The Sedona Conference® Working Group 1

Membership Survey on Preservation and Sanctions

Survey date: August 3-15, 2011

Total Responses: 132 (17.8% of WG1 membership)

1.(A) Please indicate the percentage of cases in which you participated in state and federal courts within the past five years.

State Court	33.75%
Federal Court	68.58%

1.(B) What role do you primarily play in litigation?

Lawyer	75.0%
Vendor	3.0%
Consultant	9.8%
Records Manager	0.8%
Litigation Support	7.6%
IT	0.0%
Other	3.8%

1.(C) Regardless of your role, which side were you on?

Defense	69.22%
Plaintiff	27.66%
Nonparty	14.54%

2. In your experience, how often do preservation problems that you consider significant arise in the following general types of cases?

	Never	Rarely	Sometimes	Often	Always
Over $1 million	1	11	38	53	29
More than $500k less than $1 million	3	16	56	45	12
Less than $500k	5	32	52	34	9

3. How often and in what percentage of lawsuits in which you have participated during the past five years has a preservation issue arisen that required court intervention? Please answer both questions (A) and (B).

(A)

No cases	15.2%
1-10 cases	64.4%
11-50 cases	15.9%
More than 50 cases	4.5%

(B)

0-25%	70.6%
26%-50%	11.1%

51%-75%	13.5%
76%-100%	4.8%

4.(A) How often within the past five years have you raised with the court (e.g., by motion, phone call, or a letter) a claim that the opponent party has failed to comply with preservation obligations, which adversely affected your ability to present your case?

Never	23.5%
Rarely	38.6%
Sometimes	31.8%
Often	6.1%
Always	0.0%

4.(B) Please check one of the following statements that most closely matches your experience over the past five years:

Preservation issues arise more frequently in federal court	46.2%
Preservation issues arise more frequently in state court	8.3%
Preservation issues arise about equally in state and federal court	45.5%

5. In what percentage of cases in which you have participated on the defense side within the past five years have you taken steps to preserve information before a lawsuit has been filed?

0-25%	31.8%
26%-50%	19.7%
51%-75%	22.7%
76%-100%	25.8%

6. How often within the past five years have you or your client taken steps to preserve evidence anticipating a lawsuit that has never been filed or that settled before filing?

Never	11.4%
1 to 10 times	59.8%
11 to 50 times	17.4%
More than 50 times	11.4%

7. Parties engage in multiple stages of preserving and producing information in litigation, each of which can impose substantial costs. Please indicate the percentage of the total cost of all seven stages (including, e.g., time and effort spent by you, your client, and your client's employees) that are typically incurred for each of the following seven preservation and production stages. (your responses must total 100%)

Identifying potentially discoverable information to comply with preservation:

11.38%

Steps, if any, involved in collecting information pending discovery:

10.69%

Costs incurred in storing information in order to comply with preservation obligations:

7.44%

Processing information for review:

14.34%

Reviewing information for responsiveness before production:

29.64%

Reviewing information for privilege before production:

18.12%

Formatting & production of relevant information:

7.34%

8.(A) How often and in what percentage of cases in which you participated within the past five years has ESI, which is discoverable and stored overseas, been subject to the data privacy protection laws of other countries? Please answer both questions (i) and (ii).

(i)

Never	21.2%
Rarely	28.8%
Sometimes	28.8%
Often	18.9%
Always	2.3%

(ii)

0-25%	65.2%
26%-50%	20.5%
51%-75%	10.6%
76%-100%	3.8%

8.(B) How often within the past five years have you incurred added costs to preserve ESI stored overseas, which was subject to the data privacy protection laws of other countries?

Never	32.6%
Rarely	28.8%
Sometimes	26.5%
Often	9.8%

Always	2.3%

9. In what percentage of cases in federal court in which you have participated within the past five years have you met and conferred under Rule 26(f) and discussed preservation issues, the results of which were reported in a Rule 26(f) discovery plan, addressed in a Rule 16(b) scheduling order, or otherwise brought to the attention of the court?

0-25%	28.0%
26%-50%	22.0%
51%-75%	27.3%
76%-100%	22.7%

10.(A) In what percentage of cases in which you have participated within the past five years have you taken steps to preserve (either "in place" or through collection) ESI stored in laptops, home computers, tablets computers, smart phones, personal assistant devices, or other mobile devices?

0-25%	13.6%
26%-50%	11.4%
51%-75%	25.0%
76-100%	50.0%

10.(B) In what percentage of cases in which you have participated within the past five years have you taken steps to preserve (either "in place" or through collection) ESI stored on servers controlled by a non-party (i.e., "the cloud")?

0-25%	65.2%
26%-50%	16.7%
51%-75%	12.1%
76-100%	6.1%

10.(C) In what percentage of cases in which you have participated within the past five years have you taken steps to preserve (either "in place" or through collection) ESI stored in "social media" sites?

0-25%	80.3%
26%-50%	10.6%
51%-75%	6.8%
76-100%	2.3%

10.(D) In what percentage of cases in which you have participated within the past five years have you taken steps to preserve (either "in place" or through collection) ESI stored in employer-controlled "collaborative" or shared sites?

0-25%	39.4%
26%-50%	21.2%
51%-75%	18.9%
76-100%	20.5%

11.(A) How often have issues relating to whether or when a preservation duty is triggered been the subject of dispute in cases in which you have participated within the past five years?

Never	14.4%
Rarely	49.2%
Sometimes	25.0%
Often	11.4%
Always	0.0%

11.(B) Would a rule change that lists examples of specific events that trigger the preservation obligation (e.g., complaint filing, notice of intent to sue), while

retaining the common-law requirement that the obligation arises when "litigation is reasonably anticipated," make any difference in your evaluation of when the preservation obligation arises in your cases?

Never	24.2%
Rarely	31.1%
Sometimes	26.5%
Often	15.9%
Always	2.3%

12.(A) In what percentage of cases in which you have participated within the past five years have you advised your client to preserve "everything" that is potentially discoverable?

0-25%	38.6%
26%-50%	9.8%
51%-75%	17.4%
76-100%	34.1%

12.(B) In what percentage of cases in which you have participated within the past five years have you advised your client to preserve information that was potentially discoverable when the cost of preservation was not proportional to the amount of damages at risk or the issues at stake in the lawsuit?

0-25%	48.5%
26%-50%	23.5%
51%-75%	17.4%
76-100%	10.6%

13. Assuming that spoliation of evidence has prejudiced a party, what culpability standard should be required to impose a "serious sanction," including sanctions listed in Rule 37(b)(2)(A) for failing to preserve ESI?

Purposeful Efforts to Destroy Evidence	6.1%
Willfulness, in Bad Faith	36.4%
Recklessness	17.4%
Gross Negligence	14.4%
Negligence or Fault	2.3%
No Per Se Standard - depends on the circumstances	23.5%

Note: The following questions were optional and the response rate varied.

14. In your experience over the past five years, have preservation issues become increasingly significant in civil litigation?

Yes	95.1%
No	4.9%

If yes, is this primarily or substantially due to the increasing volume or complexity of ESI?

Yes	77.1%
No	22.9%

If this change is not due primarily or substantially to ESI, what are the principal factors?

- Another significant contributing factor is the belief - fueled by some of the decisions - that the cost of making a spoliation claim is small compared to the

potential benefit of persuading a court that conduct less than willful deserves a substantial sanction.

- Preservation issues have become increasingly significant in civil litigation over the past five years due to an increased judicial emphasis on sanctions for spoliation without providing consistent direction as to: (a) when the preservation obligation attaches; (b) what is a reasonable scope of material for preservation; and (c) what level of effort is required to avoid sanctions (or, put another way, what level of culpability will give rise to sanctions). In addition, an increased emphasis on this topic in the legal landscape in general has allowed enterprising litigants to leverage issues related to preservation as a means of harassing or burdening opponents with the intent of forcing victory on collateral issues rather than on the merits.
- A small minority of published judicial opinions are increasingly expanding the criteria of what 'ought' to be preserved in the name of reasonableness. Each published opinion adds to the list of obscure ESI which a party risks not preserving and is creating a reasonableness expectation that is skewed towards over-preservation.
- I think the change is also due, in part, to increased awareness by courts and practitioners of the changing nature of business and all communication and, accordingly, the reality that ESI is an essential part of civil litigation.
- Lawyers' and judges' awareness of the issue.
- An additional comment to my "yes" answer - the volume, including in many cases legacy data - has raised the complexity of even identifying sources of potentially relevant data.
- Opposing counsel's lack of knowledge of ESI issues or willingness to engage in a fruitful Rule 26(f) conference. Client's risk adversity and knowledge of cases that involve sanctions. These cases induce hoarding behavior because parties made preservation decisions in an abundance of caution. Outside counsel's risks associated with failure to advise a client to keep information that may be requested later drive behaviors that are at odds with the proportionality principle. Often, the court is asked to arbitrate the issue later in the case, and parties and their counsel feel that they can't take the risk that the court might disagree with their proportionality decisions.
- A better understanding of what is at stake with regard to preservation. As courts and litigants understand the technical issues better, what may have been thought of as easily preservable now can be seen as too costly, or what may have been thought of as unpreservable can now be seen as preservable.

- "Failure to preserve" claims have increasing settlement value. Litigants realize this and seek to raise the specter of such claims as additional leverage in the settlement process. Because the apparent standard is "preserve everything" it is virtually impossible to meet so is a fruitful area for litigation. It is becoming a "standard" part of discovery in large civil cases.
- The weaponization of ediscovery coupled with uncertainty. In the federal system alone, nearly 1000 judges and magistrates, guided but not bound by their brethren, review a responding party's reasonableness through the finely focused lens of hindsight and, when they deem conduct lacking, are empowered to issue harsh even draconian sanctions. As a consequence, winning the procedural war can be just as important, and in some instances more important, as winning the substantive.
- The enactment of the HITECH Act and the requirement that all providers become meaningful users of electronic health records (EHRs) is having a significant impact on the healthcare industry and the process by which information is obtained from the medical record for both regulatory investigations (claims payment , privacy and security, and other matters) as well as issues and concerns about the quality and safety of technology in healthcare -- as evidenced by the following two (2) recent cases: Death of Baby Genesis Burkett, http://www.huffingtonpost.com/2011/04/06/hospitals-sodium-overdose_n_845689.html; http://articles.chicagotribune.com/2011-06-27/news/ct-met-technology-errors-20110627_1_electronic-medical-records-physicians-systems. Suicide of Nurse in Seattle - Kimberly Hiat, http://www.msnbc.msn.com/id/43529641/ns/health-health_care/t/nurses-suicide-highlights-twin-tragedies-medical-errors/

  [personally identifying information redacted]

  Additionally, the preservation of potentially relevant ESI has the attention of our legislature. The Office of the National Coordinator for Health Information Technololgy (ONC) has published an Advanced Notice of Proposed Rulemaking (ANPRM) for Metadata Standards to Support Nationwide Electronic Health Information Exchange. It was published in the Federal Register on Tuesday, August 9, 2011: http://www.federalregister.gov/articles/2011/08/09/2011-20219/metadata-standards-to-support-nationwide-electronic-health-information-exchange; http://www.gpo.gov/fdsys/search/pagedetails.action?granuleId=2011-20219&packageId=FR-2011-08-09&acCode=FR; http://www.healthcareitnews.com/news/onc-seeks-input-ehr-metadata.

Response period for the ANPRM is 45 days, so we can expect comments due on or about September 23rd.

I personally, feel a very strong personal and professional commitment to the development of standards which both improve the quality and safety of healthcare and support the spirit and intent of FRCP 1 "just, speedy, and inexpensive determination of every action and proceeding."

- Lawyers fail to proactively negotiate or seek court intervention to identify a sensible scope for preservation when the obligation first arises. Rule 26 is too late.
- Expanding obligations imposed by court rulings, such as sending hold notices to former employees, independent dealers, former lawfirms, etc.
- Storage capacity on live systems and the dynamic nature of many types of ESI (especially data)
- The burgeoning "ediscovery" law practice and advocate judges pushing particular technologies.
- Qualified "yes." Increasing emphasis on preservation has been a function of increasing visibility of ESI as a means of testing the truth of a person's formal statements, and a way to detect dishonesty through a person's efforts to alter or destroy ESI after the fact. ESI itself has been present in "documents" for more than a generation, and much of the increasing "volume" is a matter of more complex form instead of substantive content. Compare, for example, the volume of a one-page, plain-text message (1000 bytes) vs. a one-page Word document (20,000 bytes) vs. a one-minute video clip (10 million bytes). I don't know that ESI has increased the amount of truly material information that has to be preserved. It does seem to have increased the noise & trash surrounding the material information that needs either to be separated, or preserved & separated later.
- It's primarily due to over preservation and none of the questions in the front end of the survey address that cost impact. Generally, we cast the preservation net more broadly than just the actual custodians selected for review and production out of fear of spoliation claims. The mere existence of a motion to compel in the public domain is generally spun by the media as something intentional by the big bad company and once that bell is rung you cannot unring it. The damage to your company's goodwill is impacted. And plaintiffs' counsel are aware of this and will utilize it in their litigation strategy. We use Exchange 2010, so when a custodian is placed under Lit Hold, their mailbox is Lit Hold enabled -- meaning that every email they

send, receive, delete or alter is captured. Effectively there is no way to delete any email. This process ensures there can be no spoliation (voluntary or involuntary) for email. Since 90 to 95% of all collected data is culled out (meaning not responsive), we are over preserving 90 to 95% of the data. If there were rules that required the parties to agree upon search terms, date limitations, custodians, etc. to use in the preservation effort, then only those docs/email with those terms would need to be preserved. A rule could specify that the parties must agree upon search terms within 30 days of the answer to the complaint and 30 to 60 days after each Request for Production is issued -- so the process is iterative. However, there would need to be a safe harbor provision protecting the parties from any spoliation claims arising between the date that the first agreed upon preservation search terms were solidified and the date of the next agreed upon preservation search terms such as RFPs. For example, if the complaint addresses apples and the parties agree upon search terms relating to apples and the parties preserve accordingly. But then discovery comes in and they want docs on oranges and bananas too. The parties will agree upon search terms for the discovery but since oranges and bananas were not mentioned in the complaint nor were they considered in the agreed upon search terms, the parties cannot be left exposed to spoliation claims for the time between the Lit Hold was placed addressing only apples and the time when the discovery added oranges and bananas to the case.

- Increased awareness of ESI as a potential source of information leads to more sophisticated and extensive discovery; strategic use of ESI discovery to leverage settlement and to promote other non-merits-focused purposes;
- I would also add that the ability to preserve and collect information has become easier, so if new technologies make it possible to preserve ESI, parties expect that they must use such technologies to do so.
- Not the increased volume or complexity, but the increased frequency of evidence being electronic.
- Although the proliferation and occasional complexity of ESI is a significant factor in my practice (in-house), there are others, including the strategic use of overbroad or unreasonable preservation demands by requesting parties that are employed to gain strategic advantages and increase settlement values. This seems to occur with greatest frequency in the employment dispute context. I also find that opinions that stressed proportionality in discovery have brought preservation issues more to the foreground, and some requesting parties are more willing lately to have meaningful early discussions about the scope of preservation and collection, without

universally insisting on global preservation without any consideration of the associated burdens (which used to be more common in my experience).

- While technology is a significant factor, the failure to have good rules of thumb and a strong set of proportionality guidelines is the principal factor causing preservation issues to creep into more and more cases. Where one side has its "preservation house in order" (either because it is well organized or has little data), then it can take free shots at the other side at little cost and with a potential huge gain. This problem is exacerbated by a understandable fear among corporate defendants that the decisions that come from these orders may not be nuanced. Therefore, these lead to bad settlements, either of the preservation issue or of the litigation.
- increased awareness of the duty to preserve by opposing counsel
- A smaller factor is the breadth of caselaw that creates an artificial requirement on businesses to retain information.
- gamesmanship; attempt to use as leverage; "discovery about discovery"
- I don't think the volume or complexity has increased dramatically in the past 5 years. I think awareness of esi discovery issues have increased the significance.
- The change is due to ESI but not necessarily the volume - it is more an issue that automated systems destroy and do not retain information. Also an issue is that changes in technology by a party makes older data obsolete which may result in it being purged. There is also a problem with counsel making it clear to clients re what data/information needs to be preserved.
- The single most costly factor in preservation is the incompetence of counsel with respect to their understanding of the sources and forms of ESI, coupled with a lack of reasonable diligence directed to primary sources of ESI. The second factor in my cases has been a pervasive arrogance about ESI that it somehow needn't be treated like evidence--an attitude that, in my unique practice, too often manifests itself in the intentional destruction or willful suppression of electronic evidence. I've seen preservation become easier, not harder, in the past five years as lawyers and clients grudgingly adapt to meet ESI obligations. Unfortunately, far too many attorneys think they will escape the obligation to deal with ESI by waiting until, e.g., rules changes, ameliorate their obligation to acquire the competence needed to perform efficiently and skillfully in the ESI arena.
- Outlier ESI, (not backed up on the corporate severs, e.g. text messages, linked in messages, cloud ...) is rarely preserved by defendants. This ESI is critical in cases involving concealed conduct

- Judicial decisions imposing sanctions and efforts of lawyers to gain a litigation advantage by making spoliation claims and/or attempting to impose burdensome and expensive preservation obligations on their opponents.
- In my experience disputes involving preservation issues have become increasingly more significant because parties increasingly use allegations of spoliation of ESI as a sword in litigation regardless of the value of the ESI as it pertains to the claims and defenses at issue. Spoliation has increasingly become another arrow in the litigants' quiver and in my experience federal judges in particular have become increasingly sophisticated in discerning when preservation issues are being used to gain a tactical advantage and when concerns over spoliation of ESI is a genuine concern.
- Greater awareness of the bar of the role of ESI in litigation overall, and the ability to wield it as a sword.
- Also due to a lack of knowledge of eDiscovery obligations, and about the relevant technologies, by the lawyers.
- Other significant factors include 2006 FRCP ESI amendments, increase in judicial opinions, dramatically increasing awareness, and opponents' efforts to shift the focus to non-merits based litigation.
- The complexity of ESI has not really changed. While the volume has increased, the problem is with my organization's lack of an effective "Information Management" system. It was designed as a very decentralized system that is not conducive to speedy and effective e-discovery efforts.
- The drivers in my cases are (1) cost to preserve by collection and (2) user behavior. If we opt to preserve by collection, we wrestle with the proper scope of the collection (our litigators have not always thought it useful to discuss the scope of preservation with opposing counsel). The scope drives costs, but, if we guess wrong, we may be in trouble. If we preserve in place to save costs, we are responsible to the courts for whatever errors may be committed by users.
- Most of the issues are around scope - parties to collect from, date range, topics
- Opposing parties are more knowledgeable and are demanding preservation
- I think ESI complexity is used as a pretext for raising preservation issues in the first place.
- I think it has become more important because of increased awareness in the profession about these issues, and especially increased awareness that this can be an effective attack where one's client does not have significant ESI of its own to worry about.

- It is also caused by increased awareness of ESI issues by the courts.
- Opposing counsel uses ESI as a means to gain an advantage in the case unrelated to the merits.

15. Which technologies, if any, are you using to reduce out-of-pocket costs associated in preserving ESI? (Optional)

- Enterprise search products, archives, backend collection
- Since I am a U.S. magistrate judge, this question does not affect my actions.
- None found yet that are effective.
- Some clients have committed to legal hold software believing that it will solve preservation issues. We have found that this can sometimes come at the expense of human follow-up. Our experience has been that lower tech preservation approaches, coupled with human follow-up pursuant to a protocol, can be as or more effective a preservation tool.
- Costs of storage have gone down, so preservation is often not a large portion of the cost structure. Collection, processing and review activities create the heavier cost burdens on parties.
- Moving to native format review software to relieve processing cost our clients pay now
- We encourage clients who are involved in litigation frequently to take different steps, depending upon what is most cost efficient: 1) invest in archives; 2) preserve via forensic data collection (and then go on with your lives); 3) negotiate with the opposing party as to what needs to be preserved (requires a good understanding, from both custodians and IT, as to what data is where, and candor with opposing counsel)
- As outside counsel, we don't do this. The client does.
- On-site email journaling.
- We have employed various technologies to comply with preservation obligations, but not to reduce costs.
- Our archive system only stores items once, saving space. We also use a litigation server to snapshot data that needs to be preserved so business can continue to run normally.
- I am working on the HL7 Records Management and Evidentiary Support Workgroup where we are discussing and trying to address issues related to the preservation of ESI in EHRs and data that is exchanged electronically as part of the evolving Nationwide Health Information Network Exchange (NHIN).

- the technology of throwing out old data for which there is no legal or business need to keep
- Legal hold software
- SaaS automated legal hold offerings, self-collection offerings,
- Clearwell, email journaling.
- Clearwell, Summation
- Depending upon the situation, we may use date or custodian filtering; keyword or -phrase searching; enterprise archiving tools for bulk storage; or other tools that are defensible as a regularly conducted activity. The most important step for us, is to accomplish preservation as a usual-course-of-business activity instead of having to pay the hard costs of expert consulting fees & specialized technology.
- Clearwell
- Proprietary software that dedupes.
- With some clients, not specifically technology, but a standardized work-flow around preservation and collection designed to accommodate a large volume of litigation and showing, over time, a track record of reasonableness for purposes of the type of litigation.
- Vendors/software companies that specialize in the collection, hosting and processing of data for electronic discovery and document retention and management solutions.
- Social media download tools such as Facebook's Download Your Information tool and Twitter's Tweetakes.
- Re-engineering of the corporate architecture from distributed to centralized systems-of-record. More judicial use of disaster recovery plans that minimize the perpetuation of backup tapes. Destruction of the PST file.
- Targetted (keyword-based) indexing and collection software (to get away from overbroad imaging of computers, etc.)
- We are moving towards preservation tools that will result in vast over collection of data to avoid the risk of spoliation. This will create other major problems however. We are also using automated preservation tracking tools to ease management of holds.
- Some clients use archiving approaches for email, which amounts to preserving everything from an email standpoint. That is not much of a "solution."
- Brought into our firm technology for processing data, so that we can process in-house much of what we farmed out to third party vendors

- I rely heavily on sampling and testing, particularly the use of message collections from key custodians to evaluate culling and scope. I also employ native preservation exclusively and apply in-situ preservation judiciously. If you have a fair appreciation of the forms and venues ESI occupies, it's not all that hard or expensive to preserve that which is likely to be of evidentiary value. It's not a technology, but I communicate about the specifics with opponents and seek agreements, which are often more feasible than imagined when you are candid and build trust with an opposing counsel.
- DYI collection hard drives
- Litigation Hold process management software to issue and track active holds and information subject to hold, early case assessment tools to understand potential sources of ESI and gather hard facts for meet and confers regarding scope and obligations.
- Automated legal hold management (issuance, acknowledgements, reminders, releases, etc. - with full audit trail features and robust reporting); advanced technology to cull, filter and identify potentially relevant information
- Because of my organization's decentralized "Information Management" system, there is no practical, technological fix. Until the IM structure is overhauled (underway), we are mired in a labor intensive, manually-driven effort that is less than optimal.
- Preservation of backup tapes and use of Index Engines search appliances to index, search and extract potentially relevant ESI for review and production. Sampling. May use document scoring (predictive coding) as it becomes accepted by courts.
- Records management products that impose automatic deletion of documents and data that are not classified as business records and/or are beyond their retention schedule.
- Various software to assist in archiving, segregate and single instance storage and document management. Also automated legal hold software to help initiate and END holds.
- Automated, remote collection tools are a low cost way to preserve by collection in small cases.
- None, yet. we are looking at "solutions."
- automated review (this is used on the collection side as well, not just review, even though the name is automated review)
- EMC/Kazeon ECA
- None
- PSS, Guidance

- Search term technologies.
- a variety of collection tools, including Kazeon, Stored IQ and other products above and beyond the standard EnCase collection tools.
- Email Archive with search and preservation features.

16. Do you believe that advances in technology within the next three years will reduce the frequency or significance of preservation issues arising in your cases to such an extent that a new preservation rule would be outdated by the time it was promulgated? (Optional)

Yes	33.9%
No	66.1%

Why or why not? (Optional)

- Further, I believe that the forms of ESI that are sought will change as technologies evolve, so the "yardsticks" will always move ahead of the rules-making process.
- Technologies are beginning to help search within the enterprise, and companies are getting better at governing their information so they increasingly know where it is and what is in it. But with the preservation obligation so broad and the ramifications of improperly preserving so severe that the burden is still immense and technology is only helping a little.
- Rules reform on preservation (and discovery in general) is necessitated because of the inconsistency in the law on this topic, not because of the advance of technology. The advance of technology increases the relative burden related to preservation and other discovery issues, but the advance of technology is not the root cause of the problem. Nor will the advance of technology solve the problems posed by an inconsistent and unclear application of the law in this area: indeed, the pace of technology outpaces that ability of technology to provide solutions to yesterday's problems.
- No.
- I think advances in technology will continue to spur significant change, but certainly not in the next three years to make any rule being considered outdated in that span of time.

- As technology advances it will be more prevalent for parrties and the court. Consequently as judges become more informed, trained and knowledgable about ESI issues it will be easier and quicker for rulings to be made. And, the parties will know that the courts are more sophisticated in these issues and work harder to avoid court interaction on ESI issues.
- A properly drafted rule should not be technology-restrictive.
- See answer to 15 above. Parties to litigation should never preserve everything. Determining what should be preserved (whether through the development and use of robust keywords, the identification of data sources (which will also continue to advance), identification of sources likely to be duplicative, etc., will almost always require some human element. A preservation rule that recognizes the need for some discretion (i.e., no one can preserve every possible bit of potentially relevant ESI, reasonableness and proportionality should play a role in individual decision-making and party discussions concerning preservation).
- Technological advancements are increasing the complexity of data transmission and storage activities, not reducing them. Social media and cloud computing, for instance, introduce additional complications for the data identification, preservation, and collection processes.
- Technology is advancing, but not that fast. If the rule is based upon today's cutting edge, then it will certainly be applicable in three years' time. If the rule is not specific to the technology but focuses on principles of law, then it will certainly be applicable as long as the principle is valid.
- Clients will still need to purchase such technology and there will be many that choose not to do so. People love rules.
- Because issues involving preservation are not technical in nature. Here is a great example. A client is a very large, international company that frequently needs to preserve and search data. We have encouraged it for over five years to invest in an email archive, with no success. Instead, they keep DAILY BU incremental tapes. Every time they have an issue of preservation going back several years, they must have us go through hundreds of tapes to restore the email of one custodian. That is not a problem of technology or rule, but one of vision.
- Technology is only part of the solution. Process is equally as important if not more important. Also, technology is a moving target. New things will arise that will not be easy to resolve even if old issues become more manageable.
- Absolutely not. Data is multiplying, the kinds of devices we are using is multiplying, the kinds of data we create is multiplying, etc. That makes

"preservation" of relevant ESI in its pristine condition an increasingly difficult exercise, particularly for collaborate or other software as to which data changes all the time. Data storage costs may be falling, but the complexity of figuring out which data to preserve is increasingly challenging. Also, counsel (especially plaintiffs) have become more sophisticated on this topic and use it as leverage when the merits of their case are not so good. It becomes a pretext to spend time and money on a distraction rather than litigating the merits, contrary to the spirit of FRCP 1.

- Because I deal with a lot of international clients, I don't see this helping. There is not one standard across the world so I'm not sure what can be mandated which would make sense.
- Identification of potentially discoverable ESI at an early stage in litigation in a large corporation is much more difficult than generally understood. Additional data sources are is naturally discovered during the course of discovery in a complex case, and by then, some of that information may have been deleted through routine practices not suspended by the time of discovery. Technology does not help with information not yet identified.
- Technologies influence how we preserve, the rules influence who, what and when.
- Yes. I think it is very difficult to craft hard and fast rules. These issues not only change with the technology but the skill with which the legal profession deals with the issues depending upon the client's data architecture and information management practices which is also changing.
- Of course it will, and already has. With archive systems that keeps storage down and making finding particular information easier, we see a lot less non relevant collections meaning we are getting more of what we need to get to respond to document requests. I only see this technology getting smarter and more helpful.
- As more providers work to become meaningful users of EHRs and more and more health information is exchanged electronically, the issues related to preservation of relevant data needed for a regulatory investigation or litigation will increase exponentially. I believe the judiciary can and will be able to make a positive difference in the lives of others through the development of new standards regarding preservation of ESI - there is so much education and work to be done in this industry segment."
- The drivers of these issues are volume and the lack of clarity as to what must be preserved. Technology will not resolve either issue.
- The problem is not technology - the problem is the lawyers.

- No matter how much the relevant technology advances, it'll still be too expensive for some parties and cases, so it won't solve all problems. The rules need to be clearer, among other things, to drive people toward those technological solutions and (hopefully) to drive down their prices.
- While I believe that technological advances will enhance the ability of some clients to control and manage data to meet preservation obligations, I am concerned that those on the fringes (at both extremes) will remain in a posture similar to what most companies face today, which is not an acceptable status quo. I would hope that limits on the scope of preservation obligations are under discussion, and that federal courts will become more proactive in helping parties to achieve reasonable limits on preservation obligations in the early meet and confer stages of litigation.
- Advances in technology have, in many ways, increased preservation disputes, by causing much more ESI to be saved, and therefore subject to dispute in litigation. Additional advances in technology will not likely reduce such disputes.
- This is a qualified "yes," because I question whether any rule or technology change, by itself, will "solve" preservation issues. For one example, I doubt whether any technology will address issues of witness character & credibility. I question whether any rule would create a safe harbor to shield a person from dire consequences of selectively destroying relevant information in anticipation of an official proceeding. I do believe that advanced *application* of technology will better separate noise & trash from material information as a regularly conducted activity. What I do believe is that persons will integrate responsible retention & disposal policies into their usual information management practices, so the over-retention of ESI compared to other forms of information will not be so prominent. This ordinarily slow & incremental evolution has accelerated in response to judicially-imposed urgency.
- The promise of technology solutions to solve (or mitigate) the preservation problem never matches the corresponding issues technology evolution and adoption creates. I have a sense we are always
- Until the Rules are specific enough to give the parties guidance regarding what must be preserved via agreed upon search terms, date limitations and custodians, the parties will have constant exposure to spoliation claims/motion and have little choice but to continue to over preserve.
- Burgeoning methods/forms/locations by/in which ESI is created and resides with related privacy and other legal concerns are likely to outpace attempts to marshal data.

- It's entirely possible that advances in technology will INCREASE preservation issues to such an extent that a static preservation rule would become outdated.
- The technology will advance significantly but the core issues will remain the same.
- Advances that address/solve today's issues will still be chasing new drivers of preservation issues. I do not know whether the gap will close but there will still be problems. A well-reasoned rule would not solve all problems, but it would help clarify/standardize what is expected, making things at least somewhat more predictable, and thus potentially reducing the need to choose between what feels like over-preserving and risking problems downstream.
- Technological advances unlikely to remove, ever, the element of human judgment involved in identifying what exactly needs to be preserved.
- The main concern about preservation is that it is costly. As we increasingly move to the cloud, I suspect much of the preservation issues we now face will be easily overcome by tools that allow us to easily preserve could content. We are just in a growing phase and until our technology and technology-market catch up, it is just going to be more costly than we'd like it to be. I have heard no other "legitimate" concerns about preservation of ESI. The most disturbing concern I've heard is that companies don't want to preserve in one case because it means there will be ESI inadvertently preserved for another case that comes along at a later date. This fear of having too much evidence, i.e., evidence that may be critical to the opposing party, should not be a reason for altering the rules. The purpose of evidence is to enable the truth to come out. We don't want to create a rule that protects a party's ability to destroy evidence just for the sake of destroying potential smoking-gun evidence in another case.
- The shelf-life of a new rule will depend on how it is written. If we end up with a rule requiring pleadings with more specificity, for example, that will probably not expire with the advent of new technology. If we have default limitations such as number of custodians, that will probably also not expire with the advent of new technology. Until and unless we universally adopt technologies that preserve ALL data, we will have preservation issues. A future where ALL data is preserved, however, is equally bad for litigation and for parties. It would surely result in overly broad (and expensive and time consuming) data volumes.
- I expect that regardless of any technological advancements, disagreements over the timing scope of required preservation will continue, as everyone would still be arguing with one another over the meaning and application of

the vague and conflicting common law standards that apply. Additionally, I really don't see preservation technology keeping pace with the proliferation of ESI. It never has, and currently, there are huge unmet needs for the technology in the area of mobile devices, etc.

- I believe the exact opposite is true. Technology will only make the situation worse as potentially relevant data is distributed farther and more widely and it is more difficult for organizational parties to identify where the data exists and capture it.
- We will gravitate away from traditional requests for documents and move toward requests for sources of data, definition of search criteria based on sampling, the testing of criteria against a set of known relevant documents, and agreed upon search engines with the results defining the documents to be used in a case.
- The advances in technology will make preservation issues more difficult and more expensive because these technologies are designed for efficiency and maximizing technological tools. This is usually inconsistent with preservation requirements.
- We need to, if possible, gain clarity on the trigger for and scope of preservation obligations. Technology advancements seem unlikely to solve those issues.
- Absent an outcome where nothing is ever destroyed or rendered difficult to obtain, there will always be cost and strategy challenges associated with what to keep and what may become evidence.
- Change happens so slowly in this area that 3 years is too soon for significant change. Hopefully significant change will take place in the next 5 years.
- Changes in technology won't change the behavior of those charged with making decisions re what to retain.
- Of course, it depends upon the rule. but a rule that employs specific directives based upon a current lay perception of the forms and direction of ESI will be as out-of-touch as the 2006 FRCP amendments would have been if the drafters had lacked the wisdom to shy away from citation of specific technologies. The growing dominance of the cloud, handhelds and social networking were almost entirely out-of-mind in 2006. Why would any thinking person assume that we are done with development of new and innovative ways to create, communicate and store information?
- The rule should tie preservation to standard technology in existence at the time.

- The cost of retaining data is decreasing to the point where one might argue that all commercial data be retained beyond the longest statute of limitations period of say four years unless good cause exists for its deletion.
- Preservation is becoming as important a consideration in driving litrigation decisions as the underlying merits of the dispute. I increasingly find my clients in a position where they make decisions about whether or not to litigate or to settle based upon ESI considerations, as opposed to the merits of the case.
- Even if developed it will not be universally adopted by all parties for quite some time, if ever.
- Our problem is "Information Management," not anything having to do with a rule.
- Our use of technology already reduces burden when applied. General rules are more long-lived than specific, feel-good, bright-line tests that cannot be forward looking. Specific rules may actually discourage innovation.
- While many larger clients can employ technologies that would assist in preservation, the vast majority of companies are not sued often enough to justify the cost of software like this.
- Preservation issues are seen as an important "sword" in the advocate's arsenal and will continue to be so unless the rules are amended to contain more "bright line" guidance on preservation and spoliation.
- Technologies are still in the early adopter stages, and will not abrogate the need for clear guidance about when and to what extent the duty to preserve arises.
- There is no doubt that automation and improved technology makes this issue an easier challenge every day. Also, users of information must learn to be accountable for how they use and store information and indeed technological advances will enable them to do so. It's happening right now.
- Not all clients will be in a position to adopt new technologies for preservation. Only the most litigious and well-funded clients will do so. All the rest will be in the same technological position they are in today.
- Technology already exists to help with preservation of the right stuff (info, docs, and scope), that the rules don't need a change. Lawyers just need to get with it about the technology and stop waiting for a court to say technology is OK to use for preservation or review or production of data. It's downright maddening to see how much malpractice law firms do in this area. As a General Counsel of a Vendor that works with many, many companies and

law firms, there are some law firms I would NEVER hire for litigation after seeing how they advise (or not) their client re eDiscovery.

- I have more and more clients who have taken a view that they should just preserve everything, as that option becomes easier and more affordable I can see a lot of clients going that way. This is problematic because they end up preserving things they would not ordinarily preserve which adds costs in the end.
- No matter what technology exists to store and create data there is always going to be someone who comes up with some way of deleting or destroying whether intentionally or unintentionally
- There will always be a need to tailor preservation to the needs of each case, and judgment calls will need to be made. Technology will continue to facilitate this process and will only get better. But a rule that outlines the contours of the duty will still be necessary and helpful in making the necessary judgment calls.
- I don't believe that advances in technology will significantly reduce the burdens of preservation. New technologies will certainly reduce the burden of review and production of preserved material.
- The volume of ESI in general has always been an issue. However, with the increasing "interactivity" of the web (think, product and company message boards for employees and customers, etc.) and the social media explosion has really complicated this issue and raised costs. Larger and larger portions of potentially relevant ESI are now unmanaged and, in many cases, transitory (blogs, twitter, Facebook, etc.) with increasingly "fuzzy lines" between official company sponsored content and unsponsored content.
  The technology does not seem as relevant to the preservation trigger question.
- The timing and scope of preservation obligations are key, and advances in technology don't impact those factors.
- Data volumes

17. Are cost savings more likely to be achieved through advances in technology than through a rule of civil of procedure? (Optional)

Yes	51.8%
No	48.2%

Why or why not? (Optional)

- But the rules-makers and courts should not require that parties acquire all new technologies as a cost of doing the business of litigation. American companies - large and small - need to be able to continue conducting productive business in competitive world markets.
- Technology will certainly help, but the current state of the law is immensely burdensome. The triggering event isn't the most burdensome piece. It is the broad definition of what is discoverable that is the problem. An idea of proportionality like in Rule 26 needs to be applied to the preservation element. That way, if the value of the information isn't worth the cost of preserving it, and you can prove that up, then a party shouldn't be held responsible for not preserving it.
- The pace of technology will continue to expand the volume of material potentially subject to the preservation obligation or discovery obligations in general. Only a principled reform of the rules to limit the scope of discoverable material (and consequently that material subject to preservation obligations) can achieve meaningful reduction in burden associated with discovery and with returning our judicial process to one that is designed to adjudicate disputes on the merits and in a speedy, inexpensive and just fashion.
- Advances in technology is making preservation harder and setting up more 'gotcha' scenarios. SharePoint is a great example. Sure you can preserve it, but to capture all the data that might be relevant, you have to take a copy of the full database. Forget about preserving just the relevant data if you want to preserve usage information, calendars, edits, etc.
- At this point, without knowing what the rule would look like, or how technology will advance, that question is difficult to answer.
- More technology, if properly used, will reduce time and expense for parties and courts.
- For the reasons outlined in 15 above. Technologies won't develop robust keywords without human input, technologies won't necessarily identify the least burdensome source of potentially relevant information, and technologies won't necessarily do the legwork to determine when legacy sources do and don't require further investigation. Technology may, however, provide the key information that parties need to have meaningful discussions about cost savings and proportionality.
- Rule advancements are needed. We need rules that put lines in the sand and offer guidance in the advisory notes. Parties and their counsel need

something concrete to point to that supports the decisions they make regarding preservation and collection of certain data sets, but not others.

- I think both will yield cost savings, and both are sorely needed.
- Lawyers are terrified of screwing up. They prefer to rely on rules opposed to technology. They are more likely to be less excessive in their efforts if there are rules. Unfortunately, the common law may end up undermining that rule...
- See my prior answers - they will be achieved by smart use of existing technologies, preservation techniques that fit the specific problem, and cooperation with the parties (or court relief if the opposing party will not cooperate)
- Technology is a moving target. New things will arise that will not be easy to resolve even if old issues become more manageable.
- I think both are necessary. Indeed, perhaps the rule should acknowledge the role of technology. A written rule provides guidance and consistency that the common law has not. Technology on the back end can help us filter and sort data in an efficient way. Both are part of a solution.
- If technology can ensure production of relevant documents without minimal human intervention than technology wins this one. If rules require cost sharing for all discovery than civil procedure wins but I don't see that happening.
- While new technologies reduce costs per unit, volume increases - also due to new technologies - outpace the cost-per-unit reductions. So long as the rules continue to essentially require the preservation and production of all potentially relevant evidence, despite this writer's experience that less than 1% is ever used in pre-trial and far less than that ever makes it to a trial exhibit list, total ediscovery costs will continue to skyrocket.
- A rule change will only add to costs - once a preservation trigger can be litigated, not only do you have any bills for holding the data during the motion practice, but you must pay the actual costs of motion practice. Seldom, if ever, do clients fail to understand what a triggering event is.
- I truly believe (and have seen) that the lack of rules or standards has resulted in a lot of extra time and expense as litigators work to "make up" how to go about preserving or producing relevant information for litigation or a regulatory investigation. Additionally the vendors of EHRs are VERY RELUCTANT (almost anti) to develop and establish legal hold mechanisms into the design and functionality of today's EHR systems - it is very

disconcerting and adds SIGNIFICANTLY to the costs involved with the preservation and discovery of healthcare ESI.

- A clearer path that makes scope of preservation objectively determinable, and that takes into account the cost of preservation in a meaningful way is the most likely means of cost savings.
- All we need to fix this is a rule that requires the parties to meet (or seek court intervention) IMMEDIATELY to identify scope of preservation
- Will be a combination or both
- See above. You need a one-two punch of clearer rules and more robust and accessible (inexpensive) technology.
- Advances in technology are leading to more, not less, ESI and finding a rational basis upon which to set the boundaries will have more impact.
- Technology improvements will scale to an increasing volume of information. Changes to rules can help modify behavior, but that takes much more time to change than technology. Also, the current rules and case law provide a reasonable framework for discovery, particularly ESI. Reviewing and analyzing the rule every 3-5 years is an appropriate action. The evolving technology seems to be only used in mostly federal court cases (or state cases in major cities). The technology is still growing and changing. Five years from now, tweaking the rule will likely generate greater cost savings than technology. Until then, I prefer to let the courts continue to deal with the new technology; the rules committee can use the additional 5 years of jurisprudence to fashion the changes.
- & in addition, increased familiarity of attorneys & judges with realities of EDD will lower costs as demand to preserve e-trash becomes less common.
- See above.
- This is another qualified "yes." It hasn't been the technology that matters, so much as how it is applied. In the hands of experienced users & business IT, simple search & archiving technologies can be more cost-effective than the most recent black-box technology in the hands of expert consultants.
- Maybe - it would depend on the rule but I can't imagine a rule that would lower the costs.
- Intelligent review, predictive coding, automated review should have a positive effect by automating much of the document review discovery. It's still in the early stages of use yet it is gaining much attention. I'm not aware of any company actually relying solely upon predictive coding in lieu of the more generally accepted page by page review. However, none of this technology addresses the over preservation issues.

- Common law duty to preserve is extremely broad and diverse; improved technology will not prevent/curtail disputes.
- Cost savings resulting from a change in the rules will much more likely be offset by corresponding disruptions in the litigation process, intentional or otherwise.
- The rules are naturally reactionary while technology is proactive. This does not mean that effective civil rules cannot help to curtail costs.
- I wish there was a "hard to say" choice on this one. Technological advances may help in some areas, rule changes perhaps in others. The approaches are not exclusive, they can complement. Also, for more modest sized cases, where the cost of better technology may be more of an issue, rule changes may hold the most promise.
- (see comments above)
- Technologies will continue to provide for cost savings, but technology will also continue to perpetuate the problem. At the end of the day, we KNOW that the world will produce more data than the world can store, by a magnitude (see IDC annual report on the Data Universe). Therefore it will be impossible to preserve all data and decisions must be made. Without guidance or limits, there will always be greater preservation than necessary. The efficiencies gained by technology will also, most likely, be offset by the increased ability of technology to create data volumes.
- See above.
- So long as we can begin to move away from the notion that everything must be reviewed to locate the illusive (and usually non-existent) smoking gun document.
- The lack of rules under the current situation provides no clarity. We have to design approaches based on what one judge might say in any potential case. We have litigation in many jurisdictions and we have to design processes and procedures to meet the varied standards in all potential courts. Technologies make this more difficult because the types of tools used by businesses make it more difficult to preserve and manage this vastly increase trove of information.
- see above
- Rule changes, and clarification will be the best cost saving tool. Technology requires capital expenditures or significant "per click" charges. Rule changes, especially those that address proportionality questions, will have a greater impact.

- Although the greatest cost savings will come through the fostering of competence in those charged with designing and implementing preservation, the move to the cloud--to cite only one significant development--will have a huge impact on the cost and mechanisms of preservation. Certainly a rule that operates to exclude a crucial swath of probative evidence from preservation and, in turn, deprive the courts of same will save a lot of money, and more so by freeing those who might be required to pay damages from being held accountable for their malfeasance. This will bring significant benefits to American business, though greater savings could be achieved by simply closing the civil courts and trusting that what's good for business is good for America.
- BC defense firms aren't incentivized to reduce ediscovery costs e.g. they refuse to use anything but Boolean search instead of more robust analytics that improve recall and precision.
- Storage costs will decrease to a trivial amount such that commercial entities will have a hard time justifying deletion except to preserve consumer privacy or to reduce risk of evidence in future lawsuits.
- Both are equally helpful, but the current problems do not stem from a lack of rules, they stem from a lack of enforcement of the current rules that are more than adequate at controlling discovery when applied.
- Getting agreement of all parties will save more money than any technology.
- Our problem is "Information Management," not anything having to do with a rule.
- Technology generally solves the problems it creates. Rule changes may delay that process via temporary band aids.
- A rule may put more definition on exactly what might need to be preserved. With all new technology comes additional preservation issues.
- Not clear whether this question refers to cost savings solely in connection with the preservation (i.e. storage) of ESI, or more broadly to the entire process of preserving, collecting, reviewing and producing.
- Rules can be interpreted and litigated myriad ways. Technology can be leveraged to save money when properly used.
- It's not a technological problem. It's a problem of pure guesswork--will my best guess on the scope and manner of preservation pass muster with the courts months from now if it becomes an issue?
- As I said above, technology already exists to help in preserving the right info; lawyers are just afraid to use it. And by this, I mean law firm lawyers. I see companies doing this because they need an economical and defensible way to

preserve less data and to preserve the right data. They don't want to pay to store it all or to have to search it all if litigation arises. They have a business incentive to save only what they need.

- I think both can have a substantial impact.
- I think it will take advancements in both
- More clear-cut and even rules could reduce costs by preventing parties from pursuing spoliation claims when they have no merit. Motion play and proving and defending spoliation claims is costly. Often times, there is a fight and nothing of significance was deleted and most of the time anything deleted is not all that relevant to the case. It simply gives a piece of mud for the parties to fling. Clear rules regarding burden of proof might help.
- The general contours of the duty to preserve are already pretty well established. A new rule will mostly codify the leading case law and maybe provide some additional clarity. A rule will help us to navigate these issues when they arise and this can help reduce disputes and litigation costs. But advances in technology will be what makes preservation less expensive.
- Some guidance on how far into the social media or "blogosphere" that a producing party needs to go would be helpful. Using a pharmaceutical company as an example in descending order of company control - they have company sponsored social media sites for employees - web sites for drugs and diseases with message boards where clients, patients, and doctors are allowed to comment - Facebook pages sponsored by the company - and non-sponsored message boards where their employees may or may not comment in their spare time. Where does the preservation obligation end? How far down the rabbit hole?
- The largest cost is attorney review. I don't anticipate that even with the best technology that we won't be having to review volumes of data, a lot of which is not relevant.
- The subjective nature of the preservation obligation (timing, scope) is what impacts the costs more directly than the technology used.

18. Does the current state of the law (rules, case law, statutes, or regulations) provide you with adequate guidance as to the scope of your duties concerning:

(A) The events or circumstances that trigger a preservation obligation (Optional)

Never	4.1%
Rarely	13.2%
Sometimes	33.9%
Often	39.7%
Always	9.1%

Please comment on your answer. (Optional)

- If the question is expanded to include secondary authorities, such as The Sedona Conference Commentary of Legal Holds, my answer would have been "often". But there will necessarily always be an element of "judgment" which is inherent in a "reasonableness" standard.
- This is the most clear part. Harder for plaintiffs, but not terribly difficult.
- It most definitely depends on the type and circumstances of the case, but there could be more guidance overall.
- The only dicey issues arise when there is the possibility of litigation (sometimes with non-specific threats). But typically, my cases do not involve a lot of doubt as to whether a preservation obligation has been triggered. However, one area that could use clarification is whether "reasonable anticipation of litigation" means the same thing in the context of legal holds and the work product doctrine. In other words, if a party is claiming that materials have work product protection does that automatically mean a legal hold must be in place.
- Some courts have taken a very broad view of appropriate triggering events. They drive conservative decision making by parties and their counsel around the United States.
- Yes, until there is disagreement. It is too subjective to be defensible.
- I generally advise our clients that if we act in good faith, take efforts to preserve information to the best of their knowledge and ability, we should be okay in the end.

- "Always" is too extreme - "almost always" is the best answer. There are some ambiguous situations, but they are rare.
- The hardest issue is whether non-parties to a potential litigation have a duty to preserve, and, if so, when that duty arises. The "reasonable anticipating of litigation" standard does not make clear whether it applies only to parties.
- The term "reasonable" is debatable. In tort law, JURIES decide whether someone has acted "reasonably" and a lot goes into that inquiry. Therefore, it can often be difficult to predict at the outset whether preservation efforts will be looked at with approval in retrospect. The guidance is therefore to err on the side of caution, but this is expensive and usually unnecessary.
- Because I deal with global clients the rules do not help as they are in conflict with National rules regarding data privacy
- The trial courts in Hynix and Micron prove, even for potential plaintiffs, reasonable minds can differ as to when the plaintiff "reasonably anticipated" litigation. Who knows, how far in advance of a complaint a defendant "reasonably anticipates" litigation.
- The Sedona Conference® remains the trusted source I (and my clients) refer to to understand the scope, events or circumstances regarding the events that trigger a preservation obligation. I appreciate it when TSC is cited as an authoritative resource in this regard.
- This is a well-developed area with a good deal of case law.
- I believe I can make defensible decisions, but I cannot confidently predict outcomes.
- Plaintiff's trigger is unclear. When is litigation reasonably foreseeable during the investigative phase of the plaintiff's decision making, especially when it is undertaken with the explicit purpose of litigating if at all possible. Also when is the trigger for government investigations for both the government and the investigated entity?
- I appreciate the general rule, and in many contexts, especially from the defense side, it is adequate; however, in instances where a handful of months one way or the other can mean the loss or preservation of literally tens or hundreds of thousands of electronic documents and communications, small subjective disagreements can have potentially profound effects. The rule changes you are apparently considering to me seem most pertinent to such large scale cases and cases where those with disproportionate IM burdens are opposed.
- Lawyers are trained and paid to advise our clients. We use common law, statutes, and rules - along with our experience - to fashion that advice. Three

to five years ago, there was a lack of common law and experience to really understand and implement preservation law across the profession. The lawyers who fail to undertake appropriate duties today do not lack guidance from the law; they lack awareness of current discovery rules. (I know many otherwise sophisticated attorneys, even those in their 30s and early 40s, who are simply unaware.) A new, or modified, rule will not address this unawareness.

- I have practiced cases in jurisdictions which applied different standards, ranging from anticipation of litigation to the filing of an action to "it depends on the circumstances." As long as I have been able to find *some* kind of guidance, it has been enough to advise my clients on a range of more-to-less-safe practices. The most important consideration has been to act in an even-handed way, because I question whether any jurisdiction would ever tolerate an appearance of selective destruction of relevant information in anticipation of an official proceeding.
- reasonable anticipation of litigation' is too vague. Unless the triggers are articulated specifically, we'll effectively be stuck with 'reasonable anticipation' which is too subjective yet easy to define in vastly different ways based upon whether you are a plaintiff or defendant.
- The current state of the law provides a good deal of guidance. Unfortunately changes in the common law are steered by reigning in the "outliers" who don't follow the guidance of current law.
- As noted above, the standards are currently based on common law. Too many of the underlying cases are vague or entirely unrealistic in the duties that they purport to impose. Some decisions, such as those in *Zubulake*, appear to require omniscience from corporations in assessing when the duty triggers. Likewise, there are decisions that speak to scope that describe preservation obligations that are literally impossible for businesses to achieve without shuttering themselves. Although there are increasing decisions that articulate more rational and realistic approaches, the conflict means that there is no certainty, and often one can't tell what the standards are, sometimes even within a district court jurisdiction. Thus, attorneys like me who advise producing parties must routinely warn that the law in this area is very unsettled, and if preservation decisions receive judicial scrutiny, the results are likely to be unpredictable.
- A more objective standard should be defined, such as actual notice of a claim. The primary burden should be on the Plaintiff to define the claim and give notice so that the defendant knows what to preserver and when. There may be certain types of cases where the duty can be defined by some other criteria

but those would be special cases. However, the question of whether such notice by a plaintiff would trigger a declaratory judgment action would have to be addressed.

- The question of when a trigger takes place when litigation is not yet filed is very unclear and fraught with the gotcha element. Therefore we have to assume the worst.
- varies state to state, but proportionality is still a very big issue.
- The trigger is fuzzy particularly when a large company with a robust consumer complaint department could treat almost any such complaint as a something which could trigger a duty to preserve.
- In an ideal world, the preservation decision would be like a light switch, with only options for "on" and "off". The realities of litigation are that "on/off" switches are a rarity. About the best we could hope for is uniform guidance, so litigants can at least base their decisions on the same set of rules. For that reason, I would prefer to see uniform guidance from a federal rule of civil procedure.
- There is significant inconsistency at the periphery. For example, it is unclear what the obligations are as to companies faced with EEOC claims filed against them that are not yet reached the level of litigation. There is some case law saying a hold is necessary for all claims and other cases saying the opposite. Not sure even a rule change would ever bring 100% certainty though.
- standards are too vague and the application depends on the specific facts and circumstances of each case; the cases are very fact specific; not particularly helpful more generally
- Other major factors include ensuring an understanding of the nature of the matter, knowing how and where information is stored, and collaborative efforts with involved parties to define and narrow the scope.
- "Claims" submitted to government agencies need to be excluded from being a trigger. Agencies have formal claim adjudication programs that resolve 95% +/- of all claims submitted. Thus, when an agency receives a claim, it does not reasonably anticipate litigation; quite the opposite. The ability to rely on this default standard would be hampered if receipt of a claim is enumerated as a trigger.
- It's more obvious to me because I am a member of this group, but others in the firm often disagree.
- Extremely difficult to objectively characterize "reasonable anticipation of litigation," when the vast majority of claims (e.g. trademark cease and desist

letters) and notices (e.g. notices of accidents involving products that are often involved in accidents as a result of user error) never result in litigation. Even as a prospective plaintiff, there is no clarity on when the duty is triggered, i.e. what degree of certainty and specificity must the prospective plaintiff have that there is a reasonable basis to file a complaint for a specific cause of action against a specific defendant before the duty is triggered? In the commercial context, when a relationship between two contracting parties begins to sour, at what point must one or both anticipate it will turn into litigation and start preserving documents, when most of the time such disputes are eventually resolved without litigation?

- To me it is relatively clear when litigation is reasonably anticipated, but my understanding is irrelevant. Defense counsel are not usually engaged until litigation is known, then we must determine when our client should have reasonably anticipated litigation. I don't know if a new rule or new technologies will cause lay people to begin regularly evaluating whether they reasonably anticipate litigation and preserving information accordingly. The only rule that may be helpful would be excruciatingly detailed. For example, the *Zubulake* case (and others) make clear that the filing of an EEOC complaint is a preservation trigger. As soon as one of our clients has an EEOC complaint filed against them, we begin preservation. Similarly specific triggers are desired in all industries but developing such a list to put in a rule seems unworkable.
- reasonably anticipate litigation is a "reasonable person" type standard that people interpret in hind sight, which is always 20/20 - this, of course, leads to different interpretations, depending on one's side.
- still many gray areas and varying demands court to court
- I think the law coupled with common sense is generally sufficient. All too often lawyers want to be zealous and push the boundaries for no real cost benefit on both sides.
- The case law has long established that preservation duties arise when one does, or reasonably should anticipate some legal process for which one's evidence may be needed. This is not a bright line rule but it works. Any attempt to apply it in advance to specific events is too complex to reduce to a precise rule and will always end up falling back on the general rule. For example, pre-litigation demands, oral or written, can trigger the duty to preserve. *Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57, 61 (Ct. Cl. 2003); *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1446 (C.D. Cal. 1984). But it depends on what they say and on the context. *Cache La Poudre Feeds, LLC. V. Land O'Lakes, Inc.,* 2007 WL 684001 (D.

Colo. Mar. 2, 2007) (Duty not triggered by letter that "alluded to … possible 'exposure'" but "did not threaten litigation" and "hinted at the possibility of a non-litigious resolution"). This is too nuanced an issue to be reduced to a rule that is any more specific than the general rule. For another example, take hiring an expert. Many times we hire an expert to figure out if filing a claim is worth it, or to help bring about a business resolution. It doesn't necessarily mean a lawsuit is likely. Similarly, lawyers are sometimes hired to draft complaints where there is no intention to file them; perhaps just to see if the complaint might be viable, or just to get the attention of someone to resolve a business dispute. There is no reason to think that even destructive testing necessarily means litigation is coming. In *MacNeil Automotive Products, Ltd. v. Cannon Automotive Ltd.*, 715 F.Supp.2d 786, 801 (N.D. Ill. 2010), the court found that the plaintiff did not know, and should not have known, that litigation was likely when it destroyed evidence of possibly defective products, because in the past the parties had resolved their previous business disputes short of litigation. The court explained: Defendant had supplied defective mats to Plaintiff on occasions prior . . . but legal proceedings never resulted – the parties were able to resolve the disputes among themselves. And even after the disagreement . . . the parties continued their business relationship for at least a year. During this time, Plaintiff sought to resolve the dispute without court intervention. It was entirely reasonable for Plaintiff to believe that Defendant would remedy the problem, thus negating the need for judicial involvement; indeed, Defendant had, on prior occasions, acknowledged the issues and committed itself to doing just that. *MacNeil*, 715 F.Supp.2d at 801. In sum, none of the activities listed in the proposed amendments necessarily means that litigation is or should be reasonably anticipated. They are certainly relevant to the question but they are not dispositive. All this list could ever be is a list of factors, which we don't really need.

- I feel like the issue is not when a trigger begins as much as how far back to we have to go to preserve information. I would like guidance on that issue that would allow me to act reasonably and not have to preserve everything that could be potentially relevant from the beginning of time.
- Preservation and scope is too fact specific.

18. Does the current state of the law (rules, case law, statutes, or regulations) provide you with adequate guidance as to the scope of your duties concerning:

(B) The events or circumstances that end a preservation obligation (Optional)

Never	11.8%
Rarely	22.7%
Sometimes	26.1%
Often	32.8%
Always	6.7%

Please comment on your answer. (Optional)

- Much attention at conferences and the like is spent on the subject of when the duty to preserve attaches. Much too little time and attention is spent on the question of when a preservation obligation has been satisfied. As a result, there are huge amounts of accumulated ESI in most organizations. It would be a huge help if courts were receptive to applications for orders that preservation obligations could be deemed satisfied, so that holds could be released and this problem mitigated.
- Very little guidance on this, and a lot of variation amongst jurisdictions.
- More guidance is needed on when parties can relax or reduce the scope of their preservation of information after:

  - discovery closes

  - the trial is over and the case is on appeal

  - a "related case" is ongoing that overlaps in some way with a case that has been terminated (or the record has been closed)

- The big unanswered question which I know is being debated is when does a preservation obligation in which litigation is anticipated but never occurs, end. I think it is unduly burdensome to have the obligation continue until the SOL expires.
- This is ALWAYS in question.
- Same as above

- This is an especially big issue in government investigations. The government often does not say when it is "done" with an investigation. It should.
- Usually this is the end of the case and the exhaustion of time to appeal.
- There could be further development in this area - oftetimes the preservation obligation (or belief that one needs to keep saving everything) never ends and this is costly.
- Seems straightforward.
- Major problem for defense is when to end preservation if claim/suit is never filed or formally settled. This is difficult to address in a rule if an action is never commenced & no judicial intervention sought. Potential defendant could commence declaratory judgment action to put potential claim to bed, but this is rarely practical or wise. There should be tort liability for negligently, recklessly, knowingly or intentionally failing to withdraw preservation demand after making such demand or after deciding not to file a threatened suit or claim. Liability would be cost of preservation up to date of judgment on tort. Question: Consequential damages liability due to existence of record that would not have existed but for legal hold that was negligently not terminated when it should have been?
- Law regarding the end of a proceeding has not been the sticking point for continued preservation. The issue has been whether the information might be needed or useful at some indefinite point in the future, as a subjective matter of fact.
- The governmental departments that issue subpoenas/CIDs where you are a 3rd party rarely advise you when their investigation is closed. Sometimes the same is true when your company is the target of the investigation.
- The guess work must be minimized
- The lack of clarity when a preservation obligation ends adds significant uncertainty, including with third party subpoenas as well as situations when lawsuits are not filed but threatened.
- While it is fairly understood that it is reasonable to anticipate litigation whenever an employee is fired, or a contract is breached, or a number of other events that would suggest an impending conflict, except for the settlement of a matter, or document preservation regulations for public documents, there seems to be little guidance on how long is too long to be hanging on to ESI.
- Often, this is not difficult to determine. The difficulty occurs when trying to determine whether the preserved information is subject to other legal holds or can be returned to regular retention management.

- We treat the end of the preservation obligation as the end of litigation or the running of the statute of limitations, which, necessarily, requires guesswork as to the legal theory.
- Too many 'what-if' scenarios.
- If claims or notices of incidents never result in litigation, it's not clear if the duty to preserve extends as long as the statute of limitations. If one lawsuit ends, it's not clear whether the duty to preserve continues because there might be more. When documents are gathered for a subpoena, the subpoenaed party, who is not a party to the underlying litigation, never knows when its duty ends - upon production? upon close of discovery? not until the lawsuit is over? [all of which are dates to which it will have no visibility anyway].
- Preservation ends when a case is finally resolved and all appeal periods have expired.
- If there is a final order, you can tell that the litigation is over. The difficulty we have is in conjunction with subpoenas and investigations which a change in the federal rules will not address.
- Clearer guidance can be given here through case law - not sure we need another rule. When one suit ends, should I have anticipated another one - that could go on forever.
- still many gray areas and varying demands court to court
- This one is tougher, especially for companies that are often involved in litigation. However, I think better internal planning, versus a change in the law, is the answer to tacking that issue.
- The anticipates-litigation trigger already provides the answer. It is built in. The duty ends once the litigation is over or the credible threat of litigation has otherwise passed, or the likelihood of the documents being properly sought in discovery has passed. Making the determination is a judgment call. But the standard is already known.
- Other than settlement or final decision. Then, the data is likely responsive to another investigation or matter. I rarely see data "purged".
- It would be helpful to have guidance on when we can release a legal hold. We now follow a 6 months to one year guideline when we have received a threat and no litigation follows.

18. Does the current state of the law (rules, case law, statutes, or regulations) provide you with adequate guidance as to the scope of your duties concerning:

(C) The subject matters of information to be preserved (Optional)

Never	5.0%
Rarely	23.5%
Sometimes	42.0%
Often	22.7%
Always	6.7%

Please comment on your answer. (Optional)

- This is an area where the rules makers might make a difference, i.e., by clarifying that the scope of preservation is only as good as the pleadings and/or parties' agreements around the scope of relevance in a given matter. Thus, if the pleadings are vague, the preservation obligation cannot be broad. It should suffice for a responder in the case of vague pleadings to make a subjective determination of what is relevant, communicate that at a 26(f) or otherwise, and have no risk of sanction unless and until the pleadings or scope of relevance are refined. This would be consistent with the long-held tenet that the scope of relevance can expand or contract during the course of a matter. As it is, there is much too much games-playing by requesting parties. Courts should make clear that requesting parties - on both sides of the aisle - must live by the effort they put into framing the case, and that they will not tolerate loose pleading and later claims of failure to preserve according to later-framed pleadings. In the case where a party provides a tardy amendment that clarifies the scope of relevance, that party -- and not the responding party -- should bear the risk that, in the interim, some now-relevant information will have been lost.
- But way too broad with no proportionality or balancing.
- Same as above
- This is always a difficult point, as it is hard to predict the scope of discovery and who will be deemed relevant custodians of relevant ESI. The current guidance is overbroad, in my opinion, and assumes that most of the relevant

data can't be found in several places. It often is, but the cases require us to preserve all sources of potentially relevant ESI.

- Again, more work and further development in this area would be very helpful.
- The standard enunciated in case law is unhelpful. Virtually anything can be the subject of discovery given the broad interpretation to Rule 26 ordinarily espoused by the courts. Thus, preservation scope is often dictated by guessing at the whims of plaintiff's counsel. This is a particular problem in class and collective actions where the scope of a claim is often not defined for an extended period.
- Fact specific.
- Proportionality is a pretty blunt instrument and does little in helping you to determine what things to preserve and what not to preserve.
- This is always tough and in large cases always puts outside counsel in a terrible spot between their client, the court and opposing counsel. The more clear cut the standard, the better; however, I am not sure I have good suggestions as to how to draw bright lines here ...
- Proportionality is still a tough call, especially before the lawsuit is filed. Divining the opposing party's intent and possible claims is a difficult part of an attorney's work. Still, early involvement by the court to winnow claims is a better way to address this issue. Unfortunately, many state court judges are reluctant to take this action. Many federal courts, though, appropriately address these issues, making a rule change unnecessary to address this specific issue.
- The dichotomy in federal discovery between claims or defenses, and the subject matter of an action, creates an ambiguity that is not unique to ESI issues. However, it may appear most clearly in the ESI context. It would be helpful to have additional guidance on factors constituting "cause" for discovery beyond the claims & defenses, because that in turn would help a party better predict the need for broad preservation.
- any potentially relevant documents' is too broad. Common sense should dictate because attorneys are officers of the court and have ethical obligations to adhere to. Properly outlining the scope of what needs to be retained is part of those obligations.
- This requires an attorney who is familiar with electronic discovery and knows the right questions to ask.
- Please see my comments above about the lack of certainty over the required scope of preservation.

- The scope of potential discovery, particularly in early stages of a lawsuit requires significant over protection of information to avoid the risk of missing something. This adds considerable costs to the processes.
- Scope needs to be addressed, particularly the concept of proportionality in preservation.
- The subject matter of preservation is very fuzzy and overlaps with work product privilege - it requires an educated guess at to what each party thinks is relevant before seeing a lawsuit - and reasonable lawyers can often guess wrong.
- electronic information is overwhelming and often has nothing to do with the case; separating it out and devising a methodology that can withstand after the fact attack is difficult, resulting in the preservation of everything
- Other major factors include ensuring an understanding of the nature of the matter, early identification and interview of key custodians, and collaborative efforts with involved parties to define and narrow the scope.
- Presently, we a left to work through what could be included in "all potentially relevant information." That is basically everything. Given our decentralized information management structure, this also requires end users to engage in some amount of analysis in making this determination.
- Litigation issues evolve as cases mature. What was thought to be irrelevant at the outset (and not preserved) often becomes relevant later in the case and thus subject to a motion for sanctions. Unless preservation orders (holds) are overly broad, there is a great risk of missing something that later provides fodder for the sanction motion practice.
- Extremely difficult to assess the appropriate scope of preservation when claims or notices are not specific about what actual claims might be made.
- Meet and confer process critical - rule won't diminish or enhance the significance of this critical step.
- It depends almost entirely on the facts of the case.
- If it's likely to lead to discoverable evidence - ok - that's pretty broad. Maybe a bit more guidance would be helpful in the notes, but please no more rules. It seems like we could get rid of a few more rules if we just enforced Rule 1 - after all it is the FIRST rule!
- The scope of the duty to preserve evidence that has emerged from the case law is clear enough. The duty to preserve evidence extends to documents, ESI and tangible things in a party's possession, custody or control that it reasonably should anticipate will be subject to discovery in the litigation. "Subject to discovery" is meant to incorporate all aspects of the discovery

rules, including expanders and limiters. For it would seem unjust to sanction a party for not preserving something that the party correctly concluded would be beyond the scope of legitimate discovery in the case. Of course, prudence will suggest erring on the side of caution in close calls. But too often rules build over-preservation into the duty itself (see Delaware's recently adopted rules), which is a mistake. If a litigant tries to get very close to the line without seeking advance guidance from the court, the party has taken its chances. But the rule should not be written so as to put the party in technical fault even though the party does not actually cross the line.

One case that comes very close to articulating this standard is *Wiginton v. CB Richard Ellis, Inc.,* No. 02 C 6832, 2003 WL 22439865, at 4-5, 7 (N.D. Ill. Oct. 27, 2003) ("party must provide all evidence that it has notice is reasonably likely to be the subject of discovery request even before a discovery request is actually received"). Inserting the word "proper" before "request" would have made it complete. It is apparent from the whole of the opinion that the court did not mean that discovering parties have the unilateral power to force opponents to preserve anything under the sun just by asking for it, no matter how improper the request.

In *Turner v. Hudson Transit Lines, Inc.,* 142 F.R.D. 68, 72 (S.D.N.Y.1991), the court held that "[w]hile a litigant is under no duty to keep or retain every document in its possession ... it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action." The shorthand use of simple "relevance" in Turner is an obvious over simplification. Nothing in the opinion suggests that the court meant to rule out all of the other discovery standards in the rules; whether those that broaden the relevance standard ("reasonably calculated" for example) or those that narrow it (proportionality for example). It is common shorthand to say discovery extends to the "relevant" even though all are well aware that there is more to discoverability.

In *Zubulake,* 220 F.R.D. at 217, the court held that a party need not "preserve every shred of paper, every e-mail or electronic document" but "must not destroy unique, relevant evidence that might be useful to an adversary." This formulation supports discarding even relevant evidence that is not unique, showing that relevance is not alone sufficient but rather that the cumulativeness factor from the proportionality rule also matter. Also note the qualifier "that might be useful to an adversary," which hints

that things that won't be important enough to be discoverable need not be retained.

In *Miller v. Phillip Holzmann,* CA No. 95-01231 (RCL/JMF), 2007 U.S.Dist. LEXIS 2987 (D.D.C. Jan. 17, 2007), the court held that "a party has an obligation to preserve evidence it knew or reasonably should have known was relevant to the litigation and the destruction of which would prejudice the other party to that litigation"). Like Zubulake's qualifier, that "might be useful to an adversary," Miller's "prejudice" qualifier even more clearly suggests that things that wouldn't ultimately be discoverable need not be retained.

In *Lewy v. Remington Arms Co.,* 836 F.2d 1104, 1112 (8th Cir. 1988), the court held there is a duty to preserve any documents that a company "knew or should have known … would become material at some point in the future"). The use of "material" rather than merely "relevant" again suggests mere relevance, and possibly even the minimum discoverability threshold, is not the standard for the scope of preservation. The documents may need to be not just minimally discoverable, but also material to the case.

See also, Jones v. Bremen High School District, No. 08-C-3548, 2010 WL 2106640 at *5 (N.D. Ill. May 25, 2010) ("[A] party has a duty to preserve evidence that it has control over and which it reasonably knows or can foresee would be material (and thus relevant) to a potential legal action"); *Dardeen v. Kuehling*, 821 N.E.2d 227, 231 (Ill. 2004) ("the plaintiff must show that the duty extends to the specific evidence at issue by demonstrating that a reasonable person in the defendant's position should have known the evidence would be material to potential civil litigation.").

The 7th Circuit Pilot Program supports the application of the proportionality standard to the scope of evidence preservation. Principle 2.03(a) states:

> Appropriate preservation requests and preservation orders further the goals of these Principles. Vague and overly broad preservation requests do not further the goals of these Principles and are therefore disfavored. Vague and overly broad preservation orders should not be sought or entered. The information sought to be preserved through the use of a preservation letter request or order should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C).

Principle 2.04(a) also incorporates the proportionality principle into the evidence preservation calculus:

> Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.

As an aside, it would be helpful if the Rules Committee can define "control" in a way that settles some of the competing case law. Some courts seem to find control by a subsidiary or affiliate by asking the nearly tautological question whether the parent or affiliate would provide the documents if the related entity needed it for some business purpose. *E.g., Camden Iron & Metal, Inc. v Marubeni America Corp.*, 138 F.R.D. 438 (D.N.J. 1991) (a court will find "control" if the court is convinced that the company could secure the information "to meet its own business needs" or if "the need [were] to arise in the ordinary course of business.") Taken literally it is almost inconceivable to answer that question in the negative. It essentially says that related companies always control each other's documents, even if there has never been and is unlikely to be an actual need to request the documents for any such business purpose in the real world. This control issue frequently is a tough one for large multi-nationals to navigate when setting up preservation steps, since they often need to manage to the most aggressive case law in the country.

18. Does the current state of the law (rules, case law, statutes, or regulations) provide you with adequate guidance as to the scope of your duties concerning:

(D) The custodians to be notified of preservation obligations (Optional)

Never	6.8%
Rarely	25.4%
Sometimes	39.8%

Often	22.0%
Always	5.9%

Please comment on your answer. (Optional)

- The rules, case law, regulations, etc., should not be expected to identify the custodians; the nature of the matter drives that issue.
- I find that clients are often extremely broad in notification. For big corporations with large litigation profiles, one wonders if these notices lose impact given their wide distribution. Neither the rules or the case law provide meaningful guidance to limit who should receive initial notification. But limits may not make sense, especially if notices are constructed in a way that recipients are asked to "raise their hands" if they may have relevant information.
- Same as above
- As with these other questions, we are making determinations before or at the moment litigation is brought, and they are judged after the issues in the case become much more clear (and, potentially, after the amendment of pleadings). This leads to a potential "gotcha" game.
- Especially as healthcare records evolve from a hybrid state (paper and electronic) the issues (and cost associated with these issues) regarding custodianship have become murky and confusing.
- We need clarification of the concept of key player. Some case law suggests that the term should be given its natural meaning. Other case law suggests that the definition is dependent on who might have anything subject to discovery, which raises the same issue as C above. This is a particular problem in class and collective actions where the scope of a claim is often not defined for an extended period.
- Fact specific.
- Here, the rules are so ambiguous as to be all but meaningless, especially when whatever decisions are made are attacked in court with the benefit of hindsight.
- Sooner or later, counsel has to decide who the material witnesses & sources of information are in resolving the case. The fact that an explicit preservation duty accelerates that diligence to the early stages of a matter is not, in itself, troublesome to me.

- Generally, there are a small group of custodians who are the decision makers relating to the subject matter of the litigation. If the Rule required an agreement of counsel on the number of custodians with a provision for adding custodians, it would help.
- This requires an attorney who is familiar with the electronic discovery and knows the right questions to ask.
- There is no clear answer on who needs to be subject to a hold. Therefore we usually over protect, adding people to holds who should not be required to retain information. This has significant costs.
- This is more of a factual inquiry than a legal one.
- This is more easily achieved by early identification and interview of key custodians, and ensuring key custodians identify during the interviews others who may have relevant information.
- There could be hundreds of individuals with only tangential connection to the possible claims, yet arguably having information "that could lead to the discovery of relevant information" -- sales representatives, for example. Anyone could have sent an email to someone that mentioned the product or relationship at issue.
- Again, must meet and confer and have transparency and cooperation.
- It depends almost entirely on the facts of the case.
- This is just plain common sense - we don't need a rule here. Lawyers aren't doing their jobs if they can't figure out who the right people/custodians are.
- The individual determinations often involve difficult judgment calls. But the standards seem pretty well established. And it is difficult to imagine any rule that could lay out in any bright line way what is reasonable and proportionate in each and every situation.
- You usually have "some" custodians but most require identification through investigation and interviews.

18. Does the current state of the law (rules, case law, statutes, or regulations) provide you with adequate guidance as to the scope of your duties concerning:

(E) The process necessary to notify preservation custodians (Optional)

Never	11.1%
Rarely	16.2%
Sometimes	30.8%

Often	34.2%
Always	7.7%

Please comment on your answer. (Optional)

- The law states that reasonable efforts should be made to inform custodians. Further the law should not do, as the situations of those giving such notice will vary greatly. A not-for-profit organization should not be expected to use the same process as a multi-national oil company.
- Many questions are left unanswered by the rules, but have been filled in by courts. E.g., is a written notice required or sufficient? How specific must the notice be in explaining the claims (and likely defenses)?
- The cases are pretty clear about the process of sending out a litigation hold and issuing reminders.
- see 18 a
- There needs to be A LOT of education and resources dedicated to embracing ediscovery as a business process -- especially in healthcare -- the issues are (literally) sometimes a matter or life or death and without good controls in place - justice may not always be served to the party involved.
- This is a matter of judgment not rule or regulation
- There may be some ambiguity over the need for a formal, documented process that arises from some judges' frustrations with the ad hoc, crisis-oriented handling of ESI that has been the ordinary course of business for a generation. But most courts seem to look to the ultimate issues -- whether there is any indication that important sources of information were overlooked, or whether important information has gone missing. In those circumstances, custodians should be notified <somehow>; followed up as circumstances require; and otherwise treated as material witnesses. To restate a previous point, it has not been a significant issue as long as the jurisdiction has provided *some* guidance.
- There is no guidance with any specificity regarding the notification process. Judges tell us that simply issuing a Hold Notice is not sufficient -- but that you need to remind the recipients. OK -- how often? Judges would also like to see a compliance mechanism - what does that look like? No one can go around watching the employees in how they use their email so you either have to rely upon technology such as the Lit Hold feature in Exchange 2010

to achieve compliance but there are some kinds of data that do not have the Lit Hold feature that Exchange 2010 does.

- This requires an attorney who is familiar with electronic discovery and knows the right questions to ask.
- We use a tool to provide notice via email. It would help for a rule or comment to provide clarity that this process is appropriate.
- This process is becoming more manageable over time as entities accept the necessity - from all perspectives: business units, upper level management, IT, RIM, Compliance, Information Security, HR, etc. Whether to invest in technology solutions is proportional to the litigation portfolio of an entity. Huge investments required for automated solutions, however, are not appropriate for entities with a low volume of litigation.
- Some cases have addressed what should be included in a litigation hold letter. However, I find this largely meaningless without the information management structure needed to implement an effective hold.
- No clarity in the law about whether more detailed notices are better because they provide more guidance about the types of information to be preserved, or more streamlined notices because they are shorter and more likely to be read, even if their scope is not understood. The concept of "key" sources who should be followed up with in person may be meaningful in a *Zubulake* type case where a discrete number of individuals was involved in the alleged incidents, but is much more nebulous in commercial, product liability, or intellectual property cases where dozens or hundreds of people could be involved in some aspect of the design, development, manufacture or marketing of the product in suit.
- We deploy written litigation hold notices in all matters based on the case law.
- The process is left up in the air, as it should be. Documentation of the process used could be required by case law or by rules. This little change would make a huge difference. Lawyers couldn't come in and argue straight-faced that someone didn't do the right thing, if they actually documented what they did and why.
- still many gray areas and varying demands court to court
- The case law, including *Zubulake*, holds that issuing a legal hold "is not enough." In *Zubulake* there was a legal hold notice issued but it was not followed either by the direct participants in the underlying events or by IT personnel, and sanctions were imposed. Other cases also impose sanctions against a company where important ESI is lost through negligence or worse misconduct of key players, even though the company issued a legal hold

notice to those key players. *See, e.g., U.S. v. Philip Morris USA*, 327 F.Supp. 2d 21, 26 (D.D.C. 2004) (sanctioning company because 11 executives failed to comply with legal hold notices). My point is that issuance of a legal hold notice is often given way too much significance. The simple fact is that issuing one is not always necessary, and that issuing one alone is not necessarily enough. So building some presumption of reasonableness around whether a legal hold notice was issued makes little sense to me.

18. Does the current state of the law (rules, case law, statutes, or regulations) provide you with adequate guidance as to the scope of your duties concerning:

(F) The information sources to be investigated for possible preservation (Optional)

Never	7.6%
Rarely	27.1%
Sometimes	39.0%
Often	21.2%
Always	5.1%

Please comment on your answer. (Optional)

- The liberal relevance standard (made even more liberal when it is expanded to things that are, in the earliest days of litigation, viewed as "potentially relevant," does not offer much in terms of reasonable limitations. The requirement that one identify sources claimed to be "not reasonably accessible" also could use more clarity. As it is, it may lead to over-designation and over preservation where an opponent is not willing to agree to limits (because so little is known about the source).
- This, in my humble opinion is a critical step to be taken to help control costs and the scope of the preservation obligation.
- See comment C
- This is a matter of due diligence not rule or regulation
- Direction on investigation of Cloud and collaborative repositories would be helpful

- See (D-E), supra. Every information source has a person who should be accountable for its responsible preservation. If none seems to exist, then its potentially responsive information should be collected & placed into the custody of an accountable person.
- This obligation falls on the shoulders of the parties which is logical since they should know what data they have.
- This requires an attorney who is familiar with electronic discovery and knows the right questions to ask.
- The lack of certainty regarding sources of information adds significant concern as to the scope of holds.
- This is primarily dependent on how well a party and counsel understand the ESI infrastructure and landscape of the entity. Other major factors include ensuring an understanding of the nature of the matter, knowing how and where information is stored, and collaborative efforts with involved parties to define and narrow the scope.
- Some cases have addressed what locations should be searched. However, I find this largely meaningless without the information management structure needed to implement an effective search.
- It depends almost entirely on the facts of the case.
- This part changes so much depending on the business, the IT technology that the company uses, and the software used to run it all that it senseless to try to make this part rules based.
- still many gray areas and varying demands court to court

18. Does the current state of the law (rules, case law, statutes, or regulations) provide you with adequate guidance as to the scope of your duties concerning:

(G) The information sources to be preserved (Optional)

Never	6.8%
Rarely	29.7%
Sometimes	38.1%
Often	20.3%
Always	5.1%

Please comment on your answer. (Optional)

- For all of these questions, the laws are too varied between states and federal jurisdictions to give any guidance on the appropriate limits to preservation.
- The issue of what metadata needs to be preserved often arises. Courts that have considered the issue do not seem to differentiate between metadata that is useful and metadata that the program uses to allow access to a file or information about the file.
- Again, the information sources (at least in healthcare) are all over the place and not at all slightly controlled - without metadata standards, appropriate EHR designs which mandate legal hold requirements and mechanisms to protect the privacy and security of the information, the costs and appropriate preservation of relevant information for discovery can't/won't happen.
- See comment C
- See comment C
- Increasingly, third-party data hosts are becoming integral to the relevant preservation analysis. Unfortunately, this is often as big or an even bigger issue for smaller and less sophisticated clients than for larger ones. The irony is that those portions of the bar that have been exploiting preservation issues to harass larger defendants may find themselves confronted by extremely complex and elusive preservation issues where their clients have placed critical data or information into the cloud depending on how courts define what is and is not within a parties' control. The evolution of such a standard is likely to be painful and inconsistent and slow.
- This is a reasoned judgment based on proportionality and reasonableness which cannot possibly be reduced to a bright line rule
- See above
- See (D-E), supra. Every information source has a person who should be accountable for its responsible preservation. If none seems to exist, then its potentially responsive information should be collected & placed into the custody of an accountable person.
- This obligation falls on the shoulders of the defendant which is logical since we should know what data we have.
- This requires an attorney who is familiar with electronic discovery and knows the right questions to ask.
- The current law is very unclear as to whether databases for example have to be preserved, or web sites, etc. It is usually practically impossible to preserve that type of data source for ongoing cases in any event.

- There should be a duty for counsel to ask key custodians about all possible sources of outlier ESI and then follow up to collect and/or vet veracity of custodian.
- Major factors include ensuring an understanding of the nature of the matter, knowing how and where information is stored, and collaborative efforts with involved parties to define and narrow the scope.
- It depends almost entirely on the facts of the case.
- Same answer as above in F
- My prior comments explain that I believe the standard of what needs to be preserved is now pretty well established. Applying that standard to specific facts on the ground can be complex and involves judgment calls. But I don't believe a rule could ever provide the specific answer, up front, for every possible scenario.

19. Please indicate your preference among the approaches to a new preservation rule being considered by the Advisory Committee, described in detail at http://www.thesedonaconference.org/wgs/content/wgs110/?tab=ref: (Optional)

Approach 1 is a comprehensive rule that includes detailed prescriptions identifying when the duty of preservation arises, the scope of subject matter, the nature of sources, the duration, and appropriate sanctions for failure to preserve.

36.8%

Approach 2 is a streamlined rule that simply requires parties to act reasonably in determining the trigger and scope of preservation actions.

28.9%

Approach 3 does not define a duty to preserve apart from the implications of listed factors that courts should consider in deciding whether sanctions for failure to preserve are justified.

14.9%

Approach 4 is no rule change or "none of the above."

19.3%

Please comment on you answer: (Optional)

- The problem the committee should be addressing is not in explaining what needs to be preserved. We don't need any more rules along those lines. We need a set of rules which prescribe what doesn't need to be preserved absent special circumstances, and a culpability standard that requires a showing of intentional misconduct.
- Neither 2 nor 4 is a viable option. #2 because it appears to mirror the current state of affairs and #4 because we would not be having the conversation if nothing was the appropriate response. The specific right course of action is obviously the toughest question, but I believe that a combination of elements from 1-3 is what we should try to achieve--providing enough guidance without being so specific that the rule becomes unworkable.
- Approach 1 is the best route, in my opinion. As a U.S. Magistrate Judge I know that the more detailed and direct the rules are the less wiggle room is available for parties who want to raise arguments based on perceived, or claimed conflicts in the rules.
- Approach 2 with some examples of what should be considered in the reasonableness determination would be helpful.
- I would like to see a hybrid of Approach 2, with some detailed information in the Advisory Committee notes about identifying triggers, the scope, the nature of sources to be considered, and the duration of the duty. I do not think that we need more guidance on the appropriate sanctions for failures to preserve. The body of case law on this issue offers useful guidance that is tailored to the facts of each case. The Committee should not be modifying the Court's discretionary power to impose appropriate sanctions by a one-size-fits-all rule.
- A comprehensive rule would be fantastic, but I have no idea how to draft a rule that is "one size fits all" for all cases. There are too many variables, i.e., type of case, sophistication of litigants, value of matter.
- A comprehensive rule would be welcome. It can assist us in impressing the importance of preservation upon clients, and may defuse disputes as they arise. There does need to be an exception for reasonable efforts under the circumstances, because every case is going to be different, especially when parties are in a pre-litigation mode.
- Litigation is more complex so a comprehensive rule makes more sense especially if you want to get the attention of seasoned attorneys who do not really know how to confront these issues.

- Industries that have mandatory ESI retention, such as brokerage firms or energy traders, have developed software and systems to accommodate the added storage and data management - they have not, to my knowledge, attempted to lobby congress and the judiciary for changes to law that requires them to keep records of every trade, email or instant message related to any trade. The effort to add a rule is simply an attempt to create a curtain for certain parties to hide behind. If parties would act in good faith, meet and confer on these issues, narrow custodian lists to relevant custodians, reserve rights to come back if more information is necessary, then a rule change would be unnecessary. But parties are sometimes more interested in gamesmanship than in an open exchange and honest discovery. My answer to that is that if you want to roll the dice, then roll them - just don't ask the judiciary to legitimize your gamble.
- I can't comment on this preference. I checked on link above and it was bad. I accessed TSC Website and could not find the approaches to preservation discussed above. Would love to know more about this, but I just couldn't find the new preservation rule being considered by the Advisory Committee.
- Approach 1 would provide the greatest certainty. Approach 1 must, however, include within it meaningful limits based on reasonableness and proportionality. Otherwise it will simply further over-burden litigants.
- All we need is a rule that requires the parties to meet and identify scope of preservation as soon as they are aware that they may be filing a claim in federal court. The comments to the rule might say that the parties are presumptively reasonable if they meet and discuss scope immediately upon learning of the potential federal claims.
- Specific guidance is best for most practitioners and will reduce litigation over these issues.
- Today, I believe I can make defensible decisions, but I cannot confidently predict outcomes. Approach 1 would enhance the advice I could give to clients and reduce the "known unknowns."
- In truth, I'd prefer a hybrid approach. There are some areas where I think detailed guidance would be extremely helpful, recognizing that in others, a detailed standard would possibly be more nuisance than benefit. Part of the problem from my perspective is that the burdens and relative benefits are so variable. Mandating that courts be involved in establishing limits on preservation burdens early on would perhaps be the most welcome change for many larger and more sophisticated clients, whereas a uniform and more deferential standard governing sanctions and limits on what data is and is not within a parties' control may be the most important issue for many small

businesses, which are the least likely to seek early representation and the least capable of preserving data without outside assistance and, likely, the cooperation of third parties that are increasingly likely to be hosting much of the data in question. The issues in this context can become extremely complex and the results elusive -- all of which is very challenging in a case with tight budget constraints.

- Category 1's specific preservation triggers undermine the fact-specific inquiry necessary for ensuring reasonable and proportional preservation. A rule of general applicability cannot be crafted in such a manner as to address the wide variety of factors a party must weigh pre-suit when making preservation decisions. Furthermore, the proposed rules changes likely would foster wasteful satellite litigation and produce unfair and inappropriate results. Finally, the court is not suited to regulate pre-litigation activity and some of the proposed provisions present significant issues under the Rules Enabling Act.
- I had been planning to advocate for "no change"; a streamlined rule is probably a better option for two reasons: the courts still have room to adjust to evolving technology and work through a few more years of issues; the committee will have greater flexibility 5 years from now to tweak the rule, if necessary.
- Approach 1 could not be fit every case. Perhaps Approach 1 with different levels based on amount at issue, types of issue & complexity? To approach 2 I'd add duty to confer & agree or if no agreement to get court to rule on scope of preservation. Q. Pro se parties? Q. Pre-litigation (when preservation issues often (usually?) arise).
- The duty to preserve has evidentiary, regulatory & even criminal implications. Thus, I question whether a rule of civil procedure could be "comprehensive" in any meaningful way. On the other hand, a "streamlined" or otherwise non-definitive rule could hinder the efforts of those individual judges who wish to prescribe more specific standards in local practice. I may not agree with rigidly formalistic local rules, but I wouldn't try to stifle them because some may become widely accepted when proven over time. On the other-other hand, I question again whether a rule of civil procedure can trump other laws and rules to prevent selective destruction of evidence from being considered as a matter of character, credibility, or substantive instruction or finding at trial. Particularly in the situation where the selective destruction occurred before a proceeding began or process was served. People have gone to jail & had property forfeited civilly for such pre-proceeding acts, as well as receiving the range of sanctions encountered in

commercial litigation. In sum, I believe we are in a roughly 10-year transition in which courts are requiring litigants to handle ESI in a more disciplined way than through the ad hoc, crisis-oriented methods in which it has evolved. Current prevailing standards require even-handed preservation of potentially relevant (meaning "material") information in the reasonable anticipation of an official proceeding. Interim results of the surveys in the 7th Cir. Pilot Program suggest that ESI discovery is not a significant issue in most cases, but a major concern in some cases. So if any action is needed, perhaps it consists of more guidance about when there is "cause" for extended discovery beyond claims & defenses in large cases. Perhaps more illustration of when subjective thoughts about a possible dispute become "reasonable anticipation" of an official proceeding. Those may be matters for education, not prescription.

- Bright line rules allow the parties to manage to those requirements. Otherwise, the parties are subject to a myriad of different and sometimes conflicting standards as illustrated by the various state and federal court opinions regarding preservation. Measuring whether a party's conduct falls outside of the requirement becomes more objective -- it lessens the subjectivity.
- Approach 1 sounds like an impossible ideal that will not attract consensus. Approaches 2 and 3 sound like what is or should be in place but somewhat amplified -- hard to see positive cost/benefit to expensive/time-consuming business of rule generation. Current rules actually applied with a greater emphasis on proportionality, with less diversity across jurisdictions and greater certainty around expiration of duty might be best outcome.
- I feel that approach 3 is the best way to provide some level of clarity without bogging down in a level of specificity that will not serve the legal system long term.
- I am a little afraid that too much detail will lead to a solution that becomes obsolete with advances in technology, However, I do believe more guidance is needed especially to assist those that have unfortunately not done their homework and become well-schooled on electronic discovery issues.
- First, the directions aren't clear as to where the "approaches" can be found on the WG1 website. The survey should list the document containing the approaches by name of the document as it is saved on the website. From what I have seen on the website, the proposed approaches are flawed in several ways: (1) they allow for unilateral subjective assessment of the financial value of a claim... by the very party that has an incentive to devalue a claim and to avoid preservation; (2) assessment of financial value of a claim

overlooks the possibility that important claims with no financial value (e.g., civil rights cases seeking injunctive relief) would ruin a party's ability to obtain discovery for such claims; (3)

- I believe that a reasonable anticipation standard should be adopted (without a detailed understanding of what are triggering events) and wash away case law that may (or may not) disagree with this standard (Dell, Rambus's reasonably foreseeable standard (?)). However, I think a better definition of scope and a clear reliance on proportionality is required. Moreover, I think that the Rules Committee should look closely at the Seventh Circuit Pilot Program and understand that if a party has no reasonably reason to believe that a data source has unique relevant information in it, then it need not be preserved. The focus needs to be on what information is relevant to the dispute, not the variety of locations that a party may have or use.
- A rule that if followed would provide a safe harbor against sanctions in conjunction with a rule that requires a clear showing of actual, demonstrable prejudice would be preferred. This entire area is akin to fraud such as the inequitable conduct in patent cases which recently has been considerable restricted. That approach is a model that I think would be a starting point for a rule.
- We need a comprehensive approach to provide guidance to all parties on when the trigger applies, what needs to be preserved (and for how long) and when sanctions are appropriate.
- I am strongly opposed to any attempt to craft a "comprehensive" rule. It will never be so and the attempt will be counterproductive.
- My practice experience and line of research leads me to believe that rule changes will not be that effective. Courts, clients and counsel need to follow the current rules and case law (particularly the majority rule re triggering of preservation duties) that are now in place. Were those rules and that case law followed, the number of discovery disputes - plus the costs and delays (see Rule 1) associated with those disputes - would dramatically drop. Initiating new rules will not solve this problem. Moreover, I strongly disagree that a new rule will be a panacea re preservation given the fact intensive nature of this issue.
- In answering these questions it is clear to myself and my clients when these duties arise, it does appear as though it is not as clear in the eyes of other parties. This is particularly true of government, especially federal, agencies, who tend to respond to more specific guidance, especially where a government worker must state their case to a superior as to why a budget is

necessary for ESI preservation compliance. This is why I am in favor of the most specific rule changes.

- Determining when, how and what to preserve cannot be black and white – it cannot be set out in writing – it is definitely judgmental – and must be done in a reasonable, consistent, defensible manner – with adequate documentation. It always has been and always should be. If it were so easy to set out, great minds would not differ in hindsight. For example, the mere receipt of a "demand letter" should never be considered a trigger to preserve standing on its own - it must be considered in light of all involved circumstances, and in many instances, the response will be "we have reviewed your letter, and have determined there is no reasonable likelihood of litigation. Therefore, we will not now incur the tremendous expense of initiating a legal hold. You may rest assured, however, that we will continue to monitor this matter, and will at all times strive to comply with all applicable laws and rules."
- 1) I don't think a rule will fix the perceived problem (the real problem is information management) 2) Any rule enacted now, will be obsolete in a matter of years.
- The real issues are disclosure by parties and education of judges and lawyers about the state of current technologies. The days of paper and the paper model are gone. The new model is being built by the marketplace and in case law, which can react to infinite variations. This is the nature of the Digital Revolution.
- 2 and 3 should be considered but if I had to pick just one it would be 3
- Something between 2 and 3 might be best -- the problem with 2 is that it provides no guidance at all. The problem with 3 is that it doesn't describe a positive threshold that allows a party to determine if it has acted appropriately and reasonably, but only a negative threshold (i.e. whatever you did, it did, or didn't, deserve sanctions).
- The first two approaches are fraught with issues and only add to the ambiguity and complexity, and only create more bases for litigation over discovery. The problem isn't in the triggers as much as it is in the execution. That is, clients and lawyers are worried that their reasoned judgment will be second guessed and sanctioned by the court later. Protecting reasonable preservation will encourage a reasoned and documented preservation process that would provide a "safe harbor" from spoliation claims and sanctions to good-faith litigants. I would like to see some mechanism that protects reasonable laypeople from having their judgments seconded-guessed by more sophisticated courts well after the fact.

- I thought about choosing option/approach 3 but it really is already addressed in case law - it sounds like you just want to codify existing case law (which can make it easier on lawyers) but then it just starts a whole new area of interpretation of the rules. I think judges just need to start calling lawyers on bad lawyering (malpractice) in the ediscovery area. People know what to save, now they just need to work with IT or whoever to make it happen and make the data available to the people that need access throughout the litigation. Guidance on when it can be destroyed or put back in it regular records retention mode is sorely needed. People are afraid to not preserve something so they preserve everything which is extremely costly when it comes to processing and review of the data.
- I would take approach 3 in the sense that the rules should not be phrased to say "every person who reasonably expects to be a party to an action cognizable in a U.S. court shall ..." but rather to say that "each party to an action, or respondent in discovery, in a U.S. court will be subject to sanctions under [insert whatever sanctions rules end up being applicable] unless [insert trigger and scope of duty]." The third option as presently drafted gives factors that include most if not all of the right elements, but that leave open questions of whether any factor is dispositive or essential and the relative weighting of the factors. For example, what if factor (A) is not satisfied because the party was not on notice of the litigation (or had no reason to expect that the lost evidence would eventually be discoverable in the litigation)? As currently drafted, a judge could still impose sanctions. Or, what if factor (E) is not satisfied in that the preservation steps not taken would have been disproportionate to the case? The judge could still sanction the party, perhaps noting its vast resources and sophistication under factor (D). I doubt that is the intention but it could be the result as presently drafted. To fix this I would take some of the elements of approaches 1 and 2 and build them into the structure of approach 3. So, putting this all together, a rule might read something like:

> Each party to an action, or respondent in discovery, will be subject to sanctions under [insert applicable rules] if that party or respondent is unable to produce discoverable evidence because it failed, beginning promptly upon notice of facts that would make a reasonable person anticipate litigation or subpoena, to take reasonable steps to preserve evidence that was in its possession, custody or control and that a reasonable person under the circumstances would have anticipated to be discoverable in the action.

The Advisory notes would explain that "discoverable" is meant to encompass all of the discovery rules, including both expanders (e.g., "reasonably calculated to lead to") and limiters (e.g. proportionality and such).

The referenced sanctions rules would then provide the contours of appropriate sanctions including levels of culpability, what showing of prejudice is needed, and what kind of sanctions can be imposed. Or maybe this same rule just carries on from here and sets out all of the conditions for sanctions.

By the way, I think that "notice of facts that would make a reasonable person anticipate litigation or subpoena" covers the water front, including actual notice of, as well as formal service of a complaint or subpoena. They are subsumed within that formulation. No need to redundantly add "pending" litigation or the like. You can anticipate litigation if you know it is already pending. No one would say work product's "reasonable anticipation" standard ceases to apply once the case is already pending. Same here. The Advisory notes could explain this.

Note that I used "evidence" as a catch all for "documents, ESI, and tangible things." It is less of a mouthful. But, unless it becomes a defined term, it may be ambiguous; some may think it means "admissible" evidence. Unless we come up with a defined term that includes all three items, we'll need to repeat "documents, ESI, and tangible things" quite a lot. Something should be done about this problem throughout the rules, since, for one of many examples, Rule 26(b)(3)(A) still says "documents and tangible things" without mentioning "ESI." I think somewhere in the advisory notes, maybe to Rule 34, there is some sort of caution about not narrowly interpreting references that still refer to just documents and not ESI. But it seems like it is time to fix this terminology throughout the rules, either by defining a catch-all term, or consistently referring to all three items everywhere.

- I can't really answer this question as written. There may be some instances where additional guidance would be helpful, particularly identification of what ESI in ordinary circumstances does not need to be preserved.