COMMENT

Preservation – Moving the Paradigm to Rule Text

Submitted to the

Civil Rules Advisory Committee

On behalf of
Lawyers for Civil Justice

April 1, 2011

Introduction

This Comment is respectfully submitted to the Civil Rules Advisory Committee ("Committee") to offer our views on suggested rule language that incorporates the necessary elements of a preservation rule. We have relied to a great extent in developing our proposal on the "Elements of a Preservation Rule" presented at the 2010 Litigation Conference at Duke Law School[1] and the "Category 1 Detailed and Specific Rule Provisions" of the "initial set of drafts of the three categories of rule exemplars" presented in the Discovery Subcommittee's "Preservation/Sanctions Issues" memorandum for the Committee's April 4-5 meeting.[2] As we said in our earlier comment ("Preservation Comment"),[3] bold action is needed to fix real problems related to preservation of information in litigation; those problems exist for plaintiffs, defendants and third-parties; the problems, although real, are not readily quantifiable; and rule making solutions exist that do not violate the Rules Enabling Act.

We do not here intend to re-plow the ground covered in our earlier Preservation Comment or in our White Paper,[4] but it is worth rehearsing briefly how the current *ad hoc* patchwork of preservation obligations created by individual courts is creating burdens on litigants far beyond what anyone would consider reasonable. The current paradigm involving preservation and spoliation of electronically stored information (ESI) is undermining the "just, speedy and inexpensive" determination of actions. Cases are being settled, discontinued or not brought in the first place because the cost of preservation is too high, the risk of spoliation sanctions is too great, and the impact of ancillary litigation proceedings on discovery disputes is too debilitating. We respectfully submit that the few high profile sanctions decisions are merely the tip of the iceberg. They have forced litigants to spend millions of dollars to address an unquantifiable risk in computing systems that are designed for myriad business purposes, not litigation holds.

In short, it is important to reemphasize some key points. In today's world, technology has and will continue to dramatically change the way individual litigants and companies create, store and dispose of business and personal records. And, complying with expectations of preservation standards developing around the country is not as easy to honor as flipping a switch, buying more digital storage or distributing a litigation hold notice. Thus, meaningful rule amendments would supply the guidance necessary to help solve these increasingly serious and costly preservation problems that our members see in everyday litigation. Most seem to agree that amendments should be considered in each of the three key areas: Triggers, Scope, and Sanctions.

First, determining the time at which the duty to preserve exists (the trigger) is an almost impossible task under the current varying interpretations of what we might call the "reasonable anticipation" of litigation standard. We believe that it is necessary to consider developing a standard that better and more pragmatically articulates the events and time at which the duty to preserve information is triggered.

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[1] *Elements of a Preservation Rule,* 2010 Litigation Conference (May 10, 2010), *passim,* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/EAF7D6B2D709B78E8525770700487925/$File/E-Discovery%20Panel%2C%20Elements%20of%20a%20Preservation%20Rule.pdf?OpenElement

[2] *Preservation/Sanctions Issues Memorandum*, Committee Agenda Book, Tab 6 (April 4-5, 2011), http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/AgendaBooks.aspx.

[3] *Comment, Preservation – Moving the Paradigm* at 2-3 (November 10, 2010) , Preservation - Moving the Paradigm.

[4] *White Paper, Reshaping the Rules of Civil Procedure for the 21st Century* (May 2, 2010) Reshaping the Rules of Civil Procedure for the 21st Century

Therefore, we propose for consideration a "bright line" standard based on analysis of certain specific facts and circumstances that create the reasonable expectation of the certainty of litigation. Our "trigger" proposal is an attempt to incorporate what we consider to be the best and most workable features of the elements of such a rule proposed by the Duke panel and the "rule exemplars" in the Preservation/Sanctions Issues Memorandum.[5]

Second, a rule addressing the scope of preservation, while acknowledging the overarching considerations of reasonableness and proportionality, should provide clear and specific guidelines to parties regarding the types and sources of information subject to preservation, for example, and should more realistically align with the principle that the right to discovery is not absolute. Rather than engage in extensive efforts to litigate what information might have been missed in a litigant's preservation efforts, we suggest that the Rules should guide courts and litigants to focus instead on what information exists that is related to a claim or defense and has been preserved because of the needs and requirements of conducting the litigant's business or personal affairs. Our scope proposal also attempts to incorporate the Duke "elements" and the more specific "rule exemplars" in the Preservation/ Sanctions memorandum.[6]

Third, sanctions on a party for failing to preserve or produce relevant and material electronically stored information should be determined by intent to prevent use of the information in litigation, not by the inadvertent failure to follow some procedural step like issuing a written notice, failing to identify a key custodian, failing to identify an electronic storage location or failing to anticipate a specific request for ESI. Therefore, we have proposed a sanctions rule that permits sanctions to be imposed by a court only if information, documents, or tangible things were willfully destroyed for the purpose of preventing their use in litigation on proof of a duty to preserve information relevant and material to claims or defenses as to which no alternative source exists and which demonstrably prejudiced the party seeking sanctions. Again, we have attempted to combine the Duke "Elements" and the "rule exemplars" into a practical rule.[7]

The following three sections explain our approach and set forth the Rule text we respectfully submit for the Committee's consideration. The full text is in the Appendix.

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[5] *Op. cit. supra fn.*1 and 2. See, Gregory P. Joseph, *Electronic Discovery and Other Problems* (May 2010) , http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/EE0CC8AFE81F5D90852576480045504B/$File/Gregory%20P.%20Joseph%2C%20Electronic%20Discovery%20and%20Other%20Problems.pdf?OpenElement; John M. Barkett, *Walking the Plank, Looking Over Your Shoulder, Fearing Sharks Are in the Water: E-Discovery in Federal Litigation?* (May 2010), http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h_Library/9E884B4174EE27B6852576E900738E7B/?OpenDocument; and Thomas Y. Allman, *Preservation and Spoliation Revisited: Is it Time for Additional Rulemaking?* (April 9, 2010), http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/02E441B3AD64B2D9852576DB005D976D/$File/Thomas%20Allman%2C%20Preservation%20and%20Spoliation%20Revisited.pdf?OpenElement

[6] *Id.*

[7] *Id.*

I. Proposed Rule 26.1(a): Trigger Events and Fundamental Fairness in Discovery

We propose a version of Rule 26.1(a) which seeks to clarify the commencement, or "trigger" of the duty to preserve information. In "Preservation/Sanctions Issues", the Discovery Subcommittee suggested various alternative approaches to possible rule amendments. For example, proposals for more general language, as well as quite specific phrasing, are to be evaluated. In this proposal, we seek to strike an appropriate balance between specific and general provisions, avoiding the extremes of language which is so general as to be essentially meaningless, and that which is so specific that it risks becoming obsolete even before it is given effect. The proposed Rule 26.1(a) below aims to create a general standard for the start of the duty to preserve which is more quantifiable than current rule language (e.g., that litigation be "reasonably certain" to occur), while at the same time providing concrete guidance with specific instances defining and exemplifying what "reasonably certain" means.[8]

The first goal of the proposed Rule is to eliminate the current practice in which each district court formulates its own standards concerning what constitutes a trigger of the duty to preserve information, replacing it with a standard applicable to federal civil actions generally. Under the current procedure, a litigant is confronted with a hodgepodge of varying standards and requirements among the circuits and the district courts. As stated in our earlier Preservation Comment, the *ad hoc* patchwork of preservation obligations created by individual district courts creates burdens on litigants far beyond what could be considered reasonable.

For example, in some district courts, the duty to preserve is said to arise "...from the moment that litigation is reasonably anticipated."[9] In other courts, this duty is held to commence when the party has

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[8] **Rule 26.1. Duty to Preserve Information.**

(a) **Duty to Preserve Information.** The duty to preserve information relevant and material to civil actions and proceedings in the United States district courts applies only if the facts and circumstances below create the reasonable expectation of the certainty of litigation:

(1) Service of a complaint or other pleading; or

(2) Receipt by the party against whom the claim is made of a written notice of a cognizable claim setting out specific facts supporting the claim [or other reproducible communication indicating an intention to assert a claim]; or

(3) Service of a subpoena, CID, or similar instrument; or

(4) Retention of outside counsel, retention of an expert witness or consultant, testing of materials related to a potential claim, discussion of possible compromise of a claim or taking any other action specifically in anticipation of litigation; or

(5) Receipt of a written notice or demand to preserve information related to a specifically enumerated notice of a cognizable claim; or

(6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, or rule.

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[9] *Victor Stanley, Inc. v. Creative Pipe, Inc*., MJG-06-2662, 2010 WL 3530097 at pp. 22-23 (D. Md. Sept. 9, 2010).

notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.[10]

Compounding this problem are the differing standards for preservation existing in state courts. For example, in *Royal & Sunalliance v. Lauderdale Marine Center*,[11] the Court rejected the contention that there was a common law duty to preserve materials when litigation is merely anticipated. The court held that a duty to preserve evidence can arise by contract, statute, or by a properly served discovery request, after a lawsuit has been filed.[12] The issue of divergent state standards would not seem to be solvable by federal rule. However, the harmonization of the various considerations utilized in district courts would help stabilize the expectations of parties in federal cases involving such intense discovery.

This mélange of differing discovery rules is unlikely to enhance either the efficiency of the discovery process or provide the necessary guidance or certainty.[13] A number of courts have acknowledged the need for clarity and guidance in this area.[14] Although most of the "standards" in use, however worded, seem to boil down to some sort of "reasonable anticipation" of litigation, such "standards" are themselves less than clear and definite.[15]

Our proposed Rule 26.1(a) seeks to replace this uncertainty with a more definite, objective standard, which may be stated as follows:

> The duty to preserve information relevant and material to civil actions and proceedings in the United States district courts applies only if the facts and circumstances below create the *reasonable* expectation of the *certainty* of litigation (emphasis added).

Then our proposed rule seeks to clarify the existence of and the beginning point of a duty to preserve. It provides in the six subparts of 26.1(a) specific examples of events that would "create the reasonable expectation of the certainty of litigation" and trigger the duty to preserve. These are:

(1) Service of a complaint or other pleading; or

(2) Receipt by the party against whom the claim is made of a written notice of a cognizable claim setting out specific facts supporting the claim [or other reproducible communication indicating an intention to assert a claim]; or

(3) Service of a subpoena, CID, or similar instrument; or

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[10] *Zubulake v. UBS Warburg LLC* ("Zubulake IV"), 220 F.R.D. 212, 216 (S.D.N.Y. 2003); *see also, Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001); *Sylvestri v. General Motors Corp*., 271 F.3d 583 (4th Cir. 2001); *Pension Committee of Univ. of Montreal Pension Plan v. Banc of America LLC*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010).

[11] 877 So.2d 843 (Fla. 4th DCA 2004)

[12] 877 So. 2d at 845.

[13] S. Scheindlein and J. Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up To the Task?,* 41 B.C. L. Rev. 327, 378 (2000).

[14] See, *Rimkus Consulting Group v. Cammarata*, 2010 WL 645253 at 6 (S.D. Tex. Feb. 19, 2010); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 2010 WL 3530097 at 36-7 (D. Md. Sept. 9, 2010).

[15] *Compare*, for example, the disparate treatment of the same conduct in *Samsung v. Rambus*, 439 F. Supp.2d 524 (E.D. Va. 2006) (litigation should have been anticipated, giving rise to a duty to preserve information), with *Hynix Semiconductor, Inc. v. Rambus, Inc.*, 2006 WL 565893 (N.D. Cal. 2006) (the same conduct did not trigger a duty to preserve).

(4) Retention of outside counsel, retention of an expert witness or consultant, testing of materials related to a potential claim, discussion of possible compromise of a claim or taking any other action specifically in anticipation of certain litigation; or

(5) Receipt of a written notice or demand to preserve information related to a specifically enumerated notice of a cognizable claim; or

(6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, or rule.

Subparts (1)-(6) thus give needed definition to the task of identifying the point at which the duty to preserve is triggered[16]. As indicated in (1), the receipt of a complaint in most instances is certainly an event that triggers the commencement of a duty, so that the inquiry would ordinarily move on to determining the scope of the duty. Likewise, in (2), receipt of a claim which specifically says what the source of the complainant's dissatisfaction is, could give rise to notice that litigation is reasonably certain. Subpart (3) reflects the reality that service of a proper subpoena, production request or similar instrument can also trigger the duty to preserve.[17]

Subpart (4) reflects the reality that the perception of the need to take positive steps in anticipation of litigation, such as the retention of counsel or experts, or both, can indicate the existence at that point of the duty to preserve information.[18] Proposed Rule 26.1(a)(5) concerns the receipt of a written demand to

[16] The "Preservation/Sanctions Issues" Memorandum at 8 identifies the issue of whether the duty to preserve should be limited to electronically stored information. Certainly, as the Memorandum points out, electronic discovery has been the main focus of the current discussion. However, LCJ's proposed Rule 26.1(a) speaks in terms of "information" and is not ~~only~~ limited only to electronically stored materials. "Hard Copy" and other tangible things will continue to play an important role in litigation, thus in discovery, and we believe a new rule should cover them. For example, our proposed Rule 26.1(b)(3) states: "The duty to preserve information extends to all documents, electronically stored information, or tangible things within Rule 34(a)(1)…."

[17] However, see the discussion *infra* at 10-11, pointing out that complaints, claims, production requests and the like which are vague, unclear and indefinite should not automatically trigger the duty.

[18] A clear distinction must be drawn between the commencement of a duty to preserve information and events which initiate the attorney-client privilege and work product protection. The considerations surrounding these latter legal principles are well-known and not necessary to discuss in detail here. Any argument that a party's invocation of the privilege or the work product doctrine demonstrates that the party reasonably anticipated litigation, completely misses the mark. Attorney-client privilege and work product are favored in our law, in order to facilitate open and candid discussions between client and lawyer. In the context under discussion here, the presence of these principles can enable the lawyer to gain a more complete understanding of the information in question, which could avoid subsequent disputes among the parties. A client may consult the lawyer when litigation is "reasonably certain," (or indeed, has already started), when it is merely anticipated, or when a lawsuit may be only a remote possibility. Privilege and work product protections attach in each instance. Thus, there is no connection between privileged communications between client and lawyer, or the creation of work product-protected materials, and the trigger of a duty to preserve. By the same token, the mere discussion of possible resolution of settlement of a disagreement does not per se trigger a duty to preserve all information possibly relating to that dispute. See, e.g., *Goodman v. Praxair Services, Inc.*, 2009 U.S. Dist. LEXIS (D. Md. July 17, 2009) (...the mere existence of a dispute does not necessarily mean that parties should reasonably anticipate litigation or that the duty to preserve arises.") Many companies do risk audits associated with activities around a product launch, and implement recommendations based on that audit. It is a risk avoidance activity so it could be argued that it is done specifically in anticipation of litigation, which is the justification for the expense. Also, companies utilize outside counsel for compliance investigations, but then may take action on findings associated with the investigation which are risk avoidance actions and done specifically in anticipation of future litigation.

preserve information. Such a demand of course must provide clear indications of exactly what information is sought to be preserved. Subpart (6) makes reference to the numerous requirements for record-keeping imposed by statutes, regulations, local ordinances and the like.[19]

We have based much of our proposed Preservation Trigger rule, as well as the Scope and Sanctions provisions, on the Discovery Subcommittee's "Category 1 Detailed and Specific Rule Provisions." Of course, both the Rule 26.1 proposed by LCJ, and the Subcommittee's "Category 1" draft are significantly more specific than either current rule language or the "trigger standards" enunciated in the cases. Two points need to be made: (1) the concern that the specific requirements may become obsolete because of technological advances is overstated, and our members are convinced that a "specific" rule such as the proposed 26.1 will serve well into the foreseeable future; and (2) we believe that the framework of the LCJ proposal is a realistic and workable proposal that will supply the kind of guidance to litigants and the bar that will significantly reduce the enormous costs and burdens of the over-preservation we are experiencing today.

Our proposed Rule 26.1(a), is not in danger of becoming obsolete because of technological advances. Rather, it sets forth specific, but common-sense, criteria defining the types of events which can give rise to a duty to preserve. There is no reference to technology or terminology which may cease to be meaningful in at least the near future. Rather, subparts (a) (1)-(6) represent events of known significance, which are not likely to fall into disuse. For example, the receipt of a complaint, or a request for production, will undoubtedly continue to have legal consequences, whether the item is received on paper, by e-mail, or whatever particular method of communication future technology may make possible.

One of the Category 1 "rule exemplars" presents "reasonably certain" as an alternative to "reasonably expects" with respect to involvement in litigation. We believe that the standard of "reasonable certainty" is much more definite, and provides a clearer "bright line" by which parties (particularly businesses generating large volumes of data) can evaluate their business practices, ascertain their litigation responsibilities, and determine whether or not a preservation duty has been triggered.[20]

The "reasonable certainty" standard together with its subparts is precisely the kind of specific rule which is needed to give adequate guidance to both courts and parties. When litigants, or prospective litigants, know what their legal duty is, and when it is that such duty commences, steps can be taken to better protect the rights of all concerned. This in itself could have the salutary effect of lessening the need for court involvement in discovery disputes, saving significant court time.

These activities do not contemplate a specific claim or specific litigation, but are just an acknowledgement of the reality of the litigious environment in which companies operate.

[19] See, Memorandum, K. David, *Laws Imposing Preservation Obligations* (Dec. 15, 2010)

[20] The issues of scope of the preservation duty are dealt with in the next part of this paper. However, it is clear that many of the criteria utilized by the courts in addressing discovery disputes bear little resemblance to good business practices, and even less to the needs of daily operation of an ongoing company. Thus, given the excessive breadth and undue burden of many discovery requests, it is simply unreasonable to expect that a business with a number of different offices, and many hundreds or even thousands of employees who receive and disseminate information on a daily basis in the course of their duties, can instantaneously initiate a litigation hold for many categories of information, affecting the work of innumerable employees, and have this process begin and continue perfectly, with absolutely nothing being lost, misplaced or difficult to locate. Yet, this is what some courts have stated must occur, on pain of severe sanctions.

LCJ strongly supports a more “detailed and specific” preservation rule. A more general statement of this duty runs the inevitable risk of engendering the same multiple interpretations, and resultant ambiguity and confusion, as prevails under current practice.

A bright line standard, that there be a "reasonable certainty" of litigation, would at least reduce, if not avoid, the proliferation of costly and, in many cases unnecessary, holds in matters which do not actually result in litigation. A more definitive standard, such as the reasonable certainty of litigation, better and more pragmatically articulates the time at which the duty to preserve information is triggered. This is a standard which can be met, analyzed, and understood under most factual scenarios.

Under the current proliferation of court-enunciated standards for the initiation of the duty to preserve, the tail truly wags the dog. All too often, records retention practices which are perfectly appropriate, and suited to the business of a company, run afoul of legal demands issued, if not in a vacuum, at least with imperfect understanding of those practices, and the effect of litigation preservation requirements on that party. Not only must those in possession of information try to adjust their practices from situation to situation, and from court to court, but must try to do so under criteria which are less than models of clarity. A single, readily understandable standard, such as the one discussed above, would foster confidence in the foreseeability of consequences of actions (or lack thereof), rather than forcing individuals and companies to make decisions in the absence of clear guidelines.

The often-used statement that the duty to preserve information commences when litigation may be "reasonably anticipated"[21] can be subject to many interpretations. The reported cases are replete with different understandings of which circumstances may or may not give rise to a reasonable anticipation of litigation[22]. In today's litigious environment, virtually any action or absence of action, particularly on the part of a company or individual conducting a wide-ranging business, could possibly subject that company or individual to a lawsuit or threat of a lawsuit. In this context, a standard that litigation be "reasonably anticipated" loses meaning.

Some businesses, particularly large providers of products or services worldwide, receive many different complaint letters, demands of various types, or other communications evidencing dissatisfaction with some aspect of that provider's business on a daily basis. Undoubtedly, most if not all of these communications may give rise to some anticipation that litigation could ensue, at least pursuant to some of the case law generated over the last several years. Under these circumstances, a large business acts at its peril in ever disposing of anything, as it can anticipate having its actions scrutinized with the benefit of "20-20 hindsight."

For example, suppose that automobile manufacturer A produces 15 different "lines," or basic types of vehicles each model year, each with approximately 10,000 component parts. Suppose further that at least 10 of these 15 lines undergo design changes of greater or lesser magnitude to at least some of their components each model year. Also, suppose that a number of components may be shared by more than one vehicle line. If this manufacturer gets a single complaint of a defect in one or more components of a vehicle line produced 7 years ago, does it have to issue a litigation hold on every record of every vehicle

[21] See *Victor Stanley, Inc. v. Creative Pipe, Inc*, supra.
[22] See the cases cited in footnote 3. *But see,*, *Goodman v. Praxair Services, Inc.*, supra footnote 5; *Treppel v. Biovail Corp*., 233 F.R.D. 363, 371 (S.D.N.Y. 2006).

ever produced with those components, even if these components were installed in another line? Worse, manufacturer A is likely to receive a vague, general complaint that an entire vehicle is defective, without specifying which of the thousands of specific components is allegedly at fault. Upon which records should the manufacturer place a litigation hold?

Now, still following the hypothetical, assume that this manufacturer of millions upon millions of vehicles gets 100 complaints, warranty claims, customer complaint letters or other communications of dissatisfaction *each day*, concerning innumerable components of vehicles produced by the company over the last 30 years. How are litigation holds to be crafted and disseminated? How is such a company to know which information, even concerning older models, it can safely dispose of? Can it ever discard any information? These are precisely the type of real-life problems faced daily by businesses across the country in attempting to address their discovery obligations.

The explosion of information which can be accessed, stored and retrieved by electronic means has been well documented. The technology involved in electronic records-keeping was designed to reduce the burden on businesses, and ease the task of information management. However, the very opposite has obtained in many instances. The burden on companies, as well as individuals, in being forced to retain ever-increasing mountains of information, for fear of adverse consequences in some future lawsuit, has also been the subject of considerable commentary. A bright line standard for the starting point of a duty to preserve particular categories of information would certainly help reduce this burden, and provide more certainty to guide the business decisions of the community.

It is submitted that this is the precise reason why the standard that litigation be "reasonably certain" is much clearer and more easily understood than the "reasonably anticipated" or other criteria used by the various district courts across the country. Codification of this standard would increase predictability by (1) avoiding the confusion engendered by the multiplicity of different criteria by different courts; (2) better and more pragmatically articulating the point in time at which the duty to preserve information is triggered, thereby (3) decreasing the current exacerbated state of litigation over discovery issues, reducing the "discovery over discovery" battles. The Rule we propose would provide better guidance to courts, relieving individual judges of the burden of attempting to apply a very general, vague standard to specific situations, with understandably disparate results.

Absent a duty to preserve, of course, individuals and organizations are perfectly free to preserve or destroy information as they see fit.[23] Thus, the date of commencement of this duty to preserve is the dividing line between activities with no litigation consequences, and those activities which may give rise to consequences which are potentially disastrous in the context of subsequent lawsuits. Few would argue with the proposition that such an important, or even crucial, point in time must be defined with sufficient certainty to enable litigants or potential litigants to govern their actions appropriately. Yet, this is exactly what may not obtain under the current "balkanized" system, with each district court defining its own trigger for the duty to preserve.

This is not to argue that some trigger events are not easily recognizable, and parties will have little difficulty in these instances in determining that a duty to preserve appropriate information exists. A ready example is the actual filing of a lawsuit with accompanying discovery seeking production of documents and other information. The point being made, however, is that in many other instances the

[23] *Arthur Andersen LLP v. United States*, 544 U.S. 696, 125 S. Ct. 2129, 2135, 161 L. Ed. 2nd 1008 (2005).

duty to preserve may not be as readily identifiable. Too many times judgments made with respect to the initiation of information preservation are subject to "Monday morning quarterbacking," and actions undertaken honestly, even if erroneously, are found to be in bad faith or malicious. The principle advanced in proposed Rule 26.1(a) would provide clarity and certainty to litigants or potential litigants in their decision-making.

The several subparts of 26.1(a) set forth examples of occurrences which typically would demonstrate that litigation is reasonably certain. For example, as mentioned above, the receipt of a complaint would appear to be ample notice that litigation is not only reasonably certain, but actually in progress.[24] Likewise, the receipt of a subpoena, written request for the production of information, or specific demand letter could clearly indicate to any reasonable person that information relevant to the action needs to be preserved.

However, even such seemingly clear-cut examples may not be as definitive as they appear. For example, if a complaint is so vague, overly broad and poorly worded that it is difficult or impossible to tell what is sought to be alleged, it may not be sufficient to serve as a bright line indicator of the existence of a duty to preserve information.[25]

Likewise, receipt of a claim or demand letter which gives little clue as to the wrong alleged or the relief sought, would not be particularly informative in determining whether a duty to preserve information exists from that time forward, much less the scope or extent of that duty. Nor would receipt of a blanket request for production of information which simply asks for "all information concerning your products" be the type of notice giving rise to any sort of "reasonable certainty."

The point is that the provisions of proposed Rule 26.1(a), while attempting to be as definitive as possible, cannot and do not provide *de facto* determinations that proper notice has been given and received, triggering a duty to preserve information. "Reasonable certainty" means just that: the *certainty*, within reason, that litigation will ensue.

Other submissions have amply documented the failure of prior efforts to cure discovery abuse by enacting narrowly focused rule changes, and overemphasizing judicial management of discovery issues.[26] As pointed out in the *White Paper*, the systemic problems causing discovery abuse require a comprehensive reevaluation of, among other things, the methods provided under the rule for obtaining information through the discovery process. Rule 26(a), and specifically the provisions concerning the preservation of information, are in great need of this reevaluation as we, the American College of Trial Lawyers, and the Institute for the Advancement of the American Legal System have observed.[27]

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[25] Hopefully, the adoption of recommendations to enact enhanced fact pleading standards, as referenced in the LCJ *White Paper*, op. cit. supra n. 4 would make this eventuality much less likely to occur. The *White Paper* also addresses issues concerning the proper scope of discovery and sanctions.

[26] See, *e.g., White Paper* at 22-28.

[27] Institute for the Advancement of the American Legal System, *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System* 2 (2009) ("ACTL/IAALS Report") available at http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008

Adopting proposed Rule 26.1(a) would be a major step in the right direction. The proposed Rule provides clarity missing from the current discovery rules, and the cases arising under them. In providing guidance, the Rule would also enable those seeking to respond to discovery to make better decisions, avoiding "discovery over discovery" battles which are enormously expensive, and which cause much judicial frustration and case delay.[28] It is fair, and would reduce discovery overuse and abuse.

Our system of discovery in federal litigation needs help. Only the type of systemic restructuring contemplated in proposed Rule 26.1(a) can provide it. This proposal goes hand in hand with other proposals for reform of the federal rules outlined in the LCJ *White Paper*, including detailed suggestions regarding discovery scope, the burdens imposed by current discovery procedures, and sanctions issues. If enacted, these proposals would promote fundamental fairness, and advance the basic premise of the rules, to "...secure the just, speedy and inexpensive determination of every action and proceeding."[29]

II. Preserving Proportionality through Specificity: Reigning in the Scope of Preservation through Clear Limits and Examples

> *Reasonableness and proportionality are surely good guiding principles for a court that is considering imposing a preservation order or evaluating the sufficiency of a party's efforts at preservation after the fact. Because these concepts are highly elastic, however, they cannot be assumed to create a safe harbor for a party that is obligated to preserve evidence but is not operating under a court-imposed preservation order. Proportionality is particularly tricky in the context of preservation. It seems unlikely, for example, that a court would excuse the destruction of evidence merely because the monetary value of anticipated litigation was low.*[30]

It is widely recognized that the rise of electronic discovery has dramatically changed the litigation landscape, and in particular the nature of discovery. A process once largely accomplished by the exchange of paper and often involving only the lawyers and their clients has now grown into a highly technical endeavor ruled by technology and involving teams of people, often including computer systems specialist, third party "vendors", and other outside consultants, all of whom add significant expense to each parties' litigation costs. Beyond the traditional (albeit dramatically evolved) costs of identifying and producing relevant materials, though, a new cost driver has emerged as a major concern for litigants, namely, the preservation of electronically stored information (ESI).

The cost of preservation can be astronomical. Indeed, public testimony from one corporate representative before the Advisory Committee illustrated the dramatic realities of preservation for large organizations where the number and type of possible repositories of ESI are staggering.[31] For example,

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[28] *See*, *e.g., Pension Committee of University of Montreal Pension Plan v. Banc of America Sec. LLC*, *supra*.
[29] Rule 1, F.R.C.P.
[30] Orbit One Commc'ns, Inc. v. Numerex Corp., 271 F.R.D. 429, at n. 10 (S.D.N.Y. 2010).
[31] *Benchmark Survey on Prevailing Practices for Legal Holds in Global 1000 Companies* at 14 (GCOC 2008) (citing Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure (testimony of Chuck Beach) (January 28, 2005)) *available at*: http://www.cgoc.com/events/benchmarkwebinar. ("We operate in 200 countries around the world. We have 306 offices around the world, 70 of them in the U.S. We generate 5.2 million emails a day, about half of that in the U.S. We have 65,000 desktop computers around the world and 30,000 laptop computers. These are for employees, about half of those in the U.S. We have, in addition to the 65,000 desktops and 30,000 laptops, we have between 15,000 and 20,000 Blackberries and PDAs around the world. We have 70,000 servers worldwide, 4,000 of them in the U.S. We have 1,000 to

the representative testified that his company had no less than 95,000 computers (desktops and laptops), 1,000-2,000 networks, and 3,000 databases. All together, the company maintained approximately 800 terabytes of information (in 2005!)—*approximately 400 billion pages*.

Keeping in mind the incredible resources required to address preservation obligations across such a wide spectrum of repositories, the revelation of a recent empirical study that, on average, only one tenth of one percent (0.1%) of pages *produced* in litigation are used as exhibits at trial is troubling.[32] This disparity is all the more compelling in light of the fact that the number of pages produced is typically only a small percentage of what was originally preserved.

As discussed in our White Paper and follow up Preservation Comment, the need for a rule addressing preservation is widely acknowledged. However, in light of the costs and burdens of preservation that have drastically increased with the rise of electronic discovery, the danger of merely codifying existing preservation practices cannot be overstated. As a practical matter, the scope of preservation can no longer be tied to the current scope of discovery as codified by Rule 26(b)(1) or to the myriad interpretations of reasonableness and proportionality that have thus far proven insufficient to reduce the scope of preservation to more closely align with the true needs of the parties. Rather, a rule addressing the scope of preservation, while acknowledging the overarching considerations of reasonableness and proportionality, should provide clear and specific guidelines to parties regarding the types and sources of information subject to preservation, for example, and should more realistically align with the oft-forgotten (or perhaps ignored) principle that "the right to discovery is not absolute." [33]

A. The Current Scope of Preservation and its Consequences

Currently, the duty to preserve is extremely broad and extends to all potentially relevant documents.[34] While courts have opined that the duty to preserve "is neither absolute, nor intended to cripple organizations"[35] or, more notably, that "[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards,"[36] in practical reality "courts have tended to overlook the importance of proportionality in determining whether a party has complied with its duty to preserve evidence in a particular case."[37]

A major consequence of the broad scope of preservation is the need for significant expenditures of resources to ensure compliance with the duty to preserve, particularly in light of the specter of sanctions

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2,000 networks worldwide, about half of those in the U.S. We have 3,750 e-collaboration rooms. I assume that they're chat room type things, for people to be working on document simultaneously. About 3,000 of those are in the U.S. We have 3,000 databases; 2,000 of those in the U.S. Our total storage of information that we have now is 800 terabytes; 500 terabytes in the U.S. One terabyte equals 500 million pages. 500 terabytes equals 250 billion pages. 800 terabytes equals 400 billion pages.").

[32] Lawyers for Civil Justice et. al. *Statement on Litigation Cost Survey of Major Companies*, App. 1 at 16 (2010) *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/33A2682A2D4EF700852577190060E4B5/$File/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf?OpenElement [hereinafter, "Statement on Litigation Cost Survey"].

[33] *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc*., 244 F.R.D. 614, 619 (D. Colo. 2007).

[34] *Victor Stanley v. Creative Pipe,* Inc, 269 F.R.D. 497, 522 (D. Md. 2011).

[35] *Id.*

[36] *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010)

[37] *Victor Stanley*, 269 F.R.D. 497 at 523.

created by spoliation jurisprudence in recent years. As Judge Lee Rosenthal observed in a recent opinion: "The frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential future sanctions than on reasonable need for information."[38]

Discovery, and in particular preservation, can be very expensive. For example, according to a recent survey of litigation costs for the years 2006-2008, the average company paid an average per case discovery cost of $621,880 to $2,993,567. Companies at the high ends during the same years reported average discovery costs ranging from $2,354,868 to $9,759,900 per case.[39] As was reported in our Preservation Comment, "we are aware of one company that undertook a recent preservation project that included well over $7,000,000 in infrastructure costs associated with preservation and collection tools, not including the personnel devoted to managing those tools."[40]

Beyond the staggering expense, compliance with current preservation obligations under the common law, particularly for large organizations and corporations, requires significant expenditures of time and energy. This is dramatically illustrated in a hypothetical scenario based upon data collected in a recent survey.[41] The hypothetical assumed the need to manage litigation holds across two hundred matters involving 75 custodians over one year and projected that such a scenario would require *60,000 tasks* to send out the litigation hold notice and provide quarterly reminders.[42]

Arguments that the burdens of preservation may be effectively reduced under the current rules, particularly Rule 26(b)(2)(C) are unrealistic. Indeed, the need for herculean preservation measures was recently reinforced by the analysis of United States Magistrate Judge James C. Francis IV, in his discussion of the scope of preservation:

> Although some cases have suggested that the definition of what must be preserved should be guided by principles of "reasonableness and proportionality," *Victor Stanley, Inc. v. Creative Pipe, Inc.,* No. 06-2662, 2010 WL 3703696, at *24 (D.Md. Sept.9, 2010); *see Rimkus Consulting Group, Inc. v. Cammarata,* 688 F.Supp.2d 598, 613 (S.D.Tex.2010), this standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle.[FN10] **Until a more precise definition is created by rule, a party is well-advised to "retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches."** [FN11] *Zubulake IV,* 220 F.R.D. at 218. **In this respect, "relevance" means relevance for purposes of discovery, which is "an extremely broad concept."** *Condit v. Dunne,* 225 F.R.D. 100, 105 (S.D.N.Y.2004); *see Oppenheimer Fund. Inc. v. Sanders,* 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978); *Convolve, Inc. v. Compaq Computer Corp.,* 223 F.R.D. 162, 167 (S.D.N.Y.2004); *Melendez v. Greiner,* No. 01 Civ. 7868, 2003 WL 22434101, at *1 (S.D.N.Y. Oct.23, 2003).[43]

In light of statements such as this and the undeniable evidence of courts' willingness to impose sanctions even for negligent lapses in the effectiveness of parties' preservation obligations, litigants are forced to

[38] *Rimkus Consulting Group, Inc*., 688 F. Supp. 2d at 607.
[39] Statement on Litigation Costs Survey at 3.
[40] Preservation Comment at 19.
[41] *Benchmark Survey on Prevailing Practices for Legal Holds in Global 1000 Companies* at 22 (GCOC 2008) *available at*: http://www.cgoc.com/events/benchmarkwebinar.
[42] See, Preservation Comment at 16 for a graphic representation of the results of this hypothetical.
[43] *Orbit OneCommc'ns, Inc. v. Numerex Corp*., 271 F.R.D. 429 (S.D.N.Y. 2010).

preserve information not otherwise subject to retention under their document retention policies and which provides little or no value beyond preventing the imposition of sanctions. Put another way, outside of litigation, much of the information subject to preservation would not otherwise be maintained for business purposes. This dilemma has been called a "Hobson's choice" by the Sedona Conference:

> A producing party can face a Hobson's choice between the burden of the costs of preservation and the risk of sanctions for failing to do so. Parties engaged in ongoing, recurrent litigation can also face a serial preservation duty dilemma, in which preserved data sources that would not be kept for any other reason may become subject to preservation duties in subsequent litigation.[44]

As discussed above, a shockingly small percentage of the information preserved is actually utilized by the parties in support of their claims or defenses. Indeed, much of what is preserved is never even collected, let alone produced. This disparity will only widen as the explosion of technology continues and greater and greater volumes of ESI are created and subsequently subjected to preservation obligations resulting from litigation. The burden of such obligations results in significant injustice where "at a time when potential access to electronically stored information is virtually limitless . . . the costs and burdens associated with full discovery could be more outcome determinative, as a practical matter, than the facts and substantive law."[45] It is no wonder considering these facts, that there is widespread agreement that the current "discovery system is broken"[46] and that while the civil justice system may "not be broken" it "is in serious need of repair."[47]

B. The Right to Discovery is Not Absolute

The burden of preservation can be addressed without detracting from the rights of litigants to full disclosure. Keep in mind, however, that "full disclosure does not require the production of all witnesses or documents"[48] and that "the right to conduct discovery is not absolute."[49]

Parties are not entitled to the discovery of *all* relevant evidence. While the American legal system has long-operated with a premise of broad discovery ("Discovery has become broad to the point of being limitless."),[50] a party does not have a right to discover every piece of relevant evidence that may be available. This principle finds ample support in both the civil rules and in case law. Pursuant to Rule 26(b)(1), for example, the presumptive scope of discovery is limited to information relevant to any party's claim or defense and can be expanded only upon a showing of good cause.[51] Similarly, under Rule 26(b)(2)(C), "a party's right to obtain discovery may be constrained where the court determines that the requesting party has had ample opportunity by discovery to obtain the information sought, or

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[44] Sedona Conference, *Commentary On: Preservation, Management and Identification of Information that are Not Reasonable Accessible* 4, n. 10 (July 2008).
[45] *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.,* 244 F.R.D. 614, 620 (D. Colo. 2007).
[46] Am. College of Trial Lawyers & Inst. For the Advancement of the Am. Legal Syst., Final Report 9 (2009).
[47] *Id.* at 2.
[48] Report of the Advisory Committee on Civil Rules 4 (May 1998) *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-1998.pdf.
[49] *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 619 (D. Colo. 2007).
[50] ACTL Report at 9.
[51] See Lawyers for Civil Justice et. al., *A Prescription for Stronger Medicine: Narrow the Scope of Discovery* (September 2010), for an expanded discussion of Rule 26(b)(1).

determines that the burden or expense of the proposed discovery outweighs its likely benefit."[52] Pursuant to Rule 37(e), a court may not impose sanctions 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." Notably, neither Rule 26(b)(2)(C) nor Rule 37(e) are precluded by a showing that the evidence at issue is/was relevant to the claims of the party objecting to their application. That is to say, relevant information may be precluded from discovery upon an appropriate showing pursuant to Rule 26(b)(2)(C) and a safe harbor may be available despite the loss of relevant evidence.

Courts have also recognized that discovery is not unlimited, particularly with the rise of electronic discovery, and have specifically acknowledged the need for appropriate limitations on preservation:

> First, to hold that a corporation is under a duty to preserve all e-mail potentially relevant to any future litigation would be tantamount to holding that the corporation must preserve all email. This would be especially burdensome where the e-mail system was used primarily for routine communication rather than to convey material significant to antitrust violations. Any corporation the size of defendant (or even much smaller) is going to be frequently involved in numerous types of litigation. . . . Arguably, most e-mails, excluding purely personal communications, could fall under the umbrella of "relevant to potential future litigation. . . ." Thus, it would be necessary for a corporation to basically maintain all of its e-mail. Such a proposition is not justified. . . . With corporations spending enormous amounts of money to preserve business-related and financial data (the information that is really of the most value in determining the issues of this case), they should not be required to preserve every email message at significant additional expense.[53]

Five years later, Judge Shira Scheindlin echoed the same sentiments:

> The question is: What is the scope of the duty to preserve? 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.[54]

Most recently, Magistrate Judge Grimm recognized the applicability of limitations of proportionality to all discovery: "Fed. R. Civ. P. 26(b)(2)(C) cautions that all permissible discovery must be measured against the yardstick of proportionality." [55] And, the Civil Rules Advisory Committee has recognized the need for a shift in understanding regarding the practical realities of electronic discovery and the necessary limitations on disclosure:

> As we continue to adapt to this information age, the notion of having all information on a subject is almost unattainable. We are going to have to move increasingly to a notion that although disclosure must be fair and full, it does not necessarily require that every copy of every document that relates to a particular proposition be introduced. You need only think about the

[52] *Cache La Poudre Feeds, LLC*, 244 F.R.D. at 619-620.
[53] *Concord Boat Corp. v. Brunswick Corp.*, No. LR-C-95-781, 1997 WL 33352759, at *4 (E.D. Ark. 1997).
[54] *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (2003).
[55] *Victor Stanley v. Creative Pipe, Inc*, 269 F.R.D. 497, 523 (D. Md. 2011).

amount of material on every desktop computer in a large corporation to visualize what that entails.[56]

Despite such widespread recognition of limits to allowable discovery, including preservation, the imposition of drastic sanctions for perceived lapses in preservation obligations, particularly since the explosion of electronic discovery, reveals a schism between principles and reality. In recent years, for example, parties have been sanctioned for the failure to preserve ESI, even where the relevance of the lost information is not clear.[57] Similarly, some courts have held that sanctions must be imposed for certain ministerial failures regardless of the value of information lost, if any.[58]

Without intervention, parties' preservation obligations will only expand. Studies indicate that the volume of digital material created worldwide has grown dramatically in recent years, and shows no signs of slowing down. Within the current preservation paradigm, the growth and evolution of technology will most certainly lead to an expansion of litigants' already burdensome preservation obligations. For example, since the adoption of the electronic discovery rules in 2006 the popularity of social networking sites has exploded, resulting in a wide range of discovery considerations for litigants, including questions surrounding preservation. Steps must be taken now to establish clear and reasonable limits to the obligation of preservation, lest the substance of litigation be subsumed by the procedures.

C. Proposed Rule Regarding the Scope of Preservation

To be effective, any rule addressing preservation and in particular the scope of preservation *must* incorporate considerable specificity, including examples where practicable. A general rule based in the concepts of reasonableness and proportionality would merely serve to codify the current state of the common law and would not answer the myriad concerns expressed by this organization and many others. Echoing the sentiments of Magistrate Judge Francis discussed above, the concepts of reasonableness and proportionality, while "good guiding principles for a court that is considering imposing a preservation order or evaluating the sufficiency of a party's efforts at preservation after the fact," are "highly elastic" and "cannot be assumed to create a safe harbor for a party that is obligated to preserve evidence but is not operating under a court-imposed preservation order." Specificity, on the other hand, would provide much needed clarification to parties subject to the current common law standards of preservation, which can contract and expand dramatically based on different parties' interpretations and which often result in over-preservation of all potentially relevant evidence—an expensive and burdensome proposition in light of the volumes of data generated in today's modern age of technology. Accordingly, our proposal is based on the "Category 1 Detailed and Specific Rule Provisions" draft,[59] because only such specific proposals will address the serious problems of preservation that exist under the current common law.

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[56] Report of the Advisory Committee on Civil Rules 4 (May 1998), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-1998.pdf.

[57] See *e.g., Pinstripe Inc. v. Manpower Inc.,* N0. 07-CV-620-GKF-PJC, 2009 WL 2252131, at *4 (N.D. Okla. July 29, 2009) (imposing sanctions despite finding that "[plaintiff] has not established that [defendant] has not recovered emails at issue *or that any missing emails are relevant to [plaintiff's] claims herein*."(Emphasis added.)).

[58] *Pension Comm. of Univ. of Montreal Pension Plan v. Bank of Am. Secs., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010) (holding that a party's failure to institute a litigation hold constitutes gross negligence and imposing sanctions).

[59] "Category 1" contemplates "Preservation Proposals incorporating considerable specificity, including specifics regarding digital data that ordinarily need not be preserved, elaborated with great precision." All discussion herein of the alternative

Our proposed new Rule 26.1(b) would provide:

(b) Scope of Duty to Preserve. A person whose duty to preserve information has been triggered under Rule 26.1(a) must take reasonable and proportional steps to preserve the information as follows:

(1) ***Subject matter***. The person must preserve any information that is relevant and material to a claim or to a defense to a claim;

(2) ***Sources of information to be preserved***. The duty to preserve information extends to information in the person's possession, custody or control used in the usual course of business or conduct of affairs of the person;

(3) ***Types of information to be preserved***. The duty to preserve information extends to all documents, electronically stored information, or tangible things within Rule 34(a)(1), but a person need not preserve the following categories of electronically stored information, absent an order or agreement based on a showing by the person requesting preservation of substantial need and good cause:

(a) deleted, slack, fragmented, or other data only accessible by forensics;

(b) random access memory (RAM), temp files, or other ephemeral data that are difficult to preserve without disabling the operating system;

(c) on-line access data such as temporary internet files, history, cache, cookies, and the like;

(d) data in metadata fields that are frequently updated automatically, such as last-opened dates;

(e) information whose retrieval cannot be accomplished without substantial additional programming, or without transforming it into another form before search and retrieval can be achieved;

(f) backup data that are substantially duplicative of data that are more accessible elsewhere;

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language proposed in *Preservation/Sanctions Issues* refers to Category 1. Categories 2 and 3 are insufficient to address the problems with preservation that have been widely identified by the legal community.

(g) physically damaged media; or

(h) legacy data remaining from obsolete systems that is unintelligible on successor systems.

(4) ***Form for preserving electronically stored information***. A person under a duty to preserve information must preserve that information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. The person need not preserve the same electronically stored information in more than one form.

(5) ***Time frame for preservation of information***. The duty to preserve information is limited to information created during the two years prior to the date the duty arose.

(6) ***Number of key custodians whose information must be preserved***. The duty to preserve information is limited to information under the control of a reasonable number of key custodians of information not to exceed ten.

1. The duty to preserve should extend only to information that is relevant and material to a claim or to a defense to a claim.

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Rule 26.1 (b) Scope of Duty to Preserve. A person whose duty to preserve information has been triggered under Rule 26.1(a) must take reasonable and proportional steps to preserve the information as follows:

(1) ***Subject matter***. The person must preserve any information that is relevant and material to a claim or to a defense to a claim;

* * * * *

As discussed above, the right to discovery is not absolute. Despite this fact, the common law currently requires preservation of all potentially relevant evidence upon the trigger of a duty to preserve. This obligation imposes significant burdens on parties to litigation, particularly large organizations or corporations. As has been recently observed, "It is not an exaggeration to say that many lawyers, as well as institutional, organizational, or governmental litigants, view preservation obligations as one of the greatest contributors to the cost of litigation being disproportionately expensive in cases where ESI will play an evidentiary role."[60]

The notion of limiting the scope of discovery to information relevant to the claims and defenses at issue has garnered widespread support throughout the years.[61] Indeed, the bifurcation of discovery under Rule 26(b)(1) in 2000 was a direct response to many years of calls for limitations to the scope of discovery

[60] *Victor Stanley v. Creative Pipe, Inc, 269 F.R.D.* 497, 516 (D. Md. 2011).
[61] See Lawyers for Civil Justice et. al., *A Prescription for Stronger Medicine: Narrow the Scope of Discovery* (September 2010).

and created a presumptive scope of discovery ("party-controlled discovery") which is directly in line with the proposed scope of preservation. Because preservation is widely acknowledged as a major contributor to the cost of discovery (and where the cost of discovery is widely acknowledged as a major contributor to problems of civil litigation), the curtailment of the scope of the preservation obligation would serve the principle of proportionality to which all discovery is subject and would assist in the just, speedy, and inexpensive administration of the claims at issue, as contemplated by Rule 1.

Under the amended rule (as proposed), the scope of preservation would align with the presumptive scope of discovery under current Rule 26(b)(1) and *require only the preservation of information that is relevant and material to the claims or defenses at issue in the litigation*. This will strike the appropriate balance between the competing considerations of proportionality in discovery and full disclosure (keeping in mind that full disclosure does not require the production of all relevant evidence). It is also consistent with the concept that the information that must be preserved should be that information that is necessary to the conduct of the business or personal affairs of a litigant.

As discussed ~~above and~~ in greater detail in our Supplemental Discovery Comment,[62] the broad scope of discovery as defined by current Rule 26(b)(1), even after repeated attempts to restrict the burden to parties by the creation of tiered discovery, remains a major contributor to the overwhelming burden of electronic discovery. Accordingly, recognizing the widespread outcry for a reduction in the burden of discovery, particularly with regard to electronic discovery, and the principle of proportionality currently embodied in the first tier of "party-controlled" discovery under Rule 26(b)(1), a meaningful rule would require only the preservation of that which is currently presumptively discoverable. To tie the scope of preservation to the outer reaches of information discoverable under the broad ("limitless") scope of discovery would merely codify the current and incredibly burdensome common law standards.

Any rule incorporating only vague or general standards would likewise fail to address the concerns of the legal and business communities. Again referencing Judge Francis, the much-championed principles of reasonableness and proportionality offer little guidance to parties making difficult decisions about preservation and have thus far failed to address the burdensome nature of electronic discovery, despite their notable rise in popularity, particularly within the judiciary, when addressing questions of preservation and sanctions.

Finally, while a narrow scope of preservation controlled by a requesting party's specific demands (Alternative 3) would no doubt lessen the burden of preservation, the difficulty in adjudicating any objections to such a demand, as discussed by the Committee in footnote, presents an insurmountable barrier to the adoption of such a standard.

2. Sources of Information to be Preserved Should Extend to Information Used in the Usual Course of Business or Conduct of Affairs

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(2) ***Sources of information to be preserved.*** The duty to preserve information extends to information in the person's possession, custody or control used in the usual course of business or conduct of affairs of the person;

[62] *Id.*

* * * * *

The duty to preserve should extend only to those sources of information in a person or entity's possession, custody, and control and which are used in the usual course of business or affairs of the person. Requiring preservation of ESI not used in the usual course of business or affairs of the person absent a court order based on sufficient showing of a party's need for information outside of that scope (or agreement of the parties) is unreasonably disruptive and burdensome and, considering the limitations of Rule 26(b)(2)(C) and the underlying principle of proportionality, is not justified where such information is unlikely to be material and relevant to parties' claims or defenses.

The obligations of litigation should not be allowed to unreasonably disrupt parties' usual course of business or daily affairs. Limiting the preservation obligation to sources of information used in the usual course of business or affairs of the person would mitigate the disruption to business while at the same time maintaining the availability of information most likely to be relevant and material to the parties' claims and defenses. Such a limitation would also ensure proportionality in discovery where preservation of information not regularly utilized can result in significant burden and expense, as discussed above. One example is backup tapes used by a company for disaster recovery, which are often intended to be recycled so that the device (e.g. the actual back up tape itself) can be reused. Discontinuing a company's usual recycling schedule can result in significant and disproportional expense where, as in the case of backup tapes, purchasing additional storage media is quite expensive, and serves no active business purpose for the company.[63]

The preservation of active data which is regularly accessed in the usual course of business or a person's affairs will result in a reasonably limited burden, while at the same time maintaining the availability of that information which is most likely to be subject to a request for production and utilized in litigation. Unfounded concerns that material and relevant information might be contained only in inaccessible or otherwise difficult to access locations should not trump litigants' rights to reasonable and proportional discovery. Businesses run their information systems to remain competitive in the marketplace. Accordingly, concerns that vital information will be hidden outside of the scope of preservation are baseless where such information, in addition to being material and relevant to the claims or defenses of a party, is also likely to be material and relevant to a business' ongoing operations, and thus would be maintained as active data.

Alternative 2 contemplated in *Preservation/Sanctions Issues* at 17, adequately addresses the substantial burdens of current preservation requirements and is substantially similar to the standard we propose above. However, the "reasonably accessible" Alternative 1 proposed at 16, fails to address the substantial burden of disruption to a party's business or personal affairs and thus does not sufficiently incorporate the principle of proportionality. Information subject to preservation under the current paradigm is often retained only for litigation purposes and offers no continuing value to the company (or person). Additionally, the current cost of preservation frequently results in substantial injustice to the

[63] For example, during the testimony before the Advisory Committee discussed above, the corporation revealed that in the U.S. alone, 121,000 backup tapes were generated for disaster recovery purposes. Further, the corporation's representative opined that if ordered to "stop all of our backup tapes, just the replacement of backup tapes would cost 1.98 million dollars a month." Such a significant disruption to a party's business affairs cannot be justified. *Benchmark Survey on Prevailing Practices for Legal Holds in Global 1000 Companies* at 14 (GCOC 2008) (citing Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure (testimony of Chuck Beach) (January 28, 2005)) *available at*: http://www.cgoc.com/events/benchmarkwebinar.

preserving party where much of that information is never requested in discovery, let alone used to support a party's claim or defense.

Specific examples of information outside of the scope of preservation, whether addressed under the umbrella of "sources of information to be preserved" or "types of information to be preserved" (as in the proposed rule above) are *critical* to the success of any preservation rule. Concerns related to whether specific examples will remain sufficiently current are unfounded provided the examples incorporated into any preservation rule are merely illustrative and do not assume to identify the only sources of information properly excluded from a party's preservation obligation (an issue easily clarified in any Advisory Committee Notes).

Moreover, fears of the examples' eventual obsolescence are adequately tempered by the current language of Alternative 2 (and the proposed rule above) where such language makes clear that the identified information is merely an example of the type of information properly excluded from preservation. Taking one example, the language of Alternative 2 precludes the obligation to preserve "Random access memory (RAM) *or other ephemeral data*." Such a provision, while undoubtedly valuable to members of today's legal community will also provide significant and valuable instruction to future lawyers, litigants and judges where it provides an example of what constitutes "other ephemeral data" that is excluded from the preservation obligation. Even if the day comes when RAM is no longer a concern, litigants could make informed decisions about what constitutes "ephemeral data" by analyzing the ephemeral nature of RAM.

(3) ***Types of information to be preserved.***[64]

Absent a showing of good cause or substantial need, the duty to preserve should not extend to sources of information which are generally recognized as inaccessible or which require disproportional efforts to retrieve and produce the information thereon. Information contained on such sources is unlikely to hold evidence that is material and relevant to any party's claims or defenses. Moreover, to the extent such information does exist, it is likely more easily accessed from a less burdensome source because ESI is commonly duplicated, particularly within a large organization or corporation.

[64] The duty to preserve information extends to all documents, electronically stored information, or tangible things within Rule 34(a)(1), but a person need not preserve the following categories of electronically stored information, absent an order or agreement based on a showing by the person requesting preservation of substantial need and good cause:

(a) deleted, slack, fragmented, or other data only accessible by forensics;
(b) random access memory (RAM), temp files, or other ephemeral data that are difficult to preserve without disabling the operating system;
(c) on-line access data such as temporary internet files, history, cache, cookies, and the like;
(d) data in metadata fields that are frequently updated automatically, such as last-opened dates;
(e) information whose retrieval cannot be accomplished without substantial additional programming, or without transforming it into another form before search and retrieval can be achieved;
(f) backup data that are substantially duplicative of data that are more accessible elsewhere;
(g) physically damaged media; or
(h) legacy data remaining from obsolete systems that is unintelligible on successor systems.

Specific examples of the types of information not subject to preservation provide much needed clarification on the proper scope of the preservation obligation. While no rule can successfully identify all types of electronic information which may be subject to a particular standard, specific examples of the types of information outside of the scope of preservation provide concrete benchmarks from which practitioners may draw in making decisions about the scope of preservation in each case. Parties may also use these benchmarks in discussions with opposing counsel when seeking agreement regarding what information will or will not be subject to discovery and thus preservation.

The types of information excluded from preservation pursuant to this rule have previously been recognized by the Seventh Circuit as "not generally discoverable in most cases" in those cases participating in its Electronic Discovery Pilot Program.[65] A report on the success of the program after the first phase indicated that the rule identifying the excluded information types "appeared to be promoting some of its goals" and that it was "achieving some of its objectives."[66]

As discussed above specific examples of information outside the presumptive scope of preservation are critical to the success of any rule and can be appropriately included within a discussion of either sources or types of information excluded by the rule.

(4) ***Form for preserving electronically stored information***.

* * * * *

A person under a duty to preserve information must preserve that information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. The person need not preserve the same electronically stored information in more than one form.

* * * * *

Information subject to preservation should be maintained for possible production in a form or forms in which the information is ordinarily maintained or in a reasonably usable form or forms but need not be maintained in more than one format. This rule corresponds to the production requirements of Fed. R. Civ. P. 34(b). As with Rule 34, this proposed rule acknowledges the diversity of information likely subject to a party's preservation obligation and seeks to maintain flexibility and to avoid any unnecessary cost or burden potentially associated with a mandated format of preservation. For example, pursuant to this rule, a party who changes a relevant computer system during the preservation period would not be required to maintain legacy data on the old hardware and software (and bear that expense) so long as it is exported from the legacy system in a reasonably usable format.

[65] See Seventh Circuit Electronic Discovery Pilot Program Statement of Purpose and Preparation of Principles, Principle 2.04 (Scope of Preservation), at 14 (Oct. 1, 2009) (identifying the following sources of ESI as "generally not discoverable in most cases" : (1) "deleted," "slack," "fragmented," or "unallocated hard drives; (2) random access memory (RAM) or other ephemeral data; (30 on-line access data such as temporary internet files, history, cache, cookies, etc.; data in metadata filed that are frequently updated automatically, such as last-opened dates; and (5) backup data that is substantially duplicative of data that is more accessible elsewhere; (6) other forms o ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.).

[66] Seventh Circuit Electronic Discovery Pilot Program Report on Phase One 64 (May 2010).

The proposed rule above substantially conforms to the illustrative language provided in Category 1 of *Preservation/Sanctions Issues* at 21 and should be incorporated into any preservation rule.

> **(5)** ***Time frame for preservation of information.***
>
> * * * * *
>
> The duty to preserve information is limited to information created during the two years prior to the date the duty arose.
>
> * * * * *

The time frame for preservation of information should be limited to a reasonable but specifically defined time prior to the date the duty arose. Such a limitation would recognize the significant burden of preservation under the common law and instead impose an obligation that is more proportional to the likely value of any information subject to the preservation duty. Presumptive limitations to the scope of discovery have proven successful in the past. Currently, the civil rules impose bright-line limitations on the number of interrogatories and depositions, for example. These limitations have been in place for almost 18 years and have not caused substantial hardship to litigants or prevented parties from establishing their claims. On the contrary, as expressed in *Reshaping the Rules*, "parties have adapted to the presumptive limits" and, "more importantly, they have contributed to at least some streamlining of federal litigation."[67] A proposed temporal limitation would likewise serve the interests of justice by essentially codifying the principle of proportionality and in turn reducing the unreasonable burdens of preservation currently imposed under the common law.

As has been established, the percentage of information actually utilized in litigation versus that which is preserved creates an unfair burden on parties in possession of large volumes of ESI, usually large organizations and corporations. Where the volume of information created and saved in the modern age, even when limited for purposes of discovery by subject matter and type, can nonetheless grow to incredible volumes, a bright-line time limitation will serve to bring parties' preservation obligations more closely in line with the value of the issues at stake in the case without requiring time consuming and costly negotiations or motions. Additionally, a bright line will prevent the inevitable over-preservation of material commonly undertaken to mitigate the threat of sanctions absent more specific guidelines.

Limiting the temporal scope of preservation would also reduce other costs of discovery, including the costs of collection and review. Specifically, limiting the scope of preservation to a reasonable time period will serve to reduce the costs of collections where the information at issue is more likely to be maintained on active systems. A temporal limit on preservation will also serve to limit the volume of ESI subject to processing, which in turn will reduce the volume subject to review—both expensive components of current electronic discovery practices.

Alternative 1 considered in *Preservation/Sanctions Issues* at 21-22 best addresses the problems with preservation that exist in today's common law paradigm as discussed above. Alternative 2 at 22-23 is less desirable and would do less to relieve the burden of preservation. The primary problem with Alternative 2 is the need for parties to determine, even prior to the filing of litigation, the likely claims

[67] White Paper at 39.

and defenses in the case before efforts to preserve information can begin. Often, at the time of the trigger of the duty to preserve, there is insufficient information upon which to base such a decision. Such uncertainly would inevitably support a continuation of the current practices of over-preservation where parties unable to definitively rule out the possibility of certain claims and/or defenses (particularly those with longer statutes of limitations) would no doubt err on the side of caution, lest sanctions be imposed for the loss of information.

A direct temporal tie to the statute of limitations of any claim may also encourage plaintiffs to assert claims, at least initially, that are subject to longer statutes of limitations and which would therefore require greater preservation efforts. While such claims might later be withdrawn, the "damage" would already be done.

Finally, Alternative 3 at 24-26 is simply too general and would not serve the purpose of lessening the burden of preservation where "reasonableness" provides too vague a limitation on the scope of preservation and would not substantially change current preservation practices under the common law.

(6) ***Number of key custodians whose information must be preserved.***

* * * * *

The duty to preserve information is limited to information under the control of a reasonable number of key custodians of information not to exceed ten.

* * * * *

Limiting the number of custodians subject to preservation will, like the temporal limit, serve to bring parties' preservation obligations within reasonable bounds. Included in the limitation are both human (custodial) and non-human (informational) sources. The limitation as proposed corresponds to the current limitations on the number of depositions—limitations which, despite initial reticence, are now well-accepted by litigants.

Limitations on the number of custodians subject to preservation addresses problems of cost associated with preservation of duplicative ESI where employees of a corporation working within the same unit or division are likely to maintain substantially identical (if not exactly identical) versions of the same ESI. Thus, it is reasonable to identify a single person through whom key communications were filtered as the single custodian for subject matter related to that group and to thereby obtain the most relevant materials while reducing duplication (and thus cost).

Attempts to limit the number of custodians using principles of reasonableness and proportionality, absent bright lines, will do little to address the problem of the burdens of preservation. As discussed above, vague standards offer little comfort or direction to litigants struggling to make the "right" decisions about preservation, particularly with the ever-present specter of sanctions that has grown with the rise of electronic discovery.

Again, recalling the success of prior limitations to the scope of discovery currently present in the civil rules, a limitation on the number of custodians will serve the interests of justice by ensuring

proportionality in the scope of preservation and by reducing the related burdens of collection, processing, and review.

III. Sanctions Should be Based on Willful Destruction of Relevant and Material Information that Results in Demonstrable Prejudice

1. The Problem

As we have said on many prior occasions, the current paradigm involving preservation and spoliation of ESI is undermining the legal system. Cases are being settled, discontinued or not brought in the first place because the cost of preservation is too high, the risk of spoliation sanctions is too great, and the impact of ancillary discovery disputes is too debilitating.[68] A particularly troubling abuse is the trend of using spoliation as a litigation tactic.[69] Parties, seeking to gain a litigation advantage, "have an incentive to request some electronic documents not because they are relevant but rather in hopes of securing a large sanction when the opposing party cannot produce them."[70] In light of this new avenue of abuse, it is not surprising that the emergence of electronic discovery "has coincided with a substantial growth in allegations that spoliation has occurred"[71] and that e-discovery sanction cases are at an all-time high.[72] We understand that the numbers of sanctions cases may not be overwhelming, but the most recent opinion sends legions of lawyers and technicians scurrying to adjust their clients' preservation practices to the new lowest common denominator.

Sanctions litigation creates new conflicts for both the courts and parties involved. In pursuing these sanctions, parties often engage in "discovery about the discovery," wasting valuable resources searching for the "absence of evidence," rather than on the materials relevant to the suit.[73] Courts then in turn must expend judicial resources to entertain these motions, often investigating whether parties preserved all of the document based facts in existence.[74] Parties attempting to avoid costly and time-consuming sanctions litigation spend huge amounts of money and valuable resources over-preserving digital information that may have little or no use in the litigation.[75] Indeed, as Judge Rosenthal noted recently: "Spoliation of evidence--particularly of electronically stored information--has assumed a level of importance in litigation that raises grave concerns."[76]

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[68] Preservation Comment at 2.
[69] *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ELECTRONIC DISCOVERY: A VIEW FROM THE FRONT LINES 21 (2008), *available at* http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf
[70] John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 563 (2010).
[71] Thomas Y. Allman, *Preservation Rulemaking After the 2010 Litigation Conference*, 11 Sedona Conf. J. 217, 221 (2010).
[72] Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations by the Numbers*, 60 DUKE L.J. 789, 790-96 (2010) ("there were more e-discovery sanction cases in 2009 than in all years prior to 2005 combined").
[73] *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 3, at 21.
[74] In *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, No. 05 Civ. 9016, 2010 WL 184312, at *32 (S.D.N.Y. Jan. 15, 2010), Judge Scheindlin articulated that sanctions motions related to electronic discovery are "very, very time consuming, distracting, and expensive for the parties and the court" and that they "divert court time from other important duties -- namely deciding cases on the merits." *Id*. at *32, n. 56.
[75] *See* Memorandum from Hon. Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Procedure, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of and Procedure 6 (Dec. 6, 2010) (on file with author) ("Uncertainties as to the duty to preserve and fear of spoliation sanctions have generated great concern in large organizations that process huge volumes of information . . . Many voices have proclaimed that uncertainty leads to vastly expensive over-preservation.").
[76] *Rimkus, supra* n.38 at 607.

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Corporations which are accused of deficiencies in electronic production are typically presumed guilty until they can somehow manage to prove themselves innocent. The burden is squarely placed upon the producing party to show that all requested items have been supplied. Even in large businesses, with thousands of employees sending and receiving electronic messages and other data on an hourly basis, absolute perfection is often required in attempts to preserve, recover and produce millions upon millions of documents. Performance short of perfection is treated as gross negligence or bad faith, resulting in crippling sanctions. Sanctions proceedings under the present rule sometimes seem to resemble the courtroom scene in which the Queen of Hearts asks: "Now then, are you ready for your sentence?" To which Alice replies:" But there has to be a verdict first." The Queen shouts: "Sentence first! Verdict afterwards."

Draconian discovery requirements are unreasonable, and often do not comport with the operating needs of the company involved, or with good business practices. The LCJ recommendations have the aim of restoring a measure of balance and fairness to the discovery procedures under the federal rules. Predictability, rationality, and a lessening of the burden on the courts should result from their adoption.

Moreover, federal courts across the nation have inconsistently imposed sanctions for alleged electronic discovery violations, whether decided pursuant to the federal rules or the court's inherent powers to impose spoliation sanctions. Specifically, courts have varied views with regard to the level of culpability required to impose sanctions.[77]

This inconsistent treatment persists notwithstanding the existence of the current FRCP 37(e), which attempts to provide some protection against sanctions for ESI "lost as a result of the routine, good-faith operation of an electronic information system."

However, Rule 37(e) falls short of creating a "safe harbor" from sanctions for several reasons.[78] First, "routine, good-faith operation of an electronic information system" is too vague to provide clear guidance as to a party's preservation obligations. Second, Rule 37(e) does not make clear what exceptional circumstances might warrant the imposition of sanctions even when data are lost through the routine, good-faith operation of a computer system. Third, the Rule does not require courts to consider the degree of prejudice resulting from a party's failure to preserve electronic data in determining whether sanctions are warranted. Thus parties abuse the system by making overly broad discovery requests to expose imperfections in preservation efforts as a basis for sanctions that have no valid connection to the merits of the case. Finally, courts have rarely applied the rule in practice."[79]

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[77] *Compare Penalty Kick Mgmt. Ltd. v. Coca Cola Co*., 318 F.3d 1284, 1294 (11th Cir. 2003) ("[A]n adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith.'") (citation omitted), *and Rimkus*, 688 F. Supp 2d at 614 ("the severe sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of 'bad faith'"), *with Pension Comm.*, 2010 U.S. Dist. LEXIS 4546, 2010 WL 184312, at *105 (adverse jury instruction appropriate when defendants demonstrated that plaintiffs conducted discovery in a grossly negligent manner).

[78] See, Beisner, supra note 70, at 591-2

[79] Willoughby, *supra* note 77, at 826. The authors conducted a comprehensive review of federal written opinions prior to January 1, 2010 involving motions for sanctions. Willoughby, *supra* note 77, at 789. In concluding that courts have not shown a propensity to apply the safe harbor provision of 37(e), the authors observed that:

> One court cited the rule at the outset of a case, warning the parties to be cautious in relying on its protection. In another case, the court cited the rule but deferred consideration of sanctions. In twelve decisions, the court denied the safe harbor, with many courts finding that the post-notice destruction of evidence was not within the protection

As we said in our White Paper and Preservation Comment, it is imperative to enact uniform rules that directly address preservation, clearly define "the type of conduct subject to spoliation sanctions," and focus the inquiry on what information is available, rather than what is missing. With these goals in mind, we propose the following amendments to the Rules regarding sanctions.

2. The Solution - Proposed Rules Regarding Sanctions

Rule 26.1. Duty to Preserve Information.

* * * * *

(e) Remedies for failure to preserve. The sole remedy for failure to preserve information is under Rule 37(e).

* * * * *

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(e) Sanctions for failure to preserve information. Absent willful destruction for the purpose of preventing the use of information in litigation, a court may not impose sanctions on a party for failing to preserve or produce relevant and material information. The determination of the applicability of this rule to sanctions must be made by the court. The party seeking sanctions bears the burden of proving the following:

(1) a willful breach of the duty to preserve information has occurred;
(2) as a result of that breach, the party seeking sanctions has been denied access to specified information, documents or tangible things;
(3) the party seeking sanctions has been demonstrably prejudiced;
(4) no alternative source exists for the specified information, documents or tangible things;
(5) the specified electronically stored information, documents or tangible things would be relevant and material to the claim or defense of the party seeking sanctions;
(6) the party seeking sanctions promptly sought relief in court after it became aware or should have become aware of the breach of duty.

Proposed rule 37(e) clearly defines the type of conduct subject to sanctions: the "willful destruction" of electronically stored information. Explicitly providing that sanctions are not appropriate in the absence of willful conduct provides much-needed clarity regarding what is and what is not sanctionable conduct. Focusing on the culpability of the actor ensures both that "bad actors" will not benefit from their malfeasance and that "well intentioned parties" will "not be caught up in the attempts by some to cast an

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of Rule 37(e). Among these cases, three involved findings of intentional conduct, one involved gross negligence, one involved recklessness, and two involved a failure by the responding party to show good faith. Several courts have also held Rule 37(e) inapplicable to bar sanctions awarded under the court's inherent power or in cases in which Rule 37 did not govern the conduct giving rise to the sanction. Courts have also declined to apply the rule for other reasons, including that the opposing party had not sought sanctions.
Willoughby, *supra* note 77, at 826-27 (quotations and citations omitted).

ever-expanding spoliation net."[80] Because electronic information is unique and so easily "created, transmitted and stored," it becomes a challenge for companies to locate all information that may need to be preserved and "given the large volumes of computer records that now exist in some companies, it may be virtually impossible to preserve all potentially relevant electronic data."[81]

The requirement of a willful state of mind is further "consistent with the nature of sanctions for failure to preserve documents," which "generally contain some presumption that the lost information would have helped the requesting party or hurt whoever has failed to produce it."[82] However, without a finding of willful conduct, "that presumption is unwarranted,"[83] as it is not rational to presume that a party who negligently destroys requested information did so because the information was detrimental to their case and helpful to the requesting party. On the other hand, logic does lead to the conclusion that parties who intentionally destroy requested discovery do so because the information is harmful to their claims or defenses. In any event, as discussed below, pursuant to our proposed rule, the party seeking sanctions must prove that they have been "demonstrably prejudiced" by the absence of the requested discovery.

In addition to focusing on the culpability of the actor, the proposed rule emphasizes that "the prejudice to an opponent" and "the usefulness of the evidence that was actually preserved" must be considered when deciding the appropriateness of sanctions. This emphasis, found in sections (3), (4), and (5), aims to preclude a case from being won or lost based on "an alleged lack of preservation of evidence with little or questionable relevance."[84] Factor four, which requires that the party seeking sanctions prove that "no alternative source exists for the specified information, documents or tangible things," refocuses the sanctions analysis on the available information rather than what might be missing. Beginning with an analysis of "the volume and type of existing evidence" will discourage courts from "starting from the premise that it is necessary to examine the actions taken to prevent the alleged destruction of missing evidence."[85] As previously outlined, engaging in the latter often results in courts conducting "ancillary litigation over whether enough was done to prevent the loss" of electronically stored information.[86]

3. Consideration of Alternative Rule Exemplars

a. The Need for Specific Rules

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As we said above, we urge the Committee to develop "specific and detailed" preservation rules and, therefore, our focus is on the Category 1 proposals in the *Preservation/Sanctions Issues* memorandum. Therefore, only illustrative rule 37(e) in "Category 1" would in our view come close to adequately addressing sanctions in the digital era.

We believe that any amendments considered must directly address preservation, which in turn will provide guidance regarding the imposition of sanctions. Accordingly, the rule-amendment in Category

[80] White Paper ***at*** *39*.
[81] Beisner, *supra* note 70 at 590.
[82] Richard M. Esenberg, *A Modest Proposal for Human Limitations on Cyberdiscovery* 18 (Marquette Univ. Law Sch., Working Paper Series, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1735122.
[83] *Id*. at 18.
[84] Preservation Comment at18.
[85] Preservation Comment at 10 and 5.
[86] Preservation Comment at 5.

3 is insufficient as it omits two (triggers and scope) of the three major components of a workable preservation rule in favor of relying "entirely on a 'back end'" sanctions rule While enacting a "back end" sanctions rule may not create the same "significant rulemaking challenges for a rule that attempts overtly and solely to regulate pre-litigation preservation", —we believe the Duke Conference and subsequent writings have gone a long way toward ameliorating such concerns.[87]

We also conclude that the more general Category 2 rule will not adequately address the uncertain and inconsistent imposition of sanctions for the same reasons that we believe a rule addressing preservation and in particular the scope of preservation *must* incorporate considerable specificity.[88]

b. Category 1 Exemplar.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(e) Sanctions for failure to preserve [electronically stored] {discoverable} information. A court may not impose sanctions [under these rules] on a party for failure to preserve information if the party has complied with Rule 26.1. The following rules apply to a request for sanctions for violation of Rule 26.1:

(1) ***Burden of proof***. The party seeking sanctions has the burden of proving that:
- **(A)** a violation of Rule 26.1 has occurred;
- **(B)** as a result of that violation, the party seeking sanctions has been denied access to specified electronically stored information, [documents or tangible things];
- **(C)** no alternative source exists for the specified electronically stored information [documents or tangible things];
- **(D)** the specified electronically stored information [documents or tangible things] would be [relevant under Rule 26(b)(1)] {relevant under Evidence Rule 401} [material] to the claim or defense of the party seeking sanctions;
- **(E)** the party seeking sanctions promptly sought relief in court after it became aware of the violation of Rule 26.1.

(2) ***Selection of sanction***. If the party seeking sanctions makes the showings specified in Rule 37(e)(1), the following rules apply to selection of a sanction:
- **(A)** the court may employ any sanction listed in Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information, but must select the least severe sanction necessary to redress [undo the harm caused by] the violation of Rule 26.1;
- **(B)** *[Alternative 1]* the court may not impose a sanction listed in Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information unless the

[87] See generally, Joseph, Barkett, and Allman, all *supra* note 5; White Paper; and Preservation Comment.
[88] See discussion *supra* at Part II. C.

party seeking sanctions establishes that the party to be sanctioned violated Rule 26.1 [negligently] {due to gross negligence} [willfully] {in bad faith} [intending to prevent use of the lost information as evidence];

(B) *[Alternative 2]* the court must not impose a sanction if the party to be sanctioned establishes that it acted in good faith in relation to the violation of Rule 26.1;

(C) the court must be guided by proportionality, making the sanction proportional to the harm caused to the party seeking sanctions and the level of culpability of the party to be sanctioned.

Section 37(e)(1)(A)-(E), sets forth many of the requirements on which we based our proposal as both proposals seek to incorporate the "elements of a preservation rule" tendered at the Duke Conference.[89] Specifically requiring that the party seeking sanctions show that no alternative source exists for the specified ESI and that the specified ESI would be relevant, focuses the sanctions analysis on the relevancy of the information and facilitates courts deciding cases on their merits. These provisions prevent courts and parties from spending time and resources investigating potentially missing discovery, rather than first examining if the missing information is relevant or if it is relevant, if alternative sources of this information exist. As recognized in a footnote to this illustrative rule, "to the extent alternative sources of information (or sources of alternative information) exist, there seems little reason for the sorts of sanctions listed in Rule 37(b)(2)(A)."

The two alternatives set forth in Section 37(e)(2)(B) of the Category 2 exemplar, which discuss the level of culpability required for the imposition of sanctions, will simply not solve the problem. Alternative 1 would authorize a court to impose sanctions on a party who violated the preservation rule on a "sliding scale": "negligently," "due to gross negligence," "willfully," and "in bad faith." Alternative 2 places the burden on the party to be sanctioned to prove that "it acted in good faith in relation to the violation" of the preservation rule.

A sanctions rule should clearly set out the principle that sanctions will be imposed only for destruction of relevant and material information for the purpose of preventing its use in litigation which demonstrably prejudiced the party seeking sanctions. If not, certain parties will not be deterred from using spoliation as a litigation tactic. For example, parties attempting to exploit the nature of electronic discovery will still seek overly-broad discovery, with the hope that the responding party will inadvertently lose or fail to preserve a requested item~~,~~ or already have done so, a scenario that "'is almost a certainty in litigation involving electronic discovery.' "[90] Imposing sanctions for different levels of culpability, particularly negligence, fails to account for the unique challenges, and sometimes impossibility, of preserving electronically stored information. Furthermore, Alternative 2's requirement that the party facing sanctions show that it acted in good faith puts the burden on the wrong party and requires that the preserving party demonstrate that in hindsight it did everything just right. Thus, the inconsistent imposition of sanctions will persist.

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[89] *Elements, op.cit. supra,* n. 1

[90] *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 3, at 21 (quoting Arthur L. Smith, *Responding to the "E-Discovery Alarm,"* ABA BUSINESS LAW TODAY, Sept./Oct. 2007, at 27-29).

CONCLUSION

LCJ and the many defense trial lawyers and corporate counsel who contributed to the preparation of these comments hope that they will assist the Rules Committee in developing meaningful preservation amendments in each of the three key areas: Triggers, Scope, and Sanctions. Meaningful rule amendments in these areas would supply the guidance necessary to help solve the increasingly serious and costly preservation problems that our members see in everyday litigation.

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Respectfully submitted,

Lawyers for Civil Justice

DRAFT PRESERVATION RULES

N.B.: Material in [brackets] is Comment or alternative language.

Rule 26.1. Duty to Preserve Information.

(a) **Duty to Preserve Information.** The duty to preserve information relevant and material to civil actions and proceedings in the United States district courts applies only if the facts and circumstances below create the reasonable expectation of the certainty of litigation:

(1) Service of a complaint or other pleading; or

(2) Receipt by the party against whom the claim is made of a written notice of a cognizable claim setting out specific facts supporting the claim [or other reproducible communication indicating an intention to assert a claim]; or [**Comment**: control group test can be explained in Note.]

(3) Service of a subpoena, CID, or similar instrument; or

(4) Retention of outside counsel, retention of an expert witness or consultant, testing of materials related to a potential claim, discussion of possible compromise of a claim or taking any other action specifically in anticipation of litigation; or

(5) Receipt of a written notice or demand to preserve information related to a specifically enumerated notice of a cognizable claim; or

(6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, or rule.

(b) **Scope of Duty to Preserve.** A person whose duty to preserve information has been triggered under Rule 26.1(a) must take reasonable and proportional steps to preserve the information as follows:

(1) ***Subject matter***. The person must preserve any information that is relevant and material to a claim or to a defense to a claim;

(2) ***Sources of information to be preserved***. The duty to preserve information extends to information in the person's possession, custody or control used in the usual course of business or conduct of affairs of the person;

(3) ***Types of information to be preserved***. The duty to preserve information extends to all documents, electronically stored information, or tangible things within Rule 34(a)(1), but a person need not preserve the following categories of electronically stored information, absent a showing by the person requesting preservation of substantial need and good cause:

(a) deleted, slack, fragmented, or other data only accessible by forensics;

(b) random access memory (RAM), temp files, or other ephemeral data that are difficult to preserve without disabling the operating system;

(c) on-line access data such as temporary internet files, history, cache, cookies, and the like;

(d) data in metadata fields that are frequently updated automatically, such as last-opened dates;

(e) information whose retrieval cannot be accomplished without substantial additional programming, or without transforming it into another form before search and retrieval can be achieved;

(f) backup data that are substantially duplicative of data that are more accessible elsewhere;

(g) physically damaged media; or

(h) legacy data remaining from obsolete systems that is unintelligible on successor systems.

(4) ***Form for preserving electronically stored information***. A person under a duty to preserve information must preserve that information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. The person need not preserve the same electronically stored information in more than one form; [**Comment**: Note would include discussion of reasonably usable form or forms, including types of ESI that would be preserved and in what format.]

(5) ***Time frame for preservation of information***. The duty to preserve information is limited to information created during the two years prior to the date the duty arose.

(6) ***Number of key custodians whose information must be preserved***. The duty to preserve information is limited to information under the control of a reasonable number of key custodians of information not to exceed ten.

(c) **Ongoing duty.** Information subject to preservation must continue to be preserved unless the person subject to the duty to preserve notifies the person requesting preservation (to the extent that a request was submitted) in writing that it is not engaged in ongoing preservation. Later generated information is not subject to preservation except pursuant to written request, court order or agreement. This Rule does not supersede any applicable statute or regulation.

(d) **Compliance.** Activities undertaken in compliance with the duty to preserve information are protected from disclosure and discovery under Rules 26(b)(3)(A) and (B). [**Comment**: Does this need to be made more explicit?]

(e) **Remedies for failure to preserve.** The sole remedy for failure to preserve information is under Rule 37(e).

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(e) Sanctions for failure to preserve information. Absent willful destruction for the purpose of preventing the use of information in litigation, a court may not impose sanctions on a party for failing to preserve or produce relevant and material information. The determination of the applicability of this rule to sanctions must be made by the court. The party seeking sanctions bears the burden of proving the following:

(1) a willful breach of the duty to preserve information has occurred;

(2) as a result of that breach, the party seeking sanctions has been denied access to specified information, documents or tangible things;

(3) the party seeking sanctions has been demonstrably prejudiced;

(4) no alternative source exists for the specified information, documents or tangible things;

(5) the specified electronically stored information, documents or tangible things would be relevant and material to the claim or defense of the party seeking sanctions;

(6) the party seeking sanctions promptly sought relief in court after it became aware or should have become aware of the breach of duty.