. But I submit that's because they have all solved the problem of trigger uncertainty by simply starting to preserve long before a complaint is filed. Indeed, Microsoft Corporation, which made an excellent submission[7] to the Advisory Committee, stated that "*[o]nly about one-third of the 14,805 litigation holds at present relate to active litigation.*"[8] Another participant at the mini-conference stated that "[a]t our company, 40% of our holds are not about active litigation."[9] If the trigger rule were changed to eliminate uncertainty (for example, by requiring preservation only when, as I propose *infra*, a party acquires actual knowledge of a filed complaint or formal administrative proceeding), it is doubtless that a substantial amount of the over-preservation that occurs now would cease. (Of course, companies could choose, for their own business reasons, to preserve materials in excess of what the law requires, but they would no longer be forced into over-preserving because of risk produced by the law's ambiguities.)

Scope: How broadly to preserve material is simply unknowable with any precision at present. This is so primarily because the obligation to preserve often arises before a case has been commenced, under the "reasonable anticipation of litigation" standard just discussed. So a party is left to speculate what its potential adversary might allege, and take shots in the dark as to the legal claims and factual theories it will be defending against. Given the breadth of American discovery rights, the scope of what might be requested – and required by a court in hindsight – is vastly broad. To avoid even a charge of spoliation, companies routinely over-preserve. For example, at present, in the absence of presumptive limits on the number of custodians whose ESI must be preserved, it is not unusual for a single litigation hold notice to be distributed to -- and thus require the attention of and action by -- hundreds or even thousands of custodians within the company. If the trigger for preservation were actual notice of a filed complaint or a formally commenced administrative proceeding, the scope of preservation including the number of custodians placed on hold could be more precisely determined by reference to the plaintiff's own recitation of his allegations. And there would be an opposing counsel with whom to dialogue, perhaps cooperatively, about the scope of preservation.

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[7] Letter of Microsoft Corporation to the Advisory Committee dated August 31, 2011 (the "Microsoft Letter"). http://tinyurl.com/MicrosoftLtr (last visited Oct. 24, 2011).

[8] Microsoft Letter at 3 (emphasis in original).

[9] Mini-Conference Notes at p. 18.

Manner of preservation. There is even a dispute in the case law about *how* preservation must be accomplished. Dating back to the beginning of the ESI age, individual employees have traditionally been trusted to select and preserve relevant material, following the centuries-old practice by which businesses have trained and then relied on their individual employees to be careful stewards of their business documents. But a few cases have expressed criticism of the practice, thus raising the possibility that unless companies implement new – and vastly more complex and expensive – methods of preservation, they might be exposed to sanctions.[10] So *another* area of doubt and uncertainty has been created.

Duration: The rule on duration is simple to state: when the case ends the obligation to preserve ends. But there are two unresolved issues that lurk behind that simple façade.

> First, holds that are instituted *prior* to litigation under the reigning "anticipation of litigation" trigger standard have no clearly defined end if litigation never comes. Companies have no way of knowing when they can release the holds, short of waiting until the end of all applicable limitations periods in all possible jurisdictions where the claim might have been brought.
>
> Second, material that has been retained beyond its normal retention period because it has been preserved for use in one case can become ensnared by the preservation requirements of a later-filed case. This has created a situation where theoretically information might never be discarded, even when it is years beyond its destruction date, because of the effect over time of temporally overlapping litigation holds. This problem of overlapping litigation holds is rarely the topic of discussion, and was not raised at the mini-conference, but I submit that it is nonetheless a very real problem.[11]

C. Unjustified. *The current system was created without empirical evidence of need, and what evidence there is suggests that spoliation is not a rampant problem.*

A handful of instances in which custodians attempted to destroy relevant materials has, without critical examination or discussion, been accepted *sub silentio* as sufficient evidence for the proposition that *every* potential litigant in the country must, when possessed of a "reasonable anticipation of litigation," take *affirmative steps* to preserve *all* material potentially relevant to a

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[10] The cases are (i) the *Pension Committee* decision and (ii) *Phillip M. Adams & Assocs. LLC v. Dell Inc.*, D. Utah, Case No. 1:05-CV-64 TS, 3/30/09 (2009 WL 91080). The *Adams* case and in particular its departure from age-old practices is discussed in an article David Kessler and I co-authored: *Outlier or Harbinger? Recent Case Invents New Preservation and Information Management Duties for Corporations* by David J. Kessler and Robert D. Owen, BNA DIGITAL DISCOVERY & E-EVIDENCE, June 1, 2009.

[11] Although my proposal for a trigger upon filing, *infra*, would resolve the first issue related to duration, I do not attempt to deal with the second issue, which in my view has not been sufficiently discussed or studied.

claim its adversary *might* bring. One of the participants in the mini-conference submitted a letter urging that more empirical evidence be gathered prior to any further rule-making,[12] which I found ironic since the entire preservation regimen has been imposed on American litigants *without a shred of empirical evidence that it was necessary*. The only evidence of need before the district judges who expanded the preservation duty with their decisions were the facts of the cases they were deciding. The area is a classic example of bad facts leading to the creation of bad law.

Some of the participants in the mini-conference cited the low incidence of spoliation motions found by the FJC study[13] as suggestive that the current preservation regimen is working and does not need changing, but I submit the data can be read as supporting an alternative, equally valid, conclusion: that spoliation is simply not a widespread problem. Out of 131,992 cases analyzed, spoliation was raised by motion in only 209 cases, or 0.15% of cases filed in 2007-2008. The FJC study notes that this extremely low percentage "compares favorably to other studies," meaning simply that it's at least in the ballpark. FJC Study at 4. Moreover, the spoliation motions resulted in sanctions in only 23% of the cases involving ESI, or 20 cases.

Thus, the FJC study shows that in 20 cases out of 131,992 or (0.015%), spoliation of ESI was found and resulted in sanctions. This is extremely weak evidence that a game-changing preservation regimen was necessary in 2003 or is necessary now. Nonetheless, in the other 131,972 cases, litigants in the federal courts were forced to adopt extensive affirmative preservation measures because our spoliation decisions are based on the unproven assumption that without those measures they would become spoliators also. (See discussion in Point I(D), *infra*.)

Our knowledge of the need for an affirmative preservation rule is imperfect, but what we know now does not justify the sweeping rules that the decisions have imposed on Americans.

It bears recalling that the standard of proof in most civil cases is the preponderance of evidence, i.e., 51-49%. As I mentioned at the mini-conference, this reflects our society's acceptance of "rough justice," loosely speaking, in most civil cases. Our system's settled acceptance of this standard is sharply at odds with the implicit striving for perfection that permeates the preservation decisions.

But what, then, is the answer when evidence is obviously lost, but without the fault of the producing party? What can and should be done to ensure fairness to the non-spoliating party?

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[12] Letter of the Civil Division of the U.S. Department of Justice to the Committee, Sept. 7, 2011 at 1 et seq. http://tinyurl.com/9-7-11-DOJ-letter (last visited Oct. 22, 2011)

[13] Report to the Judicial Conference, Advisory Committee on Civil Rules, "Motions for Sanctions Based Upon Spoliation of Evidence in Civil Cases," Federal Judicial Center, 2011. http://tinyurl.com/FJC-study (last visited Oct. 22, 2011).

Additional discovery is the logical first recourse, not sanctions. Professor Redish observed, in his prescient 2001 article, that without intentional destruction, there can be no fair inference that the evidence lost was necessarily adverse to the party who lost it:

> Indeed, if the logic of a primary spoliation sanction—taking as established the point that the other litigant wished to make on the basis of the destroyed evidence— is the assumption that the party who destroyed potentially relevant evidence did so "out of a realization that the [evidence was] unfavorable," then imposition of such a sanction in the case of routine electronic destruction in the ordinary course of business is wholly improper. The destruction would have taken place, regardless of surrounding legal circumstances.[14]

If additional discovery cannot cure the loss, I submit that the answer is to have a trial, at which witnesses will testify and a jury will weigh their accounts and the available documentary proof, and decide the matter. Remember, and this is key to my whole analysis of the current situation: "Let not the perfect be the enemy of the good." For decades prior to the advent of electronic evidence, our civil justice system operated well and disputes were fairly resolved even in the absence of comprehensive documentary evidence on all elements of the issues to be tried. It can still do so.

Our current preservation regimen is not justified either by any available empirical evidence or our deepest legal traditions.

D. Radical. *The current preservation regime has silently reversed the long prevailing presumption that persons in possession of evidentiary material would not destroy it. Our federal courts no longer trust that this is so, and instead require affirmative direction and policing by lawyers and judges.*

The law until recently did not say to citizens, "You must take affirmative steps to preserve any and all material that might become relevant to a legal dispute." Instead, the law's command was, "Do not destroy something relevant to a legal dispute." Our current preservation regime lives in the gap between those two commands. In the past, the consequence that typically followed a finding of spoliation was a negative evidentiary inference and it was based on the reasonable assumption that the spoliating party's consciousness of guilt led him to destroy the adverse evidence, to keep it from being used against him.

The law thus embodied a prohibition against the deliberate corruption of the legal process by the *intentional destruction* of evidence. A citizen could comply with the prohibition against spoliation simply by being a normally good steward of his possessions and by taking normal, reasonable care not to destroy material that was of obvious relevance to a dispute, e.g., an allegedly defective part such as a tire or a trailer spring, or the contaminated medicine, or an

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[14] Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L. J. 561, 622 (2001)(footnotes omitted).

incorrectly designed item blamed for some adverse event. There was no concomitant requirement that the citizen take affirmative steps to preserve *all* material possibly relevant to the civil action, nor did his lawyer have an ethical duty to prevent him from allowing it to decay or disappear.

But today, since *Zubulake*, we have quietly assented to a radical change in the law, which now requires much, much more than the old law of spoliation, even though the current law uses the law of spoliation as a *stare decisis* justification for its newly created requirements. Before *Zubulake*, participants in American litigation generally presumed that everything that should remain available for use in litigated disputes, was in fact retained. I have never encountered a case in which deliberate destruction happened. Am I so naïve as to believe that deliberate destruction of relevant material never happened? No. But if it did, we still had oral testimony, trial advocacy and juries, and the litigation results reached were fundamentally just.

Now, however, our cases presume the reverse. Our current preservation law presumes and *is entirely premised on* the assumption that unless notified, overseen, restrained and policed by their employer and their employer's counsel, employees will engage in rampant spoliation. This is most ironic, as it is harder today for employees to destroy ESI completely than it was for custodians in times past to destroy paper files. The uncertainty that today's employees will always experience when contemplating a deliberate destruction of ESI is, I submit, a significant brake on their actions. They can never be quite sure they have succeeded if they try to delete all copies of certain ESI. If they try and fall short and an undeleted copy of the ESI is discovered, thus proving their intentional destruction, they can expect to suffer severe consequences. A few poster child cases would do wonders to spread the cautionary word to any American employees that might be tempted to try.

The regime of affirmative preservation and oversight that *Zubulake* and its progeny launched is overkill and, with all respect to one of the finest and most energetic judicial minds of our time, should be overturned.

E. Unbalanced. *A putative plaintiff can create a "reasonable anticipation of litigation" in a defendant without incurring any legal exposure, but in that moment a defendant is legally exposed if he doesn't take immediate, affirmative and often expensive steps to preserve all relevant evidence.*

When it comes to preservation, the deck is stacked against large data producing defendants and in favor of plaintiffs.[15] Under the "reasonable anticipation of litigation" trigger standard, potential plaintiffs can -- *without any legal risk to themselves* -- unilaterally create substantial legal risk to potential defendants. Potential plaintiffs can credibly threaten litigation

[15] Judge Easterbrook made the same point about federal discovery in general in his 1989 article, *Discovery as Abuse*, 69 BOSTON U. L. REV. 635 (1989), which was cited by the Supreme Court in *Twombly*.

and trigger preservation duties and risks without actually filing a complaint. The same is true of persons who send preservation demand letters, which are subject to little control pre-litigation. As one participant at the mini-conference observed, so far there is no "tort of wrongful preservation demand."[16]

By contrast, plaintiffs and their lawyers who take the formal step of filing complaints in federal court are immediately subject to sanctions if their complaints lack a reasonable factual basis or have been presented for an improper purpose. Fed. R. Civ. P. 11(b). Likewise, under many states' laws, the filing of a complaint for an improper purpose can subject the filer to tort liability for malicious prosecution. Exposure to these legal duties inevitably tempers those who would otherwise be quick to commence a case. No such restraint operates on those who merely threaten litigation or send off a preservation demand letter.

This situation has produced a gross asymmetry in our preservation regimen, which as a result is severely unbalanced in its effects on plaintiffs and defendants. The impartiality and neutrality of our vaunted adversary system, which was handed down to us after literally centuries of evolution and of which Americans have been justly proud, has been sullied by elevating the theoretical needs of a putative plaintiff for ESI above the neutrality of our system and considerations of economy, efficiency, and practicality.

F. Expensive. *The hypothetical benefits of the current preservation regimen do not justify the very real costs and burdens.*

When two-thirds of Microsoft's litigation holds do not relate to active litigations,[17] when it preserves 340,000 pages of material for every one page actually used at trial,[18] and when a Fortune 10 company spends $5 million and $100,000 a month to preserve ESI on a case that hasn't been filed,[19] something is drastically wrong. This is not a system that any legislature would design. Is it really a system with which the Committee is prepared to live for another 5 to 10 years, as some have suggested?

It is difficult precisely to measure the financial costs of the current preservation regimen, because its effects are dispersed so widely -- from legal headcount, to the time required of custodians, to technology and technologists, to outside counsel fees and costs – but I submit it is not seriously contested by anyone that, whether or not the amount can be precisely measured, it is very very expensive.

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[16] *See* discussion in Mini-Conference Notes at p. 20.

[17] Microsoft Letter at p. 3.

[18] *Id.* at pp. 4-5.

[19] Mini-Conference Notes at p. 2.

Are the costs justified by the benefits? Given the absence of empirical evidence that the regimen is necessary and the evidence discussed above that even alleged spoliation occurs only rarely, and given that the burden in civil litigation is preponderance not perfection, I believe they are not, and I think that reasonable people would have to agree there is at least a serious question as to whether the costs are justified.

G. Spurs Ancillary Litigation.

The law wisely limits parties to litigating the dispute before the court, and prohibits parties from litigating extraneous issues. Witnesses may not be impeached on testimony collateral to the merits of the instant dispute. The rules of relevance confine the parties' proof to their claims and defenses. The new preservation regimen, however, has spawned an area of dispute entirely ancillary to the merits. This has increased the complexity and costs of litigation in American courts, driven many citizens away from the courts, and as one speaker at the mini-conference noted, has negatively effected our international competitiveness and our Nation's attractiveness to those considering where to locate new ventures. The Committee can take notice of these obvious circumstances. Moreover, I believe the vast increase in costs imposed by our preservation system has not been justified by the number of outcomes that have been materially altered.

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This is not a system anyone would design from scratch, and yet it is the system with which the most sophisticated civil justice system in the world must contend. Its current existence is not the fault of the individual judges whose decisions in the cases before them have led us here, but this situation should be a strong call to action by everyone who loves our judicial system. This letter is a plea that something be done now, not later, and that it be transformative, not incremental.

II. EXPLORING THE ALTERNATIVES

A. The Existing Rules Do Not Contain the Solution.

In the many public[20] and private discussions of this topic over the past few years, persons opposed to any change in the current system have sounded certain themes. The commonly heard objections to rules change are unpersuasive.

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[20] Including the Sedona Conference on Complex Litigation, April 8-9, 2010, which I co-chaired with Bill Butterfield, and the Duke Conference, which occurred a month later, in May 2010.

1. Case management.

Some have suggested that improved case management, meaning more involvement by judges, would ameliorate the situation. This suggestion is not a realistic solution to the pre-filing problems of uncertainty and imprecision in trigger and scope – because pre-filing there is no judge to manage anything -- and on that score little more needs to be said. But I will note that the argument that all we need is more and better case management by the district judges once a case is filed is belied simply by sitting down and reading the committee notes to Rule 26 from 1970 to the present. There have been repeated calls for more case management to solve one problem or another, and those calls have consistently been ineffective. The Supreme Court in *Twombly* took note of "the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side."[21] The likelihood that judicial oversight is the answer is even less likely at present, when many judges lack the expertise to manage ESI issues. There is no reason to believe calls for case management will be more effective if repeated once more, and in the complex world of ESI there is ample reason to believe the exhortations will be ineffective.

2. Invocation of proportionality

Similarly, calls to use the proportionality principle contained in Rule 26(b)(2)(C) ignore that the rule has no application prior to the commencement of a case, and in any event there is no place for the parties to take any disputes they may have as to what, exactly, is proportional in the case they are litigating. Even once case is filed, while I agree that resort to proportionality can sometimes yield benefits, proportionality like reasonableness lies in the eye of the beholder, and affords even the most earnest defendants no safe harbor, and this is particularly true when it comes to preservation.[22]

3. Cooperation

Cooperation, like peacemaking, is a wonderful thing when it is possible between two adverse parties, and The Sedona Conference is to be commended for leading the call for cooperation among litigants and for bringing about whatever change in behavior has resulted. But when one faces a determined and uncooperative adversary, as I have often when litigating matters in New York courts, earnest calls for cooperation fall flat. "War is not the answer" may make a nice bumper sticker for some, but when all other attempts to resolve irreconcilable

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[21] 550 U.S. 544, 559 (2007).

[22] A defendant that had spent $1.5 million to preserve "computer hard drives for thousands of former employees" attempted to obtain an order limiting its preservation obligations and invoked Rule 26(c) in support of its motion. *Pippins v. KPMG LLP*, 2011 WL 4701849 (S.D.N.Y. Oct. 7). The Court observed that "courts in this district have cautioned against the application of a proportionality test as it relates to preservation" and denied the motion. KPMG's effort to shift the costs of preservation to the plaintiff also failed.

differences between antagonists fail, war *is* the answer whether we like it or not, and the same is true of our adversary system. And in any event, as one participant at the mini-conference noted, with whom can one cooperate when there is no action on file and no plaintiff's counsel to call?[23]

4. Rule 26(f)

Likewise, calls to resolve these issues at the Rule 26(f) conference ignore that preservation decisions, under the current rubric, must be made long before the parties assemble for their 26(f) conference. Unless we abandon the requirement for affirmative preservation steps prior to the 26(f) conference, the 26(f) procedure can never be a universal fix for the current system's flaws.

5. "We need more education"

Some well meaning participants in the discussions of what to do about preservation have recently begun to urge that more education of the bench and bar will substantially ameliorate the problems of our current system. This approach has a superficial appeal – who can object to more education and more-informed practitioners and judges? – but it assumes that there is a core set of points which, once taught, will bring about substantial improvement. There is not, and sadly there is in fact substantial disagreement even among the most sophisticated thinkers concerning fairly basic issues. I remarked at the conclusion of a Sedona Conference meeting a few years ago that Sedona's aspiration should be to *simplify* the applicable rules and guidance, not create more papers about ever more technical areas of ediscovery. I said, "If those of us here at Sedona can't agree on what the law does require or should require, how can we expect the other 99% of lawyers and judges to understand the area?" Hence, what would the education these advocates seek teach about the following questions: when preservation is required, what scope could safely be adopted, whether to entrust preservation and collection to custodians or not, how long to keep material on hold if a threatened case is never filed, etc.?

In order to be just in its application, the law must be clear to those whose actions it regulates. The answer is to adopt clear and comprehensible rules first, and *then* educate.

B. Advisory Committee's Alternative Approach 1: "Considerable Specificity"

Prior to the mini-conference, the Committee described three different approaches to rulemaking that it wanted mini-conference attendees and others to address. These were not specific proposals but rather generally described alternative approaches to rulemaking, and they framed the discussion well. The three proposed approaches were discussed at length in the

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[23] Mini-Conference Notes at p. 16 (before litigation begins, "I can't talk to opposing counsel because there is no opposing counsel.")

Committee's "Preservation/Sanctions Issues" memorandum.[24] Its summary of the first approach is as follows:

> Preservation proposals incorporating considerable specificity, including specifics regarding digital data that ordinarily need not be preserved, elaborated with great precision. Submissions the Committee has received from various interested parties provide a starting point in drafting some such specifics. A basic question is whether it is necessary (or really useful) to include such specifics in rules to make them effective in solving the problems reportedly resulting from overbroad preservation expectations. At least, they could create very specific presumptions about what preservation is necessary. Perhaps they could be equally precise about the trigger. It might be that any such precision would run the risk of being obsolete by the time that a rule became effective, or soon thereafter.

Some participants in the mini-conference said this approach had some appeal, because at least to a limited extent it would reduce uncertainty. For example, a rule stating that certain types of ESI need not be preserved would help. So would presumptive limits on the number of custodians whose email must be preserved. A rule stating that a preservation demand letter standing alone, i.e., in the absence of a filed complaint, creates no preservation duties would be beneficial.

But the more specific the rule becomes, the more complex it is. I submit that a major problem with the current system is its complexity, and all involved in the rulemaking process should strive to make the rules understandable and compliance straightforward. The first approach posited by the Committee would not do so, and in any event the best specific rule would likely be overtaken by future technological innovations in short order, creating more uncertainty and requiring more rulemaking.

C. Advisory Committee's Alternative Approach 2: "General Guidelines"

The Committee's memorandum described the second rulemaking approach as follows:

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

A general guideline approach would perhaps help in some instances by making decisions somewhat more predictable, and might help to cure some of the problems of inconsistency we now face, but pre-litigation there would still be no adversary to talk to or court to resort to, there

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[24] Available at http://tinyurl.com/ACCR-Issues (last visited Oct. 22, 2011).

would still be ultimate uncertainty on issues of trigger and scope, and I doubt that costs and risks would be reduced appreciably.

D. Advisory Committee's Alternative Approach 3: "Back-End Sanctions Rule"

And the third approach was described in the Preservation/Sanctions Memo as follows:

> This approach would address only sanctions, and would in that sense be a "back end" rule. It would likely focus on preservation decisions, making the most serious sanctions unavailable if the party who lost information acted reasonably. In form, however, this approach would not contain any specific directives about specific preservation issues. By articulating what would be "reasonable," it might cast a long shadow over preservation without purporting directly to regulate it. It could also be seen as offering "carrots" to those who act reasonably, rather than relying mainly on "sticks," as a sanctions regime might be seen to do.

The single best thing the Committee could do would be to adopt a rule that sanctions (other than allowing more discovery) would not be available in the absence of bad faith on the part of the producing party.[25] Given the difficulty of achieving perfect deletion (which discourages attempts at spoliation), given the civil justice system's satisfaction with a preponderance of the evidence standard and the availability of trials (which should discourage all of us from a costly pursuit of perfection in preservation), given the impracticality of any pre-filing solutions (when often no adversary is available with whom to stipulate and no neutral is available to help when stipulation is impossible), and given the expense of over-preservation which results from the current regime, much would be accomplished by the simple expedient of assuring parties that if they pursued their preservation decisions in good faith they would be insulated from cost awards, adverse inference instructions and dispositive sanctions. I weave precisely such a rule into the proposals I make *infra*.

E. Technology

It is tempting to think that there exists a technological solution to this problem that technology has created. While it can ease the burden of retrieving relevant materials from a large mass of ESI, there is no simple solution to the many problems with the current preservation

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[25] Connecticut has adopted a new rule of procedure effective January 1, 2012, barring sanctions for a failure to provide information lost owing to routine, good faith operations of systems or processes "in the absence of a showing of intentional actions designed to avoid known preservation obligations." Practice Book Revisions, Superior Court, Rules of Professional Conduct, Sec. 13-14 (emphasis added):

> (d) The failure to comply as described in this section shall be excused and the judicial authority may not impose sanctions on a party for failure to provide information, including electronically stored information, lost as the result of the routine, good-faith operation of a system or process in the absence of a showing of intentional actions designed to avoid known preservation obligations.

regimen discussed here. And in any event, technology is only available and helpful to those parties who have the internal resources and staff or the financial wherewithal to hire outside help. Technology is not a solution for the smaller companies that lack both. And in any event I think adopting a rule that depends on technology for compliance is akin to the detested unfunded mandates from Congress that burden the states' budgets. Many at the mini-conference were skeptical of a technology silver bullet for these and other reasons.[26]

F. New York State Bar Association Proposal

On the whole, the NYSBA proposal, which was submitted to the Committee[27] and obviously represents a great deal of thoughtful work, does little to address most of the flaws identified herein. Its principal features are as follows:

Trigger: The NYSBA report proposes a new Rule 26(h)(1)[28] which would provide that the "duty to preserve" arises "when a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action." This maintains the "reasonable anticipation of litigation standard" which suffers from the flaws discussed above, most notably (i) the imprecision created by the reasonableness standard, (ii) the imbalance that results when potential defendants can be made subject to legal duties while the potential plaintiffs are exposed to no legal risk until they actually file an action, (iii) the potential expense of preserving material for actions that are never filed, (iv) the radical change wrought in our judicial system's view of the likelihood that custodians will successfully spoliate, and (v) the inevitability that even under the NYSBA's slightly tighter trigger standard there will still be substantial ancillary litigation.

Scope. Proposed Rule 26(h)(2) merely attempts to incorporate the 26(b)(2)(C) proportionality principal into scope determinations, but this determination would still have to be made in many cases by potential defendants pre-filing and without any adversary to talk to or court to resort to, and leaves unaddressed (i) imprecision, (ii) imbalance, (iii) expense, and (iv) ancillary litigation.

Sanctions. Proposed Rule 37(g)[29] does require the court to "select the least severe remedy or sanction necessary to redress a violation of Rule 26(h)" but it maintains the *Pension*

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[26] Tom Allman, Maura Grossman and Jason Baron submitted an excellent piece to the Committee that explored the possibilities and limitations of current technology, which can be found on the Dallas mini-conference website at http://tinyurl.com/PreservationTechnology (last visited Oct. 22, 2011). Thomas Y. Allman, Jason R. Baron and Maura R. Grossman, "Preservation, Search Technology & Rulemaking."

[27] The Interim Report of the New York State Bar Association ("NYSBA Report") can be found at the mini-conference website at http://tinyurl.com/NYSBA-Report (last visited Oct. 22, 2011).

[28] NYSBA Report at 36.

[29] *Id.* at p. 37.

Committee multi-level analytical scheme of fault – negligence, gross negligence, willfulness and bad faith – and permits sanctions for negligent action and allows cost-shifting "regardless of any culpability."[30] In light of the imprecision and imbalance factors, I submit this approach is unduly punitive of producing parties. The complex categorization of fault is itself a massive invitation to ancillary litigation, for what adversaries will not want to argue about the distinctions among the four categories? I submit that if defendants have not destroyed material in bad faith no sanctions should be considered. The proposed sanctions rule does provide that "it is evidence of due care" if a person with duties under the proposed preservation rule "timely . . . disseminates and maintains a reasonable litigation hold" but this is scant comfort, especially since the comment to that rule pulls back on even that limited safe harbor when it states that

> if an employee intentionally destroyed potentially relevant [material] despite his or her company's timely . . . dissemination and maintenance of a reasonable litigation hold, a court might be justified in finding such actions constituted exceptional circumstances that would eliminate the safe harbor.

This is unfortunately yet another thing about which disputants could litigate.

G. Lawyers for Civil Justice

Lawyers for Civil Justice submitted a paper to the Committee that contains a proposal that a party seeking sanctions bears the burden of proving (i) a willful breach of the duty to preserve that (ii) denies the party seeking sanctions access to specified information or material that is (iii) relevant and material to the claim or defense of the party seeking sanctions, (iv) causing demonstrable prejudice to the party seeking sanctions because (v) no alternative source exists for the specified information or material.[31]

H. Cost-shifting

Recent cases reflect an emerging tendency to award costs to preserving/producing parties in instances in which discovery abuse has multiplied the litigation costs.[32] One can infer from this trend that individual courts in individual cases are becoming increasingly aware of the massive costs that ediscovery and preservation can impose on producing parties, and of the potential for abuse. While cost-shifting orders entered in many individual cases could, over time, have some incremental effect on litigants' practices, this approach would still be plagued by inconsistency and unpredictability, and thus would afford producing parties little solace in the near future, if ever. Cost-shifting imposed by a rule could have a more dramatic effect on

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[30] Proposed Rule 37(g)(2)(C)(v). NYSBA Report at 38.

[31] http://tinyurl.com/LCJ-Paper (last visited Oct. 22, 2011).

[32] *See, e.g., In re Aspartame Antitrust Litig.*, 2011 WL 4793239 (E.D. Pa. Oct. 5, 2011) (over $510,000 in ediscovery costs awarded against losing party plaintiffs).

requesting parties' actions, but would not address the core issue that the Committee has taken up, which is preservation. In short, while cost-shifting by case law or rule would effect a welcome change in current practices, and while it could be a useful tool for courts to use in egregious cases, it is by no means a complete solution.

III. SIMPLE, CLEAR RULES SHOULD BE SUBSTITUTED FOR THE CURRENT REGIMEN

One of the great drawbacks to the current regimen is its increasing complexity, which threatens to put understanding and compliance out of the reach of many. The Committee should, I respectfully submit, strive to adopt a set of rules that can be comprehended and followed by the vast majority of competent attorneys. I recognize that simplicity comes at a price, but one huge benefit would be that the courthouses of the Nation would remain open to the middle class of individuals and companies.

Consequently, I propose that the following five principles form the basis for a combination of rules and explanatory comments that would, in application, prevent substantial injustices but at the same time be sufficiently comprehensive and more easily comprehensible.

A. *General Prohibition Against Intentional Destruction of Litigation Materials.* The first principle would make it sanctionable to destroy any material (i) while it is still within its retention period (as established by a retention schedule duly adopted in good faith or established by law) (ii) with the intention of making it unavailable to an adversary in litigation, whether specific litigation is reasonably foreseeable or not.[33]

B. *Trigger.* The duty to preserve material would be triggered when a defendant or respondent receives actual notice that a complaint or petition has been duly filed against it, or a formal administrative claim that is a statutory prerequisite to filing

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[33] This proposal was first made, unbeknownst to me, by Prof. Martin H. Redish in his 2001 article, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 624 (2001). Prof. Redish stated there:

> under my proposed standard *any* destruction other than those regularly scheduled would be sanctionable, if the defendant was aware both of the likelihood of suit and of the likely discoverability of the destroyed documents. Thus, a defendant would not be allowed to willfully destroy documents out of a fear that they may prove harmful in an impending suit.

I was unaware of Professor Redish's article until preservation scholar and friend Tom Allman told me about it recently.

a complaint in a U.S. District Court has been duly commenced. The trigger for a plaintiff would also be when the complaint is filed.[34]

C. *Pre-filing Preservation Orders Available for Good Cause.* Rule 27 would be amended to empower district courts to order pre-filing preservation for good cause shown in potential matters of which they would have jurisdiction. Because the producing party would be on notice and likely present, this procedure could apply many of the solutions that some have suggested as solutions to problems with the existing regimen: (i) dialogue and ideally cooperation with known opposing counsel, (ii) management of preservation issues by a court, (iii) application of Rule 26(c)'s proportionality principle, and (iv) cost-shifting in appropriate cases. Combined with the filing-as-trigger rule it could be a powerful tool to prevent unfairness in egregious cases. Its mere existence in the rulebook would likely spur voluntary cooperation and obviate application to the district court in many cases.[35]

D. *Scope.* The scope of preservation would be bounded by the active complaint, petition, etc., duly filed, but would be limited to material used in the conduct of the preserving party's business, and presumptively would not include the types of material excluded from discovery and preservation by the 7th Circuit pilot project.[36]

E. *Sanctions.* Punitive sanctions would not be available in the absence of evidence that the party from whom sanctions are sought acted in bad faith. This rule clarifies that the traditional command of the law of spoliation – Thou Shall Not Destroy – should be the

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[34] *Alternative Trigger – Service of Discovery Requests.* Actually, the trigger would most logically engage upon the service of discovery requests. This would give clear definition to the scope of preservation required, and would also lead plaintiffs to serve discovery requests as early as possible in the litigation. With the protection of my first proposal – the general prohibition against intentional destruction of discovery materials – it is unlikely that significant losses would occur. Professor Redish made a similar proposal back in 2001. Redish proposed that "the filing of a discovery request clearly describing the category of documents to be produced should trigger respondent's absolute obligation to preserve all such documents." Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 624 (2001). Prof. Redish added that if the producing party objected to the requests, the producing party's "absolute duty to preserve should be triggered [by] the issuance of a discovery order by the court." *Id.*

[35] I learned just today that Professor A. Benjamin Spencer published an article making substantially the same suggestion earlier this year. A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2005, 2020 (2011). My thanks again to Tom Allman who alerted me to this article.

[36] *Presumptive Limit on Custodians.* Many have argued that any rule on scope should also include a presumptive limit on the number of custodians whose ESI must be preserved, subject to being increased upon a showing of good cause. I personally favor that approach.

only source of a power to sanction a spoliating party. Negligent loss of data would not be sufficient, but could be addressed by additional discovery or other remedial measures.

Discussion and Rejoinder

One jurist at the mini-conference raised a question about a patient death and posed a hypothetical in which the hospital's nurses' notes were automatically overwritten after 90 days. Because the deletion was automatic, the general prohibition against intentionally destroying materials would not prevent their destruction nor punish the hospital. Upon further reflection, my answer to that query is that not every refinement to the system needs to come from the Committee and that the complex system of legal interrelationships present in the hypo could and probably already do contain the solution. In reality, hospitals likely retain such records themselves for purposes of defense, or research, or any of a number of business reasons. Current statute and regulations probably already require an applicable retention period. If not, a legislature could provide for mandatory retention periods that are more than sufficient for a plaintiff to draft and file a complaint. Insurance carriers could also require certain retention periods as a condition of coverage, calculating that knowing what happened in fact is more often than not useful to a reasonable resolution of a claim. My proposal for pre-filing application for preservation orders would be another way to prevent the data loss. And in those cases where data was not preserved, the matter would be decided by witnesses' testimony and a jury's verdict rendered under the preponderance of the evidence standard. It is impossible to achieve perfection when it comes to losing potentially relevant evidence – data will be lost – but in striving to do so, our decisional law has brought us to this point of having a system that is inconsistent, imprecise, unjustified, radical, unbalanced, and expensive and which makes ancillary litigation inevitable.

Another judge asked a good question about statutory regimes that require the exhaustion of administrative remedies. I have amended my proposal to include as a preservation trigger the formal commencement of an administrative proceeding that is a statutory prerequisite to filing a civil action. I realize that in the case of certain such proceedings the filing of a complaint can be done with little effort and very little legal risk (e.g., an EEOC filing), but I believe on balance it would be better to require preservation in those instances than the vast amount of pre-litigation over-preservation that now plagues the system.

I examine briefly below how well these principals would address the deficiencies in the current preservation regimen:

Flaw in Current Regimen	**How Rules and Comments Based on These Principles Address Each Flaw**
Inconsistent	Consistency would be achieved in areas now plagued by inconsistency: trigger, scope, duration, and mens rea.

Flaw in Current Regimen	How Rules and Comments Based on These Principles Address Each Flaw
Imprecise	Rules and comments consistent with these principles would more precisely define trigger and scope, two major sources of current uncertainty that often lead to over-preservation, as well as the state of mind that must be shown before punitive sanctions could be ordered. The duration problem of how long to retain material being held in anticipation of an action that is never filed would disappear. The problem of overlapping serial holds is not solved by these principles.
Unjustified.	These proposals do not rest – as does the prevailing regimen -- on the unproven assumption that spoliation will be rampant unless minutely supervised by employers, lawyers and courts. By making preservation requirements less complex and expensive, my proposals make the lack of such evidence less offensive to fundamental fairness.
Radical	Rules and comments consistent with my proposals would still require affirmative preservation steps once the complaint has been filed, but would substantially reduce the uncertainty and burden of affirmative preservation.
Unbalanced	Defendants would not be exposed to legal jeopardy for failing to take affirmative preservation steps until the plaintiffs suing them were themselves subject to all the legal risks one incurs when filing a complaint in court.
Expensive	Preservation for unfiled actions would no longer be required, and the scope of preservation could be more precisely determined by the producing party, or negotiated with a known adversary with the assistance, if necessary, of the court. The problem of overbroad predictions of scope would largely end. If the rule were to provide for presumptive limits on the number of custodians preserved (subject to expansion for good cause or by agreement), the costs of preservation would plummet.

Flaw in Current Regimen	How Rules and Comments Based on These Principles Address Each Flaw
Spurs Ancillary Litigation.	Preservation would continue to be an area of the law in which disputes require judicial resolution. But under this proposal, trigger disputes would almost entirely disappear, or be relatively easy to resolve, and questions about scope would no longer be a prime source of anxiety and litigation. It would no longer be necessary to determine whether an incident of spoliation was negligent, grossly negligent, reckless or intentional. How litigation holds were disseminated would be up to the business judgment of the individuals and entities affected, recalling that deliberate destruction is rare.

I realize these proposed rules are radical when compared to what we have become used to over the last ten years. But the fact that the shock has subsided and parties have found ways to accommodate the new regimen does not justify its retention, and I submit respectfully that a "tinkering around the edges" approach to rulemaking will fail to address the very real flaws in our current system.

IV. Concluding Remarks

> *"No one, I suppose, expects of a Rule that it shall solve its problems fully and forever. Indeed, if the problems are real ones, they can never be solved. We are merely under the duty of trying continually to solve them."*
>
> Benjamin Kaplan, reporter,
> Advisory Committee on Civil Rules, 1960-66.[37]

Professor Kaplan's admonition is especially apt today. No proposal for rules change can cure all of our civil justice system's current ills, and thus no solution should be rejected because it is not perfect. I respectfully submit that the Committee should recall that it does not operate in a vacuum; other bodies including legislatures and regulatory agencies have roles to play. Existing laws and regulations already prescribe literally thousands of document retention requirements, and other law-making bodies apart from this Committee can fill any gaps that become apparent over time. Companies themselves, for enduring business reasons, need and require their employees to be good stewards of their data.

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[37] Benjamin Kaplan, *A Prefatory Note*, 10 B.C.L. REV. 497 (1969). I thank Judge Lee Rosenthal for calling attention to this excellent quotation at the 2011 annual meeting of The Sedona Conference® Working Group 1.

My proposals do not attempt to address all current issues. Take but two examples:

- Putative class actions can allege vastly overbroad classes, but years can pass before the court determines the precise scope of a permissible class, so in those cases a filing trigger will not definitively narrow the scope of discovery as it pertains to putative class members.

- Many more EEOC filings are made than ripen into litigation, so a trigger upon filing of a claim with the EEOC will cause some over-preservation, but the benefits of a filing trigger would accrue in thousands of other cases (and the volume of preservation required in most employment actions is small).

Nor do my proposed Principles encompass all possible solutions, a few of which follow:

- Presumptive limits on the number of custodian mailboxes to preserve could provide a baseline from which parties could negotiate and off of which courts could rule.

- Loser pays could be instituted for spoliation motions, thereby eliminating the "free shot" that movants currently enjoy at winning sanctions from the producing party. Loser pays is not our tradition but the massive increase in potentially relevant data and the resulting probability that good faith mistakes will occur make the current practice of not awarding fees to a winning party very unfair.

- Baseball arbitration-style dispute resolution in discovery disputes (in which the arbitrator must choose solely from between the team's and the player's confidential last offers) could help to push discovery adversaries towards the middle in their final proposals.

- Parties seeking "discovery-on-discovery" should be required to demonstrate something more than mere suspicion, on the reasonable presumption that all parties and their counsel obey the law.

Doubtless other ideas will come to the fore in the years to come.

Whatever course the Committee follows, there will be unanticipated and unintended consequences. But that's life, as Judge Kaplan taught us, and future generations of thoughtful judges and lawyers will address them as they arise.

* * *

I submit that I have shown herein that while my proposal for a filing-as-trigger rule is not perfect and does not resolve all problems, it would bring substantial improvement to the current regimen and does not suffer from any fatal flaws. I respectfully submit it for consideration by the Committee. I thank you and the Committee for the opportunity to make this submission, for your work on this problem, and for your consideration.

Respectfully yours,

Robert D. Owen