

William H.J. Hubbard
Assistant Professor of Law

February 18, 2014

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Public Hearing and Comments on the Proposed Civil Rules Amendments

Dear Committee Members:

Thank you for providing me the opportunity to testify at the public hearing of February 7, 2014. With this letter, I submit the Preservation Costs Survey Final Report, which details the methodology, data, and findings of the Preservation Costs Survey, which I described briefly at the February 7 hearing.

Please note that as it was not completed at the time of the hearing, the Final Report contains additional data and analysis not reported then. With this letter, I also submit an updated version of the Preservation Costs Survey Summary of Findings distributed at the hearing.

In addition, I would like to take this opportunity to supplement my testimony. Based on feedback from Committee members at the hearing, it appears that my answers to two of the Committee's questions were confusing. I will briefly clarify my answers here. The first question, as I understood it, was:

To what extent will the preservation costs described in my study be affected by the proposed amendments to Rule 37?

As I stated at the public hearing, I believe that the proposed amendments are a modest change from the status quo and should have modest effects. What I could not provide at the hearing, because the Final Report on the Preservation Costs Survey was not complete, was a *numerical* estimate of potential cost savings from the proposed amendments affecting preservation. Analysis in the Final Report (found in Part 4.1), however, begins to quantify the costs of preservation.

While the potential effect of the proposed amendments on preservation costs will be modest in relative terms, I must be clear that the costs of preservation are high, and thus even a small percentage change in preservation costs amounts to an economically meaningful increment in savings. My Final Report *conservatively* estimates that, for the largest companies in the Survey, preservation obligations are solely responsible for more than \$40 million in costs per company per year. Thus, for

these companies, even a **modest, 3 percent reduction in preservation costs amounts to at least \$1 million in cost savings per company per year.**

Further, as I explained at the hearing, there is little downside to these cost savings. While the volume of preservation activity should decrease modestly, there should be negligible detrimental impact on the volume of potentially relevant data that is preserved. This is because of the current practice of preserving far more data than will ever be collected, processed, and reviewed.

The second question, as I understood it, was:

To what extent does the Preservation Costs Survey distinguish between data that is held for preservation purposes and data that is retained for other obligations or in the normal course of business?

This question, and my response at the hearing, drew a distinction between two types of activity that lead to data being kept by a company: (1) *preservation activity*, which responds to the duty to preserve relevant data in reasonable anticipation of litigation, and (2) *retention activity*, which responds to regulatory document retention requirements and to internally created document retention policies that reflect the business needs for the data.

To be clear: **All of the costs, burdens, and data volumes reported in the Preservation Costs Survey are attributable to preservation obligations.** All of the costs reported in the Preservation Costs Survey are due to the duty to preserve that is the subject of the proposed amendments to Rule 37(e). This is why I stated at the hearing that my data cannot allow one to compare the costs or data volumes associated with retention obligations with the costs or data volumes associated with preservation obligations. I only measure the latter.

As I stated at the hearing, data *retention* practices mean that much important data will be kept regardless of *preservation* obligations. Of course, there is a large margin by which the scope of preservation extends beyond the scope of retention. As I noted at the hearing, reducing the preservation of inessential data along this margin will generate meaningful cost savings.

Thank you for your time and consideration. I have great admiration for the immense effort the Committee has put into its task to improve the Federal Rules.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. Hubbard', written in a cursive style.

William H.J. Hubbard