

Walking the Plank, Looking Over Your Shoulder, Fearing Sharks Are in the Water: E-Discovery in Federal Litigation?

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INTRODUCTION

In 1906, Roscoe Pound, a Ph.D. botanist, lawyer, and then dean of the University of Nebraska College of Law, addressed the American Bar Association convention urging procedural reform in the federal court system. In a speech entitled, *The Causes of Popular Dissatisfaction with the Administration of Justice*,¹ he argued that there was a “real and serious dissatisfaction” with courts² and “a lack of respect for law which exists in the United States today.” One of the sources of this dissatisfaction, Pound argued, was the rigor of procedure under common law and the limited role of the judge in the dispute resolution process. He starkly described the state of the “administration of justice” 100 years ago: “Hence in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interests of justice.” Discussing lawyer abuse of procedural rules, Dean Pound was unmerciful:

The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice. It leads counsel to forget that they are officers of the court...

The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it or the public who witness it can be expected to yield to its spirit when their interests are served by evading it. And this is

¹ 29 ABA Rept. 395 (parts of which quoted here reprinted at <http://www.law.du.edu/sterling/Content/ALH/pound.pdf>).

² His remarks were specifically directed at the civil, rather than the criminal, justice system.

*doubly true in a time which requires all institutions to be economically efficient and socially useful.*³

Dean Pound's speech set in motion events that eventually resulted in the adoption of the Federal Equity Rules of 1912⁴ that, 25 years later, served as the framework for the Federal Rules of Civil Procedure.⁵

In light of Dean Pound's characterization of litigation in the law courts, it should not have been surprising that Rule 1 of the new Federal Rules of Civil Procedure directed courts to construe and administer⁶ the rules of civil procedure "to secure the just, speedy and inexpensive determination of every action."⁷

³ 29 ABA Rept. 395 (<http://www.law.du.edu/sterling/Content/ALH/pound.pdf>).

⁴ In 1908, the ABA created a Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation, which became known as the "Committee of Fifteen." Taft, *The Administration of Justice—Its Speeding and Cheapening*, 21 Va. St. B.A. Rep. 233, 238 (1908), reprinted in Taft, *The Delays of the Law*, 18 Yale L.J. 28 (1908). With the support of the Committee of Fifteen, the Supreme Court adopted the Federal Equity Rules of 1912. Hopkins, *The New Federal Rules of Equity* (reproduced by Google Books at: http://books.google.com/books?hl=en&id=L_k9AAAAIAAJ&dq=federal+equity+rules+of+1912&printsec=frontcover&source=web&ots=omCCV6z8Hg&sig=5LMr_uKZpRFn7HmK0MqIFPk86A0#PPR11.M1). This book also contains "cognate statutory provisions and former equity rules" along with an introduction, forms, and annotations by James Love Hopkins, a member of the Bar of the Supreme Court. The new equity rules eliminated technical pleading requirements and demurrers (Equity Rule 18, 29), gave parties the right to amend pleadings (Rules 19, 28, 34), and permitted depositions and interrogatories, although with limitations (Equity Rules 47, 58). Judges sitting in equity were allowed to hear witnesses testify live in open court (Equity Rule 46) rather than to have to read documents containing the testimony of the witnesses.

⁵ Dean Pound's speech also became a focal point at "The Pound Conference" held in 1976 in Minneapolis, in the same room at the Minnesota State Capitol Building where Dean Pound had given his 1906 speech. Lee, *The Profession Looks at Itself – The Pound Conference of 1976*, 3 B.Y.U. Law Rev. 737 (1981). The former solicitor general explained that participants convened to "consider current problems of American judicial administration and chart a course for improvement by the turn of the century." *Id.* at 738. In his after-the-fact summary, he wrote that from "one perspective, a comparison of Pound's 1906 address with the proceedings of the Pound Conference seven decades later is cause for pessimism. The comparison reveals that, while change has occurred, some of the changes have become the new targets of reform—that our system's response to some of the things criticized by Pound three quarters of a century ago are now the very things of which the Pound Conference participants complained." *Id.* Mr. Lee concluded: "As long as there is a judicial system, it will be attended by discontent. But the inevitability of discontent is no reason not to worry over its causes." *Id.* at 740. By invoking Pound's speech again, I do not wish to be labeled a pessimist. Rather, our goal must be to figure out today's causes of discontent and then work diligently to address them in a prompt, thorough, and decisive manner.

⁶ The words "and administered" were added in 1993. Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 537 (1993).

⁷ The 1912 Equity Rule 1 provided that the district courts "shall be deemed open" for certain purposes, making no reference to the cost or speed of justice. To find references to speed and efficiency, one has to look to Hopkins's annotations stating the reason for and purpose of Rule 26 of the 1842 Federal Rules of Equity. This equity rule prohibited impertinent or scandalous matter in a "bill," or complaint. If a bill contained impertinent or scandalous matters, sanctions could follow. Hopkins quoted from an 1898 opinion by Judge Sanborn in *Kelley v. Boettcher*, 85 F. 55, 57, 29 C.C.A. 14 (8th Cir. 1898) which explained that speed and efficiency in the administration of justice were the reasons for the rule: "The authority to control the volume and character of the pleadings and proceedings before it, and to strike from its files those that are obnoxious to its rules and practice, is necessary to the speedy and efficient administration of justice, and is one of the inherent powers of a court of chancery, which has been exercised without question since the establishment of such courts." Rule 26, 1842 Equity Rules (*The New Federal Rules of Equity*, p. 88.) In *Kelley*, the court of appeals affirmed the dismissal of a 170-page typewritten bill which contained scandalous and impertinent material, including 72 interrogatories with "no relation to any facts material to" the cause of action, but gave leave to the plaintiff on remand to file an amended bill of no more than 25 typewritten pages with discovery in aid of the claim (a mining claim and a demand for an accounting). The 1938 Advisory Committee Note Rule 1, however, did not reference Judge Sanborn's opinion to defend the references to "speedy" and "inexpensive." It references only Rule 19 of the 1912 Equity Rules which addressed amendments to any "process, proceeding, pleading or record" saying that the "court may at any time, in furtherance of justice, upon terms as may be just," permit them. (Emphasis added.)

Fast forward to 2009.

The American federal judicial system is the finest in the world. And we are doing everything we can to avoid it.

Those words were spoken publicly at the ABA Third Annual National Institute on E-Discovery by a very thoughtful assistant general counsel in charge of major litigation at a Fortune 10 company. Why? A system intended to be speedy and inexpensive has, to some, become neither. And where a system of justice is neither fast nor frugal, it may not be fair.

To be sure, history as described by Dean Pound is not repeating itself. The administration of justice is not at risk in the large majority of cases handled in federal court. They consist of prisoner petitions, wage-and-hour, social security, employment discrimination, civil rights, and consumer credit claims or straightforward, document-manageable, diversity tort or contract actions. If damages are being sought, in most of these cases, they will not involve a very large sum of money. They may only involve a few witnesses. They will be resolved in a matter of months, not years, by motion, settlement, or a trial. As the results of the 2009 Federal Judicial Center's survey of closed cases might suggest, in these cases, a large population of lawyers and their clients are content with the pace of justice and the amount of discovery, especially electronic discovery—the focus of this paper.⁸

However, there is another world of cases in the federal courts. E-discovery has brought them into focus. They may be a part of the 4.27% of civil cases commenced in the United States district courts in 2009 that were

⁸ Lee and Willging, Federal Judicial Center National, Case-Based Civil Rules Survey (October 2009) available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf). More than two-thirds of respondents agreed with the statement that the procedures employed in federal courts “are generally fair” and a majority disagreed with the statement that “discovery is abused in almost every case in federal court.” *Id.*, p. 3. More than 60% of the respondents reported that disclosure and discovery in closed cases generated “the right amount” of information. *Id.*, p. 2. Nearly 60% of the respondents also said that the Rule 16 conference did *not* include discussion of electronically stored information. *Id.*, Figure 5, p. 15. In perhaps suggesting that electronically stored information was not a focal point of many of the cases in the survey, 80% of plaintiff-attorney respondents and nearly 60% of defendant-attorney respondents said that their clients did not place a litigation hold on deletion of ESI in anticipation of litigation or in response to filing of the complaint (63% and 37% respectively), or did not say in their response whether this preservation step had occurred (18.3% and 22.4% respectively). *Id.*, Figure 6, p. 19. In addition, 54.1% of the plaintiff attorneys and 59.1% of the defendant attorneys reported that no party requested production of electronically stored information. *Id.*, Figure 7, p. 20. The surveyed population consisted of lawyers in federal civil cases terminated in the last quarter of 2008. *Id.*, p. 5. There were just over 2,600 respondents, 2,371 of which reported one or more types of discovery had occurred in the closed cases. *Id.*, p. 7, n.4, Table B-1, p. 79. For the solely-plaintiff lawyers who responded (840), 87.2% of the cases were categorized as contract (12.9%), tort (21.5%), civil rights or labor (48.8% together), and consumer (4.0%). The cases reported on by lawyers who said they represented both plaintiffs and defendants (635) that fell into these same categories totaled 67% (25.7% were civil rights, labor, or consumer cases). For lawyers who represented only defendants (1,163), 86.3% of the cases fell into these same categories (46.5% were civil rights, labor, or consumer cases). *Id.*, Table B-4, p. 81. Given this breakdown, it may not be surprising that the median cost of cases with at least one reported type of discovery was \$15,000 according to plaintiffs' lawyers, and \$20,000 according to defendants' lawyers. *Id.*, Tables 4 and 5, pp. 35, 37. Of the solely-plaintiff respondents in the survey, 70.9% were representing their clients on a contingent fee basis with roughly the same percentage of defendants' counsel billing hourly. *Id.*, Table B-2, p. 80. About 84% of the plaintiff-lawyer respondents were solo practitioners or were in law firms with 2-10 lawyers. For the lawyers who represented both plaintiffs and defendants, 50.3% fell into the same two categories. For lawyers who represented defendants only, 19.8% fell into the same two categories and another 15.4% worked for a government agency. *Id.* Table B-1, p. 79.

characterized as antitrust, bankruptcy, banking, environmental, intellectual property, securities, or RICO actions.⁹

They may be the asymmetric case where one party is data-rich and the other data-poor.¹⁰

⁹ *Civil Cases Commenced in US District Court by Basis of Jurisdiction/Nature of Suit, During the 12-Month Period Ending September 30, 2008 and 2009*. <http://www.uscourts.gov/judbus2009/appendices/C02Sep09.pdf>. In addition, in the 12-month period ending on September 30, 2009, 44.06% of the cases commenced were categorized as tort, personal injury, or personal property damage cases; 34.94% were civil rights, labor, prisoner petition, social security, or consumer credit cases; and 10.05% were “contract actions.” The remaining 7% of cases fall into a variety of categories.

¹⁰ The Federal Judicial Center also administered a survey to members of the National Employment Lawyers Association (NELA) in October and November 2009. Hamburg and Kolski, *Summary of Results of Federal Judicial Center Survey of NELA Members, Fall 2009* (March 26, 2010) (NELA Survey Report) available at: <http://www.nela.org/NELA/docDownload/29037>. Of 2,156 members who received the survey, approximately 300 members responded. *Id.*, p. 3. When asked whether the civil rules “are conducive to meeting Rule 1’s goals,” 59.9% answered “no.” *Id.*, p. 25. Nearly one-third of the respondents in the NELA survey worked in a law firm consisting of 1 to 5 attorneys and nearly 60% worked in a firm of between 2 and 10 attorneys. In other words, about 90% of the respondents worked in solo or small firms. *Id.*, p. 19. The average length of practice for respondents was 21.4 years. *Id.*, p. 20. Only 165 of the nearly 300 respondents answered the question of the fee arrangements with clients, and of this total, 72.1% said they worked on a contingent fee basis. *Id.*, p. 46. Not surprisingly the cases most often litigated among respondents (they could list three types of cases) were employment discrimination (80.4%), civil rights (41.9%), and labor (15.5%) cases. *Id.*, p. 21. 54.1% of the respondents said that “most” of their litigation takes place in federal court. *Id.*, p. 22. 64.6% disagreed that “current discovery mechanisms work well”; 65.2% of the respondents agreed that “discovery is abused in almost every case”; and 87% agreed that “sanctions allowed by the discovery (rules) are seldom imposed.” *Id.*, p. 30. However, when asked to react to the statement that “in the majority of cases, counsel agree on the scope and timing of most discovery,” 55.6% agree. *Id.*, p. 31. With respect to Rule 26(f) conferences, 29% said “no” when asked if they “frequently occur,” *Id.*, p. 33, and 45.4% said “no” when asked if they are helpful in managing the discovery process when they occur. *Id.* 81.3% said that if a motion to dismiss is pending there should not be an automatic stay of discovery. *Id.*, p. 34. When asked if a respondent had any cases involving electronic discovery, 69% said “yes” and 31% said “no.” *Id.*, p. 35. (Oddly, of those that said “yes,” 29% of them said that since December 1, 2006, when the e-discovery amendments became effective, they had not requested or been the recipient of a request for electronically stored information. *Id.*, p. 37.) Of those that answered “yes,” 60.8% agreed that e-discovery “increases the cost of litigation,” and 42.7% agreed that the costs of outside vendors have increased the costs of e-discovery “without commensurate value to the client.” Only: 34.3% agreed that e-discovery “is being abused by counsel,” 18.4% agreed that “e-discovery is generally overly burdensome,” and 16.6% felt that courts “do not sufficiently limit or otherwise protect parties against unreasonably burdensome e-discovery demands.” *Id.*, p. 36. Of the 193 respondents who have been involved in a request or response to a request for electronically stored information since December 1, 2006, 79.3% answered that most (29.6%) or some (49.7%) of the time, the e-discovery amendments “provide for efficient and cost-effective discovery.” *Id.*, p. 37. Rather consistently in the range of 58-64%, respondents said that intervention by judges or magistrate judges early in the case helps to narrow issues, limit discovery, and, if the judge stays involved, produces more satisfactory results. *Id.*, p. 40. With respect to Rule 16(a) conferences, 19.2% of respondents said that they were not regularly held. *Id.*, p. 41. As for litigation costs, 77.1% agreed that “litigation is too expensive” while 70.4% agreed that “discovery is too expensive.” *Id.*, p. 42. Not surprisingly, 98% agreed that when “all counsel are collaborative and professional, the case costs the client less.” *Id.* And 82% of respondents agreed that litigation costs are not proportional to the value of a small case, while 40% felt the same way with respect to the value of a large case. *Id.* 58.6% of respondents answered “yes” to the question of whether the cost of litigation “forces cases to settle that should not settle based on the merits.” *Id.*, p. 43.

Or on my scalability meter, they may be the case where the damages' claim is disproportionately small relative to pretrial-process costs.¹¹

This other world of cases has a common core: the cases involve e-discovery that is very expensive (a) absolutely or (b) relatively taking into account the amount or issues in controversy, and the potential for sanctions is real enough that defensive measures are employed, increasing e-discovery costs beyond what they might normally be.

As a result there have been outcries, albeit no consensus, from group after group for reform of civil litigation in America. Should notice pleading be abandoned? Should initial disclosures be increased or decreased? Should the scope of discovery be reduced? Should the scope of e-discovery be reduced? Should cost-shifting become the norm rather than the exception in e-discovery? Should there be more forgiving sanction-avoidance standards in the event of the loss of electronically stored information? Should those standards be the same in

¹¹ The American Bar Association Section of Litigation also conducted a survey of its members. It is available at <http://www.abanet.org/litigation/survey/docs/report-aba-report.pdf>. The results were compiled by the Federal Judicial Center. There were 3,300 respondents, about one-half of whom represent defendants primarily, with the remaining fifty percent split equally between those that represent plaintiffs primarily and those that represent both plaintiffs and defendants about equally. 94% of the respondents practice in a law firm, with 20% in a firm with less than 5 lawyers and more than half in a firm with no more than 50 lawyers. *Id.*, p. 15. Respondents averaged 23 years in the practice of law. *Id.*, p. 18. As for the types of cases most often litigated by respondents (they could list three), complex commercial disputes were identified by 42.7% of all respondents, followed by contracts (22.1%) and torts (16.1%). *Id.*, Table 1.5, p. 21. Over 65% of the plaintiffs' lawyers and 87% of the defense and mixed-practice lawyers surveyed said that litigation is too expensive. *Id.*, p. 9. About 37% of the survey respondents did not think that the rules of civil procedure were conducive to meeting Rule 1's goals. *Id.*, Figure 3.0, p. 32. Of all of those who responded, 38.6% believe that one set of rules cannot accommodate every case. *Id.*, Figure 3.12, p. 44. 88.5% of all respondents said that they thought litigation costs were not proportional to the value in a small case and 40.3% gave the same answer for the large case. *Id.*, Tables 11.7 and 11.8, p. 153-54. About 83% said that the cost of litigation forces parties to settle cases that they did not believe should have been settled on the merits of the case. *Id.*, Table 11.11, p. 157, compared to about 58.6% in the NELA survey response to the same question. A similar percentage, 82%, believe that discovery is too expensive, and 51.1% said that discovery is "abused in almost every case" and, a larger percentage, 66.4%, believe that electronic discovery is abused. *Id.*, Table 6.2, p. 62; Table 7.6, p. 106. The American College of Trial Lawyers (ACTL) also surveyed members. The results are at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=3650>. There were 1,494 responses although 112 were not considered because the respondents were not then engaged in civil litigation. Respondents averaged 38 years practicing law (compared to the ABA Section of Litigation Survey where the comparable figure was 23 years and NELA's survey where the figure was 21 years). *Id.*, p. 2. About 75% of the respondents said they represented defendants or primarily defendants; about one-third practiced in one of five states (California, Illinois, New York, Pennsylvania, or Texas); and about 40% litigate complex commercial cases. *Id.*, p. 2, A-2. About 85% said that they thought "litigation in general and discovery in particular are too expensive." About 45% said that they believe that "there is discovery abuse in almost every case," *Id.*, p. 4, and a larger percentage, 63%, thought that e-discovery is abused by counsel. *Id.*, p. A-4. And 87% agreed that "electronic discovery, in particular, is too costly," and 76% said "that electronic discovery issues are not well understood by judges." *Id.*, p. 5. In contrast with the results of the ABA Section of Litigation and the FJC's closed-case lawyer surveys, and closer in line to the NELA survey results, 65% of the respondents did not regard the rules of civil procedure as conducive to meeting Rule 1's goals. *Id.*, p. A-2-3. This outcome may be tempered by another survey result: only about 18% of the respondents litigate "primarily" in federal court. *Id.*, p. A-2.

both a prelitigation and postlitigation setting? Should we abandon the “one size fits all” philosophy of the civil rules and have special rules for certain cases?¹²

Or can all of the problems identified by all of the complainants be solved by better, smarter, firmer case management by engaged judges and, within the bounds of rules of professional conduct, by cooperative lawyers?

I will not attempt to offer answers to all of these questions. We address the life and liberty of criminal defendants with mandatory disclosures and no discovery.¹³ In commercial arbitrations involving tens and even hundreds of millions of dollars, private and government arbitrants, by agreement, accept procedural rules that

¹² See, e.g., *Final Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of American Legal System*, March 11, 2009, available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4053> (urging a number of changes in the rules including recognition that certain types of cases might require different rules; replacement of notice pleading with fact-based pleading; summary procedures for dispositive motions on legal issues before discovery; and limiting discovery to information enabling a party to prove or disprove a claim or defense); *White Paper: Reshaping the Rules of Civil Procedure of the 21st Century* (May 2, 2010) prepared on behalf of the Lawyers for Civil Justice, the Defense Research Institute, the Federation of Defense and Corporate Counsel, the International Association of Defense Counsel (proposing, among others, changes to Rule 8 to require pleading, with particularity, material facts known to the pleading party and (associated changes in Rules 9, 12, and 65); a change in the scope of discovery to any nonprivileged matter that would support proof of a claim or defense and that comports with proportionality standards; making certain electronically stored information (e.g., random access memory, backup data, physically damaged media, legacy data) off limits for discovery absent a showing of substantial need and good cause and subject to proportionality standards; requiring requesting parties to pay the cost of document production; development of a preservation standard in a new Rule 26(h) that would create certainty for litigants and eliminate spoliation claims for negligent conduct; and amending Rule 37(e) to allow sanctions only for willful conduct with the intent to deprive another party of the use of destroyed evidence that results in actual prejudice to the innocent party). The Special Committee on the Future of Civil Litigation of the ABA Section of Litigation also made proposals for rules' changes. Entitled, *Civil Procedure in the 21st Century – Some Proposals*, the Special Committee recommended, *inter alia*, that the existing procedure of not staying discovery while a motion to dismiss is pending should be left alone; eliminating the requirement that the parties' initial disclosures under Rule 26(a) include documents upon which their claims or defenses are based; eliminating disclosure requirements in complex cases in favor of a meet-and-confer requirement to produce a joint case management statement followed by an initial case management conference with the court at which disclosure parameters will be discussed; limiting the number of requests or admissions to 35; and adoption of a uniform standard to address imposition of sanctions for the deletion of electronically stored information after a duty to preserve has attached. The Federal Courts Committee of the Association of the Bar of the City of New York also issued *Proposals for the 2010 Duke Conference Regarding the Federal Rules of Civil Procedure* (April 2010). Among its proposals are: (1) creating a motion for summary adjudication to address substantive issues after filing of a complaint but before summary judgment; (2) an exchange of initial discovery requests “tailored to the key issues in dispute” in advance of the Rule 16 or 26(f) conference, (3) suspension of discovery if a motion to dismiss or one for summary adjudication is pending, (4) adoption of uniform definitions and instructions for discovery requests, (5) eliminating sanctions for electronic data lost “more than one year before the receipt of a preservation demand letter or the filing of a complaint, whichever occurs first,” (6) allowing cost-shifting for “overbroad preservation demands,” (7) making the Rule 16 conference mandatory and requiring follow up conferences to monitor the progress of the case, and (8) setting firm dates for completion of discovery, filing of dispositive motions, submission of the pre-trial order and for trial and granting extensions only for good cause.

¹³ Under the Jencks Act, 18 U.S.C. § 3500(a), in “any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.” Once the witness has testified § 3500(b), the court, on motion of the defendant, orders the United States to produce “any statement” of the witness in the possession of the United States “which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.” A “statement” is defined as a written statement signed or approved by the witness, a transcription of an oral statement of the witness, or a statement made by the witness before a grand jury. 18 U.S.C. § 3500(e)(1)-(3). Prosecutors are also required to disclose to defendants exculpatory evidence under the rule established in *Brady v. Maryland*, 373 U.S. 83 (1963).

severely restrict “disclosure” of documents.¹⁴ Common law practitioners accustomed to virtually unlimited discovery and civil law practitioners accustomed to no discovery managed to agree on a set of rules governing disclosure of documents that is now widely used in international commercial arbitrations.¹⁵

But I am not suggesting we eliminate discovery under the civil rules or adopt an arbitration model. Rather, my focus is on making e-discovery—and therefore, litigation—speedier and less expensive.¹⁶ I focus on three

¹⁴ For example, under the AAA commercial arbitration rules, at the request of a party or at the discretion of the arbitrator, “the arbitrator may direct” (i) the production of documents or other information and (ii) “the identification of any witnesses to be called.” Rule 21, AAA Commercial Arbitration Rules, <http://www.adr.org/sp.asp?id=22440#R21>. International commercial arbitration rules are even more restrictive. See International Centre for Dispute Resolution Rules, Art. 19.2 and 3 (“The tribunal may order a party to deliver to the tribunal and to the other parties a summary of the documents and other evidence which that party intends to present in support of its claim, counterclaim or defense,” and “At any time during the proceedings, the tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate”) <http://www.adr.org/sp.asp?id=33994#Evidence>; London Court of International Arbitration Rules, Art. 22.1(e) (the tribunal has the power “to order any party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant”) http://www.lcia.org/ARB_folder/arb_english_main.htm#article22; the UNCITRAL Rules, Art. 24.2 and 3 (“The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence,” and, “At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine”) <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>; CPR International Institute for Conflict Prevention and Resolution Rules, R. 11 (“The Tribunal may require and facilitate such disclosure as is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making disclosure expeditious and cost effective.”) <http://www.cpradr.org/ClausesRules/2007CPRRulesforNonAdministeredArbitration/tabid/125/Default.aspx>. The International Chamber of Commerce Rules do not discuss document production. However, Rule 15.2 provides: “In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.” http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.

¹⁵ International Bar Association’s Rules for the Taking of Evidence in International Commercial Arbitration, available at <http://www.int-bar.org/images/downloads/IBA%20rules%20on%20the%20taking%20of%20Evidence.pdf>. Article 3.1 of the IBA Rules provides for mandatory disclosure to the tribunal and each other party of “all documents available to it on which it relies.” Article 3.2 then deals with document production. Within the time provided by the tribunal, a party may also submit a request to produce that must contain the following: a) (i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist; (b) a description of how the documents requested are relevant and material to the outcome of the case; and (c) a statement that the documents requested are not in the possession, custody or control of the requesting party, and of the reason why that party assumes the documents requested to be in the possession, custody or control of the other party. Article 3.4 provides that within the time ordered by the tribunal, the producing party “shall produce” to the tribunal and the other parties “all the documents requested in its possession, custody, or control as to which no objection is made.” If the producing party has objections, the objections are to be made in writing and within the time ordered by the tribunal. Article 3.5 provides that the “reasons for such objections shall be any of those set forth in Article 9.2,” which include a lack of “sufficient” relevance or materiality; privilege; burdensomeness; the “loss or destruction of the document that has been reasonably shown to have occurred”; and “considerations of fairness or equality” of the parties. After receipt of objections, under Article 3.6, the tribunal “in consultation with the parties and in timely fashion,” then considers the request and the objections and decides whether to permit production. Articles 9.4 and 9.5 of the IBA Rules on the Taking of Evidence address the adverse inference. If a party “fails without satisfactory explanation” (1) to produce any document requested in a request for production or (2) to make available any other relevant evidence, including testimony, to which, in either case, the party has “not objected in due time,” or if a party “fails to produce any document” or “fails to make available any evidence, including testimony,” ordered to be produced by the tribunal, the tribunal “may infer” that such document or such evidence “would be adverse to the interests” of that party.

¹⁶ I recognize that, at least in part, improvements in technology—better document management systems, easily accessible backup storage media, better culling and search tools—will continue to contribute to this goal.

issues: the use of Rule 16, cooperation, and the prelitigation duty to preserve. I then reflect on how well the December 1, 2006 e-discovery amendments are working.

WHY E-DISCOVERY IS SO EXPENSIVE

Most information today is stored electronically. As a result, discovery in most cases will involve electronically stored information. Within the world of lawsuits where e-discovery is a major cost driver, it is not unreasonable to ask: “Why?”? Indeed, if we are to honor Rule 1, we must understand the problem we are trying to solve.

The question of why e-discovery is so expensive does not have just one answer and involves the producing party, the requesting party, their counsel, and the court, among other stakeholders. Among the answers to this question are these:

1. Producing parties can have a lot of electronic data, and the larger the producing party, the greater the amount of data. Productivity demands the use of emails, text messaging, voice mail, databases, spreadsheets, presentation software, and, increasingly, cloud-based platforms that allow multiple parties throughout the country or the world to work on documents simultaneously. But data beget data and data storage is cheap. Emails proliferate geometrically. Writing emails to multiple individuals is easy. Forwarding emails is easy. Adding attachments is easy. The more data that a producing party has, the greater will be the cost of e-discovery.¹⁷
2. Reducing the volume of data may not be easy because of, in the case of parties involved in substantial amounts of litigation, the uncertain reach of multiple litigation holds based on actions in multiple federal and state jurisdictions.
3. Attorney-client privileged documents usually are mixed in with other files in an electronic production.¹⁸ Few producing parties electronically mark such documents in ways that they can be separately segregated at the time of creation or easily identified at the time of electronic document retrieval. While electronic searches may locate some privileged documents, in many cases, they may only be located and extracted by human review.¹⁹

¹⁷ Add in multiple computer software systems, custodians and storage locations in different parts of the world, language differences and translation issues, electronic-media complications associated with acquisitions, and for multinational companies, one can see where e-discovery in major litigation becomes quite costly.

¹⁸ See *Covad Communications Co. v. Revonet, Inc.*, 258 F.R.D. 5, 14 (D.D.C. 2009) (“Electronic data is difficult to destroy and storage capacity is increasing exponentially, leading to an unfortunate tendency to keep electronically stored information even when any need for it has long since disappeared. This phenomenon—the antithesis of a sound records management policy—leads to ever increasing expenses in finding the data and reviewing it for relevance or privilege.”)

¹⁹ Fed.R.Evid. 502(d), which allows a court order to protect privileged documents disclosed in connection with litigation pending before the court from a waiver claim, should ameliorate this problem as long as parties are comfortable taking advantage of it. Certainly to address the risk of inadvertently produced documents, this option should be embraced by litigants.

4. Human review is costly.²⁰ True, review costs are dropping. But they are still high because producing parties in this world of cases involving data-rich parties or data-rich discovery demands have enormous amounts of electronic data and even with de-duping and software filters to remove unresponsive documents, the pool of documents to be reviewed can be very large.
5. Electronic documents are dynamic, can be moved rapidly, and can be deleted just as rapidly. Hence, every employee is now a file keeper.²¹ Rather than going to a central paper file repository or to an employee's filing cabinets, usually kept by a person other than the document generator, discovery today requires interviews of key players to determine key players' storage habits. Documents might exist on a person's home or laptop computer, a personal digital assistant or smart phone, a flash drive, a CD or DVD, in a cloud storage server, on a cell phone, printer, or a myriad of other devices that record and maintain information digitally. Documents might even exist on dormant drives of otherwise available servers.²²
6. The prelitigation duty to preserve has lost its way. It is so malleable that on the exact same facts it is triggered in one district court but not triggered in another district court. It can be triggered even though no lawyers are aware of the claim that triggered it. In some circuits, a violation of the prelitigation duty to preserve can result in sanctions if the failure to honor the duty was negligent or grossly negligent; in others, bad faith is required. A producing party that chooses to keep very few documents as part of a legitimate records management system may, in hindsight, find itself sanctioned for failing to preserve documents.²³
7. The number of key players who should be subject to a litigation hold can be magnified by broad allegations in a complaint. Producing parties cannot afford to guess wrong on how far to cast the key player net.²⁴ The more key players that are identified, the greater the expense.
8. Producing parties keep backup tapes too long but those involved in large amounts of litigation cannot run the risk of getting rid of backup tapes or recycling them for fear that they will be accused of violating a duty to preserve. Why? Because under current interpretations of a duty to preserve, unique, relevant information on backup tapes means that the tapes must be preserved.²⁵ But how does one determine whether unique, relevant information can be found only on backup tapes? That may not be easily done in some or many cases. The result? Backup tapes—thousands or even tens of thousand of them for some litigants—are

²⁰ See, e.g., *In re Fannie Mae Securities Litigation*, 552 F.3d 814, 818 (D.C. Cir. 2009) (explaining that the Office of Federal Housing Enterprise Oversight, a nonparty, hired 50 contract lawyers to comply with a stipulated agreement to produce documents, and incurred \$6 million in costs, representing 9% of the OFHEO's annual budget).

²¹ Cf. *United States v. Philip Morris USA Inc.*, 327 F.Supp.2d 21 (D.C.D.C. 2004) (producing party sanctioned \$2.75 million because 11 employees, including officers and supervisors, deleted emails in violation of document retention policies).

²² *Phoenix Four, Inc. v. Strategic Resources Corp. et al.*, 2006 WL 1409413, *5-6 (S.D.N.Y. May 23, 2006) (failure to locate and timely produce evidence stored in a dormant drive of a server resulted in monetary sanctions against law firm).

²³ Separately, below, I discuss the prelitigation duty to preserve at length.

²⁴ *The Pension Committee of the University of Montreal Pension Plan et al. v. Banc of America Securities, LLC et al.*, 2010 WL 184312, *7 (S.D.N.Y. 2010) (failure to identify all key players supports a finding of grossly negligent conduct by a party accused of spoliating documents).

²⁵ *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (*Zubulake IV*) ("If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of 'key players' to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to all backup tapes"); *Pension Committee, supra*, 2010 WL 184312 at *7 (failure "to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources" supports a finding of grossly negligent conduct by a party accused of spoliating documents).

needlessly maintained sometimes for years because of a fear that a sanctions motion will be brought if they are not maintained.²⁶

9. Some lawyers for requesting or producing parties may lack the necessary competence when it comes to managing electronic discovery.²⁷
10. Some requesting parties know what to do to increase the e-discovery costs of a producing party and do so purposefully as part of a cost-benefit calculus to improve the odds of settlement irrespective of the merits of a claim or defense. Some requesting parties follow boilerplate e-discovery requests seeking every bit and byte in the possession, custody, or control of the producing party, increasing the costs of e-discovery or e-discovery dispute resolution.²⁸
11. Paper discovery is handled by lawyers and nonlawyers who gather documents for production, either in response to a specific request or as the documents are maintained in the ordinary course of business. Electronic discovery in many cases may represent no more than printing of responsive emails. But for data-rich parties involved in discovery of gigabytes of data,²⁹ lawyers or their clients must retain contractors to help process data and host it. Adding an e-discovery consultant to the litigation team adds a layer of expense that did not exist in the paper world.
12. In the paper world, reviewers reviewed paper—usually a finite amount—according to some predefined protocol to look not only for documents that are responsive to a request for production but also to look for documents favorable to a party’s claims or defenses. In the electronic world, reviewers undertake the same work but at computer terminals. However, before reviewers can conduct their review, there must be a data

²⁶ Restoration and retrieval costs for backup tapes can be expensive, too. *In re Subpoenas*, 2010 U.S. Dist. LEXIS 21947 (W.D. Va. Mar. 10, 2010) (cost to restore 53 backup tapes and to search for emails associated with three individuals was estimated to be \$750 per backup tape for restoration, \$350-\$650 per gigabyte to place restored data in a reviewable format (at 5-10 gigabytes per backup tape), \$10,000 to establish the “back-up environment,” and \$240/hour for engineering required to access or troubleshoot data, or between \$137,200 and \$229,950 before the cost of reviewing the documents).

²⁷ I am reminded of the story told to me by a consultant testifying against a lawyer in a malpractice case. The lawyer had documents imaged at a cost of several hundreds of thousands of dollars. The lawyer’s client refused to pay the imaging invoice eventually resulting in a malpractice claim against the lawyer. The consultant testified before the trial court hearing the malpractice claim that he could have produced the data in native format on a \$200 external hard drive and given the drive to the requesting party instead of spending the imaging costs. I never learned how the judge ruled. See also *In re Fannie Mae Securities Litigation*, *supra*, 552 F.3d at 821-22, where a nonparty spent \$6 million in e-discovery costs and was held in contempt of court for still failing to comply with a stipulated agreement and where the court of appeals refused to relieve the nonparty from the stipulation, which had given the requesting party the sole right to determine search terms and, at the same time, had waived any claim the nonparty might have had for cost-shifting under Rule 45.

²⁸ While not providing the specific reasons, as discussed above, more than a majority of respondents in the ABA Section of Litigation and the ACTL surveys felt that e-discovery was abused by counsel. Perhaps demonstrating a data-rich party, data-poor party bias, more than a majority of NELA survey respondents had just the opposite view.

²⁹ A “byte” is the basic measurement of “most computer data and consists of 8 bits.” A “bit” is a “binary digit.” A bit consists of either a 0 or 1. Generalizing, in computer code, for a word processing system, 0’s and 1’s (electronically switched off or on) are strung together to represent letters, numbers, and punctuation. There are eight bits in a byte, 1,024 bytes in a kilobyte, 1,048,576 bytes in a megabyte, 1,073,741,824 bytes in a gigabyte, and 1,099,511,627,776 bytes in a terabyte. See <http://kb.iu.edu/data/ackw.html>. “One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes: each terabyte represents the equivalent of 500 billion typewritten pages of plain text.” *Manual for Complex Litigation (4th)* § 11.446. The Manual for Complex Litigation is available at: http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/470.

collection that follows a search strategy. And fights over keywords or other approaches to searching for responsive documents can be expensive and time consuming.³⁰

13. In the paper world there was never a fight over metadata; it did not exist.³¹ Today metadata demands frequently are the focus of motions over the form of production (native versus TIFF³² or .PDF,³³ for example).³⁴
14. Meet-and-confer sessions can be extraordinarily useful exercises. Or they can be a waste of time. When they are a waste of time in actions involving contentious discovery from a data-rich party, unless the judge intervenes or the judge's intervention is sought, e-discovery costs can spiral out of control.
15. Lawyers who do not communicate early, often, and accurately with their adversary and the court about e-discovery issues typically cause e-discovery costs to spiral out of control.
16. Federal judges are busy people with large civil and criminal caseloads.³⁵ They are dependent on lawyers to apprise them of problems. If they are so apprized and do not take a firm and rapid hold of a matter to straighten out differences, e-discovery costs can spiral out of control.
17. Some federal judges are not engaged. They do not take full advantage of Rule 16, do not require meaningful meet-and-confer sessions especially on e-discovery questions, and do not nip discovery differences in the bud to prevent them from escalating.

³⁰ I discuss below a number of decisions involving disputes over key words in a search protocol.

³¹ Metadata represents "[i]nformation about a particular data set or document which describes how, when, and by whom the data set or document was collected, created, accessed, or modified; its size; and how it is formatted. Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden from users but are still available to the operating system or the program used to process the data set or document. *Managing Guide of Electronic Information: A Pocket Guide for Judges*, Federal Judicial Center (2007), p. 24-25. See also *Williams v. Sprint/United Mgmt. Comp.*, 230 F.R.D. 640, 646 (D. Kan. 2005) (footnotes omitted) ("Some examples of metadata for electronic documents include: a file's name, a file's location (e.g., directory structure or pathname), file format or file type, file size, file dates (e.g., creation date, date of last data modification, date of last data access, and date of last metadata modification), and file permissions (e.g., who can read the data, who can write to it, who can run it). Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept.") See also *Aguilar v. Immigration and Customs Enforcement Div. of the U.S. Dept. of Homeland Security*, 255 F.R.D. 350, 354 (S.D.N.Y. 2008) (discussing the differences between substantive, system, and embedded metadata).

³² "One of the most widely used and supported graphic file formats for storing bit-mapped images, with many different compression formats and resolutions. File name has .TIF extension. Can be black and white, gray-scaled, or color. Images are stored in tagged fields, and programs use the tags to accept or ignore fields, depending on the application." The Sedona Conference Glossary: E-Discovery & Digital Information Management (Second Edition) (December 2007), http://www.thesedonaconference.org/dltForm?did=TSCGlossary_12_07.pdf (Sedona Glossary), p. 51.

³³ "An imaging file format technology developed by Adobe Systems. PDF captures formatting information from a variety of applications in such a way that they can be viewed and printed as they were intended in their original application by practically any computer, on multiple platforms, regardless of the specific application in which the original was created. PDF files may be text-searchable or image-only. Adobe® Reader, a free application distributed by Adobe Systems, is required to view a file in PDF format. Adobe® Acrobat, an application marketed by Adobe Systems, is required to edit, capture text, or otherwise manipulate a file in PDF format." Sedona Glossary, p. 39.

³⁴ The case law discussing the production of metadata is considered below.

³⁵ They are also underpaid. By any comparative scale, judges need dramatic increases in compensation reflective of the critical work that they do every day in our Constitutional democracy. See ABA White Paper, *Background Information on the Need for Judicial Pay Reform*, (May 17, 2007) http://www.abanet.org/poladv/priorities/judicial_pay/pospaper2007.pdf ("Over the past 16 years, judicial salaries have not only stagnated, they have actually declined in purchasing power. Since 1993, judicial pay has fallen 10.8% behind inflation while the pay of most other federal workers has increased by 18.5%.")

18. Sanctions motions are proliferating in federal court litigation.³⁶ They take up time that might have been avoided with earlier judicial attention to the issues in dispute, and they consume large amounts of judicial resources. They usually occur because the issues underlying them were not addressed sensibly by the litigants, or a judge was not readily available to enforce sensibility.

There are limits to what rules or a rules committee can do to address all of these issues. However, there are steps that should be taken. In the litigation world of data-rich parties or data-rich production demands, for federal litigation to be speedy and inexpensive as well as just, judges must take control, lawyers must cooperate, and communications—between lawyer and client, lawyer and lawyer, and lawyers and the court—must be both frequent and focused.

RULE 16 AND THE RETURN OF THE JUDGES

Collectively, e-discovery-related motions take up thousands of hours of judicial time every year in federal courts.³⁷ If my study of the e-discovery case law and conversations with judges have taught me anything, it is that (i) e-discovery costs will not be controlled generally, (ii) disproportionate e-discovery costs will not be

³⁶ In an admittedly unscientific assessment of the rise in discovery-related motions generally, I had a computer search performed on all federal cases reported in Westlaw or Lexis which contained the words “motion,” “compel,” “sanction,” and “Rule 37.” I broke up the search, arbitrarily, by decade, from January 1, 1940 to December 31, 1949, and so on for the periods 1950-59, 1960-69, 1970-79, 1980-89, 1990-99, and 2000-09. As the table below reflects, these words appeared in 243 reported decisions in Westlaw (213 in Lexis) for the forty-year period, 1940-79. In contrast, for the 30-year period since 1980, these words have appeared in 4,874 decisions in Westlaw and 4,659 decisions in Lexis.

<i>January 1-December 31</i>	<i>Westlaw</i>	<i>Lexis</i>
1940-1949	10	6
1950-1959	30	15
1960-1969	31	22
1970-1979	172	172
Total 1940-79	243	215
1980-1989	587	645
1990-1999	971	1,072
2000-2009	3,316	2,942
Total 1980-2009	4,874	4,659

If I had added searches for cases involving Rule 11, Rule 16(f), Rule 26(g), and Rule 30(d)(2), the numbers of cases in the post-1980 rows of the table above (obviously, in the case of the post 1980-added rules) would have been greater. The increase is not related solely to the number of reported decisions. For example, in the period January 1, 1940, through December 31, 1979, Westlaw has 304,301 reported decisions in its federal court database. For the period January 1, 1980, through December 1, 2008, there are 1,945,333 decisions. This is a less than a 7-fold increase in reported decisions compared to a 20-fold increase in decisions containing the words “motion,” “compel,” “sanction,” and “Rule 37.”

³⁷ Cf. *Pension Committee, supra*, 2010 WL 184312 at *7, n.56 (Judge Scheindlin wrote: “I, together with two of my law clerks, have spent an inordinate amount of time on this motion. We estimate that collectively we have spent close to three hundred hours resolving this motion. I note, in passing, that our blended hourly rate is approximately thirty dollars per hour (!) well below that of the most inexperienced paralegal, let alone lawyer, appearing in this case. My point is only that sanctions motions, and the behavior that caused them to be made, divert court time from other important duties—namely deciding cases on the merits.”).

avoided, and (iii) unreasonable e-discovery demands will not be eliminated, unless in the world of cases where each of these concerns is quite real there is tight and immediate control of the pretrial process after filing of the complaint.

Is this a case management or a rules-change issue? It might only include the latter if someone can explain why the provisions of Rule 16 are not intensely utilized by judges.³⁸ Current Rule 16 already allows judges to:

- Require counsel to appear for a pretrial conference at any time (Rule 16(a)).
- Establish “early and continuing control so that the case will not be protracted because of lack of management” (Rule 16(a)(2)).
- Discourage wasteful pretrial activities (Rule 16(a)(3)).
- Issue a scheduling order that modifies the timing of disclosures under Rules 26(a) and 26(e)(1); modifies the extent of discovery; and provides for disclosure or discovery of electronically stored information. (Rule 16(b)(3)(B)(i)-(iii)).

Under Rule 16(c)(2), a represented party “must”

authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference.

By identifying topics for discussion, the district court is given enormous power under existing Rule 16 to frame the action with Rule 1 in mind. Indeed, while some may call it redundant and others may call it emphasis, Rule 16(c)(2)(P) allows the district court to consider “and take appropriate action” to facilitate “in other ways the just, speedy, and inexpensive disposition of the action” after identifying these other matters for consideration and appropriate action:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses; ...

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence; ...

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a magistrate judge or a master; ...

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

³⁸ I have been told by many lawyers around the country that Rule 16 conferences are not held by some judges and, when they are held, they typically focus on scheduling only and do not involve substantive discussions. Cf. *FJC’s National Case-Based Civil Rules Survey*, *supra*, p. 15 (nearly 60% of respondents said that electronically stored information was not discussed at “the conference to plan discovery”); *NELA Survey Report*, *supra*, p. 41 (19.2% of respondents said that Rule 16(a) conferences are not regularly held).

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third party claim, or particular issue;....

An aggressive use of Rule 16 powers presupposes that judges can figure out what cases are the best candidates to improve the speed and reduce the expense of an action without compromising justice.³⁹ How might they be determined? These are possibilities:

- A party might request an early case management conference.⁴⁰
- The district court might schedule a conference based on the certain characteristics of the complaint (e.g., the type of action, amount demanded, number of plaintiffs or defendants).⁴¹
- Based on a predetermined category of cases, the district court or a magistrate judge might have a conference call with all parties' counsel to make inquiries regarding discovery generally, or e-discovery specifically, that might lead to an early case management conference with the district court judge.
- The parties might be required to file a notice that accompanies initial disclosures indicating that the number of key players exceeds a predetermined number or that e-discovery is expected to be sufficiently substantial that an early case management conference would advance the goals of Rule 1.

³⁹ Every case merits prudent use of Rule 16 but, as I discussed earlier, there are two worlds of cases in federal courts. Most cases will not need the same judicial attention as an antitrust case between companies like Intel and AMD. *Advanced Micro Devices, Inc. et al. v. Intel Corp.*, C.A. No. 05-441 (D. Del.) (which prominently featured cross motions for sanctions as a result of alleged e-discovery misfeasance and jointly involved nearly 1,500 custodians and hundreds of thousands of electronic documents). See, e.g., Letter to the Honorable Joseph J. Farnan, Jr. (http://www.amd.com/us-en/assets/content_type/DownloadableAssets/Farnan_Discovery_Letter.pdf) (March 5, 2007); Intel's Memorandum in Support of Its Motion for an Order Imposing Sanctions Against AMD and Compelling Remediation (http://download.intel.com/pressroom/legal/amd/Retention_Sanctions_redacted_Motion.pdf) (October 14, 2009).

⁴⁰ There is nothing in the civil rules that dictates when the Rule 26(f) meet-and-confer session must occur in relation to a Rule 16 pretrial conference. However, it typically occurs before the Rule 16 conference. For most cases, that makes sense. Where the document pool is manageable and the witnesses are identifiable and few in number, the meet-and-confer session should be productive. And if it is not, the district court judge should make it productive at the Rule 16 conference.

⁴¹ A judge may not wait for a Rule 26(f) or 16 conference before expressing her or his views. In *O'Bar et al. v. Lowe's Home Centers, Inc.*, 2007 US Dist. LEXIS 32497 (W.D.N.C. May 2, 2007), the district court determined that plaintiffs had standing to pursue a class action and then *sua sponte* set forth detailed guidelines the parties were to follow to develop a class action precertification discovery plan. The guidelines were based on the "Suggested Protocol for Discovery of Electronically Stored Information" set forth by the United States District Court for the District of Maryland (available at www.mdd.uscourts.gov/news/news/ESIProtocol.pdf).

Whatever the method, I remain convinced that unless judges take full advantage of Rule 16,⁴² e-discovery costs will vex litigants in this other world of cases where e-discovery, not the merits, takes center stage in the adjudication arena.

What more might judges do as part of or apart from the Rule 16(a) conference? Consider this list:

1. Evaluate the relationship between the amount in controversy and e-discovery costs. Where the latter are disproportional to the former,⁴³ using good judicial sense, evaluate what are the genuine issues in dispute and whether the early resolution of legal questions that do not require e-discovery is practicable and just.
2. Where e-discovery is necessary to address genuine issues in dispute, require counsel to focus on cost-effective ways to implement the e-discovery and be available to address any differences between counsel.
3. Insist that counsel identify any form of production issues up front and achieve a resolution and, if they are unable to do so, to bring the matter promptly to the court's attention for resolution.
4. Become engaged in the e-discovery process. Demand and enforce reasonably targeted requests for production. Demand cooperation on sensible search protocols.⁴⁴
5. Comprehend early the role that backup tapes play in the resolution of the genuine issues in dispute and insist that counsel address backup tape questions early and fairly or, failing that, the court will. Relative to backup tapes, demand and enforce the sequencing of e-discovery in ways that make sense.⁴⁵
6. Take advantage of sampling a large data-rich storage medium to evaluate the "cost and yield" of e-discovery before ordering e-discovery on a larger scale.⁴⁶

⁴² One of the reasons why litigation is so expensive in many cases is that judges do not have the time to figure out the "gut" issues until too many dollars have been spent. A motion to dismiss might educate the district court. But there are few lawyers I know who cannot draft a complaint to withstand a motion to dismiss, even after *Iqbal* and *Twombly*, and even fewer who cannot draft such a complaint after being given leave to amend. So the motion to dismiss might not get filed or filed only as to a portion of the complaint. Summary judgment motions will educate the court but, typically, they will not be brought until the close of discovery and long after the expenditure of all discovery costs, not just e-discovery costs. Hence, for cases involving data-rich parties, a data-poor party and a data-rich party, or a small dollar claim relative to e-discovery costs, it may make sense for judges to hold, or to provide the opportunity to counsel to request, a preliminary conference with the district court *before* the meet-and-confer session is held to assist the parties in achieving sensible discovery accords.

⁴³ A \$75,000 claim that would involve \$50,000 in e-discovery costs needs attention from counsel and the court.

⁴⁴ I note Rule 37(f) which permits a court the right to require a party or the party's attorney to pay the reasonable expenses, including attorneys' fees, caused by a failure to participate in good faith in developing and submitting a proposed discovery plan required under Rule 26(f).

⁴⁵ For example, discovery from active servers might occur first potentially to obviate the need to consider restoration of backup tapes. Cf. *Pension Committee*, *supra*, 2010 WL 184312, p. 34, n.99: "A cautionary note with respect to backup tapes is warranted. I am not requiring that *all* backup tapes must be preserved. Rather, if such tapes are the *sole* source of relevant information (e.g., the active files of key players are no longer available), then such backup tapes should be segregated and preserved. When accessible data satisfies the requirement to search for and produce relevant information, there is no need to save or search backup tapes. (Emphasis in original.) See *also Report of the Civil Rules Advisory Committee*, May 27, 2005 (Revised July 25, 2005), p. 42: "Lawyers sophisticated in these problems are developing a two-tier practice in which they first sort through the information that can be provided from easily accessed sources and then determine whether it is necessary to search the difficult-to-access sources." The Advisory Committee Report can be found at Appendix C in the following link (page 86 of 332) <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf>.

⁴⁶ Cf. *Securities and Exchange Commission v. Collins & Aikman*, 256 F.R.D. 403, 415 (S.D.N.Y. 2009) ("The concept of sampling to test both the cost and the yield is now part of the mainstream approach to electronic discovery."); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (S.D.N.Y.2003) (ordering a sampling of backup tapes and a report back to the district court on the results and the costs so it can undertake a cost-shifting analysis); *McPeck v. Ashcroft*, 202 F.R.D. 31, 34-35 (D.D.C.2001) (coining the phrase "marginal utility" in a discovery context, Judge Facciola authorized a "test-run" in a data restoration dispute).

7. Perhaps on a pilot basis in certain districts, designate an e-discovery ombudsman within the district court to assist the judges in problem solving or to assist the parties in identifying cost-effective solutions to technical e-discovery issues.
8. Recognize that data-rich parties might need time to figure out how they will discharge their e-discovery obligations at the time of initial disclosures, at the initial meet-and-confer session, and the initial Rule 16 conference. Some cases will require multiple meet-and-confer sessions and multiple case management conferences.

In my initial assessment of the e-discovery amendments to the civil rules, I wrote that an aggressive, enlightened use of Rule 16 would be essential to controlling the costs of e-discovery.⁴⁷ Having read hundreds of e-discovery-related decisions, teaching and writing on the subject, living with e-discovery experiences directly and vicariously, and serving as an arbitrator overseeing e-discovery issues and as an e-discovery special master, my initial views have only been re-enforced. In the data-rich, high-e-discovery-cost world of federal court actions, judges must take control of the e-discovery process.

There are caveats. Judges can become consumed by a lengthy trial or a complicated motion. They can spend weeks working on a major opinion and obviously would like to avoid distractions. They must spend time on criminal trials and obviously devote enormous attention to sentencing issues. The magistrates can and do help enormously but they, too, have competing demands on their time from the same, equally demanding caseloads. The reality is that the engaged, well-intentioned judge may not always have the time to sensibly manage e-discovery. And that's why cooperation among the advocates is a fundamental component of the e-discovery cost reduction equation.⁴⁸

COOPERATION

Cooperation among counsel is critical to e-discovery cost control. It is counterintuitive. It has its ethical contours. It is inconsistent with the way many litigators are trained. Yet there must be more of it.

Before e-discovery, lawyers alone could manage discovery. Oh sure, there were discovery vendors to manage mounds of paper documents, but they used words that lawyers comprehended. It did not take long for every lawyer to understand, roughly, the number of pages in a "banker's box" and however documents might be paper clipped or tagged, anyone could work a copy machine. Every now and then a post-it note on a document might be overlooked in the copying process or double-sided copies were only copied on one side, but lawyers and assistants could address these problems without the need to consult experts.

⁴⁷ Barkett, *The Battle For Bytes: New Rule 26, e-Discovery*, Section of Litigation (February 2006)

⁴⁸ A report to the Chief Judge and Chief Administrative Judge entitled, *Electronic Discovery in the New York State Courts* (February 2010) (<http://www.courts.state.ny.us/courts/comdiv/PDFs/E-DiscoveryReport.pdf>) (New York Courts' E-Discovery Report) contains a similar message: "E-discovery is, at least in large part, a judicial management issue. It benefits the bench and bar alike for judges and court staff to receive the training, tools and procedures that will enable them to take an early and active role in getting the parties to communicate and cooperate on an e-discovery plan, in narrowing the scope of discovery, and in ensuring that the costs and burdens of e-discovery are proportionate to the value of the case." *Id.* p. 6. Appendix 2 contains a summary of the key recommendations contained in the report; they focus on early judicial involvement and lawyer cooperation, education, and pilot projects designed to determine best practices to reduce e-discovery costs.

At any significant level, lawyers alone can no longer manage e-discovery. We have now introduced into the discovery process third-party vendors who talk in terms of “bits” and “bytes.” Few lawyers know how many pages are represented by a gigabyte but every disputant who has had to do so knows how much it can cost to “de-dupe,”⁴⁹ “process,”⁵⁰ and review each gigabyte of data, especially if privileged documents are buried among them.

In the e-discovery world, many lawyers think that with enough searching, the incriminating e-mail will be found. Hence, search terms can become a battleground. Think contention versus harmony. Somewhere between those two extremes advocates have to find a way to advance just, speedy, and inexpensive e-discovery.

An oxymoron? Hardly. If every advocate were spending e-discovery dollars as if they were coming out of their pockets and not their opponents’ clients’ pockets, we would make enormous progress in solving the e-discovery cost—and thus the litigation cost—dilemma.⁵¹

The call for cooperation is not a new one to the Advisory Committee. For example, in 2000, it amended Rule 26(b)(1) addressing the scope of discovery as a means to rein in litigation costs. In its prior form, Rule 26(b)(1) permitted discovery regarding any matter not privileged “which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.” The reference to “subject matter” was moved so that current Rule 26(b)(1) now provides that a party may obtain discovery regarding any nonprivileged matter that is “relevant to any party’s claim or defense.” Discovery “of any matter relevant to the subject matter involved in the action” was moved to the end of Rule 26(b)(1) and requires a court order upon a showing of good cause.⁵² The Advisory Committee explained that the change was intended to “signal” the district courts that they have the authority to cabin discovery and the Committee implored “reasonable lawyers” to cooperate to manage discovery without court involvement:

The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention. When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action. The court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.

⁴⁹ De-duplication does just what it says: eliminates duplicate documents from a data set.

⁵⁰ Processing documents would include elimination of obviously irrelevant documents; e.g., the daily e-mail from the New York Times containing headlines of that day’s newspaper.

⁵¹ I am reminded of the answer I received from a litigant’s counsel in a published decision where cost-shifting was ordered with respect to a number of backup tapes: “We decided not to review them.”

⁵² The redlined changes appear in the Advisory Committee Report included in the Supreme Court’s submittal of the 2000 amendments to the Congress at http://www.uscourts.gov/rules/CV_2000.pdf.

Advisory Committee Note, Fed.R.Civ.P. 26(b).⁵³

The call for cooperation was not limited to Rule 26(b)(1) or the 2000 civil rules' amendments. In a case resulting in sanctions for spoliation of documents after a complaint was filed, *Board of Regents of University of Nebraska v. BASF Corp.* 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007), the magistrate judge cataloged the Advisory Committee's efforts in the 1993, 2000, and 2006 amendments to increase voluntary production of relevant documents, develop mutually agreeable discovery plans, and require lawyers to confer before a sanctions motion can be brought:

The overriding theme of recent amendments to the discovery rules has been open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable. See, e.g., 1993, 2000, 2006 Amendments to Federal Rules of Civil Procedure, Advisory Committee Comments to Rules 26, 33, 34, 37, 28 U.S.C. Compliance with these changes has placed - on counsel - the affirmative duties to work with clients to make required disclosures, Rule 26(a)(1)(2) and (3); reduce oppression and burden, Rule 26(b)(2); cooperatively plan discovery with opposing counsel, Rule 26(f); affirmatively certify accuracy and good faith in requesting and responding to discovery, Rule 26(g); and confer with opposing counsel to resolve disputes before filing certain motions, Rule 37(a)(2)(B), among others. If counsel fail in this responsibility-willfully or not-these principles of an open discovery process are undermined, coextensively inhibiting the courts' ability to objectively resolve their clients' disputes and the credibility of its resolution.⁵⁴

Recognizing that e-discovery has placed greater demands on lawyers to cooperate in order to control litigation costs, the Sedona Conference issued a "Cooperation Proclamation" with endorsements by many federal and state court judges.⁵⁵ The Proclamation asks lawyers to focus on problem solving not problem expanding when it comes to discovery:

Lawyers preparing cases for trial need to focus on the full cost of their efforts – temporal, monetary, and human. Indeed, all stakeholders in the system – judges, lawyers, clients, and the general public – have an interest in establishing a culture of cooperation in the discovery process. Over-contentious discovery is a cost that has outstripped any advantage in the face of ESI and the data deluge. It is not in anyone's interest to waste resources on unnecessary disputes, and the legal system is strained by "gamesmanship" or "hiding the ball," to no practical effect.

⁵³ See *Averett v. Honda of America Mfg., Inc.*, 2009 U.S. Dist. LEXIS 30179, (S.D. Ohio, Mar. 24, 2009) (rejecting plaintiff's request for a search of all records referring to plaintiff in her 17 years of employment, the district court explained that the 2000 amendments to Rule 26(b) amendments were intended to "communicate the message that discovery is not unlimited").

⁵⁴ See also Barkett, *From Canons to Cannon*, Ethics Centennial Symposium, ABA Section of Litigation, Washington D.C. (April 18, 2008) (contrasting the aspirations contained in the Canons of Ethics with the decline in professionalism and civility among lawyers and the corresponding changes in the civil rules designed to foster more disclosure, more communications among counsel, greater involvement of the court, and better control over discovery).

⁵⁵ http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf (July 2008).

Specifically with respect to e-discovery, the Proclamation contains these suggestions:

1. *Utilizing internal ESI discovery “point persons” to assist counsel in preparing requests and responses;*
2. *Exchanging information on relevant data sources, including those not being searched, or scheduling early disclosures on the topic of Electronically Stored Information;*
3. *Jointly developing automated search and retrieval methodologies to cull relevant information;*
4. *Promoting early identification of form or forms of production;*
5. *Developing case-long discovery budgets based on proportionality principles; and*
6. *Considering court-appointed experts, volunteer mediators, or formal ADR programs to resolve discovery disputes.*

Judges have felt a need to cite or require lawyers to read the Cooperation Proclamation in a growing chorus of reported discovery and e-discovery cases:

- *Securities and Exchange Commission v. Collins & Aikman*, 256 F.R.D. 403, 415 (S.D.N.Y. 2009) (the SEC’s lack of cooperation prompted the district court to draw the parties’ attention to the Cooperation Proclamation, which “urges parties to work in a cooperative rather than an adversarial manner to resolve discovery issues in order to stem the ‘rising monetary costs’ of discovery disputes”);
- *Building Erection Services Co., L.C. v. American Buildings Co.*, 2010 U.S. Dist. LEXIS 2625, *5-6 (D. Kan. Jan. 13, 2010) (in a dispute over setting deposition dates, the magistrate told counsel: “To help counsel understand their obligations, counsel are directed to read the Sedona Conference Cooperation Proclamation, which this Court has previously endorsed”);
- *Gipson v. Southwestern Bell Tel. Co.*, 2008 U.S. Dist. LEXIS 103822, *5-6 (D. Kan. Dec. 23, 2008) (where 115 motions had been filed in less than 12 months after filing of the complaint, the same magistrate judge ordered counsel to read the Cooperation Proclamation and then to attempt to agree on discovery issues or a Special Master would be appointed);⁵⁶
- *Dunkin’ Donuts Franchised Restaurants LLC v. Grand Central Donuts, Inc.*, 2009 U.S. Dist. LEXIS 52261 *14-15 (E.D.N.Y. June 19, 2009) (citing the meet-and-confer provisions of Rule 26(f) and the Sedona Cooperation Proclamation in connection with the need to reduce the “rising costs” of discovery disputes, the magistrate judge ordered defendants to work out their differences);⁵⁷

⁵⁶ See *Evolution, Inc. v. The Suntrust Bank*, 2004 U.S. Dist. LEXIS 20490, *18 (D. Kan. Sept. 29, 2004) (where the same magistrate judge had to appoint a Special Master to resolve e-discovery issues and ultimately required the defendant to pay 70% of the Special Master’s \$52,000 fee because of its “representations and lack of cooperation”).

⁵⁷ This is another case involving a dispute over search terms: “Defendants’ proposed search can be narrowed temporally and the scope of the search terms sought tailored to each employee, since some employees may have knowledge of only issues relevant to one set of counterclaims but not the other. The defendants must provide Dunkin with a list of the employees or former employees whose emails they want searched and the specific search terms to be used for each individual depending on whether they were likely to be involved with issues relating to the termination of the franchise agreement or the performance of the store development agreement.” 2009 U.S. Dist. LEXIS 52261 at *16.

- *Covad Communications Co. v. Revonet, Inc.*, 258 F.R.D. 5, 14 (D.D.C. 2009) (referencing the Cooperation Proclamation, the magistrate judge said that a failure of a party to respond to an invitation to propose search terms is not the kind of “collaboration and cooperation that underlies the hope that the courts can, with the sincere assistance of the parties, manage e-discovery efficiently and with the least expense possible”);
- *William A. Gross Construction Associates, Inc. v. American Manufacturers Mutual Insurance Co.*, 2009 U.S. Dist. LEXIS 22903, *136 (S.D.N.Y. Mar. 19, 2009) (the magistrate admonished the Bar: “[T]he best solution in the entire area of electronic discovery is cooperation among counsel. This Court strongly endorses The Sedona Conference Cooperation Proclamation”);
- *In re DirecTech Southwest, Inc., Fair Labor Standards Act Litigation*, 2009 U.S. Dist. LEXIS 69142 (E.D. La. Aug. 7, 2009) (the magistrate judge echoes the statements made in *William A. Gross*);
- *Ford Motor Co. v. Edgewood Props., Inc.*, 257 F.R.D. 418, 426 (D.N.J. 2009) (in denying a motion to compel reproduction of electronically stored information, the magistrate, citing *William A. Gross*, admonished counsel: “It is beyond cavil that this entire problem could have been avoided had there been an *explicit* agreement between the parties as to production, but as that ship has sailed, it is without question unduly burdensome to a party months after production to require that party to reconstitute their *entire* production to appease a late objection”);
- *Capitol Records, Inc. v. MP3tunes, LLC*, 2009 WL 2568431 (S.D.N.Y. Aug. 13, 2009) (also citing *William A. Gross*, the magistrate judge was critical of counsel’s unilateral decision on search terms for electronically stored information: “MP3tunes’ unilateral decision regarding its search reflected a failure to heed Magistrate Judge Andrew Peck’s recent “wake-up call” regarding the need for cooperation concerning e-discovery”).⁵⁸

In *Mancia v. Mayflower Textile Servs Co.*, 2008 U.S. Dist. LEXIS 83740 (D. Md. Oct. 15, 2008), a spat over the adequacy of responses to certain document requests and a couple of interrogatories, Magistrate Judge Grimm endorsed the Cooperation Proclamation but also eloquently articulated lawyers’ obligation to cooperate already contained in the federal rules and especially Rule 26(g):⁵⁹

Rule 26(g) and its commentary provide many important “take away points” that ought to, but unfortunately do not, regulate the way discovery is conducted. First, the rule is intended to impose an “affirmative duty” on counsel to behave responsibly during discovery, and to ensure that it is conducted in a way that is consistent “with the spirit and purposes” of the discovery rules, which are contained in Rules 26 through 37. Id. It cannot seriously be disputed that compliance with the “spirit and purposes” of these discovery rules requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking

⁵⁸ The Texas Supreme Court has recently expressed the same sentiment. *In re Weekley Homes, L.P.*, 2009 Tex. LEXIS 630, *32 (Tex. 2009) (“A fundamental tenet of our discovery rules is cooperation between parties and their counsel, and the expectation that agreements will be made as reasonably necessary for efficient disposition of the case”).

⁵⁹ Under Rule 26(g)(1)(A) and (B), a lawyer must sign a discovery response and in so doing “certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry,” a disclosure is “complete and correct as of the time it is made,” and that a discovery request, response, or objection is: (i) “consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law”; (ii) is “not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation”; and (iii) is “neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.”

discovery the cost and burden of which is disproportionately large to what is at stake in the litigation. Counsel cannot “behave responsively” during discovery unless they do both, which requires cooperation rather than contrariety, communication rather than confrontation.

Id. at 357-58.⁶⁰

Magistrate Judge Facciola has also invoked the Cooperation Proclamation in another of his poignant opinions on reining in the costs of discovery. *Covad Communications Co. v. Revonet, Inc.*, “*Covad IV*”, 2010 U.S. Dist. LEXIS 31165 (D.D.C. Mar. 31, 2010). The magistrate had earlier granted a motion to compel and awarded fees but the parties could not agree on the amount. The question presented was whether defense counsel was entitled to compensation for the time spent in writing letters to plaintiff’s counsel detailing discovery deficiencies as part of an effort to avoid filing the motion to compel. The court’s scheduling order had required cooperation among counsel and defense counsel’s efforts to reach a discovery accord with plaintiff’s counsel, the magistrate held, was sufficiently related to the motion to compel to warrant an entitlement to fees:

Indeed, if the efforts of the federal courts to reduce the costs of discovery and, in particular electronic discovery, are to be taken seriously, then counsel will have to know that judicial orders and local rules requiring meaningful discussions between counsel before discovery motions are filed mean what they say. If attorneys insist on “drive by” meetings and conferrals, or they think that exchanging nasty e-mails ... will suffice, then they have to know that they are going to get hit where it hurts—in their pocketbooks.

Id. at *50.

The Seventh Circuit Electronic Discovery Pilot Program Statement of Purpose and Preparation of Principles⁶¹ addresses cooperation in Principle 1.02:

An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in

⁶⁰ Judge Grimm emphasized the values of cooperation in his conclusion: “It is apparent that the process outlined above requires that counsel cooperate and communicate, and I note that had these steps been taken by counsel at the start of discovery, most, if not all, of the disputes could have been resolved without involving the court. It also is apparent that there is nothing at all about the cooperation needed to evaluate the discovery outlined above that requires the parties to abandon meritorious arguments they may have, or even to commit to resolving all disagreements on their own. Further, it is in the interests of each of the parties to engage in this process cooperatively. For the Defendants, doing so will almost certainly result in having to produce less discovery, at lower cost. For the Plaintiffs, cooperation will almost certainly result in getting helpful information more quickly, and both Plaintiffs and Defendants are better off if they can avoid the costs associated with the voluminous filings submitted to the court in connection with this dispute. Finally, it is obvious that if undertaken in the spirit required by the discovery rules, particularly Rules 26(b)(2)(C) and 26(g), the adversary system will be fully engaged, as counsel will be able to advocate their clients’ positions as relevant to the factors the rules establish, and if unable to reach a full agreement, will be able to bring their dispute back to the court for a prompt resolution. In fact, the cooperation that is necessary for this process to take place enhances the legitimate goals of the adversary system, by facilitating discovery of the facts needed to support the claims and defenses that have been raised, at a lesser cost, and expediting the time when the case may be resolved on its merits, or settled. This clearly is advantageous to both Plaintiffs and Defendants.” 253 F.R.D. at 365.

⁶¹ http://www.ca7.uscourts.gov/7thCircuit_ElectronicDiscovery.pdf.

facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

The Seventh Circuit's Electronic Discovery Pilot Program also explicitly recognizes the Cooperation Proclamation but takes cooperation a step further. Its Principles seek (p. 10) to incentivize cooperative exchanges of information on evidence preservation and discovery early in the case:

The goal of the Principles is to incentivize early and informal information exchange on commonly encountered issues relating to evidence preservation and discovery, paper and electronic, as required by Rule 26(f)(2). Too often these exchanges begin with unhelpful demands for the preservation of all data, which often are followed by exhaustive lists of types of storage devices. Such generic demands lead to generic objections that similarly fail to identify specific issues concerning evidence preservation and discovery that could productively be discussed and resolved early in the case by agreement or order of the court. As a result, the parties often fail to focus on identifying specific sources of evidence that are likely to be sought in discovery but that may be problematic or unduly burdensome or costly to preserve or produce.

There have been calls for cooperation in the pre-trial discovery process, such as The Sedona Conference® Cooperation Proclamation. The Principles are intended not just to call for cooperation but to incentivize cooperative exchange of information on evidence preservation and discovery. They do so by providing guidance on preservation and discovery issues that commonly arise and by requiring that such issues be discussed and resolved early either by agreement, if possible, or by promptly raising them with the court. Many of these issues are readily identifiable before the initial Rule 16 conference and should be raised then. Other preservation and discovery issues that become apparent only after the case has progressed further should be raised as soon as practicable after they arise.

The drafters of the Seventh Circuit's e-discovery Principles must have had in mind the breakdown in cooperation in the area of protocols for searching electronically stored information. The case law contains unmistakable signals to the Bar.

In *Securities and Exchange Commission v. Collins & Aikman*, *supra*, Judge Scheindlin was blunt in her criticism of the SEC's refusal "to negotiate a workable search protocol" responsive to the requests for production. She called the SEC's position "patently unreasonable" and directed counsel to meet and confer to develop a workable search protocol or a Special Master would be appointed to assist them in doing so. 256 F.R.D. at 415.

In deciding to sanction the producing party's conduct, the magistrate judge in *In re Seroquel Products Liability Litig.*, 244 F.R.D. 650, 662 (M.D. Fla. 2007), was highly critical of the defendant's (AZ) unilateral search efforts:

[W]hile key word searching is a recognized method to winnow relevant documents from large repositories, use of this technique must be a cooperative and informed process. Rather than working with Plaintiffs from the outset to reach agreement on appropriate and comprehensive search terms and methods, AZ undertook the task in secret...

In this case, AZ never discussed with Plaintiffs which search terms to use as part of the search. There was no dialogue to discuss the search terms, as required by Rules 26 and 34. AZ eventually disclosed in April 2007 that a key word search had been conducted, not in seeking collaboration on the words to use, but rather as part of the dialogue on certifying the “custodial” production” ...

AZ has not been as cooperative as possible in resolving the custodial issues. It is undisputed that the production “completed” on June 30, 2007 had load file, metadata, page break and key word search problems, making the 10 million pages of documents inaccessible, unsearchable, and unusable as contemplated under the Rules.

United States v. O’Keefe, 537 F. Supp. 2d 13 (D.D.C. 2008) involved a challenge to a government agency’s compliance with court-ordered production of electronically stored information that might aid criminal defendants in their defense. Defendants questioned the government lawyers’ selection of “keywords” arguing that they did not result in the location of documents being sought. Magistrate Judge Facciola was not impressed by the lawyers’ protestations. He explained that whether key word searches will yield the information sought “is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics.” *Id.* at 24. Hence, if a lawyer is going to claim that a “certain search term or terms” would be more effective than the terms “that were used” is “truly to go where angels fear to tread.” He held that a lay person does not have the expert credentials to advance the argument. “Accordingly, if defendants are going to contend that the search terms used by the government were insufficient, they will have to specifically so contend in a motion to compel and their contention must be based on evidence that meets the requirements of Rule 702 of the Federal Rules of Evidence.” *Id.*⁶²

Magistrate Judge Grimm has also addressed search protocols. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008). The context was unusual. Defendants had produced text searchable electronic files and nontext searchable electronic files. Among them were privileged documents. Defendants explained that they had done a key word search of the documents produced and that the search should have resulted in the identification of privileged documents. Because it did not, defendants suggested that the privileged documents were among the nontext searchable files and their production was inadvertent. Plaintiff disputed these claims

⁶² In *Equity Analytics, LLC v. Lundin*, 248 F.R.D. 331 (D.D.C. 2008), Judge Facciola had the opportunity to apply this principle. There was agreement by the parties that a forensic examination of defendant’s Macintosh should occur, but the parties were unable to agree on a search protocol. Plaintiff objected to the use of search terms because Lundin had installed a new operating system on his laptop computer and may have thereby compromised the integrity of files previously stored on the computer, plaintiff argued. *Id.* at 333. Plaintiff also argued that a file extension (such as .doc or .jpg) and keyword search would not capture fragments of information contained on a hard drive. The court required plaintiff to submit an affidavit from an expert supporting plaintiff’s allegations before deciding how to proceed. *Id.*

and refused to return the privileged documents, claiming waiver. Judge Grimm was not impressed by defendants' key word search,⁶³ and citing *O'Keefe*, he rejected defendants' inadvertence claim:

Defendants, who bear the burden of proving that their conduct was reasonable for purposes of assessing whether they waived attorney-client privilege by producing the 165 documents to the Plaintiff, have failed to provide the court with information regarding: the keywords used; the rationale for their selection; the qualifications of M. Pappas and his attorneys to design an effective and reliable search and information retrieval method; whether the search was a simple keyword search, or a more sophisticated one, such as one employing Boolean proximity operators; or whether they analyzed the results of the search to assess its reliability, appropriateness for the task, and the quality of its implementation. While keyword searches have long been recognized as appropriate and helpful for ESI search and retrieval, there are well-known limitations and risks associated with them, and proper selection and implementation obviously involves technical, if not scientific knowledge.

Id. at 259-60 (footnote omitted).⁶⁴

The magistrate judge in *William A. Gross Construction Associates, Inc. v. American Manufacturers Mutual Insurance Co.*, *supra*, was very unhappy with counsel who could not agree on key words for a search. "This case is just the latest example of lawyers designing keyword searches in the dark, by the seat of the pants, without adequate (indeed, here, apparently without any) discussion with those who wrote the emails." The lawyer's impasse left the magistrate "in the uncomfortable position of having to craft a keyword search methodology for the parties, without adequate information from the parties" or the nonparty. The magistrate did so, but he also issued this warning to the Bar:

⁶³ "While it is known that M. Pappas (a party) and Mohr and Schmid (attorneys) selected the keywords, nothing is known from the affidavits provided to the court regarding their qualifications for designing a search and information retrieval strategy that could be expected to produce an effective and reliable privilege review. As will be discussed, while it is universally acknowledged that keyword searches are useful tools for search and retrieval of ESI, all keyword searches are not created equal; and there is a growing body of literature that highlights the risks associated with conducting an unreliable or inadequate keyword search or relying exclusively on such searches for privilege review. Additionally, the Defendants do not assert that any sampling was done of the text searchable ESI files that were determined not to contain privileged information on the basis of the keyword search to see if the search results were reliable. Common sense suggests that even a properly designed and executed keyword search may prove to be over-inclusive or under-inclusive, resulting in the identification of documents as privileged which are not, and non-privileged which, in fact, are. The only prudent way to test the reliability of the keyword search is to perform some appropriate sampling of the documents determined to be privileged and those determined not to be in order to arrive at a comfort level that the categories are neither over-inclusive nor under-inclusive. There is no evidence on the record that the Defendants did so in this case." 250 F.R.D. at 256-57.

⁶⁴ Judge Grimm, recognizing the concern some might have about the costs of litigation if experts had to be involved in determining key word searches, offered this advice: "For those understandably concerned about keeping discovery costs within reasonable bounds, it is worth repeating that the cost-benefit balancing factors of Fed.R.Civ.P. 26(b)(2)(C) apply to all aspects of discovery, and parties worried about the cost of employing properly designed search and information retrieval methods have an incentive to keep the costs of this phase of discovery as low as possible, including attempting to confer with their opposing party in an effort to identify a mutually agreeable search and retrieval method. This minimizes cost because if the method is approved, there will be no dispute resolving its sufficiency, and doing it right the first time is always cheaper than doing it over if ordered to do so by the court." 250 F.R.D. at 261, n.10. He also noted that a court-approved clawback agreement would have protected defendants. *Id.*

Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI's custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of "false positives." It is time that the Bar--even those lawyers who did not come of age in the computer era--understand this.

2009 U.S. Dist. LEXIS 22903, at *13-14. See also *In re DirecTech Southwest, Inc., Fair Labor Standards Act Litigation*, 2009 U.S. Dist. LEXIS 69142 (E.D. La. Aug. 7, 2009) (in another case of lawyer impasse over key words, the magistrate judge chose plaintiffs' proposed key words rejecting defendants' argument that plaintiffs' list would produce many false hits and cost \$100,000 primarily because of the need to conduct a privilege review); *Capitol Records, Inc. v. MP3tunes, LLC*, 2009 WL 2568431, *50 (S.D.N.Y. Aug. 13, 2009) ("Had the parties focused their attention on discussing their differences, rather than drafting dueling epistles for submission to the Court, MP3tunes undoubtedly would have realized that the EMI Labels were not asking to be provided with a transaction history for each search term, so long as they received assurances that the search methodology that MP3tunes employed would lead to the production of all responsive emails.").

In the world of cases where e-discovery costs have the potential to spiral out of control absolutely or relatively to the amount or issues in controversy, search issues, obviously, are not going away. Going forward, they will fall into one of two buckets: contention or cooperation. Lawyers who choose the latter will find receptive and grateful judges; lawyers responsible for the former will encounter unhappy judges.

Beyond search protocols, in this world where e-discovery controls the cost of litigation, cooperation is essential if e-discovery is to be speedy and inexpensive. As Judge Grimm explained in *Victor Stanley*, the federal rules did not need the Cooperation Proclamation or the Seventh Circuit's e-discovery Pilot Program Principles to express the importance of cooperation. But until Rules 16, 26(b)(1), 26(b)(2)(C), 26(f), 26(g) and the messages contained in Rules 11, 16(f), 30(d) 33(a)(1), and 37 and a growing chorus of reported decisions become translated by lawyers into C-O-O-P-E-R-A-T-I-O-N, C-O-M-M-U-N-I-C-A-T-I-O-N and C-O-M-M-I-T-M-E-N-T to the administration of J-U-S-T-I-C-E, Rule 1 will ring hollow to a meaningful population of litigants.

IT'S TIME TO BRING RATIONALITY AND CONSISTENCY TO THE PRELITIGATION DUTY TO PRESERVE

In the world of e-discovery, parties should "LOOK OUT!" when dealing with the prelitigation duty to preserve. Let me explain.

A duty to preserve represents a legal requirement to maintain "relevant" records. Hence, the trigger of the duty to preserve is material. The only nontreachorous or nonarbitrary trigger of the duty to preserve is service of a lawsuit. But in our jurisprudence, that is not the rule that is followed. Instead, we are taught that the duty to preserve can arise before a complaint is filed where there is "knowledge of potential relevance to the claim" or

“awareness of circumstances likely to give rise to future litigation” or “when a party reasonably should know that the evidence may be relevant to anticipated litigation.”⁶⁵

In the paper world, these various standards were rarely applied. Why? Paper documents usually are maintained for several years for tax or other reasons. In a prelitigation context, it usually did not matter when the duty to preserve attached because the paper documents were in a file cabinet or in central storage somewhere.

In the electronic world, however, as noted earlier, every employee is now a file keeper. The memo pad page that went into the garbage is now the email that can disappear with the stroke of a key. To prevent electronic data storage overload, an entity may decide that emails are not a business record of the company and if an employee wants to make them so, the employee must print and retain the email. Or a company’s records management system may provide for a short residence time of emails in a custodian’s mailbox to eliminate data clutter before storage limits are reached and computer hard drives slow down. Backup tapes, which are used for disaster recovery, may be recycled every 14 or 28 days instead of semiannually or annually. Whatever the recycling schedule, backup tapes can also become corrupted or lost and when that occurs extraordinary volumes of backup data can be lost.

That’s why in a prelitigation setting, prospective litigants have to “look out.” When the duty to preserve attaches, a prospective litigant is supposed to act. But if the litigant does not think or realize that the duty to preserve has attached, and electronic information disappears as part of automatic recycling or because someone who later is identified as a “key player” decides to delete electronic information, like night follows day, spoliation sanctions will be sought. And if a court decides that the duty to preserve attached before the prospective litigant thought or realized, the court will likely make a sanctions award.

On what basis, one might ask?

The rules of civil procedure do not apply to prelitigation conduct, we are taught.⁶⁶ Instead, to reach prelitigation conduct, courts rely on their “inherent authority.”⁶⁷ The problem is that in a prelitigation setting, not every circuit exercises its inherent authority in the same manner. And when it comes to alleged spoliation of electronically stored information and the obligatory motion for an adverse inference instruction, such variability means that similarly situated litigants in the federal court systems may not be treated in the same manner.

⁶⁵ Appendix I contains supporting citations by circuit.

⁶⁶ *Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546 (6th Cir. 1994) (“The court simply recognizes that Rule 37 is a procedural rule, and like all procedural rules, it governs conduct during the pendency of a lawsuit. Rule 37 does not, nor does any procedural rule, apply to actions that occurred prior to the lawsuit.”); *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 551 n.14 (D. Minn. 1989) (“Rule 37 does not, by its terms, address sanctions for destruction of evidence prior to the initiation of a lawsuit or discovery requests”).

⁶⁷ And they do the same for postlitigation conduct if there is not a violation of a discovery order. See, e.g., *Leon v. IDX Systems Corp.*, 464 F.3d 951, 958 (9th Cir. 2006) (IDX brought a declaratory judgment action to establish its right to terminate Leon and Leon, in turn, brought an employment discrimination action against IDX. Between the dates of the two filings, IDX’s counsel advised Leon to preserve all data on his employer-issued laptop. But Leon destroyed the data anyway. The district court dismissed the action as a sanction relying on its inherent authority. In affirming, the court of appeals agreed with the use of inherent authority since Leon had not violated a discovery order governed by Rule 37).

Inherent Authority: Variable Circuit Standards of Culpability to Warrant an Adverse Inference Instruction

There is no consistency across the circuits in the level of culpability required to obtain what most movants seek: an adverse inference instruction. Bad faith is necessary in the Fifth⁶⁸ and Eleventh Circuits.⁶⁹

Bad faith does not appear to be required in the First,⁷⁰ Fourth,⁷¹ and Ninth⁷² Circuits.

⁶⁸ *Vick v. Texas Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975) (“The adverse inference to be drawn from destruction of records is predicated on bad conduct of the defendant. Moreover, the circumstances of the act must manifest bad faith. Mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case.” (citations omitted.)); *Rimkus Consulting Group, Inc. v. Cammarata*, 2010 WL 645253, at *6 (S.D. Tex. Feb. 19, 2010) (collecting other Fifth Circuit cases).

⁶⁹ *Bashir v. Amtrak*, 119 F.3d 929, 930-31, 932 (11th Cir. 1997) (citing *Vick* which is precedent in the Eleventh Circuit, *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), the court of appeals explained: “In this circuit, an adverse inference is drawn from a party’s failure to preserve evidence only when the absence of that evidence is predicated on bad faith.”).

⁷⁰ *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 447 (1st Cir. 1997) (“Certainly bad faith is a proper and important consideration in deciding whether and how to sanction conduct resulting in the destruction of evidence. But bad faith is not essential. If such evidence is mishandled through carelessness, and the other side is prejudiced, we think that the district court is entitled to consider imposing sanctions, including exclusion of the evidence.”); *Allen Pen v. Springfield Photo Mount Co.*, 653 F.2d 17, 24 (1st Cir.1981) (“In any event, Allen Pen has not shown that the document destruction was in bad faith or flowed from the consciousness of a weak case. There is no evidence that Springfield believed the lists would have damaged it in a lawsuit. Without some such evidence, ordinarily no adverse inference is drawn from Springfield’s failure to preserve them.”); *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 219 (1st Cir. 1982) (“The court’s reluctance to label Gordon’s conduct as ‘bad faith’ is not dispositive: ‘bad faith’ is not a talisman, as *Allen Pen* itself made clear when it stated that the adverse inference ‘ordinarily’ depended on a showing of bad faith. Indeed, the ‘bad faith’ label is more useful to summarize the conclusion that an adverse inference is permissible than it is actually to reach the conclusion.”).

⁷¹ *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (“We agree with Silvestri that dismissal is severe and constitutes the ultimate sanction for spoliation. It is usually justified only in circumstances of bad faith or other ‘like action.’ *Cole v. Keller Indus., Inc.*, 132 F.3d 1044, 1047 (4th Cir.1998). But even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case.” *Id.* at 593. “At bottom, to justify the harsh sanction of dismissal, the district court must consider both the spoliator’s conduct and the prejudice caused and be able to conclude either (1) that the spoliator’s conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator’s conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.” *Id.*); *King v. American Power Conversion Corp.*, 181 Fed. Appx. 373, 376 (4th Cir. 2006) (citations omitted) (“Because of the extreme nature of dismissal as a sanction for spoliation, it is usually appropriate ‘only in circumstances of bad faith or other ‘like action.’ However, bad faith conduct by the plaintiff may not be needed to justify dismissal if the spoliation of evidence effectively renders the defendant unable to defend its case.”).

⁷² *Glover v. The BIC Corp.*, 6 F.3d. 1318, 1329-1330 (9th Cir. 1992) (“Short of excluding the disputed evidence, a trial court also has the broad discretionary power to permit a jury to draw an adverse inference from the destruction or spoliation against the party or witness responsible for that behavior. *Akiona v. United States*, 938 F.2d 158 (9th Cir. 1991). As *Unigard* correctly notes, however, a finding of ‘bad faith’ is not a prerequisite to this corrective procedure. 982 F.2d at 368-70 & n.2. Surely a finding of bad faith will suffice, but so will simple notice of ‘potential relevance to the litigation.’ *Akiona*, 938 F.2d at 161.”).

Bad faith may be required in the District of Columbia,⁷³ Seventh,⁷⁴ and Tenth⁷⁵ Circuits.

⁷³ *Wylar v. Korean Air Lines Co.*, 928 F.2d 1167, 1174 (D.C. Cir. 1991): “Appellants argue that an adverse inference [on the issue of the awareness that the plane had strayed off course] against the government is appropriate because it ‘destroyed’ the radar tapes of that night. See, e.g., *Friends for All Children v. Lockheed Aircraft Corp.*, 587 F. Supp. 180, 189 (D.D.C. 1984) (suggesting that Air Force destruction of crash photos would create adverse inference against the government if it were a party), *modified*, 593 F.Supp. 388 (D.D.C. 1984), *aff’d*, 746 F.2d 816 (D.C. Cir. 1984). The cases cited by appellants all involved the withholding or destruction of evidence after a discovery order was entered, while here the government insists that the recycling of radar tapes was routine. Appellants contend that the government should have known not to recycle these tapes in light of the disaster. Mere innuendo, however, does not justify drawing the adverse inference requested, and there is absolutely no other evidence supporting appellants’ claim that the Air Force radar trackers must have seen KE007 in the Buffer Zone. Therefore, even if they owed KE007 a duty to monitor and warn, we agree that no duty was breached by the Air Force in this case.”

⁷⁴ *Coates v. Johnson & Johnson*, 756 F.2d 524, 550-51 (7th Cir. 1985) (citations omitted) (“The prevailing rule is that bad faith destruction of a document relevant to proof of an issue at trial gives rise to a strong inference that production of the document would have been unfavorable to the party responsible for its destruction.”); *Partington v. Broyhill Furniture Indus., Inc.*, 999 F.2d 269, 271-72 (7th Cir. 1993) (“But if, being sensitive to the possibility of a suit, a company then destroys the very files that would be expected to contain the evidence most relevant to such a suit, the inference arises that it has purged incriminating evidence.”); *Crabtree v. National Steel Corp.*, 261 F.3d 715 (7th Cir. 2001) (“Although Granite City Steel destroyed most of the RIF documents while Crabtree’s claim was pending before the Illinois Department of Human Rights (“IDHR”), there was no evidence that they were destroyed in bad faith. Granite City Steel destroyed the RIF documents only after maintaining them for two years (one year longer than required under company policy) and only after giving notice to the IDHR that it was doing so. Additionally, most of the RIF documents were not relevant to Crabtree’s case because his lawsuit did not challenge the RIF, and those that were relevant—Crabtree’s own RIF evaluations—were preserved and produced.”); *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681 (7th Cir. 2008) (citation omitted) (“Morton has made no showing, however, that Motel 6’s destruction of any of those materials was done in bad faith. Such a showing is a prerequisite to imposing sanctions for the destruction of evidence. See *Crabtree v. Nat’l Steel Corp.*, 261 F.3d 715, 721 (7th Cir. 2001); see also *Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir.1998) (“That the documents were destroyed *intentionally* no one can doubt, but ‘bad faith’ means destruction for the purpose of hiding adverse information.”) Furthermore, courts have found a spoliation sanction to be proper only where a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent. (citations omitted.) In this case, Motel 6 had no reason to suspect litigation until—at the earliest—Morton’s attorney sent Motel 6 a demand letter in May 2005.”)

⁷⁵ *Turner v. Pub. Serv. Co. of Col.*, 563 F.3d 1136 (10th Cir. 2009) (“courts require evidence of intentional destruction or bad faith before a litigant is entitled to a spoliation instruction”); *Henning v. Union Pac. R.R.*, 530 F.3d 1206, 1219-20 (10th Cir. 2008) (“An adverse inference is a powerful sanction as it ‘brands one party as a bad actor’ and ‘necessarily opens the door to a certain degree of speculation by the jury, which is admonished that it may infer the presence of damaging information in the unknown contents of an erased audiotape.”); *Aramburu v. The Boeing Company*, 112 F.3d 1398, 1407 (10th Cir. 1997) (citations omitted) (“Although the parties have not directed us to precedent from this circuit on the evidentiary doctrine of spoliation and we cannot locate any such precedent, the general rule is that bad faith destruction of a document relevant to proof of an issue at trial gives rise to an inference that production of the document would have been unfavorable to the party responsible for its destruction. The adverse inference must be predicated on the bad faith of the party destroying the records. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.”); *103 Investors I, L.P. v. Square D Co.*, 470 F.3d 985, 1032 (10th Cir. 2006) (citation omitted) (“[T]he district court cited to *Aramburu* as guiding precedent and explained that an adverse-inference jury instruction would not be appropriate because defendant had not shown that plaintiff acted in bad faith. . . . we noted that ‘[c]ourts have not generally imposed a similar requirement of bad faith when considering other sanctions for the spoliation of evidence.’”).

In the Third Circuit,⁷⁶ there is a balancing of the level of fault, the degree of prejudice, and the type of sanction available to avoid unfairness and which will deter similar conduct by others in the future.

In the Eighth Circuit,⁷⁷ in the case of a prelitigation loss of records due to a routine document-retention program, there must be some indication of an intent to destroy the evidence for the purpose of obstructing or suppressing the truth in order to impose the sanction of an adverse inference instruction.

In the Sixth Circuit,⁷⁸ negligence may be enough depending upon the level of prejudice.

⁷⁶ *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994) (where district court excluded an expert because of the failure to maintain original features of a circular saw in a product liability action, the court of appeals reversed: "While we do not doubt the inherent authority of a district court to impose such a drastic sanction in an appropriate case, we conclude that this was not such a case. We believe the key considerations in determining whether such a sanction is appropriate should be: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future."); *Brewer v. Quaker State Refining Corp.*, 72 F.3d 326, 334 (3d Cir. 1995) ("Further, it must appear that there has been an actual suppression or withholding of the evidence. No unfavorable inference arises when the circumstances indicate that the document or article in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for.").

⁷⁷ *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104, 1112 (8th Cir. 1988) (The district court gave an adverse inference instruction where a gun manufacturer discarded customer complaints and gun-examination reports after three years according to a long-standing, routine document-retention program. The court of appeals reversed and remanded: "Finally, the court should determine whether the document retention policy was instituted in bad faith. (citations omitted). In cases where a document retention policy is instituted in order to limit damaging evidence available to potential plaintiffs, it may be proper to give an instruction similar to the one requested by the Lewys. Similarly, even if the court finds the policy to be reasonable given the nature of the documents subject to the policy, the court may find that under the particular circumstances certain documents should have been retained notwithstanding the policy. For example, if the corporation knew or should have known that the documents would become material at some point in the future then such documents should have been preserved. Thus, a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy."); *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746, 747, 748-49 (8th Cir. 2004) ("We have never approved of giving an adverse inference instruction on the basis of prelitigation destruction of evidence through a routine document retention policy on the basis of negligence alone. Where a routine document retention policy has been followed in this context, we now clarify that there must be some indication of an intent to destroy the evidence for the purpose of obstructing or suppressing the truth in order to impose the sanction of an adverse inference instruction."); *Morris v. Union Pac. R.R.*, 373 F.3d 896, 901-02 (8th Cir. 2004) ("We recognize that the district court did find that Union Pacific's destruction of the audiotape at issue in this case constituted 'bad faith' on the part of the railroad. That ruling, however, must be viewed in the context of our court's decision in *Lewy*, which stated in dicta that a finding of 'bad faith' was warranted where a corporation 'knew or should have known' that evidence would become material at some point in the future. 836 F.2d at 1112. The district court's heavy reliance on *Lewy*, and its specific conclusion that Union Pacific did not intentionally destroy the tape, lead us to conclude that the court's finding of 'bad faith' was premised on the 'knew or should have known' standard suggested by *Lewy*, but rejected by *Stevenson*."); *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007) ("The ultimate focus for imposing sanctions for spoliation of evidence is the intentional destruction of evidence indicating a desire to suppress the truth, not the prospect of litigation.").

⁷⁸ *Atkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009) ("[A] proper spoliation sanction should serve both fairness and punitive functions. Because failures to produce relevant evidence fall 'along a continuum of fault-ranging from innocence through the degrees of negligence to intentionality,' the severity of a sanction may, depending on the circumstances of the case, correspond to the party's fault. Thus, a district court could impose many different kinds of sanctions for spoliated evidence, including dismissing a case, granting summary judgment, or instructing a jury that it may infer a fact based on lost or destroyed evidence. (citation omitted)."

In the Second Circuit,⁷⁹ negligence appears to be enough to warrant an adverse inference if there is sufficient prejudice.

In two adjoining states, in cases decided less than one month apart, the contrast in circuit standards is stark. In *Pension Committee, supra*, a case that was six years old and had a three-year statutory stay of discovery, the district court held that a failure to issue a written litigation hold after a duty to preserve attached was gross negligence and ultimately sanctioned certain plaintiffs by deciding that it would issue a “spoliation charge” to the jury,⁸⁰ among other sanctions. 2010 WL 184312 at *23-24. In contrast, *Benzel v. Allied Pilots Association*, 2009 WL 4884052 (D.N.J. December 19, 2009) had gone up and back to the Third Circuit and was eight years old. Defendant did not issue litigation holds in a timely manner resulting in a claim that emails, documents, and other communications were destroyed. Applying the Third Circuit’s standards, which are more rigorous than the Second Circuit’s standards, the district court refused to sanction the defendant because there was no evidence of bad faith: “While Defendants should have moved more quickly to place litigation holds on the routine destruction of certain documents and electronic data, the Court does not see any

⁷⁹ *Residential Funding Corp. v. DeGeorge Fin. Corp.* 306 F.3d 99, 108-09 (2d Cir. 2002) (Referring to Rule 37 and in remanding the sanctions motion for reconsideration, the court of appeals held: “In sum, we hold that discovery sanctions, including an adverse inference instruction, may be imposed upon a party that has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence.” The court of appeals earlier explained that prejudice would still be required to be shown if only ordinary negligence was proven); *Glover v. Costco Wholesale Corp.*, 153 Fed. Appx. 774, 776 (2d. Cir 2005) (“Even in the absence of a discovery order, a court may impose sanctions on a party for misconduct in discovery under its inherent power to manage its own affairs. Moreover, where the breach of a discovery obligation is the non-production of evidence, a court has broad discretion to determine the appropriate sanction, which may include giving an adverse-inference instruction. . . . A party’s “obligation to preserve” evidence, in accordance with prong one arises when the party has notice that the evidence is relevant to litigation—most commonly when suit has already been filed, providing the party responsible for the destruction with express notice, but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation. Prong two’s ‘culpable state of mind’ requirement is satisfied by a showing that the evidence was destroyed either knowingly or negligently. *Residential Funding Corp.*, 306 F.3d at 108”); *Byrnie v. Town of Cromwell*, 243 F.3d 93, 109 (2d Cir. 2001) (“Cromwell admitted its policy to destroy such records soon after the hiring process had been completed and that the records in this case were so destroyed. At no point has Cromwell asserted that their destruction was merely accidental. This is evidence of intentional destruction sufficient to show a culpable state of mind on Cromwell’s part. Given that we have held that bad faith—an intent to obstruct the opposing party’s case—need not be shown to justify an inference of spoliation, (citation omitted), intentional destruction of documents in the face of a duty to retain those documents is adequate for present purposes.”). *Pace v. National R.R. Passenger Corp.*, 291 F. Supp. 2d 93 (D. Conn. 2003) held that *Residential Funding* applies to prelitigation as well as postlitigation destruction of documents: “Amtrak argues that this court erred in allowing the state of mind requirement to be satisfied by a showing of negligence. It maintains that the standard enunciated by *Residential Funding* is inapplicable because that case involved post-litigation discovery abuses. In *Residential Funding*, however, the Second Circuit discussed destruction of evidence generally, finding that ‘the culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without an intent [to breach a duty to preserve it] or negligently.’ *Id.* at 108 (internal quotations omitted; brackets and emphasis in original). It further explained that ‘[t]he sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence.’ *Id.* at 108. The panel gave no indication that it intended for its ruling to be confined to post-litigation destruction.” 291 F. Supp. 2d at 99.

⁸⁰ The charge allowed certain defendants to argue that relevant information was lost prejudicing them but allowed the impacted plaintiffs to argue that, in fact, no evidence was lost or lost evidence did not prejudice the defendants’ ability to defend the claims. 2010 WL 184312 at *23-24.

evidence of bad faith. Accordingly, the Court declines to issue a spoliation inference or to impose any other sanction at this time.” *Id.* at *3.⁸¹

The “inherent” in “inherent power” must become system-based, not circuit-based. Similarly situated parties should face similar results. The Federal Rules of Civil Procedure may not apply to prelitigation conduct, but for the Federal Rules to achieve just, speedy, and inexpensive outcomes, the exercise of inherent power, which can dramatically affect justice, speed, and cost—should be principled, consistent, and selective. Maybe that’s what the Supreme Court was trying to say in *Chambers v. NASCO, Inc.* 501 U.S. 32, 45-46 (1991).

Chambers v. Nasco: Must Bad Faith Exist to Justify the Exercise of Inherent Power?

In *Chambers*, the Supreme Court affirmed an award against Chambers of attorneys’ fees by the district court in reliance on its inherent authority. Chambers was the sole shareholder of a television station who agreed to sell the station and a broadcast license to NASCO but reneged on the sale prompting NASCO’s specific performance action. Chambers engaged in a number of actions to frustrate the sale, as well as acts of fraud both before the court and outside the confines of the court, filed false and frivolous pleadings, and attempted, “by other tactics of delay, oppression, harassment and massive expense to reduce [NASCO] to exhausted compliance.” *Id.* at 35-41. The district court sanctioned Chambers over \$1 million representing NASCO’s attorneys’ fees. It chose not to rely on the sanctions’ provisions of the rules of civil procedure⁸² or 28 U.S.C. § 1927,⁸³ but instead on its inherent authority. The Supreme Court accepted the petition for review to evaluate (1) the use of court’s inherent authority when rules on a statute were available to discipline Chambers, and (2) the propriety of the sanction.

The Supreme Court traced the history of the inherent authority principle back to 1812 identifying precedents supporting the power of a court to discipline attorneys who appear before it, punish for contempt, vacate a judgment upon proof of fraud perpetrated on the court and conduct an independent investigation to determine whether it has been the victim of fraud, bar a criminal defendant from a courtroom for disruption of a trial,

⁸¹ The conduct included the destruction of 269 boxes of documents by Iron Mountain which submitted a letter saying the documents were inadvertently destroyed. This prompted the district court to quote from *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 334 (3rd Cir. 1995): “No unfavorable inference arises when the circumstances indicate that the document or article in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise accounted for.”

⁸² The Supreme Court identified potentially applicable rules in place at the time: “A number of the Rules provide for the imposition of attorney’s fees as a sanction. See Fed.Rules Civ.Proc. 11 (certification requirement for papers), 16(f) (pretrial conferences), 26(g) (certification requirement for discovery requests), 30(g) (oral depositions), 37 (sanctions for failure to cooperate with discovery), 56(g) (affidavits accompanying summary judgment motions). In some instances, the assessment of fees is one of a range of possible sanctions, see, e.g., Fed.Rule Civ.Proc. 11, while in others, the court must award fees, see, e.g., Fed.Rule Civ.Proc. 16(f). In each case, the fees that may be assessed are limited to those incurred as a result of the Rule violation. In the case of Rule 11, however, a violation could conceivably warrant an imposition of fees covering the entire litigation, if, for example, a complaint or answer was filed in violation of the Rule. The court generally may act *sua sponte* in imposing sanctions under the Rules.” 501 U.S. at 42, n.8. The district court had focused on Rule 11 deciding it was not broad enough to reach the conduct in question. 403 U.S. at 42.

⁸³ Section 1927 provides: “Any attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” The district court rejected application of § 1927 because it only applied to attorneys and was not broad enough to reach actions by a litigant that degraded the judicial system. 501 U.S. at 42.

dismiss an action on forum non conveniens, and act sua sponte to dismiss a case for lack of prosecution. *Id.* at 43-44. Saying that “inherent powers must be exercised with restraint and discretion,” the Court reasoned that if there was inherent power to dismiss a complaint, there was inherent power to assess attorneys’ fees. *Id.* at 44-45.

Despite the American rule that requires each party to bear its own fees, the Court identified three “narrowly defined” circumstances when courts can award attorneys’ fees: (1) the common fund exception where one party’s success benefits others, (2) willful disobedience of a court order, and “most relevant here” (3) when a party has “acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Id.* at 45-46 (citations and internal quotes omitted).

The Court explained it could “discern no basis” for holding that § 1927 and the rules of civil procedure displace “the inherent power to impose sanctions for the bad-faith conduct.”⁸⁴ On the one hand, inherent power is broader than prohibitions in rules because it “extends to a full range of litigation abuses.” On the other it is narrower because the exceptions to the American Rule “effectively limit a court’s inherent power to impose attorney’s fees as a sanction to cases in which a litigant has engaged in bad-faith conduct or willful disobedience of a court’s orders,” while other mechanisms, such as Rule 11, “permit a court to impose attorney’s fees as a sanction for conduct which merely fails to meet a reasonableness standard.” *Id.* at 46.⁸⁵

To bolster its decision, the Court used its remand in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980)⁸⁶ to highlight the role that inherent power plays where bad-faith conduct has occurred even when a statute or rule may be applicable:

After determining that § 1927, as it then existed, would not allow for the assessment of attorney’s fees, we remanded the case for a consideration of sanctions under both Federal Rule of Civil Procedure 37 and the court’s inherent power, while recognizing that invocation of the inherent power would require a finding of bad faith.

Id. at 49 (citing 447 U.S. at 767; emphasis in original, footnote omitted).

The Court then reached this conclusion, again linking the use of inherent authority to bad faith conduct and explaining that where such conduct occurs during litigation, courts should “ordinarily” rely on the rules of civil procedure rather than inherent power if the conduct can be “adequately sanctioned” under the rules:

There is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney’s fees as a sanction for bad-faith conduct. This is plainly

⁸⁴ Later in the opinion, the Court added: “The Court’s prior cases have indicated that the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct.” *Id.* at 49 (citing *Link v. Wabash R. Co.*, 370 U.S. 626, 630-32 (1962) (affirming sua sponte dismissal of an action for lack of prosecution)).

⁸⁵ Justice White, writing for the five-justice (Justices Marshall, Blackmun, Stevens, and O’Connor joined Justice White) majority (Justices Scalia, Kennedy, Rehnquist, and Souter dissented) added that Congress had the power to limit the inherent power of a court, but said it had not done so despite the fact there were opportunities to do so as evidenced by changes made to § 1927 and Rule 11. *Id.* at 47-48.

⁸⁶ In this case, a party failed to comply with discovery orders and an order regarding the schedule for filing briefs.

the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules. A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees, see Roadway Express, supra, at 76. Furthermore, when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.

Id. at 50.⁸⁷

If *Chambers* requires bad-faith conduct before a district court may rely on inherent power to award attorneys' fees in a postfiling setting, does that mean that bad-faith conduct in a prelitigation setting is required before any evidence-based sanction can be awarded? If it does, decisions that invoke inherent power in the absence of bad-faith conduct may have reached the right result but for the wrong reason.⁸⁸ Until the Supreme Court or Congress reconcile the differences, prefiling conduct will remain subject to the varying standards in the federal

⁸⁷ The Supreme Court also affirmed the district court's assessment of attorneys' fees for *Chambers*' bad-faith conduct. *Id.* at 55-58. *Cf. ClearValue, Inc. v. Pearl River Polymers, Inc.*, 560 F.3d 1291, 1308-09 (Fed. Cir. 2009) (agreeing that bad faith conduct existed, but vacating judgment resulting from a sanctions' order striking plaintiff's pleadings because, following *Chambers*, inherent power should only be used when a rule or statute is inapplicable, and Rule 37 was not inapplicable); *Rimkus Consulting Group, Inc. v. Cammarata*, 2010 WL 645253, *4 (S.D. Tex. February 19, 2010) (In a case also involving the proper sanction for spoliation of documents, citing *Chambers*, "If an applicable statute or rule can adequately sanction the conduct, that statute or rule should ordinarily be applied, with its attendant limits, rather than a more flexible or expansive 'inherent power'"); *Qualcomm Inc. v. Broadcom Corp.* 2010 U.S. Dist. LEXIS 33889 (S.D. Cal. Apr. 2, 2010) (failure of outside counsel to meet with key players to explain document collection requirements; comprehend Qualcomm's computer system; and supervise proper collection of electronically stored information did not amount to bad faith required by *Chambers*: "Sanctions only may be imposed under the court's inherent authority upon a finding that the attorney acted in bad faith").

⁸⁸ See *Rimkus Consulting Group, Inc. v. Cammarata*, 2010 WL 645253, *5 (S.D. Tex. February 19, 2010) ("If inherent power, rather than a specific rule or statute, provides the source of the sanctioning authority, under *Chambers*, it may be limited to a degree of culpability greater than negligence.").

circuits on the level of culpability required to warrant any sanction or something more than monetary sanctions.⁸⁹ In the meantime, litigants will continue to face prelitigation jeopardy in the e-discovery arena.

Other Variabilites in the Prelitigation Duty to Preserve

Let me illustrate other problems litigants encounter in dealing with the prelitigation duty to preserve which magnify risk in the e-discovery world.

Must a Lawyer Be Involved to Trigger a Duty to Preserve in a Prelitigation Setting?

Within a corporation, who must know whether documents would become material at some point in the future or be aware of circumstances likely to give rise to future litigation? If there is a general counsel, must the general counsel or any other lawyer in a law department know? Or does knowledge of any employee within the corporation represent knowledge of every person in the corporation?⁹⁰ Are nonlawyers supposed to be able to determine when a duty to preserve arises and what documents are relevant to a claim? If a prospective litigant is not a lawyer or does not have a law department, when must a prospective litigant hire counsel to tell the litigant what to preserve?

What seems now like a long time ago, *Bowmar Instrument Corp. v. Texas Instruments, Inc.*, 25 Fed. R. Serv. 2d 423, 427 (N.D. Ind. 1977) was decided. The district court refused to sanction prelitigation destruction of records (six months before suit was filed) because the law department had no knowledge of the potential suit

⁸⁹ If a party destroys evidence that makes it impossible for a defendant to defend the case or a plaintiff to prove its case, should it matter whether the destruction was accidental or inadvertent? As noted above, the case law is inconsistent from circuit to circuit on the appropriate standard to follow. Compare *Vick v. Texas Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975) (citation omitted) ("The adverse inference to be drawn from destruction of records (before trial) is predicated on bad conduct of the defendant. 'Moreover, the circumstances of the act must manifest bad faith. Mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case.'") with *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) ("We reject the argument that bad faith is an essential element of the spoliation rule."). To understand outcomes, one must carefully comprehend the proof of prejudice. Cf. *Mosaid Technologies Inc. v. Samsung Elec. Co., Ltd., et al.*, 348 F.Supp.2d 332 (D.N.J. 2004). The district court in New Jersey surveyed the Third Circuit case law on the level of conduct required before issuance of an adverse inference instruction. It held that "bad faith" was not required: "Having considered the two different approaches courts take under the Third Circuit's 'actual suppression' standard, and the Third Circuit's characterization of the spoliation inference as a lesser sanction, this Court believes the flexible approach is the better and more appropriate approach. Primarily, the spoliation inference serves a remedial function--leveling the playing field after a party has destroyed or withheld relevant evidence. As long as there is some showing that the evidence is relevant, and does not fall into one of the three categories enumerated in *Schmid*, the offending party's culpability is largely irrelevant as it cannot be denied that the opposing party has been prejudiced. Contrary to Samsung's contention, negligent destruction of relevant evidence can be sufficient to give rise to the spoliation inference. If a party has notice that evidence is relevant to an action, and either proceeds to destroy that evidence or allows it to be destroyed by failing to take reasonable precautions, common sense dictates that the party is more likely to have been threatened by that evidence. See *Schmid*, 13 F.3d at 78. By allowing the spoliation inference in such circumstances, the Court protects the integrity of its proceedings and the administration of justice." 348 F.Supp.2d at 338 (footnotes omitted).

⁹⁰ *National Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 557-558 (N.D. Cal. 1987) is sometimes cited on this point. "The obligation to retain discoverable materials is an affirmative one; it requires that the agency or corporate officers having notice of discovery obligations communicate those obligations to employees in possession of discoverable materials." It is no defense that particular employees were not on notice of the duty to preserve evidence or what kinds of evidence were material to the potential litigation. See *Turnage*, 115 F.R.D. at 557. "To hold otherwise would permit an agency, corporate officer, or legal department to shield itself from discovery obligations by keeping its employees ignorant." *Id.* But these statements were all made in the context of a filed lawsuit and the need to issue a preservation notice to key players.

even though others in the defendant corporation had heard rumors that Bowmar was going to sue Texas Instruments: “The critical question is when the threat of litigation first became known to the Texas Instruments Legal Department. Without a clear showing of this knowledge, it is quite impossible to find that the defendant’s actions constituted the willful destruction of evidence.”

In contrast, in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*), the district court held that UBS should have known that electronic documents were relevant to future litigation by April 2001, four months before Ms. Zubulake’s charge of discrimination was filed. Why? Emails in April 2001 pertaining to Zubulake were labeled “UBS Attorney Client Privilege” “notwithstanding the fact that no attorney was copied on the e-mail and the substance of the e-mail was not legal in nature.” *Id.* at 216-217. In addition, Ms. Zubulake’s supervisor, Chapin, “admitted in his deposition that he feared litigation from as early as April 2001” when he was asked if he thought that Ms. Zubulake was going to sue UBS in late April 2001, and he said, “Certainly it was something that was in the back of my head.” *Id.* at 217. The arguments were persuasive to the district court:

Merely because one or two employees contemplate the possibility that a fellow employee might sue does not generally impose a firm-wide duty to preserve. But in this case, it appears that almost everyone associated with Zubulake recognized the possibility that she might sue.

*Id.*⁹¹

The decision was significant because documents were missing between April and August 2001. While perhaps a termination should lead a firm to conclude that it was going to be sued, not every termination results in litigation. More significantly, the UBS law department was not made aware of the sentiments of these individuals. Does it make sense to impose a duty to preserve on the basis of knowledge of individuals who are not lawyers and may have never heard of a duty to preserve? If this is not a matter of law, should it at least be a matter of fact so that some determination must be made that the individuals with knowledge were in a position to understand the significance of anticipated litigation so as to trigger the duty?

Or consider the facts in *Pension Committee*. The action was brought by investors seeking to recover \$550 million resulting from the liquidation of two British Virgin Island-based hedge funds, Lancer Offshore, Inc. and OmniFund, Ltd (Funds). The Funds were managed by Lancer Management Group LLC (Lancer). 2010 WL 184312 at *1. Lancer filed for bankruptcy on April 16, 2003. The Funds were placed in receivership on July 8, 2003. *Id.* In the summer of 2003, at least 13 investors of the Funds formed an ad hoc “policy consultative committee” to monitor court proceedings against Lancer and the Funds and to retain legal counsel “as necessary.” *Id.* at *8. Before common counsel was retained, 2 of the 13 plaintiff groups had retained

⁹¹ The district court gave an illustration to support its conclusion. An e-mail that was titled, “UBS attorney client privilege [sic]” was distributed to Chapin and others in late April 2001. It “essentially called for Zubulake’s termination.” It read: “Our biggest strength as a firm and as a desk is our ability to share information and relationships. Any person who threatens this in any way should be firmly dealt with . . . [Believe] me that a lot of other [similar] instances have occurred earlier.” *Id.* at 217. The district court then concluded: “Thus, the relevant people at UBS anticipated litigation in April 2001. The duty to preserve attached at the time that litigation was reasonably anticipated.” *Id.*

counsel, in March 2003 and mid-2003 respectively.⁹² On September 17 and 18, 2003, the investors group met prospective common counsel. The group retained common counsel in October or November 2003 to file suit. The actual filing date was February 12, 2004. *Id.*

When did the duty to preserve arise? The question was an important one because electronic documents were missing prior to October or November 2003. The district court rejected October or November 2003 (when litigation counsel was retained) in favor of April 2003 because by that date (1) Lancer had filed for bankruptcy, (2) the University of Montreal had filed a complaint with the Financial Services Commission of the British Virgin Islands, and two plaintiff groups had individually retained counsel, and one of these plaintiffs began communications with “a number of other plaintiffs.” 2010 WL 184312 at *9.

One cannot tell from the opinion whether the trigger date was the subject of contention. Perhaps not, because the district court’s entire discussion of the issue was pithy:

It is unreasonable to assume that the remaining plaintiffs – all sophisticated investors – were unaware of the impending Lancer collapse while other investors were filing suit and retaining counsel. Accordingly, each plaintiff was under a duty to preserve at that time.

Id.

Of course, it is conceivable that a sophisticated investor might be aware of what other investors were doing and still have decided not to become involved in litigation. The investor might have too little at stake to warrant litigation. There may be public relations or evidentiary reasons why the investor would not want to become involved in a suit. The investor might want to obtain an opinion from counsel on the likelihood of success vis-à-vis the likely costs before making a decision to file suit.⁹³ Or perhaps the investor legitimately assumed there was an arbitration clause, which arguably would prompt a different duty to preserve analysis.⁹⁴

Just as significantly, can a prospective plaintiff have a duty to preserve if the prospective plaintiff has not hired counsel to explain the duty? What if the prospective plaintiff is located in a civil law tradition that has no duty to preserve? Individuals and companies, no matter how sophisticated, do not necessarily know that they are supposed to preserve documents if a lawyer has not been engaged to tell them of the duty.⁹⁵

⁹² 2010 WL 184312 at *8, n. 60. This fact becomes significant later when the trigger date for the duty to preserve was established by the district court.

⁹³ Consider the mirror image of the problem. Does every defendant have a duty to preserve if a prospective plaintiff writes a letter saying the prospective plaintiff is going to sue the defendant at some point in the future? Such a letter might well trigger a duty to preserve on the right facts, but it should not trigger a duty to preserve in every case. Or on a more attenuated basis, suppose a prospective plaintiff issues a press release about a suit the prospective plaintiff is going to bring, or makes a public comment about bringing suit at a convention or in a publicly held meeting (say, a town council meeting). Do statements like this trigger a duty to preserve by the targeted prospective defendant? Does it matter who at the prospective defendant is aware of the comment—e.g., a plant manager versus an officer?

⁹⁴ Some victims of the Bernie Madoff Ponzi scheme had arbitration clauses in contracts with persons who managed their money and invested it with Madoff. United States law is not necessarily going to be applicable in an arbitration agreement and the seat of the arbitration may not be in the United States.

⁹⁵ I assume that none of these arguments had a meritorious factual basis in this matter. And, in fact, six months later, plaintiffs engaged common counsel to bring the securities action that was filed in February 2004.

Trigger Problems: Industry Litigation

Can lawsuits against other members of an industry trigger a duty to preserve five years before suit is brought against a defendant in that same industry? *Adams v. Dell*, 621 F.Supp.2d 1173, 1194 (D. Utah 2009) held it could and in the e-discovery world, lots of electronically stored information can be deleted in five years.

Adams involved claims against ASUSTEK Computer, Inc. and ASUS Computer International (jointly, ASUS), Taiwan-based companies. As a records management practice, ASUS did not archive emails and depended on employees to individually preserve emails that had any long-term value.⁹⁶ This practice resulted in an allegation of spoliation of material evidence for which sanctions were sought.

ASUS did not receive a demand letter until February 23, 2005 (it was actually sued shortly thereafter) after which it said that it had complied with its preservation duties. 621 F.Supp.2d at 1190. But the magistrate judge held that the duty to preserve was triggered in 1999-2000. Why? Because other companies in the industry were getting sued. In late 1999 Toshiba had settled a lawsuit “related to the floppy disk errors at issue” and a class action lawsuit was filed against HP, and in April 2000, a suit was filed against Sony based on a defect that had also been the subject of an email written by an ASUS employee in early 2000. Analogizing the presence of litigation against other companies to a building owner’s duty to preserve defective wiring that was critical to the issue of responsibility for a fire in the building owner’s product liability suit against the wire manufacturer, the magistrate judge held:

The building owner may not have known that a defective wiring bus caused the fire, or that suit would be filed, but the owner had a duty to preserve immediately after the fire. In the 1999-2000 environment, ASUS should have been preserving evidence related to floppy disk controller errors.

Id. at 1191.

Why? Whether a plaintiff who is going to bring an action following a fire is in the same position as a defendant who has not been sued even while other companies in the industry have been is itself a debatable proposition. ASUS might have regarded the absence of litigation against it in 1999-2000 as an indication that there were no legitimate claims against it.

Because of the magistrate judge’s holding on the trigger date, ASUS’s email management system—not surprisingly—was found to be faulty: “Similarly, here, ASUS’ system architecture of questionable reliability

⁹⁶ In my international arbitration world, I am told that central record keeping is not typical among companies in China and Taiwan and that record keeping is left to individual employees.

which has evolved rather than been planned, operates to deny Adams access to evidence. This should not be excused.” *Id.* at 1194.⁹⁷

In the e-discovery world, imposing a duty to preserve on a litigant five to six years before suit is filed does not support the “inexpensive” component of Rule 1. Aside from whether a business should be prohibited from having an email retention system that requires employees to print and retain emails, the impacts of *Adams* are obvious: for ASUS, spoliation obviously occurred since ASUS allowed emails to be deleted and did not know it had a duty to preserve until the magistrate judge said it did, and in situations where industry litigation is occurring, industry members not yet sued have to either keep electronically stored information not knowing whether they will ever be sued or take their chances that another judge will elect not to follow *Adams*.⁹⁸

Trigger Problems: Can Beauty Really Be in the Eyes of the Beholder?

In stark terms, the four *Rambus* cases present the arbitrariness associated with an amorphous standard for the trigger of a duty to preserve.

Rambus engaged in a conscious document destruction effort that coincided with plans to bring patent infringement suits against a number of manufacturers of dynamic random access memory. The question in several resulting lawsuits was whether the duty to preserve arose before or after undisputedly relevant documents were destroyed as part of what were called “Shred Days.”

In *Hynix Semiconductor, Inc. et al. v. Rambus Inc.*, 591 F.Supp.2d 1038 (N.D. Cal. 2006), the district court held that a duty to preserve did not arise in February 1998 when *Rambus* “began to plan a litigation strategy.” The district court held that filing a lawsuit was not “reasonably probable” because “several contingencies” had to occur before *Rambus* would engage in litigation (including issuing of certain patents and approval by *Rambus*’s board to commence licensing negotiations and rejection of *Rambus*’s licensing terms). The district court ultimately reached this conclusion: “In sum, although *Rambus* began formulating a licensing strategy that included a litigation strategy as of early 1998, *Rambus* did not actively contemplate litigation or believe litigation against any particular DRAM manufacturer to be necessary or wise before its negotiation with

⁹⁷ The magistrate judge did not find culpable conduct on the part of the defendant; instead the magistrate determined that Taiwanese companies should have had—five years before they were sued—a records management program in place that satisfied American discovery standards: “ASUS’ practices invite the abuse of rights of others, because the practices tend toward loss of data. The practices place operations-level employees in the position of deciding what information is relevant to the enterprise and its data retention needs. ASUS alone bears responsibility for the absence of evidence it would be expected to possess. While *Adams* has not shown ASUS mounted a destructive effort aimed at evidence affecting *Adams* or at evidence of ASUS’ wrongful use of intellectual property, it is clear that ASUS’ lack of a retention policy and irresponsible data retention practices are responsible for the loss of significant data.” *Id.* at 1194. In support of its position, the magistrate judge in *Adams* quoted a portion of a paragraph in *Kozlowski v. Sears, Roebuck*, 73 F.R.D. 73 (D. Mass 1976) to describe a “party’s duty” to use “an adequate information management system.” The full paragraph reads: “The defendant may not excuse itself from compliance with Rule 34, Fed.R.Civ.P., by utilizing a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of the documents an excessively burdensome and costly expedition. To allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules.” 73 F.R.D. at 76. *Kozlowski* is itself a controversial decision. Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2213 n.16 (*Kozlowski*’s interpretation of Rule 34(b) “appears unwise” because litigants do not have a duty to produce documents organized in the way that a requesting party would like them organized).

⁹⁸ Whether, on the facts, *Adams* could have been based on other legal grounds is the subject for another day.

Hitachi failed, namely in late 1999. While hiring of litigation counsel or actually filing suit is certainly not necessary to demonstrate that a company anticipates litigation, in light of the record presented, it would appear that litigation became probable shortly before the initiation of the “beauty contest” in late 1999 in which litigation counsel for the Hitachi matter, Gray Cary, was selected. Thus, Rambus’s adoption and implementation of its content neutral Document Retention Policy in mid-1998 was a permissible business decision. The destruction of documents on the 1998 and 1999 Shred Days pursuant to the policy did not constitute unlawful spoliation.” *Id.* at 1064.

The exact same facts were under scrutiny in *Rambus, Inc. v. Infineon Technologies AG, et al.*, 222 F.R.D. 280 (E.D. Va. 2004). The holding in the 2004 decision was that the district court would conduct an *in camera* review of Rambus’s documents to evaluate a subject matter waiver of privileged documents.⁹⁹ After that review, the district court, in an oral ruling, accepted Infineon’s argument that Rambus’s spoliation of evidence in violation of a duty to preserve satisfied the elements of an unclean hands defense to Rambus’s patent infringement claim. To avoid issuance of a written order with this adverse finding, “Rambus quickly settled with Infineon. Accordingly, the trial court properly dismissed that original case against Infineon before entry of any findings or judgment against Rambus.” *Samsung Electronics, Ltd. v. Rambus Inc.*, 523 F.3d 1374, 1377 (Fed. Cir. 2008) (explaining history of the *Infineon* litigation).

Samsung v. Rambus Inc., 439 F.Supp.2d 524 (E.D. Va. 2006) *vacated on other grounds*, *Samsung Electronics, Ltd. v. Rambus Inc.*, 523 F.3d 1374 (Fed. Cir. 2008), then followed. Piggybacking the *Infineon* outcome, Samsung initiated a declaratory judgment action to establish an unclean hands defense to claims of infringement. Based on the outcome in *Infineon*, Rambus voluntarily dismissed its infringement counterclaims with prejudice. 439 F.Supp.2d at 532. Nonetheless, Samsung filed a motion for attorney fees, prompting the district court to evaluate the spoliation evidence.¹⁰⁰ The district court incorporated the *Hynix* record in lieu of receiving the testimony again.¹⁰¹ Disagreeing with the Northern District of California, it held that the duty to preserve arose by the time of the first “Shred Day” in 1998 and found Rambus responsible for spoliation of evidence. *Id.* at 559.¹⁰²

The same facts were before another district court in *Micron Tech., Inc. v. Rambus Inc.*, 255 F.R.D. 135, 150-51 (D. Del. 2009). Without mention of *Hynix*, the district court decided that the duty to preserve arose in

⁹⁹ “Having allowed testimony about the reasons for creating the document retention program and how it was implemented, it is arguable that Rambus cannot, under claims of privilege, restrict access to documents that address those topics. It, however, is appropriate to complete an *in camera* review of the privileged documents before deciding the issue of waiver.” 222 F.R.D. at 290.

¹⁰⁰ The motion was premised on the patent law provision for an award of fees, 28 U.S.C. § 285, or the court’s inherent power.

¹⁰¹ “Thus, the *Hynix* decision fixed the point at which litigation became more than a possibility as late 1999 when Rambus undertook to retain counsel to prosecute its case against Hitachi. With respect, that does not square with the record created by a great number of Rambus’ contemporaneous business records and the testimony given by Steinberg to the effect that in 1998 and mid-1999 his job was, in part, to prepare for litigation. Those records and the testimony are outlined fully above and will not be repeated here. As explained above, the record, taken as a whole, rather clearly shows that litigation ‘became more than a possibility’ in 1998.” 439 F.Supp.2d at 569.

¹⁰² Despite the spoliation findings, the district court refused to award fees because of the dismissal of the counterclaim. Because of the voluntary dismissal of Rambus’s counterclaim against Samsung and because Rambus had made an offer of judgment to pay Samsung’s attorneys’ fees, which Samsung rejected, the Federal Circuit later held that the case was moot and the district court no longer had jurisdiction, *Samsung Electronics, Ltd. v. Rambus Inc.*, 523 F.3d 1374 (Fed. Cir. 2008), eliminating yet a second conflicting precedent.

December 1998 leading to a sanction against Rambus for evidence spoliation and a holding that its patents were not enforceable against Micron.¹⁰³

I am not focused on the correctness of any particular outcome in the *Rambus* cases. I question whether in Rule 1 terms, on the same facts, two opposite outcomes on the duty to preserve trigger date can both be “just.” It is this kind of variability and unpredictability that results in overly conservative decisions to keep too much electronic data for too long a period of time, adding cost, if not also delay, to litigation.

Trigger Problems: Demand Letters

Why do some demand letters trigger a duty to preserve and others do not?

In *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 2007 U.S. Dist. LEXIS 15277 (D. Colo. Mar. 2, 2007), a trademark infringement action, suit was filed on February 24, 2004. The plaintiff had sent demand letters to the defendant in 2002 and 2003 discussing the potential for customer confusion and defendant’s possible “exposure.” They did not trigger a duty to preserve. Why? The 2002 letter

did not threaten litigation and did not demand that Land O’Lakes preserve potentially relevant materials. Rather, Cache La Poudre hinted at the possibility of a non-litigious resolution. Ms. Anderson-Siler’s correspondence with Land O’Lakes’ outside counsel in June 2003 was no more emphatic or explicit in raising the prospect of litigation. Ms. Anderson-Siler’s correspondence in 2003 also did not include a demand for preservation of evidence. Given the dynamic nature of electronically stored information, prudent counsel would be wise to ensure that a demand letter sent to a putative party also addresses any contemporaneous preservation obligations.

Id. at *29-30. The district court held that the duty to preserve was not triggered until the action was filed and in so doing recognized the burden any other holding would place on litigants:

[A] party’s duty to preserve evidence in advance of litigation must be predicated on something more than an equivocal statement of discontent, particularly when that discontent does not crystallize into litigation for nearly two years. Any other conclusion would confront a putative litigant with an intractable dilemma: either preserve voluminous records for a indefinite period at potentially great expense, or continue routine document management practices and risk a spoliation claim at some point in the future.

Id. at *30-31.

¹⁰³ In *Rambus Inc. v. Nvidia Corp.*, 2009 U.S. Dist. LEXIS 19204 (N.D. Cal. March 11, 2009), Nvidia moved to dismiss or for partial summary judgment on issue preclusion grounds citing Judge Robinson’s decision in *Micron*. Rambus countered by citing Judge Whyte’s decision in *Hynix*. The district court stayed the proceeding until the Federal Circuit addressed the matters: “Based on these unusual circumstances, the Court finds it premature to rule on the preclusive effect, if any, of either Judge Robinson’s or Judge Whyte’s decisions, and that a stay of all proceedings is appropriate. The patents in suit are related to the Rambus patents held unenforceable by Judge Robinson in *Micron*. The Federal Circuit’s resolution of Judge Robinson’s decision in *Micron* and Judge Whyte’s conflicting decision in *Hynix I* will be relevant -- and potentially dispositive -- to these proceedings. A stay will thus promote judicial economy and conserve the parties’ and the judiciary’s resources.” *Id.* at *6

Goodman v. Praxair Services, Inc., 2009 U.S. Dist. LEXIS 58263 (D. Md. July 7, 2009) reached a different result. Suit was filed on February 13, 2004. The demand letter in issue was sent three years earlier, on January 5, 2001. The magistrate judge held that the letter established the trigger of the duty to preserve, distinguishing *Cache*:

Goodman's January 5, 2001 letter to Marty noted that he had consulted two attorneys regarding the matter, and advised Marty that if he was "forced to litigate," then he could potentially receive damages in excess of the disputed amount from the contract. This language distinguishes Goodman's letter from the more conciliatory letters in Cache. It may be that a letter that merely identifies a dispute but expresses an invitation to discuss it or otherwise negotiate does not trigger the duty to preserve evidence, but where, as here, the letter openly threatens litigation, then the recipient is on notice that litigation is reasonably foreseeable and the duty to preserve evidence relevant to that dispute is triggered. I therefore find that Tracer/PSI's duty to preserve evidence relevant to the claim raised in this case commenced with Goodman's January 5, 2001 letter.¹⁰⁴

Again, I do not pass judgment on the correctness of these outcomes. The fact that we have two outcomes creates uncertainty. And lawyers are perfectly capable of writing a triggering demand letter now that both cases have provided a road map on how to do so. If the right words are used in such a letter, does that diminish at all the "intractable dilemma" raised in *Cache*? If suit is not filed for one, two, three, or even four years—an eternity of new gigabytes of data in the world of e-discovery—should the letter recipient's e-discovery preservation practices be held hostage by the letter writer's decision on when to file suit?

¹⁰⁴ Even though the dispute arose in 1999, the magistrate judge rejected 1999 or 2000 as alternative trigger dates saying that the parties negotiated for "quite some time" before litigation became "reasonably foreseeable," and the "mere existence of a dispute does not necessarily mean that parties should reasonably anticipate litigation or that the duty to preserve arises." *Goodman v. Praxair*, 2009 US Dist. LEXIS 58263, at*42. The magistrate cited *Biovail v. Treppel*, 233 FRD 363, 371 (S.D.N.Y. 2006) (plaintiff unsuccessfully argued that the duty to preserve was triggered as of February 2002, about 15 months before suit was filed, because key events giving rise to plaintiff's claims occurred then; "the mere existence of a dispute between Mr. Treppel and Biovail in early 2002 did not mean that the parties should reasonably have anticipated litigation at that time and taken steps to preserve evidence").

Remember again, electronic information can disappear rapidly and in the prelitigation world that has huge consequences. If, as *Pension Committee* holds, after a duty to preserve attaches, it is gross negligence not to issue a written litigation hold,¹⁰⁵ preserve the documents of all key players,¹⁰⁶ or find unique information on back up tapes,¹⁰⁷ 2010 WL 184312 at *7, we can expect a new, much larger even by today's standards, wave of sanctions motions.

Scope of the Duty to Preserve in Relation to Rule 26(b)(1)

While it is a postlitigation spoliation case, *Passlogix, Inc. v. 2FA Technology, LLC*, 2010 WL 1702216 (S.D.N.Y. Apr. 27, 2010) dramatizes the need for clarity of the scope of a litigant's prelitigation preservation obligations. The case involved the alleged misappropriation of intellectual property. Suit was filed in December 2008. Defendant, a small company, never instituted a litigation hold. An officer at 2FA, Salyards, received an anonymous email in late June or early July 2009 from a "hushmail.com" account. Attached to the email was a document containing Passlogix computer specifications. Salyards reviewed the attachment, decided it was improper to have the plaintiff's document, and deleted it, without telling his counsel about it. Passlogix sought sanctions.

2FA argued that Passlogix had the attachment and the anonymous email was not evidence. The district court held that 2FA had a duty to preserve the anonymous email and the attachment because the duty to preserve extends not only to evidence, but to what "is reasonably calculated to lead to the discovery of admissible evidence" or "is reasonably likely to be requested in discovery." *Id.* at *28. The district court was quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, (S.D.N.Y. 1991), also a postlitigation spoliation matter, for

¹⁰⁵ In settings where the only way to satisfy the duty to preserve is by a written litigation hold, a litigant was ill-advised before *Pension Committee* not to have a written litigation hold and certainly after this decision is ill-advised not to have one. But the focus must be not so much on whether a hold notice is written but on whether a hold is effective. Otherwise, every time a litigant issues a litigation hold that is not written, there is the potential for a motion for sanctions to be filed. Under *Pension Committee*, prefilings, the question of when the duty to preserve is triggered will impact the outcome of the culpability analysis. If a litigant guesses wrong, gross negligence will be established because no litigation hold, much less a written one, will have been issued. Motion practice over the trigger is sure to consume judicial resources since the prize—an automatic finding of gross negligence in jurisdictions that decide to follow *Pension Committee*—may be irresistible. If bad faith is required to utilize inherent power, *Pension Committee*'s rationale may not hold up. But even if bad faith becomes the national standard in federal courts, I expect that a district court will always find a way to level the playing field where a litigant destroys relevant information prejudicing another litigant's ability to bring or defend against a claim.

¹⁰⁶ *Pension Committee* holds that it is gross negligence if, after a duty to preserve attaches, a party fails to identify "all of the key players." Litigants with one or very few employees should be able to identify key players without much difficulty. Litigants with thousands of employees in multiple locations may find this admonition impossible to satisfy. On the scale of numbers of employees between the very small and the very large, circumstances should dictate whether the initial decision on the breadth of key players was a reasonable one. If it was, "gross" negligence should not attach if someone after-the-fact can identify one or two additional persons that become "key players" because of information that turns up later in discovery. One would hope that in the future the overriding focus will be on sufficient proof of harm from spoliation conduct rather than on an automatic finding of grossly negligent conduct accompanied by an argument that relevance and prejudice must be presumed as a result.

¹⁰⁷ This is another problematic area for litigants who may not immediately know whether their backup tapes have unique, relevant information on them. Large companies with thousands of backup tapes being generated monthly are placed in automatic jeopardy, and small companies who have little litigation experience are likely to be as well. Because of a "gross negligence" label, litigants are forced to evaluate very quickly what electronic documents key players have and to do so thoroughly. That could take time meaning that litigants, in effect, are forced to preserve all backup tapes until they can determine the answer to the question for fear that they will be accused of gross negligence. The result? Litigation costs will go up unnecessarily in most cases since information on backup tapes will typically reside elsewhere and thus will rarely affect the outcome of an action.

the scope of the duty to preserve. *Turner*, in turn, was quoting from *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F.Supp. 1443, 1455 (C.D. Cal. 1984), another postlitigation spoliation case. This formulation of the scope of the duty to preserve was derived from old Rule 26(b)(1). In 2000, Rule 26(b)(1) was amended in an attempt to narrow the scope of discovery. As to the “reasonably calculated” language in Rule 26(b)(1), the Advisory Committee suggested that good cause would be required for information sought under this branch of the rule:

*The amendments also modify the provision regarding discovery of information not admissible in evidence. As added in 1946, this sentence was designed to make clear that otherwise relevant material could not be withheld because it was hearsay or otherwise inadmissible. The Committee was concerned that the “reasonably calculated to lead to the discovery of admissible evidence” standard set forth in this sentence might swallow any other limitation on the scope of discovery. Accordingly, this sentence has been amended to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence. As used here, “relevant” means within the scope of discovery as defined in this subdivision, and it would include information relevant to the subject matter involved in the action if the court has ordered discovery to that limit based on a showing of good cause.*¹⁰⁸

While the emphasis in Rule 26(b)(1) has changed, the “inherent power” case law on the scope of the preservation duty based on the former rule is perpetuating itself. Since 2FA had failed to issue a litigation hold, following *Pension Committee*, the district court held this was grossly negligent conduct. But then the district court held that the anonymous email was not relevant! Had that been the first finding, there would have been no duty to produce the email under current Rule 26(b)(1) and presumably, therefore, no duty to preserve it.¹⁰⁹ One can readily see how the formulation of the scope of the duty to preserve under inherent authority case law borrowed from the old text of the scope of discovery under Rule 26(b)(1) can create jeopardy today in a prelitigation e-discovery context. Uncertainty begets more cost and delay and possible unfairness. Rule 1 does not work in such a setting.

¹⁰⁸ In addition to *Passlogix*, other decisions do not reflect this change. See *Dunkin’ Donuts Franchised Restaurants LLC v. Grand Central Donuts, Inc.*, 2009 U.S. Dist. LEXIS 52261, *5 (E.D.N.Y. June 19, 2009) (while noting the Advisory Committee’s mandate to focus discovery on actual claims and defenses, the magistrate judge explained that “Rule 26(b)(1) still provides for broad discovery” encompassing “relevant information” and “relevance” has been “has been broadly construed to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on any issue that is or may be in the case.” *Id.* at *6 (citations omitted). Ultimately, however, the magistrate judge required the requesting party to tailor its discovery requests. *Id.* at *15. See also *Daimler Truck N.A. LLC v. Younessi*, 2008 WL 2519845, *2 (W.D. Wash. June 20, 2008) (with respect to the email discovery being sought, the district court explained: “Discovery is generally available regarding any nonprivileged information relevant to any party’s claims or defenses. Fed.R.Civ.P. 26(b)(1). Discovery being broad in scope and biased toward disclosure, requests need only be ‘reasonably calculated to lead to the discovery of admissible evidence.’ *Id.*”); *Integrated Service Solutions, Inc. v. Rodman*, 2008 WL 4791654, *3 (E.D. Pa. 2008) (the magistrate judge interpreted Rule 26(b)(1) to provide for discovery of matters relevant to a party’s claim or defenses and then defined “relevant information” to include “admissible evidence and information that ‘appears reasonably calculated to lead to the discovery of admissible evidence’” without any reference to the good cause requirement); *Hoover v. Florida Hydro, Inc.*, 2008 WL 4467661, *2 (E.D. La. Oct. 1, 2008) (Rule 26(b)(1) specifies that relevant information “need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence”).

¹⁰⁹ Certain correspondence and computer logs were also discarded and this conduct (the latter found to be bad faith) ultimately resulted in imposition of a \$10,000 fine against 2FA as a sanction. 2010 WL 1702216 at *37.

Possible Solutions

In the end, we all care about the administration of justice, and we want it to be not just fair, but also frugal and fast.

There is no question that spoliation can affect the ability of a litigant to advance a claim or defend one and thus, the ability of a judge or jury to administer justice. We need a predictable, consistent mechanism to address such spoliation so that no one gains an unfair advantage.

What are our choices? A Supreme Court decision? We have no ability to make that happen and there is no guarantee that the fact pattern of a decision will provide the opportunity to address all of the questions posed by the prelitigation duty to preserve. An act of Congress? If we are discussing a procedural rule, then the Civil Rules Advisory Committee should be the driver, not the Congress.

A new procedural rule? If procedure and not evidence is the repository of rules addressing spoliation, then one must be explored.¹¹⁰ It must eliminate as much as practicable the variability of the trigger date for the prelitigation duty to preserve information discoverable under Rule 26(b)(1) and thereby reduce, if not eliminate, a number of e-discovery-based sanction motions.¹¹¹ It would focus on the conduct that occurred taking into account all relevant facts and evaluate that conduct in relation to evidentiary standards for drawing

¹¹⁰ I do not attempt to analyze the application of the Rules Enabling Act, 28 U.S.C. § 2072 to prelitigation conduct. There was considerable disagreement about the application of § 2072 in *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010) which permitted application of Rule 23 in a setting where a state law would have prohibited a class action, but unlike the state statute involved in that case, the issue here is whether a rule of procedure (or a rule of evidence) could be adopted that would define the scope of the prelitigation duty to bring harmony to the diffuse lines of authority now extant in the federal circuits. Given the application of inherent power to establish a party's obligations, it would appear that a rule could be drafted that would "really regulate procedure" in the context of both the substantive rights limitation in § 2072(b) and *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941) ("The test must be whether a rule really regulates procedure, - the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."). Cf. Fed.R.Civ.P. 27 (permitting perpetuation of testimony on a prelitigation basis); Fed.R.Civ.P. 11 (permitting sanctions for, in effect, prelitigation conduct where a complaint does not satisfy Rule 11(b)'s requirements).

¹¹¹ Or perhaps a new rule should eliminate the concept of a "trigger" altogether and instead convert the circumstances that are currently used to determine whether a duty to preserve exists into a factor in determining whether a party's spoliation of information is more consistent with consciousness of a weak case than with a benign or nonculpable purpose.

adverse inferences from the absence, or destruction, of a relevant document.¹¹² In a prelitigation context, the bar should be a high one, focusing on spoliation conduct that reflects consciousness of a weak case and prejudice to the innocent party's ability to pursue or defend a claim.¹¹³

If there is bad-faith conduct, whether prejudice should be presumed in every case and whether that presumption should be rebuttable are propositions worthy of a healthy debate.¹¹⁴ However, if bad-faith conduct means that a party intended to get rid of harmful documents, an adverse inference or, if a party can no longer pursue or defend a claim, a terminating sanction, must follow. If there is no bad-faith conduct, the

¹¹² In 2 *Wigmore on Evidence* (1979), without focusing on trigger dates, Professor Chadbourne makes the evidentiary distinction between conduct indicating consciousness of the “*weakness of the cause in general*—bribery, destruction of evidence and the like” and conduct indicating a consciousness of the weakness of a *specific element in the cause*—failure to produce a particular witness or a document, and the like.” *Id.*, § 277 (emphasis in original). He traces the history of the adverse inference in reported decisions under English common law to 1617, including the oft-cited 1722 decision in *Armory v. Delamirie*, 1 Stra. 505, where the chimney sweeper found a jewel and took it to a jeweler to have it appraised only to have the jeweler keep the jewel. In an action for damages by the chimney sweeper, in the absence of production of the actual jewel by the jeweler, the jury was directed to presume the value as that of the “best jewels,” which they did. 2 *Wigmore*, § 285. With respect to documents destroyed, Professor Chadbourne explains: “The consciousness indicated by conduct may be, not an indefinite one affecting the weakness of the cause at large, but a specific one concerning the defects of a *particular element* in the cause....The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its *tenor is unfavorable to the party's cause.*” *Id.* (emphasis in original). He adds that there remains uncertainty “as to the precise nature of the inference and the conditions in which it may legitimately be drawn.” He later concludes that the “rule might correctly be stated as follows: The failure or refusal to produce a relevant document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to the possessor, *provided the opponent, when the identity of the document is disputed, first introduces some evidence tending to show that the document actually destroyed or withheld is the one as to whose contents it is desired to draw an inference.* In applying this rule, care should be taken not to require anything like specific details of contents, but merely such evidence as goes to general marks of identity.” *Id.*, § 291 (emphasis in original). See *Stevenson v. Union Pacific Railroad Company*, 354 F. 3d 739, 747 (8th Cir. 2004) (“We have never approved of giving an adverse inference instruction on the basis of prelitigation destruction of evidence through a routine document retention policy on the basis of negligence alone. Where a routine document retention policy has been followed in this context, we now clarify that there must be some indication of an intent to destroy the evidence for the purpose of obstructing or suppressing the truth in order to impose the sanction of an adverse inference instruction.”).

¹¹³ As noted earlier, rules of evidence, not rules of procedure, may be the appropriate repository for a rule to address prelitigation spoliation. Cf. *Atkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009) (“a spoliation ruling is evidentiary in nature”). The prelitigation destruction of an individual document (e.g., *Stevenson v. Union Pacific Railroad Company*, *supra*, involving routine taping over of a voice tape of the interview with a train crew on the date of a train accident resulting in a fatality) could, as a matter of evidence law taking into account all of the circumstances, result in an inference that the tape's contents were unfavorable to the railroad operator. Where instead gigabytes of data are lost through recycling of a backup tape or auto-delete cycles for email, it will be argued that there must have been some “dog bytes” (the liability equivalent of the “smoking gun” in the digital world) that would have been unfavorable to the “spoliator.” When data are lost in bulk, it smacks of discovery-inhibiting conduct that sounds like a procedural violation. Since “sanctions” exist under the rules of civil procedure and not the rules of evidence, parties invoke the rules of procedure when they can, and “inherent power,” when they can't, to obtain the sanction. Whenever a party seeks an adverse inference, however, the issue is an evidentiary one: if among all of those gigabytes, relevant documents are shown to have existed and to have been lost forever under circumstances that suggest consciousness of a weak case, the trier of fact is allowed to infer that the lost evidence would have been adverse to the spoliator. Cf. *Leon v. IDX Systems Corp.*, 464 F.3d 951, 956 (9th Cir. 2006) (affirming dismissal of action where, postlitigation, plaintiff wiped all files on an employer-issued laptop before returning the laptop and was found to have acted in bad faith: “The (district) court commented at the hearing that Leon's behavior was ‘very egregious and, from the written documents, ‘appears to be without remorse.’ The court found Leon's written testimony ‘to be extremely evasive’ and that Leon ‘can't answer a straight question that's being posed.’”).

¹¹⁴ I can imagine a scenario where there is bad-faith conduct but no prejudice (say, because destroyed documents exist from other sources). In such situations, monetary sanctions can address bad-faith conduct. Cf. *Passlogix, Inc. v. 2FA Technology, LLC*, 2010 WL 1702216, *35-37 (S.D.N.Y. Apr. 27, 2010) (imposing a monetary fine of \$10,000, in lieu of an adverse inference or evidence preclusion, for bad-faith conduct resulting in spoliation of relevant evidence).

choices become more difficult. Inadvertent or negligent conduct can be prejudicial to an innocent party if the ability of that party to pursue or defend a claim has been eliminated.¹¹⁵ If that evidentiary burden has been satisfied, the lack of moral culpability should not be a bar to remedial measures to level the playing field, including preclusive or terminating sanctions.

We are back to the “just” component of Rule 1. We must have sanctions’ authority. But we should want to strictly limit it to cases that warrant sanctions. As the law now stands, in the e-discovery world, because electronically stored information can be deleted or recycled so quickly, for prelitigation conduct, there are too many ways to “game the system” (e.g., trigger dates and tactics to influence them) and because of the unpredictability of the case law, too many temptations to seek potentially outcome-determinative sanctions. “Because of their very potency, inherent powers must be exercised with restraint and discretion.” *Chambers, supra*, 501 U.S. at 44. We must give content to this admonition in the case of prelitigation conduct that results in the loss of relevant electronically stored information. To do so, we must establish reasonable, manageable, and predictable contours that relate conduct to consciousness of a weak case or some similar standard that would allow a trier of fact to conclude that the lost information would have been unfavorable to the party that lost it. And we must ensure that the same rules are followed irrespective of the federal circuit in which the dispute resides.

¹¹⁵ *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 75 (S.D.N.Y. 1991) is often quoted for this proposition: “It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently. The adverse inference provides the necessary mechanism for restoring the evidentiary balance. The inference is adverse to the destroyer not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss.” (Emphasis in the original.) The missing documents in *Turner* were maintenance records on a bus that plaintiff claimed had faulty brakes. The district court refused to draw an adverse inference: “Here, there is no evidence that the destroyed records would have shown whether the brakes were in good working order. Notations of work on the brakes prior to the accident would not likely have revealed whether any problems were successfully corrected by the time of the accident. Notations after the accident would probably not show how long any problem had persisted. At best, then, the records would have contained ambiguous information. Moreover, the plaintiff has offered no extrinsic evidence to corroborate the suggestion that the brakes were faulty. No affidavit has been offered attributing the accident to the bus’s inability to stop. Nor has the plaintiff ascertained that the new bus owner found the brakes to be defective or to have been recently repaired. Thus, the maintenance records themselves would not have shown the brakes to be defective, and therefore no inference to that effect is appropriate.” *Id.* at 77. The destructive testing case law makes the point most directly. *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995) (affirming the judgment entered on a jury verdict for defendant, where plaintiff’s husband died as a result of a fire on a boat; an expert for plaintiff examined the boat in destructive ways that deprived defendant of the opportunity to conduct its own inspection of the alleged defect; and the trial court sanctioned the plaintiff by allowing the jury to draw an adverse inference if the jury found that the plaintiff or her agents caused the destruction or loss of relevant evidence; *Silvestri v. General Motors Corp.*, 271 F.3d 583, 592 (4th Cir. 2001) (affirming dismissal of a complaint as a sanction where plaintiff claimed that a GM vehicle was defective and that the defect caused the accident in issue; plaintiff had his experts inspect the vehicle; one of the experts told plaintiff to advise GM of the accident so GM could inspect it; and GM was not notified of the accident until three years later and by then the vehicle had been repaired and resold. “In sum, we agree with the district court that Silvestri failed to preserve material evidence or to notify GM of the availability of the evidence, thus breaching his duty not to spoliage evidence.”)

ARE THE E-DISCOVERY AMENDMENTS TO THE FEDERAL RULES WORKING?

If I were forced to give an unqualified answer to this question it would be “yes.”¹¹⁶

The Rule 26(f) Conference of the Parties and the Rule 16(b) Scheduling Conference and Order

The e-discovery amendments added to Rule 26(f)(2) the requirement that at the conference of the parties, the parties “discuss any issues about preserving discoverable information.” Then, with respect to the parties’ discovery plan, Rule 26(f)(3)(C) and (D) were added to provide the district court with the parties’ views and proposals concerning:

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

*(D) any issues about claims of privilege or of protection as trial-preparation materials, including – if the parties agree on a procedure to assert these claims after production – whether to ask the court to include their agreement in an order.*¹¹⁷

Proceeding sequentially to the Rule 16 scheduling order, the amendments added new paragraphs (b)(3)(B)(iii) and (iv) that permit the Rule 16 Scheduling Order to “provide for disclosure or discovery of electronically stored information” and to include any agreements the parties reach “for asserting claims of privilege or of protection as trial-preparation material after information is produced.”

The additions to Rule 26(f) lead lawyers to the e-discovery bargaining table; they can’t make lawyers prepare for discussions on e-discovery issues, or, when prepared, agree on them. In other words, the rule is fine. Implementation is the issue. That’s why it is not surprising that pilot projects like the Seventh Circuit’s have been organized and pronouncements like the Cooperation Proclamation have been promulgated. It is also why the New York Courts E-Discovery Report on New York’s preliminary conference (see Appendix 2) includes recommendations to require lawyers to have meaningful e-discovery communications at the conference and to document that they not only were prepared to do so, but did so.

The amendments to Rule 16(a) should lead courts to make appropriate inquiries of counsel regarding any e-discovery preservation or production issues, and, where necessary, to establish e-discovery ground rules consistent with justice, speed, and cost. Again, the rule is fine. Execution is dependent upon the engagement level of the judge and counsel on e-discovery issues.

¹¹⁶ If imitation is a form of flattery, I should note that while most states do not have meet-and-confer requirements, many states have adopted in whole or in part the federal rules’ e-discovery amendments. See Appendix 3.

¹¹⁷ Form 35, “Report of Parties’ Planning Meeting,” which explains the parties’ discovery plan contains conforming changes that follows the language in revised Rule 26(f)(3)(C) and (D). Form 35 is available at: <http://www.law.cornell.edu/rules/frcp/Forms.pdf>. The various lawyer survey results discussed earlier raise questions about how often Form 35 is actually utilized. Cf. *Patterson v. Goodyear Tire and Rubber Company*, 2009 U.S. Dist. LEXIS 34585, *16 (D. Kan. Apr. 23, 2009) (explaining that the District Court of Kansas has guidelines on electronically stored information that require “ESI” to be included in a party’s initial disclosures; require parties to communicate promptly about the categories of ESI being sought and to do so at the Rule 26(f) conference if the requesting party knows of the categories by then; and urges parties to reach agreement on the scope of e-mail discovery, back-up materials, and how to assess costs incurred as a result of electronic discovery, but that the parties failed to take any of these steps). The Kansas District Court guidelines can be found at: <http://www.ksd.uscourts.gov/guidelines/electronicdiscoveryguidelines.pdf>.

If any action is to be taken by rule, the action should focus on how to make sure that steps are, in fact, taken by counsel and courts to ensure that e-discovery is just, speedy, and inexpensive.

Discovery Into Inaccessible Sources of Electronically Stored Information Under Rule 26(b)(2)

The e-discovery amendments added Rule 26(b)(2)(B) to guide the district courts in addressing claims that electronically stored information is not reasonably accessible because of undue burden or cost:

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for such discovery.

This amendment has been the subject of numerous decisions looking at the burden and cost associated with a production request and cost-shifting. Backup tapes have featured prominently in many cases and what to do with them represents a costly conundrum for many litigants.

Cases fall into two categories: (1) whether inaccessible data, and particularly backup tapes, need to be accessed and who should pay for the costs, and (2) whether backup tapes need to be preserved.

On the access issues, some cases are easy. *See, e.g., Dahl v. Bain Capital Partners, LLC*, 655 F.Supp.2d 146, 149 (D. Mass. 2009) (the district court refused to shift costs or production where the producing party failed to identify which documents were inaccessible, the nature of the inaccessibility, or the undue burden or cost);¹¹⁸ *Petcou v. C.H. Robinson Worldwide, Inc.*, 2008 U.S. Dist. Lexis 13723, *4-5 (N.D. Ga. Feb. 25, 2008) (where the magistrate judge rejected a request to require defendant to search backup tapes for emails for 5,300 employees for a six-year period where the approximate cost to retrieve two years' worth of e-mails for one employee "is approximately \$79,300"); *Pescoff v. Faber*, 251 F.R.D. 59, 62 (D.D.C. July 7, 2008) (where the magistrate judge rejected a request by the producing party to shift the costs of a \$33,000 forensic examination of several computers and a server for electronically stored information where the forensic examination was made necessary by actions and inaction of the producing party that resulted in auto-deletions of relevant emails and recycling of backup tapes); *Cason-Merenda v. Detroit Med. Ctr.*, 2008 WL 2714239, *1 (E.D. Mich. July 7, 2008) (the magistrate judge denied defendant's cost-shifting motion where the defendant had not identified any information as "not reasonably accessible" and did not file a motion for protective order, but instead produced the information requested, and then sought an order imposing 50% of the costs on the plaintiff).

And the cost-shifting case law has reflected a good dose of practicality and emphasized the importance of sampling techniques. *See, e.g., Securities and Exchange Commission v. Collins & Aikman*, 256 F.R.D. 403, 418 (S.D.N.Y. 2009) (ordering parties to confer to negotiate a reasonable search protocol and then consider

¹¹⁸ The requesting party was ordered to pay the costs of producing documents in a format that was different from the one in which the producing party kept the documents in the usual course of business. 655 F.Supp.2d at 149.

applying the protocol to a segment of the data in question); *Major Tours, Inc. v. Orel*, 2009 U.S. Dist. LEXIS 97554, *19 (D.N.J. Oct. 20, 2009) (where it would cost \$1.5 million to restore, retrieve, and review emails from 2,500 backup tapes, and where production of “live” mailboxes generated 152,000 emails from 37 custodians and 70,000 of these emails contained a hit on one or more of the 100 search terms agreed to by the parties, the magistrate found undue burden or cost with respect to a search of all backup tapes, but did allow a search of 15 backup tapes from a specific time period if plaintiffs wished to share equally in the restoration and retrieval costs which were estimated to be between \$81,425 and \$114,100); *Covad Communications Co. v. Revonet, Inc.*, 258 F.R.D. 5, 14 (D.D.C. 2009) (the magistrate judge required a producing party to pay for the cost of forensic imaging of certain servers but the requesting party to pay the cost of analyzing the data in a report to be provided to the parties); *Haka v. Lincoln County*, 2007 U.S. Dist. LEXIS 64480 (W.D. Wisc. Aug. 29, 2007) (limiting search of external hard drives initially to emails only, ordering requesting party to tailor search term requests “to the narrowest set with which he is comfortable” and requiring the parties to split the costs 50% each).

The biggest problem thus far with this e-discovery amendment relates to preservation of backup tapes. They are used for disaster recovery but where they might have been used instead as “filing cabinets,”¹¹⁹ they create potential procedural headaches for litigants trying to figure out what they have to preserve.

The backup tape preservation issue first arose in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*) when Judge Scheindlin asked and answered her own question:

Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, “no”. Such a rule would cripple large corporations, like UBS, that are almost always involved in litigation. As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation.

Id. at 217. The exception, however, makes the rule:

The scope of a party’s preservation obligation can be described as follows: Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a “litigation hold” to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company’s policy. On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval), then such tapes would likely be subject to the litigation hold.

However, it does make sense to create one exception to this general rule. If a company can identify where particular employee documents are stored on backup tapes, then the tapes

¹¹⁹ *Quinby v. WestLB*, 2005 U.S. Dist. LEXIS 35583, *25, *28, n.11 (S.D.N.Y. Dec. 15, 2005) (where producing party recognized that live servers only contained emails for a narrow component of the relevant time period and producing party automatically began to search backup tapes, the magistrate judge refused to sanction producing party for doing so but also refused to shift costs except as to one custodian later resulting in a cost-shifting judgment of \$447.89, *Quinby V. WestLB AG*, 2007 U.S. Dist. LEXIS 2955, *3-4 (S.D.N.Y. Jan. 4, 2007)).

storing the documents of “key players” to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to all backup tapes.

Id. at 218.¹²⁰ The “general rule” has been cited approvingly. See *Columbia Pictures Industries v. Bunnell*, 2007 U.S. Dist. LEXIS, *55 (C.D. Cal. May 29, 2007), *review denied*, 245 F.R.D. 443 (C.D. Cal. 2007); *Consol. Aluminum Corp. v. Alcoa, Inc.*, 2006 U.S. Dist. LEXIS 66642, *8, n.4 (M.D. La. July 19, 2006). See also *Oxford House, Inc. v. City of Topeka*, 2007 U.S. Dist. LEXIS 31731 (D. Kan. Apr. 27, 2007).¹²¹ *Cf. Forest Laboratories, Inc. v. Caraco Pharmaceutical Laboratories, Ltd.*, 2009 U.S. Dist. LEXIS 31555 (E.D. Mich. Apr. 9, 2009) (permitting a hearing to determine whether the exception in *Zubulake IV* applies to the failure to keep backup tapes where the producing party argued no unique information existed on the backup tapes and the requesting party argued that documents on active servers were destroyed and only resided on backup tapes).

This “general rule” has also been cited without reference to the exception. In *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc. et al.*, 2007 U.S. Dist. LEXIS 15277 (D. Colo. Mar. 2, 2007), plaintiff argued that defendant had a duty to safeguard backup tapes from recycling. The magistrate did not read defendant’s duty quite as broadly:

As noted, counsel for Land O’Lakes was required to undertake a reasonable investigation to identify and preserve relevant materials in the course of responding to Plaintiff’s discovery requests. Such an investigation would not automatically include information maintained on computer back-up tapes. “As a general rule, [a] litigation hold does not apply to inaccessible back-up tapes . . . which may continue to be recycled on the schedule set forth in the company’s policy.” *Zubulake v. UBS Warburg LLC*, 229 F.R.D. at 431. *As of December 2006, a party responding to discovery requests must identify but need not produce electronically stored information that is not reasonably accessible because of undue burden or cost. One such source of information might be back-up tapes containing archived data.*

Id. at *48-49 (footnote and citation omitted). The magistrate later held that a party “must ensure that relevant information is retained on a continuing basis once the preservation obligation arises,” but did not address the

¹²⁰ See also *The Pension Committee of the University of Montreal Pension Plan et al. v. Banc of America Securities, LLC et al.*, 2010 WL 184312 (S.D.N.Y. January 15, 2010) (repeating *Zubulake* rule but also, in a spoliation sanctions setting, announcing presumptive categories of “gross negligence” for failures, after a duty to preserve attaches, to issue a written litigation hold, identify all key players, and preserve unique information on backup tapes).

¹²¹ While this decision cites the *Zubulake* “general rule,” it is a duty to preserve case. Defendant received a demand letter from plaintiff on August 12, 2005. The emails in question had been deleted in June 2005. While the emails went to backup tapes, the backup tapes were rotated every six weeks. More than six weeks had passed between June 2005 and August 12, 2005. Hence there were no responsive emails on backup tapes. Plaintiff’s motion to compel was thus denied because the defendant had fully responded to plaintiff’s request for production. The magistrate judge cited to the general rule and then held that the backup tapes were used for disaster recovery purposes. “Therefore, it is the court’s view that defendant had no duty prior to August 12, 2005, to retain or recover the deleted electronic messages.” *Id.* at *12 (footnotes omitted). If there was no duty to preserve prior to August 12, it does not matter how backup tapes were used by the defendant. And if the backup tapes existed after August 12, when the duty to preserve arose, the exception in *Zubulake IV* presumably would have applied since the City knew that the tapes were the only storage media containing the emails in question.

application of this principle to backup tapes because what was at issue was a practice of wiping clean the hard drives on computers of former employee/key players after the duty to preserve arose. *Id.* at *31-32. The clear sense one gets from reading the opinion is that had relevant information only existed on backup tapes, this magistrate judge would have faulted the defendant for failing to preserve the backup tapes, i.e., the exception in *Zubulake* would have been endorsed.¹²²

And a court might not even appreciate the distinction between the general rule and the *Zubulake* exception. The court in *AAB Joint Venture v. United States*, 2007 U.S. Claims Lexis 56 (Ct. Cl. Feb. 28, 2007) cited *Zubulake IV* for the proposition that “the scope of the duty to preserve extends to electronic documents, such as e-mails and back-up tapes.” *Id.* at **26.¹²³

The problem, of course, is that one cannot know whether a backup tape contains unique information that is relevant without first preserving it, figuring out the architecture of the electronic information system and the habits of key players, and then making judgments about what may be responsive information to an existing or anticipated request for production. This uncertainty leads to preservation of the backup tapes and its attendant costs.

Cost shifting is certainly the exception, not the rule, but backup tapes will not play a role in most cases. Where they do, as noted earlier, the Advisory Committee correctly anticipated the backup tape dilemma when it suggested that parties engage in two-tiered discovery, first looking at accessible information before exploring information stored in not reasonably accessible media because of undue burden or cost.¹²⁴ And courts need to be mindful of the value of sampling techniques and remain vigilant that demands for restoration and retrieval of information from backup tapes is not being used as a sword to obtain settlement leverage. Otherwise, it is more likely that the proportionality considerations in Rule 26(b)(2)(C)¹²⁵ and improvements in technology will be better hopes to sensibly address the backup tape preservation dilemma than waiting for a procedural rule to do so, even assuming that an appropriate procedural rule could be written to address the topic.

¹²² Cf. *E*Trade Sec. LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 592 (D. Minn. 2005) (“Because NSI [a defendant] relied on its backup tapes to preserve evidence that was not preserved through a litigation hold, NSI should have retained a copy of relevant backup tapes because it was the sole source of relevant evidence.”).

¹²³ The court cited to 220 F.R.D. at 216 where Judge Scheindlin wrote: “In this case, the duty to preserve evidence arose, at the latest, on August 16, 2001, when *Zubulake* filed her EEOC charge. At that time, UBS’s in-house attorneys cautioned employees to retain all documents, including e-mails and backup tapes, that could potentially be relevant to the litigation.” There was no reference in *AAB Joint Venture* to Judge Scheindlin’s later discussion of the “general rule” and the “exception” to the general rule.

¹²⁴ “Lawyers sophisticated in these problems are developing a two-tier practice in which they first sort through the information that can be provided from easily accessed sources and then determine whether it is necessary to search the difficult-to-access sources.” Report of the Advisory Committee on the Federal Rules of Civil Procedure, May 27, 2005, p. 42 (Appendix C in <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf>).

¹²⁵ Rule 26(b)(2)(C) provides: “On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”

Protection from Sanctions Under Rule 37(e)

Rule 37(e) precludes imposition of a sanction on a party accused of spoliating electronically stored information if its terms are satisfied:

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Assuming I have not missed any cases in my research, no party in a reported decision has successfully invoked the rule.¹²⁶ And those who have tried have done so on very bad facts.

In *Technical Sales Associates, Inc. v. Ohio Star Forge Co.*, 2009 U.S. Dist. LEXIS 22431 (E.D. Mich. Mar. 19, 2009), defendant OSF sought the rule's protection where it erased 70,000 files on a computer at 2 am the day before a forensic examination of the computer was to occur. The district court had no difficulty rejecting application of Rule 37(e): "This rule is intended to protect a party from sanctions where the routine operation of a computer system inadvertently overwrites potentially relevant evidence, not when the party intentionally deletes electronic evidence." *Id.* at *23.

Rule 37(e) was also unsuccessfully invoked in *Adams v. Dell*, 621 F.Supp.2d 1173 (D. Utah 2009). Taiwanese defendant companies relied on employees to archive email and data that they regarded as important or it was overwritten. Where new computers replaced old computers, employees were responsible for transferring data from the old computer to the new computer. *Id.* at 1192. As noted above, the magistrate held that the duty to preserve was triggered in 1999-2000, when litigation against others in the industry was started. This was five years before defendants received a demand letter from plaintiff; hence data were lost. *Id.* at 1190-91. An expert witness provided an affidavit explaining the "reasons for and history of ASUS' 'distributed information architecture,'" but "he did not state any opinion as to the reasonableness or good-faith in the system's operation." The magistrate also observed that the defendants had no backup system before concluding pithily: "The information before the court does not demonstrate that ASUS' loss of electronic information is within the safe harbor provision." *Id.*

Doe v. Norwalk Community College, 2007 US Dist. LEXIS 51084, *15-16 (D. Conn. July 16, 2007) involved, among other problems, an uncertain records retention policy for electronically stored information and a failure

¹²⁶ *Southeastern Mechanical Services v. Brody*, 2009 WL 2242395 (M.D. Fla. July 24, 2009) and *Escobar v. City of Houston*, 2007 WL 2900581 (S.D. Tex. Sept. 29, 2007) both refused to award sanctions for spoliation and mention Rule 37(e), but Rule 37(e) was not the basis for either ruling. In the latter case, the issue was the deletion of mobile electronic transmissions within 24 hours of a police shooting (before suit had been filed but after a claim was made to the Houston Police Department). The district court held that there the Fifth Circuit requires bad faith before an adverse inference can be imposed and there was no showing that relevant information was destroyed in bad faith. In dicta, the district court added: "And under Rule 37[(e)] of the Federal Rules of Civil Procedure, if the electronic communications were destroyed in the routine operation of the HPD's computer system, and if there is no evidence of bad faith in the operation of the system that led to the destruction of the communications, sanctions are not appropriate." 2007 WL 2900581 at *18. *Southeastern Mechanical* cited *Escobar* but this too is a case where bad faith was not proven. Rule 37(e) is mentioned in dicta; it was not the basis for the decision ("TEI fails to present any evidence that SMS had a duty to preserve the backup tapes starting in November 2008, that there was crucial evidence on these tapes, or that the automatic overwriting of these backup tapes (or those created in May and June 2009) was due to bad faith. Thus, spoliation sanctions are not appropriate.") 2009 WL 2242395 at *4. Neither case involved the violation of a discovery order under Rule 37 and in both cases movants sought sanctions based on the court's inherent authority. *Id.* at *1; 2007 WL 2900581 at *17, n.5

to suspend backup tape recycling. A motion for sanctions was filed by the plaintiff. The district court rejected reliance on Rule 37(e):

In addition, as the Commentary to Rule 37[(e)] indicates, the Rule only applies to information lost “due to the ‘routine operation of an electronic information system’ - the ways in which such systems are generally designed, programmed, and implemented to meet the party’s technical and business needs.” See Fed. R. Civ. P. 37(f) at Advisory Committee Notes to 2006 Amendment. This Rule therefore appears to require a routine system in order to take advantage of the good faith exception, and the court cannot find that the defendants had such a system in place. Indeed, testimony at the Hearings revealed that, after NCC shifted over to the Hartford server in August 2004, emails were backed up for one year; however, emails pre-dating this transfer were only retained for six months or less. Thus, the defendants did not appear to have one consistent, “routine” system in place, and Bissell admitted at Hearing II that the State Librarian’s policy [2-year retention protocol for electronic correspondence] was not followed. Counsel for the defendants also indicated at Oral Argument that he was not aware that the defendants did anything to stop the destruction of the backup tapes after NCC’s obligation to preserve arose.

This dearth of reported decisions involving Rule 37(e) may be related to the reference in Rule 37(e) to sanctions “under these rules.” A breach of duty to preserve is more likely to result in a motion for sanctions under inherent power, not under the civil procedure rules. And a prelitigation loss of information would not be by a “party” (suit has not yet been filed) or result in a sanction “under these rules.”

Until a party is able to demonstrate the loss of information from the “routine” and “good faith” operation of an electronic information system,¹²⁷ we will have little insight on what is meant by “absent exceptional circumstances.”

Other questions could be asked. The protection from sanctions under Rule 37(e) applies to a “party.” Is the party’s lawyer intended to be covered by Rule 37(e) also?¹²⁸ Are individuals who delete e-mails from the individuals’ computers covered by the phrase “routine good faith operation of an electronic information

¹²⁷ What is the “routine” operation of an electronic information system? If an information technology employee or third-party information technology manager was supposed to be advised of a lawsuit and the need to suspend recycling programs and was not, is the operation “routine”? If a records hold should have been issued and was not, can the operation be in “good faith”? See *DaimlerChrysler Motors v. Bill Davis Racing Inc.*, 2005 U.S. Dist. LEXIS 38162 (E.D. Mich. Dec. 22, 2005) (where e-mail messages were lost due to the routine operation of defendant’s computer system, sanctions—including an adverse inference instruction—were recommended by the magistrate judge because defendant failed to suspend its auto-recycling procedures after it was on notice that the e-mail messages may be relevant to the litigation, even though the destruction was found to be “negligent” and not “willful”).

¹²⁸ Rule 37(a)(4)(A) provides that if a motion for sanctions is granted, the court may require “the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney’s fees....” Presumably, however, if the party is protected by Rule 37(e), the party’s attorney will be also. Cf. California’s Code of Civil Procedure, § 2031.060(i): “absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.” (Emphasis added.)

system”? Rule 37(e) does not seem to provide protection for the electronic storage habits of individuals, putting a premium on reasonably determining the “key players” for individual storage record holds.¹²⁹

Parties who believe that electronically stored information is not “reasonably accessible” may find some comfort in Rule 37(e)—unless, of course, their beliefs are later not sustained by a district court. They, too, may be ill-advised to allow electronic data recycling to occur without a good understanding of how much relevant information is being lost that is not duplicated elsewhere.¹³⁰

In short, if Rule 37(e) was intended to be a “safe harbor,” it is not a wide or a deep one, suggesting again that good communication between counsel and client, among counsel to the litigants, and with the district court at the earliest stages of the litigation is a preferable way to avoid e-discovery disputes.

Answering Questions Under Rule 33(d) by Reference to Electronically Stored Information

Rule 33(d) discusses the option to produce business records in lieu of answering an interrogatory, where the answer to the interrogatory may be derived or ascertained from business records, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served. The change to Rule 33(d) defines business records as “including electronically stored information.”

I am not aware of any reported decision where Rule 33(d) has been successfully invoked to allow a party to review electronically stored information in lieu of answering an interrogatory. Indeed, I am not aware of any material case law on Rule 33(d) as it relates to electronically stored information.

One case, *Reedhycalog UK, Ltd v. United Diamond Drilling Services, Inc.*, 2008 U.S. Dist. LEXIS 93177 (E.D. Tex. Oct. 3, 2008), involved the invocation of Rule 33(d) by two defendants. They answered interrogatories by listing search terms that they had run to pull documents from their document production and then listed as responsive the document numbers associated with the documents retrieved by the searches. “In one instance, the production numbers of over 75,000 documents was appended to an interrogatory response.” However, after a hearing on plaintiff’s motion to compel, the district court ordered the parties to meet and confer and thereafter plaintiff withdrew the motion directed to these interrogatory responses. *Id.* at *5.

While Rule 33(d) might work in the right situation, it is unlikely that Rule 33(d) will be utilized often by parties when it comes to electronically stored information.¹³¹

¹²⁹ The importance of preserving information in relation to “key players” is highlighted in *Pension Committee*, where the district court held that the failure to identify all key players and to preserve their electronic and paper documents amounts to gross negligence. 2010 WL 184312 at *7.

¹³⁰ See discussion of backup tapes above.

¹³¹ Responding parties that seek to take advantage of Rule 33(d) as a means to respond to an interrogatory have to be prepared to make the electronically stored information available to the requesting party. Existing Rule 33(d) already provides that a respondent has to specify the records from which the answer may be derived and afford the proponent of the interrogatory “reasonable opportunity to examine” the records and “to make copies, compilations, abstracts or summaries.” It also provides, “A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.” Access to hardware, software, technical support, passwords, source code, or other assistance may be necessary to satisfy this burden.

Request for Electronically Stored Information Under Rule 34 – Sampling, Testing, and the Form or Forms of Production

Rule 34(b)(2)(E) provides that “unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information”:

(i) *A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;*

(ii) *If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms;¹³² and*

(iii) *A party need not produce the same electronically stored information in more than one form.*

This rule has worked. Where disputes have occurred, they can be traced to the nonexistence or breakdown of communications between counsel as opposed to ambiguity or lack of breadth in the rule. The issue of native production versus production in an imaged form and demands for metadata are usually solved by either a native production or ensuring that text is extracted and searchable, and associated, meaningful metadata fields (if any) are produced.¹³³ See, e.g., *Dahl v. Bain Capital Partners, LLC*, 655 F.Supp.2d 146, 149-50 (D. Mass. 2009) (the district court rejected a request for all metadata associated with emails and Word documents and instead accepted producing party’s offer to provide 12 fields of metadata, but required Excel spreadsheets to be produced in native format since they are maintained that way in the usual course of business); *Aguilar v. Immigration and Customs Enforcement Div. of the U.S. Dept. of Homeland Security*, 255 F.R.D. 350, 360-61 (S.D.N.Y. 2008) (because of a delay in making the request until after certain emails had been produced without metadata, the magistrate judge rejected a motion to compel production of the metadata; he rejected a request for system metadata with respect to Word, and PowerPoint documents which had already been produced in text searchable PDF format and there was a “limited universe” of these documents unless plaintiffs agreed to pay the costs to obtain the metadata; and he ordered production of Excel spreadsheets in native format since defendants expressed a willingness to reproduce these documents in native form); *Autotech Tech. Ltd. P’ship v. Automationdirect.com, Inc.*, 248 F.R.D. 556, 560 (N.D. Ill. April 2, 2008) (the magistrate held a defendant to its original designation of a form of production and rejected a later demand for production

¹³² The Advisory Committee Note to Rule 34(b) adds: “But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.”

¹³³ Cf. *Aguilar v. Immigration and Customs Enforcement Div. of the U.S. Dept. of Homeland Security*, 255 F.R.D. 350 (S.D.N.Y. November 21, 2008) (“Although metadata is not specifically referenced, Rule 34 of the Federal Rules of Civil Procedure addresses the production of ESI. Fed. R. Civ. P. 34(a)(1)(A), (b)(2)(E). Under the Rule, a requesting party may specify a form of production and request metadata. Fed. R. Civ. P. 34(b)(1)(C). (A typical request might be to produce Word documents in TIFF format with a load file containing the relevant system metadata.”). Magistrate Judge Maas’s decision also has a nice collection of the metadata case law breaking it down into court-ordered production of metadata when it is sought with the initial document request and no documents have yet been produced in any form and courts’ refusal to require production of metadata where electronic information has already been produced, although he also cites to exceptions in both lines of authority. *Id.* at 357.

of a Word document in native format.); *D'Onofrio v. SFX Sports Group, Inc.*, 247 F.R.D. 43, 48 (D.D.C.2008) (the magistrate denied a request for the production of a Business Plan in native format where the request was made after production had already been made in nonnative form).

The “reasonably usable form” clause in Rule 34(b)(2)(E)(ii) has had some perhaps unintended consequences that merit monitoring. The issue is: does subparagraph (ii) of Rule 34(b)(2)(E) (production in a form in which information is ordinarily maintained or in a reasonably usable form) trump (iii) (a party need not produce the same electronically stored information in more than one form)?

White v. Graceland College Center, 2008 U.S. Dist. Lexis 63088 (D. Kan. Aug. 7, 2008) illustrates the concern. The requesting party failed to specify a form of production of emails and attachments. They were produced in paper form. Nonetheless, the magistrate ordered the producing party to produce emails and their attachments in native format because the producing party failed to comply with Rule 34(b)(2)(E)(ii)—producing the emails in a form in which they were ordinarily maintained or in a reasonably usable form. There was no discussion of subparagraph (iii).¹³⁴

Similarly, in *The Scotts Co. LLC v. Liberty Mutual Ins. Co.*, 2007 U.S. Dist. LEXIS 43005 (S.D. Ohio June 12, 2007), defendant had produced paper copies of electronically stored information because the requesting party had not specified a form. Plaintiff requested reproduction in electronic form, again relying on the “reasonably usable form” language in Rule 34(b)(2)(E)(ii). Instead of ruling on the request, the magistrate ordered the parties to confer but arguably signaled the outcome:

Indeed, the Advisory Committee explains, “If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.” Plaintiff now argues that some of the documents produced in hard copy form are not reasonably usable for the purpose for which they were requested since they cannot be searched for metadata.

*It is unclear to this Court whether the parties have fully exhausted extra-judicial efforts to resolve this dispute. The parties are therefore **ORDERED** to meet and confer within ten days with regard to this issue.*

Id. at *14-15 (emphasis in original).

3M Company v. Kanbar et al., 2007 U.S. Dist LEXIS 45232 (N.D. Calif. June 14, 2007) is another case where a requesting party failed to specify the form of production. Paper documents were then produced. Kanbar moved to compel 3M to “organize” or “itemize” the documents that had been produced. The motion was denied. However, because it appeared that 3M to some extent delayed its production and because it was not onerous for 3M to do so, the magistrate judge gave the defendant relief: he ordered 3M “to produce all

¹³⁴ The magistrate’s ruling was perhaps better grounded on the importance that metadata played in the requesting party’s case. (“She has further explained the critical importance of obtaining them in their native format with metadata intact.”) 2008 WL 3271924 at *11. Subparagraph (ii) was used to get to this result. *Cf. Williams v. Sprint/United Management Co.*, 2006 WL 3691604, *14 (D. Kan. Dec. 12, 2006), where the same magistrate judge refused to require production in native format because no need for metadata was shown.

previously produced responsive electronically stored information” in an electronic and “reasonably usable format.” *Id.* at *9-10. “Although the electronic production does not provide Kanbar quite what it asked for, this order should enable Defendant to utilize commercially available software search engines to accomplish by its own undertaking at least some of what it unsuccessfully sought from the Court.” *Id.* at *10.

In *Puckett v. Tandem Staffing Solutions, Inc.* 2007 U.S. Dist. LEXIS 47287 (N.D. Ill. June 27, 2007), among other things, Puckett complained that Tandem refused to produce backup tapes that contained electronic documents other than emails. Tandem argued that it had not restored them “because it has produced these multiple documents in hard copy other than attachments as emails.” The district court ordered production in electronic format in part it appears because Tandem (like most companies) usually maintained information in electronic format:

As this information is reasonably calculated to lead to the discovery of admissible evidence,¹³⁵ this Court believes that restoration of the back-up tapes containing documents is reasonable. Tandem has asserted that in its usual course of business it maintains its documentation in an electronic format. The Court will limit this request to production of the back-up tapes of documents saved to the network system from September 2004 until September 2005.

Id. at *8.¹³⁶

There are, of course, decisions where a producing party was not required to produce in electronic format documents that had been produced in hard copy. *See, e.g., India Brewing, Inc. v. Miller Brewing Co.*, 237 F.R.D. 190, 194-95 (E.D. Wisc. 2006) (where plaintiff did not specify a form of production, plaintiff was not entitled to production in electronic format where electronic documents were produced in hard copy to correspond to discovery requests); *Northern Crossarm Co. Inc. v Chemical Specialties, Inc.* 2004 WL 635606 (W.D. Wis. March 3, 2004) (where plaintiff did not specify the form of production, defendant produced in hard copy, and there was no gamesmanship involved, request for production in electronic format was denied).

So from the above discussion, it can be seen that it is not clear whether Rule 34(b)(2)(E)(ii) trumps (iii).¹³⁷ As rules changes are evaluated, this is an area warranting clarification.

Another subtle theme in the case law involves the analytic framework to be utilized when a records management system moves most active data to backup after a relatively short residence time on an active server, and the producing party has kept the backup tapes. Under Rule 34(a)(1)(A), the requesting party can serve on a producing party a request within the scope of Rule 26(b) to produce electronically stored

¹³⁵ As can be seen by this case, despite the distinction now existing in Rule 26(b)(1) between information relevant to a claim or defense (discoverable) and information relevant to the subject matter including inadmissible information that is reasonably calculated to lead to the discovery of admissible evidence (discoverable if good cause is shown), the concept of “reasonably calculated to lead to admissible evidence” is still alive in the Rule 34 lexicon.

¹³⁶ Ameliorating the result, the district court, without discussion, ordered Puckett to pay 50% of the cost of restoration of these backup tapes. 2007 U.S. Dist. LEXIS 47287 at *11-12.

¹³⁷ This is another area where parties are well-advised to take advantage of the Rule 26(f) meet-and-confer session and Rule 16 conference to achieve a consensus on how best to proceed and to avoid misunderstanding or miscommunication that could lead to later discovery disputes.

information “stored in any medium from which information can be obtained either directly or, if necessary, *after translation by the responding party into a reasonably usable form.*” (Emphasis added.) Where what some call a “data downgrade,” is the issue of production determined under this part of Rule 34 or under a Rule 26(b)(2)(B) good cause analysis? And should it matter whether a duty to preserve existed before the “downgrade”?

If a duty to preserve does not exist, what an entity does with its data as part of a records management system should not matter. In such a case, email can be moved to backup on a schedule making the email less accessible or inaccessible without running afoul of the “reasonably usable form” language of Rule 34(a)(1)(A). After that point, and after litigation exists or a duty to preserve otherwise exists, Rule 26(b)(2)(B)¹³⁸ then kicks in: the producing party may claim that the emails are not reasonably accessible because of undue burden or cost, and, if the producing party is successful in meeting this burden, the requesting party, if it elects to pursue the matter, must show good cause. Courts then will conduct a marginal utility analysis. Should the records management system of the producing party matter in such an analysis or impact the cost-shifting analysis?¹³⁹

Whether a duty to preserve exists should matter, but it is not always clear that it does. In *In Re Veeco Instruments, Inc. Securities Litigation*, 2007 U.S. Dist. LEXIS 23926 (S.D.N.Y. April 2, 2007), emails did not exist anywhere but on backup tapes. However, the parties could not agree on an electronic discovery protocol. Plaintiff sought email from the backup tapes for a specified time period for specified individuals. Defendant resisted the request. The magistrate judge found good cause to require the production in part because the emails did not exist anywhere else:

E-mails sent or received by Defendants relating to the issues herein could constitute important relevant evidence and are reasonably calculated to lead to admissible evidence. It has not been demonstrated that said information is reasonably available from any other easily accessed source. The discovery requests are specific. The resources of the parties are not an issue. Accordingly, the Court directs that the Defendant restore the backup tapes for the time period from August 2004 through March 2005 to produce the requested non-privileged documents.

Id. at *5. The magistrate deferred the cost-shifting determination until after production, which was estimated to cost something considerably less than \$124,000 (an original estimate before plaintiff tailored the discovery request): “The Court directs that Defendant shall produce the electronic discovery set forth herein initially at

¹³⁸ As discussed earlier, Rule 26(b)(2)(B) provides: “A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.”

¹³⁹ Before the e-discovery amendments, two magistrate judges from the same court expressed opposite views on the impact of a data downgrade on a party’s preservation obligations: In *Treppel v. Biovail Corp.*, 233 F.R.D. 363 (S.D.N.Y. Feb. 6, 2006), the magistrate judge held: “[P]ermitt[ing] the downgrading of data to a less accessible form – which systematically hinders future discovery by making the discovery more costly and burdensome – is a violation of the preservation obligation.” Contrast this holding with *Quinby v. WestLB AG*, 2005 U.S. Dist. LEXIS 35583 (S.D.N.Y. Dec. 15, 2005) where the magistrate held that there is no duty to keep data in an accessible format. “I decline to sanction defendant for converting data from an accessible to inaccessible format, even if they should have anticipated litigation.” *Id.* at *27, n.10.

its own expense. Defendant shall prepare an affidavit detailing the results of its search, as well as the time and money spent. The court will then conduct the appropriate cost-shifting analysis.” *Id.* at *7.

In *AAB Joint Venture v. United States*, 2007 U.S. Claims LEXIS 56 (Ct. Cl. Feb. 28, 2007), the duty to preserve did matter. The trial court found that the defendant United States was under a duty to preserve emails as of July 2002. Since that date emails had been transferred to backup tapes. The trial court held that the decision to transfer the emails to backup tapes “does not exempt Defendant from its responsibility to produce relevant e-mails.” *Id.* at **33. The trial court ordered the United States initially to restore one-fourth of the backup tapes at its expense.¹⁴⁰

Disability Rights Council of Greater Washington v. Washington Met. Transit Auth., 242 F.R.D. 139 (D.D.C. 2007) involved resistance by a litigant to the restoration of backup tapes again where the litigant had failed to retain emails also after a duty to preserve arose and the data resided only on backup tapes. The magistrate was unsympathetic to the producing party’s plea for protection:

While the newly amended Federal Rules of Civil Procedure initially relieve a party from producing electronically stored information that is not reasonably accessible because of undue burden and cost, I am anything but certain that I should permit a party who has failed to preserve accessible information without cause to then complain about the inaccessibility of the only electronically stored information that remains. It reminds me too much of Leo Kosten’s definition of chutzpah: “that quality enshrined in a man who, having killed his mother and his father, throws himself on the mercy of the court because he is an orphan.”

Id. at *26 (citation omitted). However, the magistrate still engaged in a proportionality determination under Rule 26(b)(2)(C) and found good cause to require the defendant to produce information on backup tapes in part because the emails existed only on backup:

As to factors one through four, the request is for the emails of specific persons, and there is absolutely no other source from which the electronically stored information can be secured, thanks to WMATA’s failure to impose a litigation hold.

Id. at *29.¹⁴¹

Aubuchon Co. et al. v. BeneFirst, LLC, 2007 U.S. Dist. LEXIS 44574 (D. Mass. Feb. 6, 2007) did not involve backup tapes and also did not focus on the date the duty to preserve attached. Instead, it involved a database that was extremely difficult to search, so much so that it caused the magistrate judge to speculate why:

¹⁴⁰ Defendant had estimated the cost to restore the tapes at between \$85,000 and \$150,000. The trial court settled on restoration of 25% of the tapes initially to evaluate the relevance of the information retrieved. “The parties will then have an opportunity to argue before the Court whether or not additional restoration of back-up tapes is likely to lead to production of relevant evidence and consequently who should bear the cost for additional restoration.” 2007 U.S. Claims Lexis 56 at **36.

¹⁴¹ There was no discussion of cost-shifting in the opinion. The magistrate called the case for production of the backup tapes “overwhelming.” Perhaps that is why in quoting the text of Rule 26(b)(2)(B), the opinion omits the last sentence, “The court may specify conditions for the discovery.” Or perhaps the producing party never raised the subject.

However, because of BeneFirst's method of storage and lack of an indexing system, it will be extremely costly to retrieve the requested data. I am hard pressed to understand the rationale behind having a system that is only searchable by year of processing, then claims examiner, then the month of processing, and finally the claims date. None of these search criteria reflect the name of the individual claimant, the date that the claimant received the medical service, who the provider was, or even the company that employed the benefit holder. It would seem that such a system would only serve to discourage audits and the type of inquiries that have led to the instant litigation.

Id. at *11-12. Nonetheless, the magistrate conducted a cost-shifting factor analysis resulting in an order to the defendant to retrieve the information requested by the plaintiff at the defendant's sole expense. *Id.* at *18-19.¹⁴² One has to think that the reasonableness of defendant's records management system affected the magistrate's thinking even though it was not mentioned in the analysis of cost-shifting factors.

Capitol Records, Inc. v. MP3tunes, LLC, 2009 WL 2568431 (S.D.N.Y. Aug. 13, 2009) cited *Aubuchon* in making these observations about the producing party's electronic storage information architecture while still yielding to a Rule 26(b)(2)(B) analysis:

[I]n this case, the EMI Labels, which employ approximately 120 people in the global infrastructure services field and "probably have [two] terabytes" of data on their servers, host no ediscovery software on their servers and apparently are unable to conduct centralized email searches of groups of users without downloading them to a separate file and relying on the services of an outside vendor.

The day undoubtedly will come when burden arguments based on a large organization's lack of internal ediscovery software will be received about as well as the contention that a party should be spared from retrieving paper documents because it had filed them sequentially, but in no apparent groupings, in an effort to avoid the added expense of file folders or indices. Nonetheless, at this stage in the development of ediscovery case law, the Court cannot say that the EMI Labels' failure to acquire such software and to configure its systems to permit centralized email searches means that its burdensomeness arguments should be disregarded. I therefore conclude that the EMI Labels' email files that MP3tunes seeks to search are not reasonably accessible within the meaning of Rule 26(b)(2)(B).

Id. at *51-52 (record citations omitted).

¹⁴² *Cf. Zurich American Ins. Co. v. ACE American Reinsurance Co.*, 2006 WL 3771090 (S.D.N.Y. Dec. 22, 2006). An affiant attested that Ace processed thousands of claims and its computer system was incapable of segregating claims by the amount of the claim, the type of claim, the identity of the "cedent" (in this case that would be Zurich or other insurance companies who "ceded" an insurance obligation to the reinsurer), or the reason the claim may have been denied. Magistrate Judge Francis was not sympathetic: "A sophisticated reinsurer that operates a multimillion dollar business is entitled to little sympathy for utilizing an opaque data storage system, particularly when, by the nature of its business, it can reasonably anticipate frequent litigation." But the magistrate recognized that the volume of data accumulated by ACE made a search of its entire database "infeasible" so he ordered the parties to propose a protocol for sampling ACE's claim files "to obtain examples of claims files in which issues of the allocation of policy limits has been addressed." He also permitted Zurich's counsel to take the deposition of the affiant and other persons familiar with ACE's data storage system. If ACE objected to Zurich's sampling proposal, "it shall support its objections with specific evidence of the cost and burden involved." *Id.* at *2.

The scope of any obligation to translate information into a “reasonably usable form,” the relationship of the duty to preserve to the conversion of data to a less accessible format, and the length of time that backup tapes are kept even before a duty to preserve arises, will continue to create tension between Rules 26 and 34 that merits monitoring by the Rules Committee. Litigants and rules’ writers should also be attentive to the issue of whether business needs, rules of procedure, or common law duties are dictating how electronic information storage systems should be configured or operated.¹⁴³ As a matter of, among others, economics and proper societal allocation of resources, there has to be a proper balance maintained among these competing demands.

Discovery of Electronically Stored Information From Nonparties Under Revised Rule 45

When the e-discovery amendments were made to the above rules, conforming changes were made to Rule 45. This includes Rule 45(d)(1)(D) which mimics the provisions of Rule 26(b)(2)(B) with respect to “not reasonably accessible” information:

The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

Rule 45(c)(1) directs a party serving a subpoena to take “reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.” Where an objection is made to a subpoena, Rule 45(c)(2)(B)(ii) states that an order on a motion to compel “must protect a person who is neither a party nor a party’s officer from significant expense resulting from compliance.”

Overbroad requests and costs are almost always going to be the issues going forward where a subpoena recipient is asked to produce electronically stored information.

¹⁴³ Cf. *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104, 1112 (8th Cir. 1988) (quoted in Appendix 1, but discussing whether a records retention policy was reasonable under the circumstances). See the criticism, *supra*, of *Adams v. Dell*, 621 F.Supp.2d 1173, 1194 (D. Utah 2009) and *Kozlowski v. Sears, Roebuck*, 73 F.R.D. 73 (D. Mass 1976). See also *Static Control Components, Inc. v. Lexmark International, Inc.*, 2006 WL 897218, *4 (E.D. Ky. April 5, 2006) (citing *Kozlowski*, the magistrate concluded that the federal rules do not permit a producing party “to hide behind its peculiar computer system as an excuse for not producing” a database and ordered the producing party to produce the database “in a reasonably usable form”). In *AAB Joint Venture v. United States*, 2007 U.S. Claims LEXIS 56 (Ct. Cl. Feb. 28, 2007), the court relied on *In Re Brand Name Prescription Drug Litigation*, 1995 WL 360526 (N.D. Ill. 1995). The issue in *Prescription Drugs* was payment of \$50,000 to \$70,000 by CIBA (a defendant) or the plaintiffs to recover email from backup tapes. In evaluating “undue burden,” the district court recognized the equities on each side: “On the one hand, it seems unfair to force a party to bear the lofty expense attendant to creating a special computer program for extracting data responsive to a discovery request. On the other hand, if a party chooses an electronic storage method, the necessity for a retrieval program or method is an ordinary and foreseeable risk.” *Id.* at *2. Ultimately, the district court required the producing party to pay the cost of producing the email: “Class Plaintiffs should not be forced to bear a burden caused by CIBA’s choice of electronic storage.” *Id.* The district court did, however, order the plaintiffs to narrow their request to attempt to bring the costs down. *Id.* at *3. There was no discussion of when the duty to preserve arose and, of course, the decision predates the e-discovery rules by more than a decade.

Overbroad requests were rejected in *Daimler Truck N.A., LLC v. Younessi*, 2008 WL 2519845, *4 (W.D. Wash. 2008). The district court partially quashed a subpoena regarding contacts with plaintiff's employees where the subpoena-issuer (the plaintiff suing a former employee, among other claims, for trade secret violations) could not demonstrate that the burden placed on the subpoena-recipient (the new employer of the defendant and a competitor to the plaintiff) was outweighed by the need for the documents in question. *See also Mintel Int'L Group, LTD v. Neerghen*, 2009 WL 249227 (N.D. Ill. Feb. 3, 2009) (the magistrate judge refused to permit imaging of subpoena-recipient's computer where there is insufficient information presented to get the subpoena-issuer "beyond the mere speculation line").¹⁴⁴

Cost concerns are evidenced by *Dow Chemical Co. v. Reinhard*, 2008 WL 1968302 (S.D.N.Y. Apr. 29, 2008). In connection with a lawsuit in Michigan over a takeover attempt, Dow sought documents from a nonparty law firm in New York. The firm had represented a state fund of the Sultanate of Oman which could not be subpoenaed. The law firm had spent 2,457 hours responding, which represented \$1.3 million in fees and \$360,000 in expenses including electronic discovery. *Id.* at *1. The issue before the court was allocation of future costs to complete response to the subpoena. While acknowledging that Rule 45(c)(1) contains "mandatory language," the district court explained that courts in the Second Circuit "have found that a court does have discretion to split the costs between the nonparties and the requesting party when the equities of the particular case demand it." *Id.* at *2. Saying that the law firm "should have reasonably anticipated being drawn into subsequent litigation because of its role" as "buyout counsel" to the Sultanate fund, and saying neither party had the inability to pay,¹⁴⁵ the district court ordered that Dow pay 50% of the future production costs and the law firm pay the other 50%. "This will serve to reinforce their agreement to limit the scope of production and hopefully avoid any further disputes." *Id.*

Not all subpoena recipients might have the wherewithal of the Government of Oman. *See, e.g., Guy Chemical Co., Inc. v. Romaco AG et al.*, 2007 U.S. Dist. LEXIS 37636, *7-8 (N.D. Ind. May 22, 2007) (ordering subpoena-issuer to pay third-party ABRO's costs of electronic information production totaling \$7,200 which were not *de minimis* under the circumstances: "Simply put, it is not ABRO's lawsuit and they should not have to pay for the costs associated with someone else's dispute. Not only is it fundamentally unfair for non-parties to bear the significant litigations costs of others, but also if this Court were to allow litigating parties like Romaco to impose such a burden on non-parties, then the likelihood of cooperation by non-parties in the future would be placed in jeopardy").

In addition, while it is a pre-e-discovery amendments' decision, an offer to pay the nonparty subpoena responder's cost of producing emails from backup tapes does not necessarily convert an "undue burden" into a tolerable one. *United States et al. v. Amerigroup Illinois Inc. et al.*, 2005 U.S. Dist. LEXIS 24929 (N.D. Ill. Oct. 21, 2005):

¹⁴⁴ Even before the e-discovery amendments, in *Quinby v. WestLB AG*, 2006 U.S. Dist. LEXIS 1178, *3 (S.D.N.Y. Jan. 11, 2006) the magistrate judge quashed subpoenas to Internet service providers for plaintiff's emails within a defined period of time because the subpoenas were "clearly overbroad."

¹⁴⁵ The district court assumed that Sultanate was paying the bill and could afford it but invited the Government of Oman to advise the court *ex parte* if that were not the case.

It is not a decisive answer to say that the defendants have offered to pay the costs that might be incurred in retrieving the emails. Expense is but a part of the burden. As Mr. Petty's uncontested affidavit indicates, the process of retrieving the emails also entails the extensive use of equipment and internal man-power. It will take six weeks to restore and review the data of just one of the three individual's email accounts. The entire project, then, will entail eighteen weeks of effort. To be sure, one can imagine the use of three dedicated servers to perform each of the six weeks of restoration work concurrently, but the end result is still eighteen weeks of man-power and eighteen weeks of use of the necessary equipment. That burden, which is undeniably substantial, exists independently of the monetary costs entailed.

Id. at *13.¹⁴⁶

Whether legal fees are recoverable to respond to a motion to compel remains an open question. *Guy Chemical Co., Inc. v. Romaco AG et al.*, 2007 U.S. Dist. LEXIS 37636 (N.D. Ind. May 22, 2007) (as noted above, the magistrate denied a motion to compel and required payment to the third party of its costs of production under Rule 45(c)(2)(B)(ii) because the subpoena imposed an undue burden and cost upon the subpoena recipient but the magistrate refused to award attorneys' fees expended to respond to the motion because Rule 45 was just amended and the issue is a "novel" one).

Finally, cooperation will go a long way to resolving disputes between subpoena-issuers and the recipients of those subpoenas. *Universal Delaware, Inc. v. Comdata Corp.*, 2010 U.S. Dist. LEXIS 32158 (E.D. Pa. Mar. 31, 2010) is illustrative of the funneling process that can lead to agreement. Plaintiffs issued a subpoena to a company called Ceridian seeking electronically stored information on backup tapes for five custodians and on active servers for another twenty-one custodians. After months of negotiations, plaintiffs agreed to limit the search to a database maintained by a third-party vendor that consisted of previously processed backup tapes for the five custodians, and Ceridian's active databases for the twenty-one custodians. They also agreed to seventeen search terms and to pay imaging costs for documents from the search of the backup tapes. Before doing any production, Ceridian demanded reimbursement for one-half of any amount above \$10,000 that Ceridian would pay its attorneys to do a privilege review. *Id.* at *9-10. The case was procedurally complicated for a number of reasons, and, at one point, involved third-party Ceridian's estimate that it would cost between \$705,390 and \$990,719 to comply with the subpoena. But, after papers were filed teeing up the issue for the magistrate judge, more negotiations, and two conference calls with the magistrate, including one in which the third-party vendor joined the call, there was a solution: running agreed-upon search terms on every document in the existing database for four (no longer five) custodians,¹⁴⁷ and then ".tiffing" the documents into a new database at \$.08/page, or a total cost of \$17,334 plus shipping pass-through costs. The magistrate then, citing *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003), instead of Rule 45, engaged in a short cost-shifting analysis and required the producing party to pay 50% of these costs but 100% of any privilege review costs. *Id.* at *23-24.

¹⁴⁶ The defendants did not help their cause by claiming that the emails were critical to the "government knowledge" defense alleged in the case where, 11 months earlier, they had filed a motion for summary judgment saying that they should prevail on that defense based on the facts then in existence. 2005 U.S. Dist. LEXIS 24929 at *21-22.

¹⁴⁷ Depending upon the results of the backup search, plaintiffs reserved the right to seek information from the active databases on the twenty-one custodians. 2010 U.S. Dist. LEXIS 32158 at *15-16.

The Advisory Committee Note to the 2006 amendments to Rule 45 emphasizes the protections in Rule 45 against “undue impositions” on the responding person, referencing Rule 45(c)(1)’s direction to a subpoena-issuer to take reasonable steps to avoid imposing an undue burden or expense” on the subpoena-recipient, and Rule 45(c)(2)(B)’s direction to the district courts to protect subpoena-recipient “from significant expense” resulting from compliance with the subpoena. The Note also acknowledges that a subpoena asking a third party to permit testing or sampling “may present particular issues of burden or intrusion” for the subpoena recipient and admonishes the district courts that the “protective provisions of Rule 45(c) should be enforced with vigilance when such demands are made.” The dearth of reported case law on battles over costs suggests that subpoena-issuers and the district courts are heeding or enforcing these rules. Nonetheless, cost reimbursement/allocation would still appear to be the most likely area in the future where the e-discovery amendments to Rule 45 will be tested and, hence, the case law should be monitored.

Under New Rule 26(b)(5)(B), Asserting Claims of Privileged or Work Product Protection After Production

Rule 26(b)(5)(B) provides that “If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it.” In addition to giving notice, the producing party must “preserve the information until the claim is resolved.” Upon receipt of this notice, the receiving party under Rule 26(b)(5)(B) is obliged to “promptly return, sequester, or destroy the specified information and any copies it has” and “must not use or disclose the information until the claim is resolved.” The “receiving party” may also “promptly present the information to the court under seal for a determination of the claim.” And if the receiving party already disclosed the information before being notified of the claim of privilege, it “must take reasonable steps to retrieve” it.¹⁴⁸

Rule 502 of the Federal Rules of Evidence was added in September 2008. Fed.R.Evid. 502(d) addresses the binding effect of a federal district court order on nonwaiver of a privilege or of protection as work-product material. It provides in full:

A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding.

This language gives force to a nonwaiver order approving a “quick peek” and clawback procedure. Any party agreeing to a clawback of privileged or protected documents or information in federal court will want to have the court enter a 502(d) order. When combined with Fed.R.Evid. 502, Rule 26(b)(5)(B) gives parties

¹⁴⁸ In dealing with receipt and dissemination of privileged or protected documents produced inadvertently, ethics rules may come into play. ABA Model Rule of Professional Conduct 4.4(b) addresses the receipt by a lawyer of documents that the lawyer knows or reasonably should know were sent inadvertently. The lawyer’s duty is to “promptly notify the sender.” Comment [2] to Rule 4.4 explains that whether the lawyer is required to do more than give notice to the sender, “such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived.” In a federal litigation setting, Rule 26(b)(5)(B) answers the former question. Returning the document(s) is not required unless the party fails to sequester or destroy the documents. See generally, Barkett, *The Ethics of E-Discovery* (First Chair Press 2009).

flexibility and protection to avoid a privilege waiver in situations where it makes economic sense to produce large amounts of electronically stored information without a prior privilege review.

A 502/clawback order is more likely going to be entered to address inadvertent production of privileged or protected information since many litigants will remain reluctant to allow a quick peek of privileged information to save the costs of a privilege review before production of electronically stored information. Nonetheless, Rule 26(b)(5)(B) is available for those who choose to use it.

Unless I have missed them in my research, the case law to date does not suggest any patterns for concern with respect to Rule 26(b)(5)(B).

Clawback agreements are being enforced as written. *Bro-Tech Corp. v. Thermax*, 2008 U.S. Dist. LEXIS 100749, *8 (E.D. Pa. Dec. 11, 2008) (the district court rejected a challenge to the clawing back of an “Erroneously Produced Document” under the parties’ stipulated clawback agreement because it was not made to the e-discovery special master under the agreement and also would not have been timely had it been made to the master); *Rosa Rodriguez-Monguio v. The Ohio State University*, 2009 U.S. Dist. LEXIS 51955, *6-7 (S.D. Ohio June 3, 2009) (privileged email returned under clawback agreement where producing party acted within time frame established by the agreement). *Cf. United States v. Sensient Colors, Inc.*, 2009 WL 2905474, *2-3 (D.N.J. Sept. 9, 2009) (agreement by “sophisticated counsel” that inadvertent production of a privileged document would not “in and of itself” waive a privilege did not represent a clawback agreement; applying Fed.R.Evid. 502(b),¹⁴⁹ waiver as to some of the inadvertently produced documents was found).

Parties that fail to take advantage of clawback agreements or orders are getting little sympathy. *Infor Global Solutions (Mich.) Inc. v. St. Paul Fire & Marine Co.*, 2009 U.S. Dist. LEXIS 71370 *6-8 (N.D. Cal. Aug. 3, 2009) (where plaintiff produced a compact disc and “did not qualify the production with any ‘clawback’ notice for privileged documents,” because of the failure to take reasonable steps to prevent disclosure, waiver was found by the magistrate as to 227 privileged emails included among 5,000 email files on the disc); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008) (producing party elected not to pursue a clawback order; the magistrate found a waiver).¹⁵⁰ Parties that are forced to act quickly to comply with court-ordered production might seek a clawback provision if there is insufficient time to do a privilege review, *Capitol Records, Inc. v. MP3tunes, LLC*, 2009 WL 2568431, *51, n.6 (S.D.N.Y. Aug. 13, 2009) (suggesting the parties confer on a clawback agreement because of an earlier deadline established for email production), or as was the case in *Williams v. Taser International, Inc.*, 2007 U.S. Dist. LEXIS 40280, *20-21 (N.D. Ga. June 4, 2007) have a clawback provision imposed on them where the parties were “unable to cooperate in the discovery process” that had gone on for 18 months and the frustrated district court judge ordered production of electronic documents within a short time frame.

¹⁴⁹ Fed.R.Evid. 502(b) addresses disclosures generally in a federal proceeding or when made to a federal office or agency. The inadvertent disclosure does *not* operate as a waiver in a federal or a state proceeding if the holder of the privilege or work product protection “took reasonable steps to prevent disclosure” and the holder “took reasonable and prompt steps to rectify the error” including (if applicable) following Fed.R.Civ.P. 26(b)(5)(B).

¹⁵⁰ This case was decided before Fed.R.Evid. 502 went into effect. However, defendants had elected not to have an order entered under *Hopson v. Mayor of Baltimore*, 232 F.R.D. 228 (D. Md. 2005), which would have protected privileged documents inadvertently produced to the other party from a waiver claim. 250 F.R.D. at 255.

Otherwise, clawback agreements seem to have a place and are being used by prudent counsel. *See e.g., Starbucks Corp. v. ADT Security Services, Inc.*, 2009 WL 4730798, *4 (W.D. Wash. Apr. 30, 2009) (the parties agreed “that each would have claw-back rights relating to production of privileged materials”).

In short, this e-discovery amendment appears to be serving its intended purpose.

CONCLUSION

Over time, all discovery will involve some form of e-discovery. If judges do not manage and lawyers do not cooperate, e-discovery time and costs will become the silent killer of Rule 1’s “speedy” and “inexpensive” mandates. Particularly in asymmetric cases or cases involving high e-discovery costs absolutely or relative to the amount or issues in controversy, judges and lawyers must be committed to the vigilant administration of justice to achieve Rule 1’s goals. If they do not, the calls for fundamental changes in our procedural rules—no longer a whisper—will begin to reverberate.

The prelitigation duty to preserve electronically stored information desperately needs attention by rule or otherwise. The trigger of the duty to preserve is fraught with uncertainty. Inherent power is employed within the framework of litigation governed by rules but is currently subject to no rules. If inherent authority presupposes “bad faith” conduct, then that message has not reached all of the circuits. Similar cases are resulting in different outcomes depending upon the circuit; that’s not the way justice in America should work.

The e-discovery amendments to the rules of civil procedure have worked reasonably well. If there are areas of immediate concern with respect to e-discovery, they relate to the scope of discovery and the continued reliance on the “reasonably calculated” language of Rule 26(b)(1); the relationship between production in a reasonably usable form and the limitation to production in only one form under Rule 34; whether to attempt to deal with discovery of backup tapes or similar costly-to-access information in a manner other than currently described in Rule 26(b)(2)(B); monitoring cost issues under Rule 45; and figuring out how to guarantee that lawyers and judges convert the 2006 changes made in Rule 26(f) and Rule 16 to just, speedy, and inexpensive decision making with respect to e-discovery.

In the era of servers and cyberspace, rules of civil procedure and the persons governed by such rules must adapt. E-discovery costs for many litigants—now and especially so in the future—must be controlled if Rule 1’s goals are to be met. We have the best system of justice on the earth. Now is yet another time to make it better.

/jmb

APPENDIX I – STATEMENTS OF THE TRIGGER OF THE DUTY TO PRESERVE IN DIFFERENT CIRCUITS

Circuit Decision	Statement of the Duty
<p><i>Testa v. Wal-Mart Stores, Inc.</i>, 144 F.3d 173, 177 (1st Cir. 1998) (citation omitted).</p> <p><i>Blinzler v. Marriott Int'l, Inc.</i>, 81 F.3d 1148, 1159 (1st Cir. 1996) (citations omitted).</p>	<p>“Thus, the sponsor of the inference must proffer evidence sufficient to permit the trier to find that the target knew of (a) the claim (that is, the litigation or the potential for litigation), and (b) the document’s potential relevance to that claim.”</p> <p>“Although no suit had yet been begun when the defendant destroyed the document, it knew of both James Blinzler’s death and the plaintiff’s persistent attempts--including at least one attempt after Blinzler died--to discover when the call for emergency aid had been placed. This knowledge gave the defendant ample reason to preserve the report in anticipation of a legal action. When the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a factfinder may reasonably infer that the party probably did so because the records would harm its case.”</p>
<p><i>Kronish v. United States</i>, 150 F.3d 112, 127 (2d Cir. 1998).</p> <p><i>In re Terrorist Bombings of U.S. Embassies in E. Afr. v. Odeh</i>, 552 F.3d 93, 148 (2d Cir. 2008).</p>	<p>“This obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation--most commonly when suit has already been filed, providing the party responsible for the destruction with express notice, but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation.”</p> <p>“The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.”</p>
<p><i>Schmid v. Milwaukee Elec. Tool Corp.</i>, 13 F.3d 76, 81 (3rd Cir. 1994).</p>	<p>“In the final analysis, it seems to us that we could affirm the district court only if we were willing to hold that an expert in Dr. Bratspies’s position has an affirmative duty not to conduct an investigation without affording all potential defendants an opportunity to have an expert present. We decline to so hold.</p> <p>When Dr. Bratspies conducted his investigation, no suit had been filed and Schmid did not know whether he had a basis for instituting suit. Thus, no</p>

Circuit Decision	Statement of the Duty
	<p>defendant had been identified and, a fortiori, no defense expert had been engaged. An across-the-board rule that would require an identification of all potential defendants at this nascent stage of the potential controversy and an invitation to each of them to attend an exploratory investigation would be inefficient, if not altogether unworkable. Many accident investigations do not lead to litigation and many narrow the field of potential defendants. There are still more situations in which the resources necessary to assemble the experts of potential defendants would be invested with no significant return on the investment. On the other hand, in cases like this one, the attendant delay would pose a significant risk of prejudice to the plaintiff.</p> <p>Rather than endorse Electric Tool’s novel rule, we consider it more prudent to rely on the traditional case by case approach keyed to the degree of fault on the part of the party accused of spoliation and the degree of prejudice to the opponent.”¹⁵¹</p>
<p><i>Silvestri v. General Motors Corp.</i>, 271 F.3d 583, 591 (4th Cir. 2001) (citation omitted).</p>	<p>“The duty to preserve extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.”</p>
<p><i>Welsh v. United States</i>, 844 F.2d 1239, 1247-48 (6th Cir. 1988) (citation omitted) (applying Kentucky law).¹⁵²</p>	<p>“The District Court inferred from the VA surgeons’ failure to send the skull flap to pathology that ‘upon surgically entering the decedent’s skull on October 15 . . . the doctors found an infection of long standing that had been walled off in some manner so that it did not manifest itself until October 10.’ This inference was not mandatory, but it was permissible. In addition, the negligent destruction of evidence foreseeably pertinent to litigation and the consequent failure to perform pathological examination in accordance with the standards of ordinary medical practice give rise in the circumstances of this case to a rebuttable presumption that the missing specimen would establish that the defendant was negligent in failing to</p>

¹⁵¹ “In this case, there was very little fault that could be laid at Dr. Bratspies’s feet, very little nonspeculative prejudice to defendant, and a sanction that deprived Schmid of any opportunity to prove his claim. That sanction was not commensurate with the limited fault and prejudice present in this case. As a result, we can sanction neither the district court’s striking of Schmid’s expert evidence nor its granting judgment to Electric Tool.” 13 F.3d at 81.

¹⁵² *Atkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009) (citations omitted) overruled *Welsh* on the application of state law to a determination of spoliation sanctions: “In contrast to our persistent application of state law in this area, other circuits apply federal law for spoliation sanctions. We believe that this is the correct view for two reasons. First, the authority to impose sanctions for spoliated evidence arises not from substantive law but, rather, ‘from a court’s inherent power to control the judicial process.’ Second, a spoliation ruling is evidentiary in nature and federal courts generally apply their own evidentiary rules in both federal question and diversity matters. These reasons persuade us now to acknowledge the district court’s broad discretion in crafting a proper sanction for spoliation.”

Circuit Decision	Statement of the Duty
	discover the underlying disease process and that this negligence was the proximate cause of the decedent's demise."
<i>Partington v. Broyhill Furniture Indus., Inc.</i> , 999 F.2d 269, 272 (7th Cir.1993).	"But if, being sensitive to the possibility of a suit, a company then destroys the very files that would be expected to contain the evidence most relevant to such a suit, the inference arises that it has purged incriminating evidence."
<i>Trask-Morton v. Motel 6 Operating L.P.</i> , 534 F.3d 672, 681 (7th Cir. 2008).	"Courts have found a spoliation sanction to be proper only where a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent. (citations omitted)."
<i>Lewy v. Remington Arms Co., Inc.</i> , 836 F.2d 1104, 1112 (8th Cir. 1988) (citations omitted).	<p>"We are unable to decide, based on the record we have before us, whether it was error for the trial court to give this instruction. On remand, if the trial court is called upon to again instruct the jury regarding failure to produce evidence, the court should consider the following factors before deciding whether to give the instruction to the jury. First, the court should determine whether Remington's record retention policy is reasonable considering the facts and circumstances surrounding the relevant documents. For example, the court should determine whether a three year retention policy is reasonable given the particular document. A three year retention policy may be sufficient for documents such as appointment books or telephone messages, but inadequate for documents such as customer complaints. Second, in making this determination the court may also consider whether lawsuits concerning the complaint or related complaints have been filed, the frequency of such complaints, and the magnitude of the complaints.</p> <p>Finally, the court should determine whether the document retention policy was instituted in bad faith. In cases where a document retention policy is instituted in order to limit damaging evidence available to potential plaintiffs, it may be proper to give an instruction similar to the one requested by the Lewys. Similarly, even if the court finds the policy to be reasonable given the nature of the documents subject to the policy, the court may find that under the particular circumstances certain documents should have been retained notwithstanding the policy. For example, if the corporation knew or should have known that the documents would become material at some point in the future then such documents should have been preserved. Thus, a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention</p>

Circuit Decision	Statement of the Duty
<p><i>Stevenson v. Union Pacific R.R. Co.</i>, 354 F.3d 739, 749 (8th Cir. 2004).</p>	<p>policy.”</p> <p>“We have never approved of giving an adverse inference instruction on the basis of prelitigation destruction of evidence through a routine document retention policy on the basis of negligence alone. Where a routine document retention policy has been followed in this context, we now clarify that there must be some indication of an intent to destroy the evidence for the purpose of obstructing or suppressing the truth in order to impose the sanction of an adverse inference instruction.”</p>
<p><i>Dong Ah Tire & Rubber Co., Ltd. v. Glasforms, Inc.</i>, 2009 U.S. Dist. LEXIS 62668 at *15-16 (N.D. Cal. July 2, 2009)</p>	<p>“The Ninth Circuit has not expressly defined the term ‘anticipated litigation,’ <i>Hynix Semiconductor Inc. v. Rambus, Inc.</i>, 591 F. Supp. 2d 1038, 2006 WL 565893, at * 21, 24 (N.D. Cal. 2006), and trial courts have crafted various formulations of when a party “should know” that the evidence may be relevant to future litigation. <i>Napster</i>, 462 F. Supp. 2d at 1068; <i>World Courier</i>, 2007 WL 1119196, at *1; see <i>Hynix Semiconductor Inc. v. Rambus, Inc.</i>, 591 F. Supp. 2d 1038, 1061 (N.D. Cal. 2006) (determining that future litigation is probable when it is “more than a possibility”); <i>Ameripride Servs., Inc. v. Valley Indus. Serv., Inc.</i>, No. CIV S-00-113 LKK/JFM, 2006 U.S. Dist. LEXIS 59398, 2006 WL 2308442, at *4 (E.D. Cal. Aug. 9, 2006) (placing the anticipated litigation date to when a potential claim was identified); <i>Hynix Semiconductor Inc. v. Rambus, Inc.</i>, 591 F. Supp. 2d 1038, 2006 WL 565893, at *21, 24 (N.D. Cal. 2006) (finding that litigation became “probable” when counsel was selected). Regardless of the precise terminology employed, each of these decisions recognizes that once a potential dispute matures to the point that litigation may well follow, relevant evidence should be preserved.”</p>
<p><i>Rowe v. Albertsons, Inc.</i>, No. 02-4186, 2004 WL 2252064 (10th Cir. Oct. 7, 2004) (applying Texas law) (citation omitted).</p> <p><i>Burlington N & Santa Fe Ry. Co. v. Grant</i>, 505 F.3d 1013, 1032 (10th Cir. 2007).</p>	<p>“The person asserting the presumption must show that the party who destroyed the evidence had notice both of the potential claim and of the evidence’s potential relevance. Notice of a claim does not refer to any particular statistical probability that litigation will occur; rather, it simply means that litigation is more than merely an abstract possibility or unwarranted fear. The underlying inquiry is whether it was reasonable for the investigating party to anticipate litigation and prepare accordingly.”</p> <p>“A spoliation sanction is proper where (1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence.”</p>

APPENDIX 2 – RECOMMENDATIONS REGARDING E-DISCOVERY IN NEW YORK STATE COURTS

Key recommendations in report to the Chief Judge and Chief Administrative Judge entitled, *Electronic Discovery in the New York State Courts* (February 2010) (<http://www.courts.state.ny.us/courts/comdiv/PDFs/E-DiscoveryReport.pdf>):

(1) The Chief Administrative Judge should appoint a working group of experts “to serve as a statewide resource and to support the court system’s efforts to develop education and training curricula for judges and court staff; adopt best practices to address the practical and technical problems of e-discovery; evaluate the progress of pilot programs to improve e-discovery; and monitor relevant trends and developments.”

(2) Improving the quality of the preliminary conference required under New York’s Commercial Division Uniform Rule 8(b) and Uniform Trial Court Rule 202.12(c)(3). The Report explains that these rules “are intended to promote the reasonable, proportional and cooperative resolution of most e-discovery issues and to encourage early court intervention where that is not possible,” but that these goals are not being met: “Very few meaningful discussions are taking place at or before the PC, and protracted disputes over issues such as spoliation and sanctions continue to arise much too frequently. Judges and court staff often feel ill-equipped or powerless to avoid these roadblocks.” One suggestion was to require a report to be filled out documenting the discussion of e-discovery issues. Another was to require counsel attending the preliminary conference “to possess sufficient knowledge about client technology systems to competently discuss them with the court and opposing counsel” or to “associate themselves with and bring client representatives or outside experts with knowledge of the issues.”

(3) Run pilot projects on a number of fronts for an 8-month period:

(a) Requiring counsel before the preliminary conference to “sign and certify an Initial Disclosure form that addresses, among other things: identification of the parties’ key IT personnel; efforts undertaken to preserve ESI and avoid spoliation; substantive witnesses likely to possess relevant ESI and the location of that ESI; types of computer systems and technologies in use; and potential claims that certain potentially relevant ESI is inaccessible.”

(b) Requiring counsel to “jointly sign and certify an Affirmation of E-Discovery Compliance, to be submitted before the PC, that provides the court with three distinct lists:” (i) “e-discovery issues the parties conferred about and resolved”; (ii) “issues that the parties could not agree upon or resolve and need the court’s involvement; and” (iii) “issues the parties have not yet addressed because they depend on the issues in the second list. The Affirmation would chronicle the parties’ attempts to meet-and-confer, and indicate which client personnel/IT specialists or outside experts, if any, were involved.”

(4) Improve education and provide training for judges: “The Judicial Institute should sponsor more e-discovery law and technology programs and offer them regionally to foster smaller classes and in-depth learning. One-hour “lunch and learn” webcasts should be presented on key e-discovery topics. Technical and practical issues should be balanced with broader themes such as early court involvement, cooperation, and proportionality.”

(5) Identify court-attorney referees “to serve as e-discovery specialists in select pilot locations to help supervise and resolve protracted e-discovery disputes. Where resources permit, court-attorney referees should

team with IT personnel to combine their skills, and strengthen the quality and efficiency of e-discovery supervision.”

(6) Outreach to the bar and utilization of ADR to resolve e-discovery disputes: “To improve the bar’s familiarity with e-discovery, the court system should publish a periodic e-discovery journal that reports relevant New York State court decisions and trends. The court system should also bring to bear its ADR programs: identifying and training volunteer attorney mediators who can help resolve court referred e-discovery disputes.”

APPENDIX 3 – STATE COURT RULES ON E-DISCOVERY

State	Citation to State Court Rules Addressing Some Aspect of E-Discovery
Alaska	http://www.courts.alaska.gov/sco/sco1682leg.pdf
Arizona	http://www.supreme.state.az.us/rules/ramd_pdf/r-06-0034.pdf
Arkansas	http://courts.state.ar.us/rules/rules_civ_procedure/v.cfm ; http://courts.arkansas.gov/news/Rules_Per_Curiam.Adopting_ARCP_26.1_on_24_September_2009.pdf?num=149
California	E-Discovery Act http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-0050/ab_5_bill_20090629_chaptered.pdf ; and Rule 3.724, Duty to Meet and Confer, http://www.courtinfo.ca.gov/rules/index.cfm?title=three&linkid=rule3_724
Connecticut	Connecticut Practice Book, http://www.jud.ct.gov/Publications/PracticeBook/pb1.pdf) Section 13.9(d): “If data has been electronically stored, the judicial authority may for good cause shown order disclosure of the data in an alternative format provided the data is otherwise discoverable. When the judicial authority considers a request for a particular format, the judicial authority may consider the cost of preparing the disclosure in the requested format and may enter an order that one or more parties shall pay the cost of preparing the disclosure.”
Florida	Fla.R.Civ.P. 1.201 now addresses “complex litigation,” http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/10C69DF6FF15185085256B29004BF823/\$FILE/Civil.pdf?OpenElement
Idaho	Rule 33(c) has an option to produce electronically stored information in lieu of answering an interrogatory, http://www.isc.idaho.gov/rules/ircp33.rul . Rule 34(a) allows for service of a request to produce electronically stored information, http://www.isc.idaho.gov/rules/ircp34.rul . Rule 45(b) allows for a subpoena seeking electronically stored information, http://www.isc.idaho.gov/rules/ircp45.txt .
Illinois	Supreme Court Rules 201(b)(1) (The word “documents,” as used in these rules, includes, but is not limited to, papers, photographs, films, recordings, memoranda, books, records, accounts, communications and all retrievable information in computer storage”) http://www.state.il.us/court/SupremeCourt/Rules/Art_II/ArtII.htm#201 . Supreme Court Rule 214 (“A party served with the written request [for production of documents] shall (1) produce the requested documents as they are kept in the usual course of business or organized and labeled to correspond with the categories in the request, and all retrievable information in computer storage in printed form ...”) http://www.state.il.us/court/SupremeCourt/Rules/Art_II/ArtII.htm#214 .

State	Citation to State Court Rules Addressing Some Aspect of E-Discovery
Indiana	http://www.in.gov/judiciary/orders/rule-amendments/2007/trial-091007.pdf
Iowa	(http://www.judicial.state.ia.us/wfdata/frame6744-1671/File58.pdf contains the Supreme Court’s order and http://www.legis.state.ia.us/Rules/Current/court/courtrules.pdf contains the text of Iowa Court Rules
Kansas	<p>§ 60-216 Pretrial conferences; case management conference (mimicking Fed.R.Civ.P. 16), http://www.kslegislature.org/legsrv-statutes/getStatute.do?number=23755.</p> <p>§ 60-226(b)(2)(B) under General Provisions Governing Discovery (“A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of subsection (b)(2)(A). The court may specify conditions for the discovery”), http://www.kslegislature.org/legsrv-statutes/getStatute.do?number=23767.</p> <p>§ 60-233(d) Interrogatories to Parties (option to make available electronically stored information in lieu of answering), http://www.kslegislature.org/legsrv-statutes/getStatute.do?number=23774.</p> <p>§ 60-234 Production of Documents, Electronically Stored Information and Things and Entry Upon Land for Inspection and Other Purposes (mimicking Fed.R.Civ.P. 34), http://www.kslegislature.org/legsrv-statutes/getStatute.do?number=23775.</p> <p>§ 60-237(e) Failure to Allow Discovery; Sanctions (mimicking Fed.R.Civ.P. 37(e)), http://www.kslegislature.org/legsrv-statutes/getStatute.do?number=23778.</p> <p>§ 60-245 Subpoenas (mimicking Fed.R.Civ.P. 45), http://www.kslegislature.org/legsrv-statutes/getStatute.do?number=23786.</p>
Louisiana	<p>http://www.legis.state.la.us/billdata/streamdocument.asp?did=447007 contains Act No. 140 which amends CCP 1424 (http://www.legis.state.la.us/lss/lss.asp?doc=111195) showing the changes in CCP1460 (http://www.legis.state.la.us/lss/lss.asp?doc=111233), CCP1461 (http://www.legis.state.la.us/lss/lss.asp?doc=111234), and CCP 1462 (http://www.legis.state.la.us/lss/lss.asp?doc=111235). Louisiana has also adopted changes to its sanctions rules, (CCP 1471(B): (“Absent exceptional circumstances, a court may not impose sanctions under this Article on a person or party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system”), subpoena rule (CCP 1354, http://www.legis.state.la.us/lss/lss.asp?doc=111179, addressing form of production of electronically stored information), and its pre-trial and scheduling conference rule (CCP 1551, http://www.legis.state.la.us/lss/lss.asp?doc=111257, addressing the control and scheduling of discovery including discovery of electronically stored information)</p>

State	Citation to State Court Rules Addressing Some Aspect of E-Discovery
Maine	<p>The changes mimic the federal rules' e-discovery amendments. Maine's civil procedures are numbered in the same manner as Fed.R.Civ.P. 16, 26, 33, 34, and 37.</p> <p>http://www.courts.state.me.us/rules_forms_fees/rules/MRCivPAmend7-08.pdf</p>
Maryland	<p>http://www.courts.state.md.us/rules/rodocs/ro158.pdf</p>
Michigan	<p>http://coa.courts.mi.gov/rules/documents/1chapter2civilprocedure.pdf (see Rules 2.2.302 General Rules Governing Discovery, 2.310 Requests for Production of Documents and Other Things; Entry on Land for Inspection and Other Purposes, 2.313 Failure to Provide or Permit Discovery; Sanctions, 2.401 Pretrial Procedures; Conferences Scheduling Orders, and 2.506 Subpoena; Order to Attend)</p>
Minnesota	<p>http://www.mncourts.gov/documents/0/Public/NewsPostings/Public_Notice_07/ORADM048001-0521.pdf</p>
Mississippi	<p>See Rule 26(b)(5): “<i>Electronic Data</i>. To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot—through reasonable efforts—retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court may also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.”</p> <p>http://www.mssc.state.ms.us/rules/msrulesofcourt/rules_of_civil_procedure.pdf</p>
Missouri	<p>In the 25th Judicial Circuit (Maries, Phelps, Pulaski, and Texas Counties), Local Rule 32.3 provides: “Any party serving written discovery requests shall, immediately upon the request of the party to whom such discovery is directed, provide the discovery in electronic format in addition to printed format. The means of transmitting electronic discovery may, at the option of the party serving the same, be by disk, CD ROM, or e-mail attachment. The discovery shall be transmitted in a file form as the parties may agree and, absent agreement, in the word processing format under which it was originally created. It shall be the duty of the party requesting electronically formatted discovery to convert the same into any other word processing format. The party requesting discovery in electronic format shall bear all responsibility for scanning the medium of transmission for viruses and other computer dangers. Nothing in this rule shall relieve the party who requested electronically formatted discovery from responding to the printed discovery within the time requirements of Supreme Court Rules. Unless the parties in writing otherwise agree, the submission of electronic responses to written discovery shall not abrogate the requirement to also serve printed responses as required by Supreme Court Rules.”</p> <p>http://www.ediscoverylaw.com/uploads/file/25th%20circuit%20Local%20Court%20Rules%2020</p>

State	Citation to State Court Rules Addressing Some Aspect of E-Discovery
	09%20rev[1].pdf
Montana	See Montana Code Annotated (Rules of Civil Procedure) for Rules 16, 26, 33, 34, 37 and 45 available at http://data.opi.state.mt.us/bills/mca_toc/25_20.htm
Nebraska	http://www.supremecourt.ne.gov/rules/amendments/DiscoveryAmds.pdf
New Hampshire	http://www.courts.state.nh.us/rules/sror/sror-h3-62.htm (Rule 62.(I) of the Rules of the Superior Court of New Hampshire now provides for a “Structuring Conference” with the Superior Court to be preceded by a meet-and-confer session among counsel which is to cover, among other things, “(4) the scope of discovery, including particularly with respect to information stored electronically or in any other medium, the extent to which such information is reasonably accessible, the likely costs of obtaining access to such information and who shall bear said costs, the form in which such information is to be produced, the need for and the extent of any holds or other mechanisms that have been or should be put in place to prevent the destruction of such information, and the manner in which the parties propose to guard against the waiver of privilege claims with respect to such information....”
New Jersey	See Rule 1:9 addressing subpoenas at http://www.judiciary.state.nj.us/rules/part1toc.htm and Rules 4:5B, 4:10, 4:17, 4:18, 4:23-6, addressing case management conferences, the scope of discovery, interrogatories, production of documents, and sanctions at http://www.judiciary.state.nj.us/rules/part4toc.htm
New Mexico	http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-hit-h.htm&2.0 (see rules 1-016 (Pretrial conferences; scheduling; management); 1-026 (General provisions governing discovery); 1-033 (Interrogatories to parties); 1-034 (Production of documents and things and entry upon land for inspection and other purposes), 1.045 (Subpoena), and 1.045.1 (Interstate subpoenas). For an explanation of the changes, see the commentary following each rule.
New York	http://www.courts.state.ny.us/rules/trialcourts/202.shtml#70 . Under Section 202.70, Rules of the Commercial Division of the Supreme Court, Rule 8 provides “(b) Prior to the preliminary conference, counsel shall confer with regard to anticipated electronic discovery issues. Such issues shall be addressed with the court at the preliminary conference and shall include but not be limited to (i) implementation of a data preservation plan; (ii) identification of relevant data; (iii) the scope, extent and form of production; (iv) anticipated cost of data recovery and proposed initial allocation of such cost; (v) disclosure of the programs and manner in which the data is maintained; (vi) identification of computer system(s) utilized; (vii) identification of the individual(s) responsible for data preservation; (viii) confidentiality and privilege issues; and (ix) designation of experts.” Section 202.12 of the Uniform Rules for the Supreme Court and County allows a party to request a preliminary conference at any time after service of process. The matters covered include “(3) Where the court deems appropriate, establishment of the method and scope of any electronic discovery, including but not limited to (a) retention of electronic data and implementation of a

State	Citation to State Court Rules Addressing Some Aspect of E-Discovery
	<p>data preservation plan, (b) scope of electronic data review, (c) identification of relevant data, (d) identification and redaction of privileged electronic data, (e) the scope, extent and form of production, (f) anticipated cost of data recovery and proposed initial allocation of such cost, (g) disclosure of the programs and manner in which the data is maintained, (h) identification of computer system(s) utilized, and (i) identification of the individual(s) responsible for data preservation.” http://www.courts.state.ny.us/rules/Trialcourts/202.shtml#12.</p>
North Carolina	<p>North Carolina adopted local rules for its new Business Court.. http://www.ncbusinesscourt.net/New/localrules/NCBC%20Amended%20Local%20Rules%20-%202006.doc. See Rule 17.1 (Case Management Meeting) which requires a conference with the court within 30 days of filing of assignment or designation of a case to the Business Court. Among the topics to be discussed is this one: “(i)An estimate of the volume of documents and/or electronic information likely to be the subject of discovery in the case from parties and nonparties and whether there are technological means, including but not limited to production of electronic images rather than paper documents and any associated protocol, that may render document discovery more manageable at an acceptable cost.” Under Rule 18.6 (“Conference of Attorneys with Respect to Motions and Objections Relating to Discovery”), “(b) Prior to filing motions and objections relating to discovery of information stored electronically, the parties shall discuss the possibility of shifting costs for electronic discovery, the use of Rule 30(b)(6) depositions of information technology personnel, and informal means of resolving disputes regarding technology and electronically stored information. The certificate required by Rule 18.6(a) shall address efforts to resolve the dispute through these and any other means related to discovery of information stored electronically.”</p>
North Dakota	<p>http://www.court.state.nd.us/rules/CIVIL/frameset.htm (Changes were made to North Dakota R.Civ.P. 16, 26, 33, 34, 37, and 45 that are similar to the Federal Rules in part. For example, North Dakota does not have a meet-and-confer requirement although a court can order a discovery conference with counsel. It does not have a clawback procedure. Form 20 (“Motion for Production of Documents, etc. under Rule 34” was also amended to include electronically stored information.</p>
Ohio	<p>http://www.supremecourt.ohio.gov/LegalResources/Rules/civil/CivilProcedure.pdf (Amendments made to Ohio R.Civ.P. 16, 26, 33, 34, 37, and 45 that contain some differences from the Federal Rules. For example, Ohio Rule 26(4)(d) ties proportionality principles to a showing of good cause to obtain electronically stored information “when the production imposes undue burden or expense:” and provides in part: “In ordering production of electronically stored information, the court may specify the format, extent, timing, allocation of expenses and other conditions for the discovery of the electronically stored information.”)</p>
Tennessee	<p>http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/TRCPamendments-eDiscovery.pdf (Tennessee Supreme Court order, effective July 1, 2009, adopting amendments on electronically stored information to the following rules:</p>

State	Citation to State Court Rules Addressing Some Aspect of E-Discovery
	16.01 Scheduling and Planning Conferences and Orders 26.02(1) Discovery Scope and Limits – In General 26.02(5) Claims of Privilege or Protection of Trial Preparation Materials 26.06 Discovery Conference 33.03 Interrogatories to Parties – Option to Produce Business Records 34.01 Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes – Scope 34.02 Production of Documents and Things and Entry Upon land for Inspection and Other Purposes – Procedure 37.06 Failure to Make or Cooperate in Discovery: Sanctions – Electronically Stored Information 45.02 Subpoena – For Production of Documentary Evidence 45.04 Subpoena for Depositions – Place of Deposition 45.07 Protection of Persons Subject to Subpoena 45.08 Duties in Responding to Subpoena)
Texas	Texas R.Civ.P. 196.4 (“To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot - through reasonable efforts - retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.”) ¹⁵³ http://www.supreme.courts.state.tx.us/Rules/TRCP/RCP_all.pdf
Utah	See Rules 26, 33, 34, and 37 in the Utah Rules of Civil Procedure at http://www.utcourts.gov/resources/rules/urcp/
Vermont	The changes to Vermont Rules 16.2, 26, 33, 34, 37, and 45 mimic the e-discovery amendments to the federal rules. http://www.michie.com/vermont/lpext.dll?f=templates&fn=main-h.htm&2.0
Virginia	See amendments to Va. Rules 4:1 (changes similar to changes to Fed.R.Civ.P. 26) , 4:4 (allowing for stipulations for other methods of discovery of electronically stored information), 4:8 (mimicking the change to Fed.R.Civ.P. 33), 4:9 (with changes similar to those made to

¹⁵³ See *In Re Weekly Homes*, 2009 Tex. LEXIS 630 (Tex. 2009) for a lengthy discussion of Rule 196.4 by the Texas Supreme Court.

State	Citation to State Court Rules Addressing Some Aspect of E-Discovery
	<p>Fed.R.Civ.P. 34), 4:9A (addressing subpoenas), and 4:13 (dealing with issues comparable to e-discovery-related changes made to Fed.R.Civ.P. 16).</p> <p>http://www.courts.state.va.us/courts/scv/amendments/2008_1031_4_1_rule.pdf</p>
Wyoming	<p>The changes to Wyoming Rules 26, 33, 34, 37, and 45 mimic the e-discovery amendments to the federal rules. There was not a change made to Wyoming Rule 16 comparable to the changes made in Fed.R.Civ.P. 16.</p> <p>http://courts.state.wy.us/CourtRules_Entities.aspx?RulesPage=CivilProcedure.xml</p>

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John M. Barkett

Mr. Barkett is a partner at the law firm of Shook, Hardy & Bacon L.L.P. in its Miami office. He is a graduate of the University of Notre Dame (B.A. Government, 1972, *summa cum laude*) and the Yale Law School (J.D. 1975) and served as a law clerk to the Honorable David W. Dyer on the old Fifth Circuit Court of Appeals. Mr. Barkett is an adjunct professor of law at the University of Miami Law School.

Mr. Barkett has, over the years, been a commercial litigator (contract and corporate disputes, employment, trademark, and antitrust), environmental litigator (CERCLA, RCRA, and toxic tort), and, for the past several years, a peacemaker and problem solver, serving as an arbitrator, mediator, facilitator, or allocator in a variety of environmental or commercial contexts. He is a certified mediator under the rules of the Supreme Court of Florida and the Southern and Middle Districts of Florida, and serves on the AAA and ICDR roster of neutrals, the CPR Institute for Dispute Resolution's "Panel of Distinguished Neutrals," and the National Roster of Environmental Dispute Resolution and Consensus Building Professionals maintained by the U.S. Institute for Environmental Conflict Resolution. He has served or is serving as a neutral in more than fifty matters involving in the aggregate more than \$450 million. He has conducted or is conducting commercial domestic and international arbitrations under AAA, LCIA, UNCITRAL, and CPR rules. In November 2003, he was appointed by the presiding judge to serve as the Special Master to oversee the implementation and enforcement of the 1992 Consent Decree between the United States and the State of Florida relating to the restoration of the Florida Everglades. He also consults with major corporations on the evaluation of legal strategy and risk and conducts independent investigations where such services are needed.

Mr. Barkett is former member of the Council of the ABA Section of Litigation after service as the Section's Co-Director of CLE and Co-Chair of the Environmental Litigation Committee. He currently serves as the Section's liaison to the Judicial Conference's Advisory Committee on the Federal Rules of Civil Procedure.

Mr. Barkett has published two books on e-discovery, *E-Discovery: Twenty Questions and Answers*, (First Chair Press, Chicago, October 2008) and *The Ethics of E-Discovery* (First Chair Press, Chicago, January 2009). Mr. Barkett has also published or presented a number of articles in the e-discovery arena:

- *Zubulake Revisited: Pension Committee and the Duty to Preserve*, (Feb. 26, 2010) (http://www.abanet.org/litigation/litigationnews/trial_skills/pension-committee-zubulake-ediscovery.html)
- *Production of Electronically Stored Information in Arbitration: Sufficiency of the IBA Rules*, (a chapter in a book published by JurisNet LLC, New York, September 2008).
- *E-Discovery For Arbitrators*, 1 Dispute Resolution International Journal 129, International Bar Association (Dec. 2007).
- *Help Has Arrived...Sort Of: The New E-Discovery Rules*, ABA Section of Litigation Annual Meeting, San Antonio (2007).
- *Help Is On The Way...Sort Of: How the Civil Rules Advisory Committee Hopes to Fill the E-Discovery Void*, ABA Section of Litigation Annual Meeting, Los Angeles (2006).
- *The Battle For Bytes: New Rule 26, e-Discovery*, Section of Litigation (February 2006).

- *The Prelitigation Duty to Preserve: Lookout!* ABA Annual Meeting, Chicago, (2005).
- *Bytes, Bits and Bucks: Cost-Shifting and Sanctions in E-Discovery*, ABA Section of Litigation Annual Meeting (2004) and 71 Def. Couns. J. 334 (2004).

Mr. Barkett also teaches a course at the University of Miami Law School entitled “E-Discovery.”

Mr. Barkett is editor and one of the authors of the ABA Section of Litigation’s Monograph, *Ex Parte Contacts with Former Employees* (Environmental Litigation Committee, October 2002). He has presented the following papers in the ethics arena:

- *Cheap Talk? Witness Payments and Conferring with Testify Witnesses*, (ABA Annual Meeting, Chicago, Illinois, July 30, 2009.)
- *Fool’s Gold: The Mining of Metadata* (ABA’s Third Annual National Institute on E-Discovery, Chicago, May 22, 2009)
- *More on the Ethics of E-Discovery* (ABA’s Third Annual National Institute on E-Discovery, Chicago, May 22, 2009)
- *From Canons to Cannon*, (Ethics Centennial, ABA Section of Litigation, Washington, D.C. April 18, 2008 commemorating the 100th anniversary of the adoption of the Canons of Ethics)
- *Tattletales or Crimestoppers: Disclosure Ethics Under Model Rules 1.6 and 1.13*, (ABA Annual Meeting, Atlanta, August 7, 2004 and, in an updated version, ABA Tort and Insurance Practice Section Spring CLE Meeting, Phoenix, April 11, 2008).
- *Refresher Ethics: Conflicts of Interest*, (January 2007 ABA Section of Litigation Joint Environmental, Products Liability, and Mass Torts CLE program)
- *The MJP Maze: Avoiding the Unauthorized Practice of Law* (2005 ABA Section of Litigation Annual Conference)
- *A Baker’s Dozen: Reasons Why You Should Read the 2002 Model Rules of Professional Conduct*, (ABA Section of Litigation’s 2003 Annual Conference)

Mr. Barkett is also the author of Ethical Issues in Environmental Dispute Resolution, a chapter in the ABA publication, *Environmental Dispute Resolution, An Anthology of Practical Experience* (July 2002).

Mr. Barkett is a Fellow of the American College of Environmental Lawyers. At the University of Miami Law School, Mr. Barkett also teaches a course entitled, “Environmental Litigation,” that covers four statutes (CERCLA, RCRA, the Clean Water Act, and the Clean Air Act). Mr. Barkett is the author of *A Database Analysis of Superfund Allocation Case Law*(Shook, Hardy & Bacon, Miami, 2003). He is also an editorial board of *Natural Resources & Environment*, a publication of the ABA Section of Environment, Energy, and Resources. Among his other recently published works are:

- *Draft Reports and Attorney-Expert Communications*, 24 N.R.E. (Winter 2010)
- *Burlington Northern: The Super Quake and Its Aftershocks*, 58 Chemical Waste Lit. Rpr. 5 (June 2009)
- *Orphan Shares*, 23 NRE 46 (Summer 2008)
- *Tipping The Scales of Justice: The Rise of ADR*, 22 NRE 40 (Spring 2008)
- *Forward to the Past: The Aftermath of Aviall*, 20 N.R.E. 27 (Winter 2006)
- *The CERCLA Limitations Puzzle*, 19 N.R.E. 70 (Fall, 2004)
- *If Terror Reigns, Will Torts Follow?* 9 Widener Law Symposium 485 (2003)

Mr. Barkett has been recognized in the areas of alternative dispute resolution or environmental law in a number of lawyer-recognition publications, including Who's Who Legal (International Bar Association) (since 2005); Best Lawyers in America (National Law Journal) (since 2005); Legal Elite (since 2004), (Florida Trend), Florida Super Lawyers (since 2008), and Chambers USA America's Leading Lawyers (since 2004). Mr. Barkett can be reached at jbarkett@shb.com.