

New Corporate Survey Illustrates Burdens Of Document Preservation And Benefits Of Proposed Reform



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With the conclusion of the Federal Rules Advisory Committee’s public comment period last month, the first leg of what *The Legal Pulse* has [described](#) as the long and winding road to reform of the federal rules for discovery is now over. We have at last reached the “end of the beginning,” to borrow Churchill’s phrase.

Comments contributed by the [business](#) community conveyed the consistent message that the current rules encourage over-preserving documents, a practice that ill-serves the interests of justice. The committee record is replete with anecdotes demonstrating this point, but it had lacked aggregate data until recently. Enter a [Preservation Costs Survey](#) conducted by Professor William Hubbard (my former contemporary at the [University of Chicago](#) Law School who has returned to teach there now), which thoroughly documents systematic over-preservation of electronic materials and its profound costs. A summary of Professor Hubbard’s findings is available [here](#).

Business Defendants’ Stories. In its comment to the Advisory Committee, 307,000-employee [General Electric GE -0.73%](#) noted that in order to preserve information contained in emails alone, it is “faced with a universe of approximately 4,770 terabytes” of data. (Just 10 terabytes, by comparison, is roughly enough storage for the Library of Congress’s entire book collection.) The comment cited one example from 2011 in an instance where litigation had not yet been filed. GE incurred “fees of \$5.4 million to collect and preserve 3.8 million documents totaling 16 million pages.” The company also reported it must spend over \$100,000 a year to simply maintain those documents.

[Pfizer PFE -0.03%](#) explained in its comment that it currently has over 300 active legal holds in place impacting over 80,000 employees. It preserves 5 billion emails, and expects that amount to grow by 1 billion per year. [Allstate ALL -0.09%](#) reported that in the past 5 years it has spent over \$17 million on e-discovery costs alone.

Ford provided several case studies in its comment, including one arising from a suit in Montana. There, Ford’s legal staff invested more than 800 hours and paid outside lawyers \$2 million to produce nine computer hard drives containing 360 gigabytes of documents and 1,200 witness transcripts from past lawsuits. The plaintiff was unsatisfied with Ford’s production and filed a

motion for sanctions, which the court denied. In the end, the plaintiff sought to introduce *one* document from the massive trove it requested from Ford.

The Survey's Findings. Although compelling, these anecdotes offer only a small sampling of the problem. Professor Hubbard's study, initiated in 2011 and released on February 18, collected detailed questionnaires from 128 companies from various industries. The companies ranged in size from 18 employees to over 100,000. The only other similar survey available, done by the RAND Institute in 2012, conducted interviews with only 8 companies.



English: Laird Bell Law Quadrangle at The University of Chicago Law School at dusk. (Photo credit: Wikipedia)

The experiences and concerns reflected in the Preservation Costs Survey echo those that companies like GE and Ford related in their comments. Companies reported that uncertainty in the rules and case law related to discovery and sanctions induces over-preserving documents. Professor Hubbard demonstrates that a miniscule percentage of litigation matters—a mere 5%—accounts for more than *half* of all litigation holds companies issue. Also, plaintiffs collect only a fraction of the data preserved, and use even less of it in litigation. For that reason, Professor Hubbard states, Federal Rules changes that reduce over-preservation would neither impact the litigation process nor undermine the interests of justice. He also concludes that even if the rules

changes have only modest effects, such as a 3% reduction in preservation costs, that still amounts to over \$1 million per company per year.

The Road Ahead. Because the vast majority of discoverable documents are now in electronic, rather than paper form, one might think that preservation and production are now less burdensome. But in fact digitalization has led to the creation (and storage) of ever more documents. Also, the available modes of communication continue to proliferate: e-mail, text messaging, chats, message boards, etc., all of which can be done on numerous electronic devices.

Courts' proclivity to broadly interpret what is discoverable under the Federal Rules, and the fear of being sanctioned for failure to preserve or produce documents under the current rules' vague standards, has impelled businesses to issue wide-ranging document "holds" on their employees. The resulting amount of information that gets preserved—and the costs to preserve it—stagger the imagination.

The *Preservation Costs Survey* offers a compelling, evidence-based case for not only adopting the amendments the Judicial Conference's Committee on Rules of Practice & Procedure has proposed, but also for strengthening them. The Advisory Committee will now contemplate the several thousand comments it received and then offer its recommendations to the Standing Committee.

If the plural of anecdote is data, it's helpful to the empirical case for e-discovery reform that we now have plenty of both. WLF will remain engaged as the process continues throughout this year.