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# Preservation Costs Survey

## *Summary of Findings*

prepared for

Civil Justice Reform Group

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# Executive Summary

This Summary of Findings provides a brief overview of the main findings of the Preservation Costs Survey. A Final Report detailing the results of this study has been submitted with this Summary of Findings as a public comment.

**The Preservation Costs Survey collected data from 128 companies, including companies of all sizes and from a broad range of industries.** Data includes survey responses as well as interviews and detailed, case-level information on litigation hold activity from a subset of companies. No prior work has collected quantitative costs data from a cross-section of companies.

**The Survey generated conservative estimates of costs that are solely attributable to preservation obligations.** Among the largest companies in the sample, the estimated costs exceed \$40 million per company per year.

**Both larger and smaller companies report similar preservation burdens.** Over 79 percent of respondents reported a “great extent” or “moderate extent” of preservation burdens. Further, smaller companies are far less likely than large companies to have specialized resources to address the risks and costs of preservation. Thus, smaller companies are more vulnerable to legal uncertainty in this area, including the possibility of sanctions with severe effects on their ability to do business.

**A small percentage of litigation matters generate a disproportionate share of preservation costs.** Five percent of litigation matters account for more than half of all litigation hold notices issued.

**Companies report “overpreserving” to protect against serious uncertainty in the case law.** Rules amendments that better define the standards for sanctions for failure to preserve could address this phenomenon.

**Only a fraction of preserved data is ever collected.** On average across all survey respondents, slightly less than half of all preserved data is ever collected, processed, and reviewed. Even less is produced or eventually used in litigation.

**Rule changes with even modest effects would generate meaningful cost savings.** For the largest companies in the sample, a 3 percent reduction only in employee time spent on litigation holds would equate to savings of over \$1 million per company per year.

**Because so little preserved data is ever used, reducing overpreservation in a reasoned fashion is unlikely to have much, if any, negative impact on the production and use of data in litigation.** Rules amendments that rein in overpreservation will likely have essentially no adverse impact on discovery and the ultimate resolution of litigation.

# **Background**

## ***Motivation***

The Preservation Costs Survey (“Survey”) is the first, and to date only, systematic effort to measure the extent and costs of preservation activity across a broad sample of companies.

The Survey was commissioned in 2011 by the Civil Justice Reform Group (“CJRG”), a group of in-house counsel at large, U.S. corporations.

CJRG has not participated in the design of the survey questions; it does not have access to survey responses or data collected in the course of the survey; nor was CJRG involved in the analysis of the data.

## ***Reporting of Results***

The Final Report on the Preservation Costs Survey, which provides a detailed and comprehensive set of findings, has been submitted to the Rules Committee with this Summary of Findings as a public comment.

Results from the pilot phase of the Survey were presented in the Preliminary Report on the Preservation Costs Survey submitted to the Discovery Subcommittee for the September 9, 2011 Dallas mini-conference. All findings in the Preliminary Report are consistent with the complete results now available in the Final Report.

## ***Methodology***

Three types of data were collected:

- (1) Company-specific data quantifying the number of litigation matters (cases and matters involving anticipated litigation, investigations, and subpoenas) and litigation hold notices issued for each matter, as well as statistics on the volume of data involved in the different stages of litigation (preservation, collection, processing, review, and production).
- (2) Detailed interviews with companies on their experiences with preservation.
- (3) Survey questionnaires to gather quantitative and qualitative information about companies and their experiences with preservation.

Responses were provided based on assurances of strict anonymity and data security.

The sample in this Survey does not necessarily represent a random sample of companies. Quantitative data collected from the companies does constitute, however, truly representative samples of within-company litigation activity. This is the first study to collect such comprehensive data on cases within companies.

**Sample Size**

Detailed questionnaires were completed by 128 companies. Extensive interviews were conducted with 13 companies. Detailed, matter-level data on litigation holds were provided by 6 companies. By way of comparison, the most thorough study of preservation costs to date, a 2012 study by the RAND Institute for Civil Justice, conducted interviews with 8 companies and was not able to collect quantitative data.

**Company Characteristics**

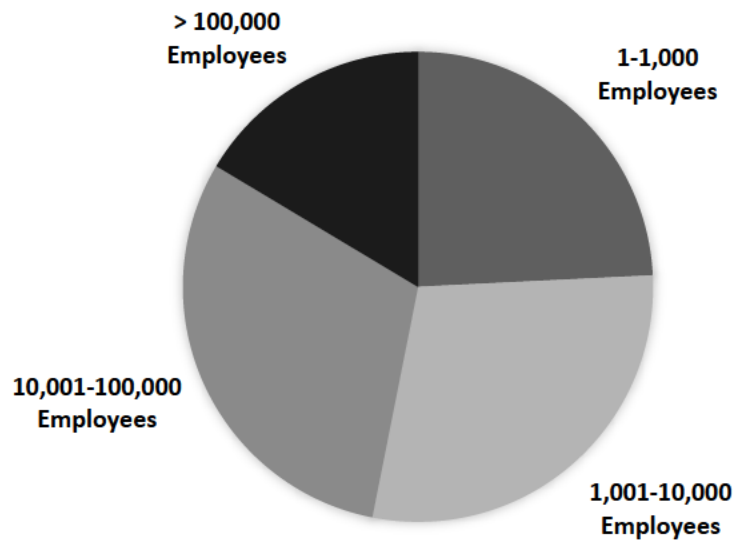
The sample included a broad cross-section of industries:

Automobiles & Parts	Food & Beverage	Chemicals	Banks
Industrial Goods & Services	Financial Services	Health Care	Media
Personal & Household Goods	Insurance	Oil & Gas	Retail
Travel & Leisure	Conglomerate	Technology	Other
Telecommunications	Utilities		

The most heavily represented categories included health care, insurance, technology, and conglomerate, each with at least 10 respondents.

The number employed worldwide by each company ranges from 18 to over 100,000. Companies of all sizes within this range were well represented. See Figure 1.

FIGURE 1: RESPONDENT SIZE DISTRIBUTION



**Litigation Profile of Companies**

The volume of litigation varies widely across these companies; the number of suits currently active varies from 0 to over 10,000. These figures do not include asbestos-related cases, which were specifically excluded from the sample.

Correspondingly, there is great variation in the number of litigation holds that companies report to have active, from 0 to over 10,000.

The number of in-house litigation attorneys ranges from 0 to over 50. Most in-house litigation teams are small, and 17 out of the 128 companies have no in-house litigation counsel at all.

Means and medians for these variables are presented in Table 1.

TABLE 1: DESCRIPTIVE STATISTICS

	Mean	Median
Total Employees	43,454	8,000
U.S. Employees	21,678	6,071
In-house litigation attorneys	12	4
Active suits	1,399	33
Current employment suits	32	5
Open matters with holds	686	33
Open employment matters with holds	80	5

# Results

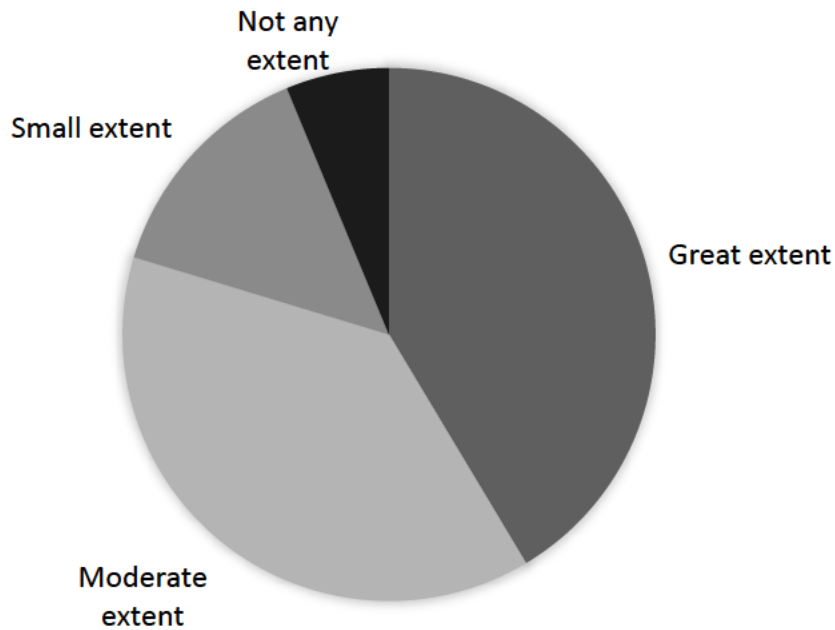
## **Companies Report Significant Preservation Burdens**

Preservation problems arise frequently: Over 79 percent of respondents reported a “great extent” or “moderate extent” of preservation burdens. See Figure 2.

Information from interviews and analysis of detailed litigation hold data reveals that, for many companies, preservation-related expenses amount to millions of dollars per year. These costs include the cost of implementing automated systems for managing litigation holds and preserving data, maintaining legal and IT personnel devoted full-time to preservation activities, and the time of employees throughout the company spent to complying with litigation hold notices and other preservation-related activities. For the largest companies in the sample, these costs amount to more than \$40 million per company per year.

In interviews, respondents often report that preservation costs “have become an important factor in whether to litigate or settle.”

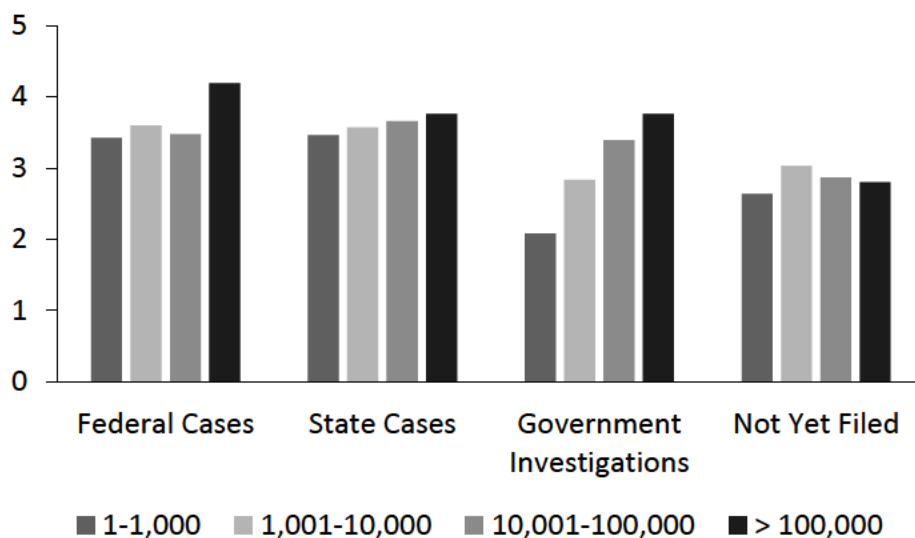
FIGURE 2: OVERALL EXTENT OF BURDENS FROM PRESERVATION



**Federal cases, complex cases, and cases involving individuals rather than businesses are the greatest sources of concern**

As Figure 3 indicates, Federal cases are a major concern for companies of all sizes. For the largest companies, government investigations are also a particular concern.

FIGURE 3: PRESERVATION-RELATED PROBLEMS BY MATTER TYPE  
(5 = “VERY OFTEN” AND 1 = “VERY RARELY”)



Survey respondents report that large, complex cases generate preservation-related problems more frequently than smaller, routine matters. Notably, asymmetric litigation—i.e., litigation between individuals and businesses—generates significantly more preservation burdens than litigation between businesses. (These differences are statistically significant.) See Table 2.

TABLE 2: PRESERVATION-RELATED PROBLEMS BY LITIGANT TYPE  
(5 = “VERY OFTEN” AND 1 = “VERY RARELY”)

Configuration of Parties	Average Rating
Large, complex matters vs. individuals	3.81
Large, complex matters vs. businesses	3.45
Small, routine matters vs. individuals	2.99
Small, routine matters vs. businesses	2.59

**Preservation of email and hard drives is the most common source of problems**

Among data types, email and hard drives are the most common sources of preservation difficulties across companies of all sizes. (The differences between email and hard drives, on the one hand, and other data types, on the other hand, is statistically significant.) See Table 3.

TABLE 3: INCIDENCE OF PRESERVATION-RELATED PROBLEMS BY DATA TYPE  
(5 = “VERY OFTEN” AND 1 = “VERY RARELY”)

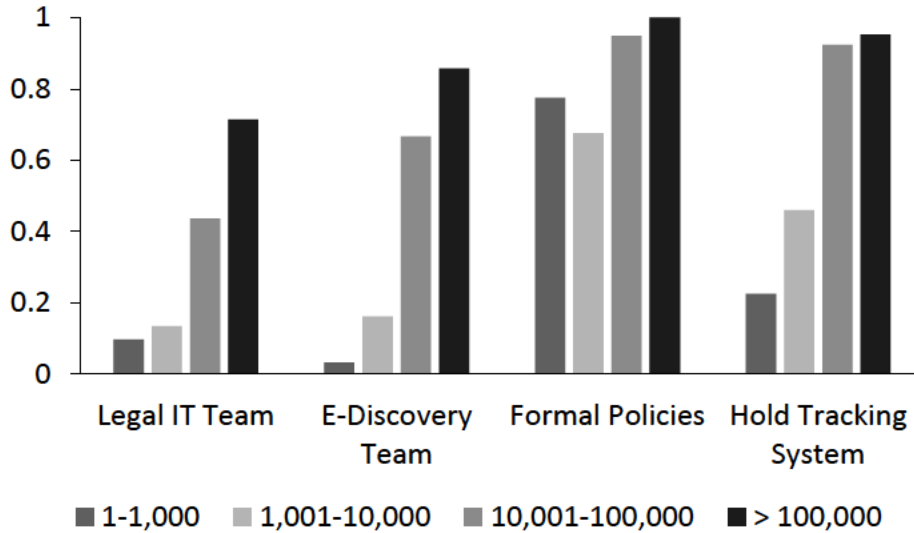
Preservation Type	Average Rating
Email	4.05
Hard drives	3.93
Legacy data	3.68
Databases	3.59
Central servers	3.43
Paper documents	3.39
Backup tapes	3.33
Collaboration tools	3.28



**Smaller companies are more vulnerable to preservation costs and risks**

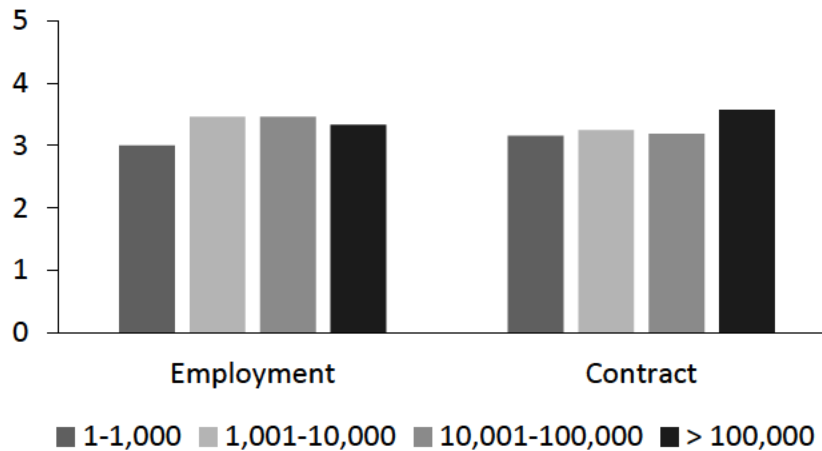
Smaller companies are less likely to have specialized resources, such as in-house legal IT and e-discovery specialists and automated litigation hold tracking software. (These differences are statistically significant.) See Figure 4.

FIGURE 4: SHARE REPORTING PRESERVATION PRACTICES, BY COMPANY SIZE



Larger and smaller companies report similar experiences and preservation burdens for types of litigation that are most comparable across company sizes, such as employment and contract. See Figure 5.

FIGURE 5: REPORTED FREQUENCY OF PRESERVATION PROBLEMS BY COMPANY SIZE (5 = "VERY OFTEN" AND 1 = "VERY RARELY")



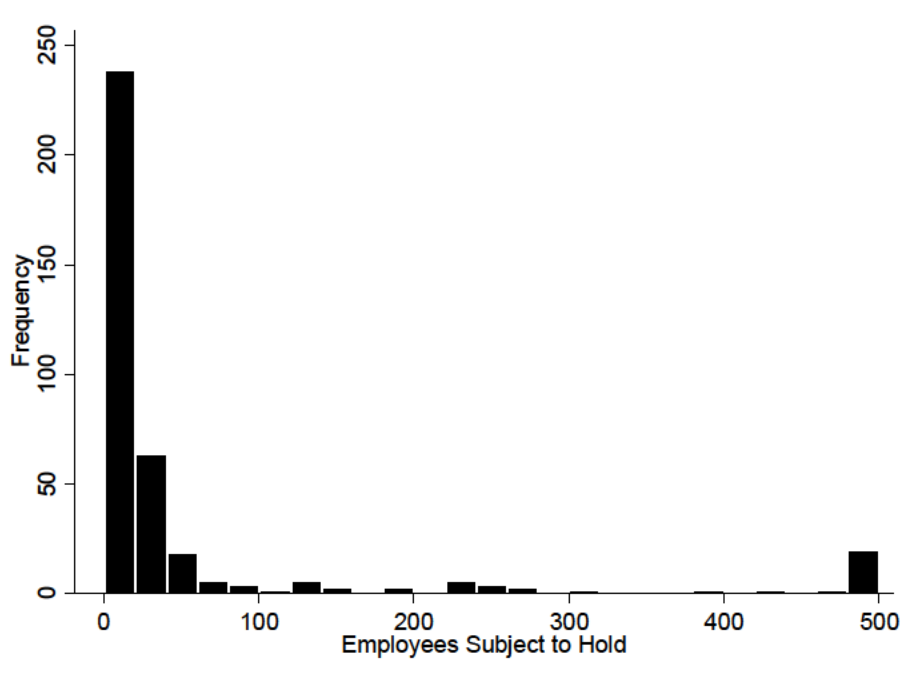
**A small share of litigation matters generates a majority of the litigation hold burden**

A histogram showing the distribution of employees on hold per litigation matter from a representative company appears as Figure 6.

In most litigation matters, preservation scope is not broad. Well over half of the matters had twenty holds or fewer. (These matters are represented by the leftmost vertical bar in Figure 6.)

Yet, there is also a fraction of matters with huge numbers of litigation holds. Five percent of the matters account for more than half of all holds issued.

FIGURE 6: DISTRIBUTION OF HOLDS PER MATTER, SAMPLE COMPANY



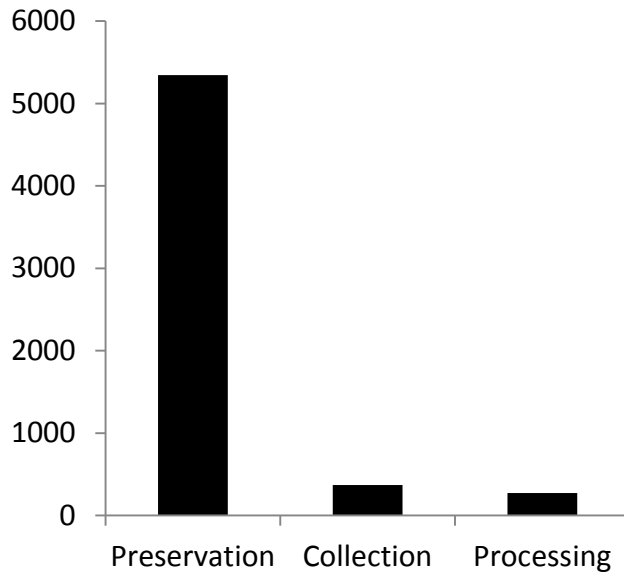
**Less than half of preserved data is ever collected and processed**

Companies repeatedly expressed in interviews that they are deliberately “overinclusive” or “overpreserve” to protect themselves against the great uncertainty associated with the current law of preservation.

On average across all companies, slightly less than half of all preserved data is ever collected, processed, and reviewed.

For larger companies, the drop-off from preservation to collection, processing, and review is even steeper. Figure 7 illustrates the number of employees subject to litigation holds, compared to the number from whom data was collected and processed in discovery, for one large company that provided detailed data.

FIGURE 7: NUMBER OF CUSTODIANS SUBJECT TO PRESERVATION, COLLECTION, AND PROCESSING, SAMPLE COMPANY



### ***Weighing costs and benefits of proposed amendments***

The costs imposed by the uncertainty created by the current environment of conflicting legal precedents is a repeated refrain from companies in this Survey. By addressing the standards for sanctions for failure to preserve, the proposed amendments to Rule 37 focus on an issue of expressed need.

A benefit of the proposed amendments is a likely modest but meaningful reduction in preservation costs. Greater stability and less uncertainty in the law of preservation will have its most direct effect on the phenomenon of “overpreservation.”

Given that preservation costs exceed \$40 million per year for the largest companies in the Survey, a modest reduction in preservation cost would constitute substantial savings. For these companies, a three percent reduction in these costs, for example, would save over \$1 million per company per year.

Because smaller companies have fewer specialized resources devoted to preservation, they are more vulnerable to costs and risks in this area. While technology promises to offer partial solutions to the burdens of preservation, small companies often are unable to avail themselves of sophisticated, but very expensive, technologies. Rules amendments, however, stand to benefit companies of all sizes.

Further, the results above suggest that the proposed amendments would have essentially no detrimental effects on discovery and the ultimate resolution of litigation. A modest scaling back in “overpreservation” is unlikely to have any impact on the production and use of data in litigation. At most, only half of all currently preserved data is ever collected, processed, and reviewed, and an even smaller fraction is ever produced, let alone used in litigation.