COMMENT

LAWYERS FOR CIVIL JUSTICE

DRI – THE VOICE OF THE DEFENSE BAR

FEDERATION OF DEFENSE & CORPORATE COUNSEL

INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL

To

THE CIVIL RULES ADVISORY COMMITTEE

March 15, 2012

NOW IS THE TIME FOR MEANINGFUL NEW STANDARDS GOVERNING

DISCOVERY, PRESERVATION, AND COST ALLOCATION

I. Introduction.

A. Amend the Rules to Keep Pace with the Litigation and Information Explosions.

There are many useful proposals in the Reports of the Advisory Committee's Discovery and Duke Subcommittees for consideration at the March 22-23 meeting.[1] However, the real need will be for the full Civil Rules Advisory Committee to cut through the myriad, complex proposals that amount to mere tweaking of the existing Rules and to focus on developing an interrelated package of broad-based, but straightforward amendments to the Federal Rules of Civil Procedure governing discovery and preservation.

In this Comment Lawyers for Civil Justice respectfully submits that the solutions to the problems of excessive and unnecessary discovery and over-preservation of information currently plaguing civil litigation, lie in preparation of amendments that (1) reevaluate the premise and focus of discovery, especially e-discovery,[2] (2) develop clear preservation standards without creating new pre-litigation preservation duties inconsistent with federal authority and state common law,[3] and (3) deter runaway litigation costs by reasonable cost allocation rules premised on economic incentives.[4] LCJ and many others have advocated such bold, forward-looking reforms as a way

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[1] *See* Agenda Materials for March 2012 Advisory Rules Committee Meeting, Tabs 5 and 9.

[2] LCJ Comment, *A Prescription for Stronger Medicine: Narrow the Scope of Discovery*, (2010)("*Stronger Medicine*"); Richard Esenberg, *A Modest Proposal for Human Limitations on Cyberdiscovery*, (2011), forthcoming, U. FLA. LAW REV. (2012).

[3] LCJ Comment, *Preservation: Moving the Paradigm*, (2010)("*Preservation Paradigm*"); William H. J. Hubbard, *Written Statement*, U.S. House, Judiciary Comm., Constitution Subcomm. Hearing "The Costs and Burdens of Discovery" (2011).

[4] Ronald J. Allen, *How to Think About Errors, Costs, and Their Allocation*; Martin H. Redish, *Pleading, Discovery and the Federal Rules: Exploring the Foundations of Modern Procedure* (both forthcoming, U. FLA. L. REV. (2012); Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*.

to help achieve the consistency, uniformity, and predictability that is necessary to reduce the costs and burdens of modern litigation.[5]

Failing to adjust the Federal Rules to meet the demands of 21st century litigation will have significant, negative implications today and for our future. The law and litigation affect primary behavior. Inefficient and unpredictable litigation is a tax on productive behavior and an inefficient system can have significant adverse impacts, including sanctioning appropriate behavior and providing incentives for inappropriate behavior.[6] These perverse effects weaken our economy and social structure, and the global competitiveness of American companies.[7]

Unfortunately, the Federal Rules have not kept pace with either the information or the litigation explosions and, as a result, federal courts are now failing in key ways to ensure the just, speedy and cost-effective determination of every action. This is largely because the many well intentioned earlier rule amendments have tinkered at the edges of necessary change and the sporadic, inconsistent holdings of various courts that have resulted from them, taken together, have failed to achieve the meaningful, systemic changes to inter-related rules that are now more necessary than ever before.

The difficult task of crafting preservation/sanctions rules that would actually help solve some of today's problems, in which the Rules Committee is now engaged, is symptomatic of a deeper underlying problem: the 1938 Rules are simply out of date and the myriad variety of "tweaks" to those rules over the last thirty years have been unable to keep pace with the skyrocketing increase in the costs, burdens, and complexity of modern litigation. This Committee should not fall victim to the siren song of yet another round of incremental tweaks that will be ignored by bench and bar.

These problems are most apparent in the context of discovery of electronically stored information (ESI), where "[t]he lack of a national standard, or even a consensus among courts in different jurisdictions about what standards should govern preservation/spoliation issues, appears

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[5] LCJ, et al., *White Paper: Reshaping the Rules of Civil Procedure for the 21st Century* (May 2, 2010). (The "*White Paper*" presented to the Duke Conference, was developed with broad input from about 100 corporate and defense counsel); *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*, (2009)("*ACTL-IAALS Report*"); *see also* Redish & McNamara, supra note 4; Allen, supra note 4; Hubbard, *supra* note 3; *cf.* E. Donald Elliott, *Managerial Judging and the Evolution of Procedure* (1986) 53 U. Chi. L. Rev. 306 (1986) ("We should think about civil procedure less from the perspective of powers granted to judges and more from the perspective of incentives created for lawyers and clients.").

[6] *See e.g.*, Ronald J. Allen & Alan E. Guy, *Conley as a Special Case of Twombly and Iqbal: Exploring the Intersection of Evidence and Procedure and the Nature of Rules*, 115 PENN. ST. L. REV. 1 (2010).

[7] *See e.g.*, John Langbein, *Cultural Chauvinism in Comparative Law*, 5 Cardozo J. Int'l. & Comp. L.41, 48 (1997)("Americans operate a system of justice whose excesses make it a laughing stock to the rest of the civilized world. Our system is truth-defeating, expensive, and capricious – a lawyers' tax on the productive sector."); Daniel Troy, *Seize the Opportunity - Reduce The Costs And Burdens Of Our Current Justice System*, THE METROPOLITAN CORPORATE COUNSEL (2010); Francis H. Buckley, *et al*., *The American Illness: Essays on the Rule of Law*, (forthcoming, The Yale Univ. Press, 2012)(Essays detailing the adverse impact of the American civil justice system on global competitiveness).

to have exacerbated [the issue and is] one of the greatest contributors to the cost of litigation being disproportionally expensive in cases where ESI will play an evidentiary role."[8]

Diverse stakeholders in the federal civil litigation process long have advocated systemic reform of the Federal Rules. But the necessary reforms cannot be left to *ad hoc* holdings by various courts deciding cases before them, because those courts face practical and institutional limitations that prevent them from making necessary systemic changes. Broad-based rule reform is essential to help achieve the consistency, uniformity, and predictability that is necessary to reduce the costs and burdens of modern litigation.

As has been clear for many years, more than just tinkering at the edges of the Rules is needed, and fundamental reforms are in order to improve the administration of justice in the federal courts.[9] The LCJ White Paper was written on the heels of two significant U.S. Supreme Court decisions (*Twombly and Iqbal*) that discussed the institutional limitations of federal courts to effectively manage discovery and other procedural issues on a case-by-case basis and recognized that the present system was failing in key ways to ensure the just, speedy and cost-effective determination of every action.[10]

LCJ's White Paper also built upon the broad, fundamental recommendations for systemic reform in the Report of the Joint Project of The American College of Trial Lawyers and the University of Denver IAALS and its findings that the civil justice system "is in serious need of repair." The Report noted that in many jurisdictions, the system takes too long and costs too much. It also asserted that some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test. Meanwhile, other cases of questionable merit are settled rather than tried because it costs too much to litigate them.[11]

These significant problems impact not only the litigants in a specific case but also the courts applying the rules and the attorneys interpreting those rules and counseling their clients. They also impact members of society who need a consistent system of civil justice that provides meaningful, accessible and affordable dispute resolution as well as a certain method with which to govern their own conduct in advance of and in avoidance of litigation and ancillary disputes.[12]

B. <u>The 2006 Amendments: An Incomplete Solution.</u>

The fact that there is still such ardent debate over the rules on discovery, preservation, sanctions, and cost allocation demonstrates that "half measures" have not and will not sufficiently reduce

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[8] *Victor Stanley v. Creative Pipe*, 269 F.R.D. 497, 516 (D. Md. Sept. 9, 2010).

[9] *See, e.g.,* LCJ, *White Paper, supra* note 5; *ACTL-IAALS Report, supra* note 5; Redish & McNamara, *supra* note 4; Allen, *supra* note 4, (both forthcoming, U. FLA. L. REV. (2012); Hubbard, supra note 3; *cf.* E. Donald Elliott, *Managerial Judging and the Evolution of Procedure* (1986) ("We should think about civil procedure less from the perspective of powers granted to judges and more from the perspective of incentives created for lawyer and clients.").

[10] *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

[11] *ACTL-IAALS Report, supra* note 5; Rebecca Love Kourlis, Hearing Statement. U.S. House, Judiciary Comm., Constitution Subcomm. Hearing "The Costs and Burdens of Discovery" (2011).

[12] *See generally*, Buckley, *et al.*, *supra* note 7.

the costs and burdens of litigation. The preservation/sanctions debate plays out those difficulties in microcosm.

During consideration of the 2006 e-discovery amendments LCJ resisted all efforts to amend the Rules to impose a pre-commencement preservation duty on litigants, while recognizing that a variety of common and statutory laws and regulations prohibited intentional, prejudicial spoliation of information. Ultimately, a carefully crafted, post commencement, sanctions limitation, applicable only to e-discovery, was adopted to protect "routine, good faith" destruction of information due to the operation of electronic information systems.[13] Soon thereafter, however, some judges opposed to the creation of *any* "safe harbor" rewrote the common law inherent authority spoliation standards to circumvent the new rule. Under the judges' approach, which held that any negligence in carrying out a duty to preserve is sanctionable,[14] the new rule was rendered "toothless" and characterized as such.[15] Thus, in *MajorTours v. Colorel*, the court held that the rule requires that "any automatic deletion feature should be turned off and a litigation hold imposed once litigation can be reasonably anticipated."[16]

C. Impact of the Duke and Dallas Conferences.

In view of the cases establishing rigid pre-litigation affirmative preservation duties, litigants began to seek reasonable regulation of these new duties. And, following the 2010 Duke Conference on Civil Litigation, the Civil Rules Advisory Committee (CRAC) chose to explore the possibility of developing rules governing preservation of information in litigation. At the 2011 Dallas Mini Conference, many, including Professor William Hubbard of the University of Chicago Law School, expressed the view that pre-litigation preservation duties based on the mere "anticipation" of litigation have undermined the value and consistency of the common law duty "not to spoliate."[17]

Most recently, however, efforts by the Advisory Committee's Discovery Subcommittee to develop preservation rules have shown that any attempt to create an effective federal preservation rule governing pre-litigation conduct would be extremely difficult to write and even more difficult to implement unless related, crucial issues concerning limitations on scope of preservation were also addressed. In short, the Duke and Dallas conferences brought to the forefront the view that it is essential to go back to basic principles and comprehensively

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[13] Fed. Rule Civ. P. 37(f), renumbered as Rule 37(e) in 2007; *see* Thomas Y. Allman, *Inadvertent Spoliation of ESI After the 2006 Amendments: The Impact of Rule 37(e)*, 3 FED. CTS. L. REV. 26, (2009).

[14] *See Zubulake* IV, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) for the proposition that "[o]nce a duty to preserve attaches, any destruction of documents is, at a minimum, negligent.").

[15] *Panel Discussion, Sanctions in Electronic Discovery Cases: Views from the Judges,* 78 FORDHAM L. REV.1, 30-31 (October, 2009)("what this toothless thing [Rule 37(e) really tells you is the flip side of a safe harbor. It says if you don't put in [an effective] litigation hold when you should there's going to be no excuse if you lose information.")(Scheindlin, J).

[16] *Major Tours v. Colorel*, 2009 WL 2413631, at *4 (D. N.J. Aug. 4, 2009). *See also Pension Committee of Univ. of Montreal Pension Plan v. Banc of America*, 685 F. Supp. 2d 456, (S.D.N.Y. 2010).

[17] *See* Hubbard *supra note 3;* Letter of Robert D. Owen to Hon. David Campbell, Oct. 24, 2011. ("Owen Letter").

reconsider the interrelationship of preservation, discovery, and cost allocation as well as amendments to the Rules governing each of those areas.

D. What Is the Solution?

As LCJ and the organized defense bar – The Federation of Defense & Corporate Counsel, The International Association of Defense Counsel and DRI – The Voice of the Defense Bar - said in the comment *The Time Is Now: The Urgent Need for Discovery Rule Reforms*: "(1) bold action is needed now to fix real problems related to the preservation of information and scope of discovery in civil litigation; (2) these problems exist for plaintiffs, defendants and third parties; (3) preservation and discovery costs and the non-quantifiable burdens they impose, are inappropriately disproportionate to the amounts in controversy; and (4) practical rule making solutions exist that are demonstrably within the rule makers' authority under the Rules Enabling Act."

A fundamental reexamination of the approach to the allocation of costs in discovery, especially e-discovery is also long overdue. Currently each party pays the unlimited costs of the discovery sought by requesting parties. A better approach, however, would be to encourage each party to manage the cost of its own discovery requests, therein shifting the cost-benefit *decision* onto the requesting party. Reversing the current cost bearing default position would result in the most effective mechanism to control the continuously escalating costs and burdens of discovery and preservation, would allow for significant savings in litigation costs for all parties, and is the most effective means of ensuring self-executing compliance with new discovery and preservation standards.

Overall, such amendments will help curb systemic excesses, increase cost-efficiency and generally improve the administration of justice under the Federal Rules. The Rules Committee certainly has the authority and responsibility to consider and propose them.

II. Now Is the Time for Reform of the Discovery Rules.

A. Runaway Discovery Costs Must Be Brought Under Control.

Substantial real world information has been presented to the Rules Committee that the lack of clear, concise preservation and discovery rules is harming businesses – even businesses at the pinnacle of the high technology community.[18] More recently, attendees at the 2011 Dallas Mini Conference were provided with vivid, concrete examples of the adverse impact of preservation costs on both primary conduct and the litigation system. According to several Dallas participants,

[18] *See* Microsoft Corp. Letter to Hon. David G. Campbell (Aug. 31, 2011); *Pippins v. KPMG LLP*, 2011 WL 4701849 (S.D.N.Y. Oct. 7, 2011)($21,000,000 simply to preserve, process, and review the hard drives for e-discovery); Richard Marcus, *Notes: Mini-Conference on Preservation and Sanctions, Dallas, Texas, Sept. 9, 2011 (*recording that one company anticipating litigation had already spent $5,000,000 and was spending $100,000 a month on an ongoing basis**;** LCJ Comment, *The Time Is Now: The Urgent Need for Discovery Rule Reforms*, 14 (October 31, 2011) ("one company's data vault system for some but not all types of ESI cost $12,000,000 to implement and maintain in 2010. Another company's system for collecting data at the outset cost $4,800,000 to implement."); Lawyers for Civil Justice et al., Litigation Cost Survey of Major Companies (2010); Letter from Henry Butler to The Honorable Lee H. Rosenthal, *et al*., June 2, 2010.

this lack of certainty as to what preservation standards will be retroactively applied in litigation has led businesses to systemize the costly practice of "over-preserving"[19] for fear of being branded "spoliators."[20] As explained in *Victor Stanley*, "in terms of what a party must do to preserve potentially relevant evidence, case law is not consistent across the circuits, or even within individual districts.[21]

Time has shown that these problems will not go away simply because the parties cooperate or meet with the court to mediate their differences. In fact, due to ever-increasing amounts of ESI and the continuing diversification of the means with which ESI is transmitted and stored, this issue is very likely to worsen despite amendments to Rule 26 (f) ("meet and confers") and the urgings of judges and well-meaning third parties.[22] In practice, better case management and attention to preparation by counsel have failed to address the underlying problems and have not, cannot, and will not significantly alleviate the enormous costs, burdens and unintended consequences of unnecessary preservation and discovery.

Some have voiced concern that, in light of how rapidly technology is changing, rule changes at present would be counterproductive. However, what would truly be counterproductive for both the system and the economy would be to maintain the current discovery system. If anything, it is particularly critical to clarify preservation and discovery standards given the rapid development of new systems and technologies. This will ensure that legal obligations move in concert with technology and will provide significant benefits in terms of cost and risk reduction.

Rather than focusing judicial attention on the merits of an action, the lack of clear and specific rules addressing preservation and sanctions combined with the current expansive scope of discovery, has resulted in an *ad hoc* patchwork of individual solutions to the complex problems created by large volumes of ESI. The explosive growth of the volume of potentially relevant ESI cries out for a policy based solution at the national level. Rule based solutions proposed by the Rules Committee would provide uniform, real world relief to costly real world problems. National uniformity relating to preservation and discovery should be restored through the rule making process and implemented as soon as practicable. The need for revision of the discovery

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[19] *See* Materials, Dallas Conference on Preservation/Sanctions, Notes from the Mini-Conference on Preservation and Sanctions (2011); *Thomas Allman: Discovery Subcommittee Report*, EDD Update, (2011).

[20] Courts have long recognized the unique impact of an adverse inference on juries. See*, e.g., Morris v. Union Pacific*, 373 F.3d 886, 900 (8th Cir. June 28, 2004)("An adverse inference brands one party as a bad actor, guilty of destroying evidence that it should have retained for use by the jury.").

[21] *Victor Stanley v. Creative Pipe*, *supra* note 8 at 523 (a national corporation "cannot have a different preservation policy for each federal circuit and state in which it operates"…. [T]he only "safe" policy is to comply with "the most demanding requirements of the toughest court to have spoken on the issue."). An appendix delineated the differences among the federal Regional circuits and the Federal circuit in regard to seven factors. (*Id*., 542-553).

[22] The volume of data stored by organizations is staggering. According to Shira Ann Scheindlin & Daniel J. Capra, *Electronic Discovery& Digital Evidence* 41 (2009), "In the three year period from 2004 to 2007, the average amount of data in a Fortune 1000 corporation grew from 190 terabytes to one thousand terabytes (one petabyte). Over the same time period, the average data sets at 9,000 American, midsize companies grew from two terabytes to 100 terabytes." "A terabyte is a measure of computer storage capacity that is 2 to the 40th power or more than a trillion bytes or a thousand gigabytes. "A terabyte is roughly the equivalent of the contents of books made from 50,000 trees. The books in the U.S. Library of Congress contain a total of approximately 20 terabytes of text." *Id.*

provisions of the rules is, therefore, urgent and immediate.[23]

B. Now Is the Time for Meaningful Discovery Amendments.

For the last several decades, courts and commentators have noted the increasing inability of federal discovery rules to keep pace with technological advances, and the concomitant increase in expense and delay in the litigation process. Numerous studies, case law, and anecdotal evidence show that litigants are being overwhelmed by the volume of data subject to discovery and the commensurate costs of properly handling such data throughout the litigation process. But there is even more bad news: absent definitive action by the Rules Committee to relieve the burdens of electronic discovery, the problems will only continue to grow.

LCJ and others asserted in the White Paper and several discovery comments that numerous prior rule amendments have unfortunately failed to achieve meaningful progress in alleviating discovery problems.[24] These papers also contended, however, that further specific, decisive action to amend the Rules will render the process more efficient.

First, Rule 26 should be amended to narrow the scope of discovery by limiting discovery to "any non-privileged matter that would support proof of a claim or defense" subject to a "proportionality assessment" as required by Rule 26(b)(2)(C).[25] While the explosion of electronic discovery has dramatically changed litigants' experience of the discovery process, the fundamental purpose of discovery – namely, "the gathering of material information" – remains unchanged. Thus, one obvious response is to limit the scope of discovery to evidence that is most material to the claims and defenses in each case. This solution solves a myriad of long-identified problems with discovery abuse and misuse while simultaneously addressing the relatively new "problem" of electronic discovery and its attendant high volumes and costs. At the same time, a narrowed focus on information relevant and material to the claims and defenses of the parties serves to better align the rules of discovery with the realities of litigation.[26] Utah now requires, for example, that a party may discover any matter, not privileged, which is "relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality" spelled out in an amended Rule 26.[27]

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[23] *See* LCJ White Paper, *supra* note 5; LCJ Comment, Stronger Medicine, *supra* note 2; LCJ Comment, *A Prescription for Stronger Discovery Medicine: The Danger of Tinkering Change and the Need for Meaningful Action* (2011) ("Danger of Tinkering") and authorities cited therein.

[24] *See* LCJ White Paper, *supra* note 5.

[25] The full text of the proposed Rule 26(b)(1) is as follows: **Scope in General:** The scope of discovery is limited to any nonprivileged matter that would support proof of a claim or defense and must comport with the proportionality assessment required by Rule 26(b)(2)(C).

[26] Honorable Randall R. Rader, Chief Judge, U.S. Court of Appeals for the Federal Circuit, Remarks at the E.D. Texas Judicial Conference: The State of Patent Litigation (2011) [emphasis added].

[27] URCP 26(b)(1)-(3)(2011). Under these provisions, a party seeking discovery has the burden of "demonstrating that the information being sought is proportional" when a protective order is sought that "raises issues of proportionality." The amended rule also provides for tiers of standard discovery which are "presumed to be proportional to the amount and issues in controversy." *See* Committee Notes, Fed. Rule Civ. P. 26(c)("Standard and Extraordinary Discovery").

Second, Rule 26(b)(2)(B) should be amended to specifically identify categories, types or sources of electronically stored information that are presumptively exempted from preservation and discovery absent a showing of "substantial need and good cause."[28] This would help inform determinations of what constitutes good cause for production of "not reasonably accessible data" where the rule does not specifically address a particular type or category of electronically stored information. The Federal Circuit Patent Rules were recently amended to establish presumptive limits on specific categories of ESI[29] and Chief Judge Rader has made a persuasive case for such presumptive limits that should be adopted generally.[30] Also, the Seventh Circuit E-Discovery Principles lists most of the same categories of ESI and states: "[t]he following categories of ESI generally are not discoverable in most cases."[31]

Third, the provisions for protective orders, embodying the so called "proportionality rule," Rule 26(b)(2)(C), should be amended to *explicitly* include its requirements to limit the scope of discovery and to make it clear that it is available to limit and manage excessive demands for unreasonable and burdensome preservation.

Fourth, and finally, Rule 34 (and consequently Rule 26) should be amended to limit the number of requests for production, absent stipulation of the parties or court order, to no more than 25,

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[28] **(B)** *Specific Limitations on Electronically Stored Information.*

(i) A party need not provide discovery of the following categories of electronically stored information ~~from sources~~, absent a showing by the receiving party of substantial need and good cause, subject to the proportionality assessment pursuant to Rule 26(b)(2)(C):

(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;

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

(i) any other data that are not available to the producing party in the ordinary course of business and that the party identifies as not reasonably accessible because of undue burden or costs and that on motion to compel discovery or for a protective order, if any, the party from whom discovery of such information is sought shows is not reasonably accessible because of undue burden or cost.

[29] Model Order Regarding E-Discovery in Patent Cases, 2 (2011).

[30] *See* Rader, *supra* note 26; Steven R. Trybus and Sara Tonnies Horton, *A Model Order Regarding E-Discovery in Patent (and Other?) Cases,* Pretrial Practice & Discovery, Section of Litigation, ABA.org (2012).

[31] Seventh Circuit Electronic Discovery Committee, *Seventh Circuit Electronic Discovery Pilot Program: Statement of Purpose and Preparation of Principles* 14 (2009) (Pilot Program).

covering a time period of no more than two years prior to the date of the complaint, and limited to no more than 10 custodians.[32]

These steps would serve to address a myriad of discovery problems by reducing the volume of information and evidence subject to discovery (a major contributor to cost), providing a clearer standard of relevance, lessening the likelihood of satellite litigation on discovery issues and, consequently, limiting the skyrocketing costs for litigants seeking fair and efficient resolution of claims.[33]

III. Now Is the Time to Address Preservation Issues: Trigger, Scope, and Sanctions.

Not too long ago, the rule for preservation was simply this: "do not destroy material relevant to a dispute." Within only a few years, however, an *ad-hoc* judge-made framework had turned that rule into an *affirmative* duty to preserve material that may become relevant to a dispute and to prevent the inadvertent disposal of material by otherwise appropriate recycling efforts. This inconsistent creation of new duties converted the system – from one of professionalism – in

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[32] Rule 26(b)(2). Limitations on Frequency and Extent.

> (A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36, or the temporal scope of the requests, or number of custodial sources required to be searched for requests under Rule 34.

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things or Entering onto Land, for Inspection and Other Purposes

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> (b) Procedure.
> (1) Contents of the Request.
> The request:
> (A) must describe with reasonable particularity each item or category of items to be inspected;
> (B) must be limited, unless otherwise stipulated or ordered by the court in a manner consistent with 26(b)(2), to:
> (i) a reasonable number of requests, not to exceed 25, including all discrete subparts;
> (ii) a reasonable time period of not more than two years prior to the filing date of the complaint;
> (iii) a reasonable number of custodial or other information sources for production, not to exceed 10;
> (C) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and
> (D) may specify the form or forms in which electronically stored information is to be produced.

[33] For a broader discussion of the benefits of these proposals, *See* Ronald J. Allen and Alan e. Guy, *supra* note 6; LCJ Comment, Stronger Medicine, *supra* note 2.

which litigants and attorneys were presumed to have acted in good faith and not to have destroyed material pertinent to a dispute – to one of suspicion – in which it is presumed that litigants and their attorneys, unless constantly monitored, reminded, overseen and policed, will engage in regular spoliation – *without any real evidence* to suggest that such a change is necessary or desirable. Under this system, litigants are today spending billions of dollars to address an undefined and largely non-existent spoliation risk based on the existence of a few high profile sanctions decisions.[34]

A. Trigger. Although the generally accepted standard for determining the time at which the duty to preserve exists (the trigger) is easily stated – upon "reasonable anticipation of litigation" – it is an almost impossible task to determine confidently the commencement of the preservation obligation under the current varying interpretations of that standard. A better standard is needed that more pragmatically articulates a "bright line" standard based on the reasonable expectation of the certainty of litigation, or the commencement of litigation, or the service of discovery requests.[35] In Florida[36] and Illinois,[37] for example, there is precedent to the effect that a duty to preserve does not exist prior to commencement of litigation.[38] Given that Florida is considering adopting e-discovery rules, some comments on the proposed rule have requested clarification of the issue by the Florida Supreme Court.[39]

LCJ has previously endorsed a "certainty of litigation" standard as a preferable trigger point, but our membership has come to see that suggestion as only a somewhat improved version of the existing "reasonable anticipation" standard and an invitation to diverting and expensive ancillary disputes as to when litigation became "certain" in a particular case. What is necessary to give useful guidance is a clear, bright line standard that will meaningfully clarify the time at which a duty to preserve information for purposes of litigation is triggered. As a result we have decided to endorse a "commencement of litigation" standard. For example:

> "The duty to preserve material would be triggered when a defendant or respondent receives actual notice that a complaint or petition has been duly filed against it, or a formal administrative claim that is a statutory prerequisite to filing a complaint in a U.S.

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[34] *See* Hubbard, *supra* note 3.

[35] Id.; Robert Owen, *The Debate Continues: Should Preservation Rules Be Changed?*, Legal Technology News (Dec. 9, 2011)(available at http://bit.ly/rO7QQZ).

[36] *Royal & Sunalliance v. Lauderdale Marine*, 877 So.2d 843, 846 (Fla. 4th DCA. July 7, 2004)("we find [the] argument that there was a common-law duty to preserve the evidence in anticipation of litigation to be without merit.").

[37] *Boyd v. Travelers*, 166 Ill.2d 188, 652 N.E. 267, 270 (S.Ct. Ill. June 22, 1995)("[t]he general rule is that there is no [pre-litigation] duty to preserve evidence.").

[38] Courts in those states address pre-litigation spoliation by use of evidentiary inferences. See, *e.g., Shimanovsky v. GM*, 181 Ill. 2d 112, 692 N.E.2d 286 (S.Ct. Ill. Feb. 20, 1998)(applying rule-based sanctions because "a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence"); *Nationwide Lift Trucks v. Smith*, 832 So. 2d 824, 826 (Fla. 4th DCA Nov. 13, 2002), but see *In re Electric Machinery Enterprises*, 416 B.R. 801, 874-875 (Bkcy. Ct. M.D. Fla. Aug. 28, 2009)(refusing to apply sanctions to pre-litigation failure to preserve in light of authority that parties were under no duty to preserve evidence under Florida law).

[39] See Comment Before Supreme Court (Florida) re Amendments, (2011).

District Court has been duly commenced. The trigger for a plaintiff would also be when the complaint is filed."[40]

The first goal of any trigger rule should be to eliminate the current practice by which each district court formulates its own standards of what constitutes a trigger of the duty to preserve information, replacing it with a bright line standard with little or less wiggle room that is applicable to all federal civil actions generally. The second goal of any trigger should be to eliminate the current gotcha game of demanding unreasonably expansive pre-litigation preservation and the costs of over-preservation to respond to those demands. A standard based on "commencement of litigation" will permit each district court to be engaged in the preservation process as necessary (rather than second guessing the propriety of pre-litigation activity) and subject the requesting party to Rule 11 (rather than the current absence of sanctions for overly broad preservation demands); and the preserving party to Rule 37 (rather than the court's inherent power).

This "commencement of litigation" rule should be supplemented with a rule or a comment that clarifies what is in reality already the law, i.e., that it is prohibited to destroy material with the intention of denying it to others in litigation. Such a bright line prohibition is easy to articulate and understand, and easy for line employees and others to comply with.

B. Scope. The problems with preservation, most notably its significant costs and burdens, are not merely the product of the post-modern age and evolving technology. The real problem is the lack of identifiable boundaries on which parties may rely when analyzing the scope of their preservation obligations. Currently the only codified guidance for the appropriate scope of preservation is the existing scope of discovery[41] – an ambiguous standard that has plagued practitioners and the Committee for many years.[42] Faced with the prospect of preserving all information relevant to the subject matter of potential litigation, parties are forced to rely on "amorphous" principles and widely divergent court opinions[43] in order to comply with their preservation obligations.

This is not to say that the evolution of technology has not contributed to the problem. While it is

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[40] Owen Letter, *supra* note 17 at 18-19; see also, Hubbard, *supra* note 3; *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 621 (D. Colo. 2007) ("In most cases, the duty to preserve evidence is triggered by the filing of a lawsuit."); and *Krumwiede v. Brighton Assocs., L.L.C.*, 2006 WL 1308629, at *8 ("The filing of a complaint may alert a party that certain information is relevant and likely to be sought in discovery.").

[41] FED. R. CIV. P. 26(b)(1) "**Scope in General.** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense *** For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action *** or reasonably calculated to lead to the discovery of relevant matter."

[42] See LCJ Stronger Medicine, *supra* note 2.

[43] *Victor Stanley, Inc. v. Creative Pipe, Inc.,* 269 F.R.D. 497, 523 (D. Md. 2010) ("A national corporation cannot have a different preservation policy for each federal circuit and state in which it operates. How then do such corporations develop preservation policies? The only "safe" way to do so is to design one that complies with the most demanding requirements of the toughest court to have spoken on the issue, despite the fact that the highest standard may impose burdens and expenses that are far greater than what is required in most other jurisdictions in which they do business or conduct activities.").

the lack of identifiable boundaries and fear of sanctions that drive litigants to undertake expansive preservation efforts, it is the incredible volume of electronic information that is created and maintained by an organization that so drastically increases the cost of those efforts. This is because the evolution of technology has resulted in the creation (and storage) of ever-increasing volumes of electronic information. Consider, for example, that the volume of potential discovery in any given case was once thought of in terms of numbers of pages or even numbers of boxes. In contrast, discovery is now frequently being thought of in terms of megabytes, gigabytes, and even terabytes.[44] This explosion of information has brought along with it an explosion of costs.[45]

To better understand the problem, "[t]hink of the growth of the Digital Universe as a perpetual tsunami;"[46] the data just keeps coming. In 2011, for example, "the amount of information created and replicated" was predicted to "surpass 1.8 zettabytes (1.8 trillion gigabytes) - *growing by a factor of 9 in just five years*."[47] According to Eric Schmidt, Executive Chairmen of Google Inc., speaking at a technology conference in 2010, we create as much information in two days as we did from the dawn of time through 2003.[48] Similarly, the Cisco Corporation has reported that "every five minutes, we create a blizzard of digital data equivalent to all of the information stored in the Library of Congress (U.S.)."[49] Those are big numbers–and they will have big consequences.

Stated simply, the obvious problem of technology is this: the creation of data is not likely to stop, or even slow down, and much of the data created is never erased. The consequence of this problem is equally obvious: the more data there is, the more data there is to deal with. Microsoft Corporation reports, for example, that the amount of ESI subject to collection for litigation has grown from an average of 7 gigabytes per custodian three years to ago to an average of 17.5 gigabytes per custodian today.[50] "Some of this growth stems from the fact that Microsoft

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44 *See e.g., In re Aspartame Antitrust Litig.*, ---F. Supp. 2d.---, 2011 WL 4793239 (Oct. 5, 2011) (noting one defendant's collection of data from 28 custodians equaling 87.73 gigabytes, another's collection of ESI equaling 1.05 terabytes of data, and a third defendant's collection of 366 gigabytes of data); *McNulty v. Reddy Ice Holdings*, Inc., 271 F.R.D. 569 (E.D. Mich. 2011) (involving a "staggering" volume of discovery, including 4 terabytes of ESI and 744 boxes of paper documents).

45 *See, e.g., In re Fannie Mae Sec. Litig.*, 552 F.3d 814 (D.C. Cir. 2009) (holding a third-party government agency in contempt for failing to timely produce the contents of disaster recovery backup tapes, despite its expenditure of over $6 million dollars—more than 9% of the agency's total budget—responding to defendant's requests); *Pippins v. KPMG LLP*, No. 11 Civ. 0377 (CM)(JLC), 2011 WL 4701849 (S.D.N.Y. Oct. 7, 2011) (denying defendant's motion for a protective order and requiring ongoing preservation of more than 2500 hard drives at a cost of than $1.5 million dollars); *Oracle USA, Inc. v. SAP AG*, 264 F.R.D. 541 (N.D. Cal. 2009) (noting that "Plaintiff's production of a collection of databases … totaled two terabytes" that "Defendants' production of their Data Warehouse contained over ten terabytes of data" and that "[d]iscovery ha[d] already cost each party millions of dollars.").

46 John Gantz & David Reinsel, The Digital Universe Decade – Are You Ready? 2 (IDC May 2010)

47 John Gantz & David Reinsel, Extracting Value From Chaos 1 (IDC June 2011) (emphasis added).

48 Ralph Losey, The Information Explosion and a Great Article by Grossman and Cormack on Legal Search, e-Discovery Team (May 30, 2011, 2:27 PM), http://e-discoveryteam.com/2011/05/30/the-information-explosion-and-a-great-article-by-grossman-and-cormack-on-legal-search/.

49 Dave Evans & Rick Hutley, The Explosion of Data: How to Make Better Business Decisions by Turning "Infolution" into Knowledge 1 (CISCO Corp. 2010).

50 Microsoft Corp. Letter to Hon. David G. Campbell, at 3 (Aug. 31, 2011) ("Microsoft Letter").

employees store increasing amounts of data in Outlook folders, and some comes from increased use of new technologies—such as smart phones, SharePoint (collaborations software that allows employees to set up Web sites to share information, manage documents, and publish reports), and other social media products."[51] As technology continues to evolve, this proliferation of data will only continue. Moreover, in a world where little information is erased, such an explosion of growth does not bode well for the future of electronic discovery, particularly where the capacity to store information continues to expand.

In this litigation landscape, many parties face a "Hobson's Choice" – they are caught between the "rock" of ambiguous standards and the risk of sanctions for failure to adequately preserve and the "hard place" of expending extraordinary resources to preserve information which often has no business purpose and which is extremely unlikely to be used in litigation.[52] In some cases, parties are resorting to a drastic third option and are staying out of the court system all together—or, more unsettling, cannot get into court in the first place because their cases are not seen as cost effective due to the expense of litigation. Rebecca Love Kourlis, Executive Director of the Institute for the Advancement of the American Legal System at the University of Denver, recently reported, for example, that "[t]hree out of four attorneys [in the ACTL and ABA surveys] believe that discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of e-discovery"[53] and that "[o]ver 80 percent of respondents to nationwide surveys of attorneys and general counsel indicate that costs drive cases to settle for reasons unrelated to the merits."[54]

The Rules Committee has recognized the magnitude of the shift in discovery brought about by technology and the explosion of electronically stored information. Indeed, the Memo Regarding Sanctions/Preservation Issues in the agenda materials for the upcoming Rules Committee Meeting acknowledges: "the emerging reality—the volume of electronically stored information is so large that the version of 'everything relevant' that has guided discovery for more than half a century should be reconsidered as it applies to electronically stored information."[55] Having recognized the "emerging reality," it now falls to the Committee to meaningfully address it.

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51 *Id.*

[52] On average, only one tenth of one percent (0.1%) of pages *produced* in litigation are used as exhibits at trial. *See* Lawyers for Civil Justice *et. al., Litigation Cost Survey of Major Companies*, App. 1 at 16 (2010); *see also* Microsoft Letter, (in an average case, 48,431,250 pages are preserved, 141,450 pages are produced and only 142 are actually used. Because much of the information currently subject to preservation concerns matters that "have not yet matured . . . the ratio of data *preserved* to data *used in litigation* is actually far greater than 340,000 to 1.").

[53] *Hearing on Costs and Burdens of Civil Discovery Before the Subcomm. On the Constitution of the H. Comm. on the Judiciary,* 112th Cong. (written statement of Rebecca Love Kourlis, Executive Director of Institute for the Advancement of the American Legal System at the University of Denver at 2).

[54] *Id. Kourlis further reported that "[t]he costs of discovery are impacting access to the courts. Surveys of attorneys suggest that for an attorney to take a case, at least $100,000 must be at issue—otherwise it is not cost effective." "A small business owner," for example, "with a defaulted payment on delivery of goods may simply be out of luck because the costs of litigation would leave him with a judgment that has cost more to obtain than the amount of the original debt." Id. at 3.*

[55] Memo Regarding Sanction/Preservation Issues, Agenda Materials for March 2012 Advisory Rules Committee Meeting, at Tab 5A, p. 250.

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A successful solution to the problems of costly and burdensome preservation must include a narrowed scope of discovery. Years of tinkering change, rather than reducing the problems of discovery, have instead resulted in the creation of a complicated network of interrelated rules and amorphous standards that have thus far fallen short of providing just, speedy, or inexpensive resolution to parties' claims. Narrowing the scope of discovery would provide a simple, straightforward, and easily understood solution to the problems of preservation—a simplicity that is sorely needed within the Rules of Civil Procedure. Rather than requiring judicial intervention to wade through the representations of the parties and to analyze the sometimes vague and ill-developed claims or defenses at issue, a narrowed scope would return the management of discovery to the parties and focus on the proper purpose of discovery—the gathering of material information. Moreover, a narrowed scope of discovery limited to that information which is most relevant to the case would have the immediate and direct effect of reducing the costs and burdens of discovery—precisely the problems the Committee has been attempting to address for many, many years.

Therefore, the most straightforward, most effective deterrent to overbroad preservation would be to limit the scope of all discovery in Rule 26 to "any non-privileged matter that would support proof of a claim or defense." [56] This could be coupled with an enhanced role for proportionality. Many have advocated for more effective use of the proportionality doctrine, and in particular applying it in the preservation context, given the close relationship between preservation and production.[57] Such a rule would allow litigants to maintain their focus on the subject of the litigation at hand, rather than on ensuring that masses of largely useless data are maintained, without creating a new duty to preserve information in the federal rules.

There is no doubt that preservation costs are a major contributor to escalating litigation costs - particularly discovery costs. These costs, in turn, contribute greatly to the now familiar conclusions that our discovery system is broken and our civil justice system is in serious need of repair. Left unchecked, the problems will only grow. For almost twenty years this Committee has recognized the danger the information explosion presents to our civil justice system.[58] In that time the problems of discovery have worsened to a dramatic degree. As technology rapidly evolves and the amount of digital information grows, so do the problems of discovery and more specifically, the problems associated with the preservation of information potentially available in discovery. Thus, the "proper purpose of discovery—the gathering of ***material*** information"[59] — has become obscured by the process and should be remedied by focusing the scope of discovery and preservation on information relevant and material to the claims and defenses.

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[56] *See supra* note 25.

[57] As already noted, Utah now requires, for example, that a party may discover any matter, not privileged, which is "relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality" spelled out in an amended Rule 26. URCP 26(b)(1)-(3)(2011). The amended rule also provides for tiers of standard discovery which are "presumed to be proportional to the amount and issues in controversy." See Committee Notes, Rule 26(c)("Standard and Extraordinary Discovery").

[58] FED. R. CIV. P. 26 Advisory Committee Note (1993) ("The information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument of delay and oppression.").

[59] Introduction, Model Order Regarding E-Discovery in Patent Cases, 2 (2011) (emphasis added).

C. Sanctions. The possibility of a sanctions order has highly negative *in terrorem* effects on most responsible American corporations and the individual employees who are internally responsible for making preservation decisions. As a result, regardless of the infrequency of sanctions motions and awards, and notwithstanding the financial impact and costs of the sanctions awards themselves, the companies spend millions of dollars to over-preserve material that is merely "potentially" relevant.

Sanctions for failing to preserve or produce relevant and material ESI should be determined by intent to prevent use of the information in litigation, not by the inadvertent failure to follow some procedural step such as failing to issue a written notice, to identify a key custodian, to identify an electronic storage location or 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 relevant and material to claims or defenses as to which no alternative source exists is willfully destroyed for the purpose of preventing its use in litigation and which demonstrably prejudiced the party seeking sanctions.[60]

Rule 37, which currently has limited application to sanctions for failure to preserve, should be amended to include those failures in its scope to reduce the reliance of courts on their undemocratic "inherent powers," [61] which can also be accomplished by amending Rule 37(e), as LCJ has proposed or as Connecticut has done, to give it new scope and life. Under the Connecticut version of its counterpart to Rule 37(e), effective in 2012, a party must show "intentional actions designed to avoid known preservation obligations" to overcome the limitations on sanctions for losses from routine, good faith operations.[62]

Rule 37(e) should embody the principle that sanctions awards be permitted only upon proof of deliberate destruction of material information by the producing party. The duty of care in this area is too ill defined to support sanctions for negligent conduct. In light of the proliferation of digital data and fantastic growth of technological innovation, any duty of care is going to get increasingly difficult to define and to apply. What is urgently needed, then, is a rule that subjects only deliberate and willful acts to sanctions. Individuals know – without any need for extensive or complex training – when they are deliberately destroying information for the purpose of denying its use to an adversary in litigation. In such a case, the law would be clear and its application to those who transgress it would be just.

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[60] See LCJ proposed Rule 37(e) "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...."

[61] See Thomas Y. Allman, *Change in the FRCP: A Fourth Way* (2011) (advocating expanding scope of Rule 37 to obviate reliance on inherent powers).

[62] See Sec. 13-14 *CONNECTICUT PRACTICE BOOK* (2011) (eff. Jan. 2012). (the "failure to comply [with discovery] as described in this section shall be excused and the judicial authority may not impose sanctions on a party for failure to provide information, including electronically stored information, lost as the result of the routine, good faith operation of a system or process in the absence of a showing of intentional actions designed to avoid known preservation obligations").

Although it is difficult to quantify precisely how much is wasted on over-preservation, it is clear and irrefutable that the number is massive and the costs are staggering.[63] The present state of the common law in the sanctions area is a classic example of the injustice that can result when the law's commands are inconsistent and unclear. Inherent power to sanction real abuses is an appropriate tool for the one-off cases that have no precedent, but the preservation area is far from a one-off case, and the rattling consequences of a few "inherent power" rulings in bad facts cases have been felt in every American company that has any litigation docket at all.

Therefore, we believe that the power of courts to use their amorphous "inherent power" to sanction parties should be cabined by rule. Allowing inherent power cases to define corporate conduct and determine corporate budgets in every corner of America is a misuse of that power, and is antithetical to the American system of justice. It is entirely appropriate to require that sanctions, if awarded at all, be awarded only pursuant to clear and consistent rules that subject only deliberate and willful acts to sanctions.

IV. Now Is the Time to Reverse Current Cost Allocation Perverse Incentives.

How can the judicial system deliver on Rule 1's promise of just, speedy and inexpensive determination of actions, if a litigant may ask for limitless costly, burdensome, and time consuming discovery – and pay for none of it?

A. The Cost Of Discovery Is Out Of Control.

Numerous amendments to the discovery Rules aimed at reining in the ever-increasing costs of discovery have not adequately or effectively controlled these costs. Today, discovery is too often used as a weapon to impact the outcome of a case irrespective of the merits, rather than as a tool to collect information to aid the fact finder.[64] Parties request substantial volumes of information that is very expensive to collect and review in an effort to force opposing parties to consider settlement based primarily on the threat of excessive litigation costs.[65] And many parties do in fact decide to settle to avoid expensive and protracted discovery instead of undertaking a fair and practical examination of the merits.

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[63] See LCJ Comment, *The Time is Now*, supra note 18 at 3-14.

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[64] Scott A. Moss, *Litigation Discovery Cannot Be Optimal But Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 Duke L. J. 892 (2009) *citing* *In re Fannie Mae Sec. Litig.*, 552 F.3d 814, 816-18 (D.C. Cir (2009). A government contractor expended over $6 million in e-discovery alone, amounting to more than nine percent of the agency's annual budget, but still failed to fully satisfy e-discovery requests for archived e-mail messages. Not only defendants suffer according to Moss. In the federal government's lawsuit against the tobacco companies defendant Phillip Morris demanded the production of electronically stored information from over thirty federal agencies, "yielding [over] 200,000 e-mail 'hits,"' compliance with which "required a 'small army' of lawyers, law clerks and activists working full time for over six months," all costing millions of dollars. *United States v. Phillip Morris, et al,*.449 F. Supp. 2d 1 D.D.C. 2006), aff'd in part and vacated in part, 566 F.3d 1095 (D.C.Cir.2009).

[65] The ACTL/IAALS Report notes that in one survey 71% of respondents thought that "discovery is used as a tool to force settlement.", *supra* note 5 at 9.

In addition, protracted discovery causes diseconomies. Substantial resources are devoted to discovery events (such as litigation holds, document preservation and production efforts, data gathering, depositions and related work) that interfere with and detract from daily business activities and harm productivity.[66]

A recent survey of Fortune 200 companies found that in 2008, the 36 companies responding spent an aggregate $4.1 billion on U.S. litigation – not including judgments and settlements or internal costs such as information technology to store and retrieve information for litigation and employee time spent attending depositions and responding to discovery requests.[67] *On average, that year, for each dollar of global profit earned, companies spent 16-24 cents on U.S. litigation.*[68] Thus it is not surprising that general counsel for many global corporations who were in attendance at the Duke conference reported that U.S. litigation costs amounted to a significant and growing factor prompting corporate decisions to locate overseas.[69]

B. Existing Rules And Practices Do Not And Cannot Control Costs.

> "Designed to enable litigants to gather the information necessary to facilitate accurate decision making and the effective vindication of substantive rights, the discovery process has a dark side that seems to have been largely undervalued at the time of the Rules' framing. At least in an important category of litigation—those cases in which significant amounts of discovery are likely to take place—the costs and burdens inherent in the discovery process threaten to give rise both to serious inefficiencies in the adjudicatory process and to a potentially pathological and coercive skewing of the applicable substantive law being enforced."[70]

The current Rules provide no reliable remedy to curb discovery costs, including those associated with preservation. Judges are asked to manage the scope of discovery, but are prevented from being effective by institutional limitations on the courts.[71] At the beginning of a case, judges struggle to determine the proper scope of discovery needed for both the court and the parties to flesh out each side's position because they know less than the parties about the underlying facts.

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[66] *See* Microsoft Corp. Letter to Hon. David G. Campbell (Aug. 31, 2011).

[67] Litigation Cost Survey of Major Companies App. 1 at 8 fig.4 (2010); *see also* text *supra* at 4-6

[68] Letter from Prof. Henry Butler to the Honorable Lee H. Rosenthal, *et al.*, June 2, 2010, *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h_Discussion/0DEC29D460FD45DA85277190060E48DB/?OpenDocument

[69] *Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation,* 4 (2010)

[70] Redish, *Allocation of Discovery Costs and the Foundations of Modern Procedure*, 2 (forthcoming chapter in The American Illness, The Yale Univ. Press, 2012), available at: http://buckleysmix.com/wp-content/uploads/2010/10/Redish.pdf.

[71] As the Supreme Court noted in *Twombly*, the Federal Rules were designed to allow liberal access to courts with weak claims being weeded out as litigation progressed. However, as discovery has grown increasingly expensive and complex, the Court noted that "[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management . . . given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side." 550 U.S. at 559.

Without effective guidance and necessary cooperation, discovery costs soar. For these reasons, parties need a cost-effective, workable, self-executing solution for access to relevant information.

The purpose of discovery is to permit parties to access information that will enable fact finders to determine the outcome of civil litigation. Having rules that encourage the parties to police themselves and to focus on the most efficient means of obtaining truly critical evidence is the best way to achieve that purpose. Some have recommended linking the parties' discovery entitlement to the amount in controversy and requiring a bond to ensure proportionality.[72] Others recommend that discovery be improved by changing its timing until after a claim has survived a motion for summary judgment.[73] Others would simply provide for equal cost-sharing – they split all the costs right down the middle.[74]

A much more effective remedy would be – to limit the scope of discovery and to enforce those limits by abrogating the current, illogical presumption that a litigant may ask for limitless discovery and pay for none of it. Recognizing this, the White Paper proposed that the Rules be amended to require that each party pay the costs of the discovery it seeks.[75] Such an explicit rule is needed because even after numerous rounds of discovery Rule amendments, existing rules and the practices of both lawyers and judges have not prevented the current discovery/preservation crisis. If we continue on the same path, further cost escalation will never be brought under control.

C. The Economic Logic Of Requiring "Requester Pays".

Numerous scholars have recognized the unfairness and economic perversity of the existing system and have likewise argued persuasively that making the consumer of discovery pay for what he consumes will naturally balance the process, largely without need for management by judges. Judges are already over-burdened and hardly need their time siphoned into discovery disputes and the ever-more-absurd practice of "discovery about discovery" that threatens to replace merits-based adjudication with a "gotcha" game that focuses on standards of care to be employed in searching for electronically stored information.

It is axiomatic that when the consumer does not have to pay for what he consumes, the consumer will demand more than is economically rational. This results in gross over-demand for resources

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[72] Peter B. Rutledge, *The Proportionality Principle and the (Amount in) Controversy*, (forthcoming chapter in THE AMERICAN ILLNESS, The Yale Univ. Press, 2012), available at: http://buckleysmix.com/wp-content/uploads/2010/10/Rutledge.

[73] Scott A. Moss, *supra* note 64.

[74] Robert Hardaway, Dustin D. Berger, Andrea DeField, *E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age*, 63 Rutgers Law Review 521 (2011).

[75] LCJ White Paper, *supra* note 5 at 56: "In General. A party submitting a request for discovery is required to pay the reasonable costs incurred by a party responding to a discovery request.
(1) Such costs include the costs of preserving, collecting, reviewing and producing electronic and paper documents, producing witnesses for deposition and responding to interrogatories.
(2) Each party is responsible for its own costs related to responding to Disclosure Requirements under Rule 26.
(3) Non parties responding to Subpoenas under Rule 45 shall be entitled to recovery of reasonable costs associated with compliance with the subpoena.
(4) The costs described in subsection (1) and (3) above shall be considered Taxable Costs under Rule 54(d)."

that are by no means free, but which must be provided at a cost borne by someone else. As Reddish and McNamara have noted, this multiplies the incentive a party already has to consume that which is "free" by creating a "free" benefit to the requester on one side of the ledger, and a detriment to the opponent on the other side.[76]

A Rule requiring each party to pay the costs of the discovery it seeks will encourage each party to manage its own discovery expenses and tailor its discovery requests to its needs by placing the cost-benefit decision onto the requesting party – the party in the best position to control the scope of those demands and, therefore, their cost. It would undoubtedly represent significant savings for the litigation system and the economy. The Rule would also discourage parties from using discovery as a weapon to force settlements without regard to the merits of a case; a party that pays for discovery will have no incentive to make overly broad requests. Cooperation between parties would be encouraged as a way to control discovery costs and would provide courts with a workable standard to guide parties through litigation.

As Professor Martin Redish has observed, "given that it is the requesting party's opponent will have to bear that cost[preparing the discovery response], one might even suggest that in a perverse sense, the higher the cost the greater the incentive to invoke the discovery process."[77] Accordingly, "a reversal in the *ex ante* presumption of discovery cost attribution can function in a symbiotic manner with both direct and prophylactic methods of discovery control. While those more judicially driven methods are more likely to punish or deter *abusive* discovery, the self-executing shift in discovery cost allocation is far more likely to deter the practice of *excessive* discovery."[78]

The result is easily predictable, as parties hit with tremendously burdensome discovery requests "buy peace through settlements even though the underlying behavior is perfectly acceptable:

> "In such cases, defendants will be deterred from productive activities not by the law but by litigation costs that increase the *in terrorem* value of even meritless suits that puts pressure on a defendant to settle and burdens otherwise lawful conduct."[79]

A change in the cost allocation default procedure would not only induce greater efficiency; it would comport more appropriately with established precepts of economic justice:

> "If one strips away the long accepted assumption as to how the American system allocates costs among litigants, the actions of the parties to a lawsuit in the discovery process would be most appropriately seen as analogous to a quasi-contractual relationship between the adversary litigants. Under the theory of *quantum meruit*, a party to a quasi-contract is legally entitled, as a matter of fundamental principles of economic justice, to be reimbursed for any benefit he

[76] *See* Reddish & McNamara, *supra* note 4.
[77] Redish, *supra* note 4 at 37.
[78] Redish, *supra* note 70 at 10
[79] Allen, *supra* note 4 at 5.

> confers on another person at that person's expressed or implied request….[I]t is [therefore] morally untenable to allow the requesting party to retain the benefit of its opponent's labor without, at the very least, reimbursing the costs of discovery incurred by the producing party."[80]

Indeed, conventional economic theory on prices as a mechanism for efficient allocation of resources is adequate justification for a "requester pays" rule:

> Judges should not confuse costs with penalties. There is nothing punitive about requiring an economic actor to pay for resources that are consumed in an activity that they undertake to make a profit. On the contrary, the philosophy behind a market economy is that resources will be used most efficiently if those who decide to consume them pay the marginal costs of production. For the same reasons that electricity will be wasted and over-consumed if government requires it to be supplied at a price below the marginal cost to make it, litigation will be over-supplied, wasting societal resources, if those who initiate litigation pay only a small fraction of its cost. [Sources omitted.][81]

In the specific context of procedural rule-making, Professor Robert G. Bone has described the law-and-economics version of utilitarianism thusly: "The optimal rule from a set of feasible alternatives is the rule that maximizes expected social benefit net of costs, or what is equivalent, minimizes the total of expected social costs."[82]

The abuses discussed herein are only possible because of the gross disproportionality engendered by the deadly combination of loose pleading rules, unlimited discovery, nebulous duties to preserve information, and the ability of the requester to "free ride" by demanding everything and paying for nothing. This phenomenon was described in more scholarly fashion by Professor Allen:

> "If each side will have about the same amount of discovery costs, it makes perfect sense to let each side bear their own costs. That is identical to cost shifting, and any resources spent in shifting costs are simply wasted. Asymmetric costs, by contrast, cause skewed cost allocation and provide the opportunity for strategic exploitation. By contrast, placing the costs of discovery provisionally on the person asking for it, but allowing for judicial involvement to make adjustments, may both generally give incentives for the optimal production of information and permit a safety valve in the unusual case."[83]

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[80] See Redish & McNamara, *supra* note 4 at 6-7.

[81] E. Donald Elliott, *Twombly in Context: Or Why Federal Rule of Civil Procedure 4(b) is Unconstitutional*, (2011), forthcoming, U. Fla. L. Rev; See also, E. Donald Elliott, Managerial Judging and the Evolution of Procedure, 53 U. Chi. L. Rev. 306 (1986); E. Donald Elliott, Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence, 69 B.U. L. Rev. 487 (1989) (Because regulating by incentives is more efficient than by judicial command and control, incentive-based procedure is the first-best solution.)

[82] Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 Iowa L. Rev. 873, 910 (2009).

[83] Allen, s*upra* note 4 at 12.

Rather than enshrine economically perverse activity, the Federal Rules should encourage parties to pursue discovery at the lowest cost and in the least burdensome manner possible to obtain the evidence necessary for the fact finder to determine the case on the merits. Discovery rules should not provide weapons for parties to force settlements not justified by the merits. As Redish and McNamara state: "Subsidization—through allocation of the total costs to the responding party—renders discovery costs a complete externality, and removes all incentives for litigants to limit the scope of their requests."[84]

A "requester-pays rule" would help achieve those results. A party who benefits by making a claim or raising a defense is in the best position to decide if information is worth the cost of obtaining it. A requester-pays rule will encourage focused requests designed to obtain that information necessary for the just adjudication of the issues without the excessive costs currently experienced. "The externalization of discovery costs, accomplished through the *de facto* hidden litigation subsidy caused by our current model of cost allocation, incentivizes what can most appropriately be labeled 'excessive discovery."[85]

The cost allocation rule proposed here will force a more realistic assessment of cases before they are filed, and will create more realistic incentives to settle meritorious cases before the completion of discovery, helping to ease over-crowded court dockets but making those cases that are litigated to conclusion more fair to both sides and more likely to be resolved on the merits, through settlement or trial and judgment, without the perverse incentives created by the current system.

D. Some States And Rules Already Require Requester Pays.

A number of states already allocate some discovery costs to the requesting party. Texas began the move toward economic rationality by mandating that the requesting party must pay the producing party's "expenses of any extraordinary steps required to retrieve and produce [electronic or magnetic] information."[86] Further, the requesting party must pay for the costs of "inspecting, sampling, testing, photographing and copying" items, the actual production of which is still borne by the responding party.[87]

North Carolina recently adopted a rule providing that "[t]he court may specify conditions for the discovery, including allocation of discovery costs."[88] California requires the demanding party to pay the reasonable expenses of translating data compilations into reasonably usable form and adopted additional provisions: "[i]n order to eliminate uncertainty and confusion regarding the discovery of electronically stored information, and thereby minimize unnecessary and costly litigation that adversely impacts access to the courts."[89] Under the New York and Mississippi rules, "when the requested ESI is reasonably available in the ordinary course of business, the producer must provide it at its own cost. However, if the effort to produce the data as requested

[84] Redish & McNamara, *supra* note 4 at 33.
[85] *Id.* at 34.
[86] Tex. R. Civ. P. 196.4.
[87] Tex. R. Civ. P. 196.6.
[88] North Carolina Session Law 2011-199, amending Rule 26 (a) (3) of the N.C. R. of Civ. P. (June 23, 2011).
[89] 2009 Cal. ALS 5; Stats 2009 Ch. 5; Cal. Code Civ. P. sec. 2031. 280 (e) (Jan 15, 2011).

imposes a burden in excess of a 'reasonable effort' then the producer can move for cost shifting."[90] When New York passed the rule permitting allocation of e-discovery costs, it made the front page of the New York Law Journal, while adoption of the rule in other states did not receive quite as much fanfare.[91]

Fed. R. Civ. P. 26(b)(4)(C) already requires the requesting party to pay most of the other side's costs with regard to expert discovery. In practice, we know that each party often agrees to bear its own expert witness costs despite the rule-based ability to shift those costs, because this is often a bi-lateral and roughly equivalent expense on both sides. What does this tell us about why parties almost never agree to pay for the other types of discovery they request? It says that costs in most claims by individuals against large entities are asymmetrical. When discovery costs are roughly (and reasonably) proportional, parties do in fact "work it out among themselves"; i.e., agree to divide costs in a fair way, without need for judicial intervention. But when costs are asymmetrical, the phenomenon described by Professor Allen prevails.

This situation was also addressed by Professor Esenberg:

> In cases in which both parties are more or less equally subject to the costs and burdens of electronic discovery, each side can expect the other to be as aggressive or reasonable as it has been. This form of mutually assured destruction may discipline the parties and temper the discovery "arms race," although, as noted above, the party with the weaker case has no incentive to increase transactional costs – or at least their threat. More ominous, in cases of asymmetrical information, i.e., those in which the bulk of information (particularly ESI) resides with one party, incentives diverge. Here the burden of responding to discovery is largely borne by one side, there are fewer incentives to self-discipline. Indeed, Judge Easterbrook, writing before E-discovery points out that asymmetric information can lead to impositional discovery requests and the escalation of costs.[92]

"Producer pays" is simply incompatible with asymmetrical information. The two cannot fairly coexist. There is nothing the Federal Rules can do to prevent asymmetry of information. The Rules can eliminate, however, the ability of litigants to abusively exploit asymmetry by the simple expedient of applying a rule of proven economic fairness; i.e., "you get what you pay for."

E. Requiring Requesters To Pay For The Discovery They Initiate Will Not Curb Access To Justice.

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[90] Hardaway, Berger & Defield, supra note 55 at 70, citing *In Weekly Homes,* 295 S.W.3d 309, 322 (Tex. 2009); Miss. R. Civ. P. 26 (2003).

[91] *See* N.Y.L.J., *Allocating E-Discovery Costs!* A1 (Aug 17, 2009), NY Code (§202.70) (2006) (as amended); *but see U.S. Bank N.A. v. GreenPoint Mtge. Funding Inc., 2012 NY Slip Op 01515 (App. Div., 1st Dept. Feb. 28, 2012).*

[92] Esenberg, *supra* note 2 at 13 (referencing, Frank H. Easterbrook, *Discovery As Abuse*, 69 B.U. L. REV. 635, 643 (1989) (citing John Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence and Discovery Abuse*, 69 B.U. L. REV. 569 [1989]).

There is no reason to believe that imposing a fair system of cost allocation should curb access to justice. Private, individual litigants rarely bear the expenses of initiating lawsuits under the contingency-fee systems that prevail in the U.S., despite the fact that anything beyond small-claims litigation can have massive costs apart from the discovery costs that are the subject of this comment. One need only look to the steep up-front expenses of employing expert witnesses, forensic accountants, investigators and the like to know that litigation is expensive. Despite this, few would argue that U.S. citizens are under-served in this regard. For example, while placing some of the costs of discovery on those requesting it "may be thought to burden the ability of less wealthy litigants to pursue a claim, the investment of substantial resources into litigation on behalf of nonwealthy parties thought by counsel to have a meritorious claim is quite common in a variety of contexts and has not materially impeded the pursuit of claims.[93]

Adjustments can certainly be made in individual cases. Professor Allen would "permit a safety valve in the unusual case"[94] and Professor Redish recommends that "Rule 26 should therefore be amended to state unambiguously that discovery costs are attributable to the requesting party, unless applicable substantive law provides to the contrary or the court finds that a compelling reason for shifting the costs to the responding party exists.[95]

F. "Requester Pays" Is Consistent With The American Rule; "Producer Pays" Is Not.

A great deal of debate – well beyond the scope of this comment – has gone on for the better part of the last century as to whether the "American Rule" -- that each party should bear its own expenses in litigation -- is better or worse than the so-called "loser pays" rules that prevail in many other jurisdictions. Suffice it to say that based on all appearances, the American Rule's demise does not appear imminent. If so, why then should this one, glaring exception continue? In no sense can the costs of answering discovery requests from an opponent be considered an expense of prosecuting one's own claims or defenses. This goes even beyond "loser pays," because for the most part, even when a massive consumer of discovery loses the case, it still does not pay. The disconnect between "the American Rule" and the current system of discovery cost allocation is difficult to explain as anything other than an historical anomaly that – if it ever served a laudable purpose -- no longer does.

> "Yet at no point has anyone—including those who drafted the Federal Rules in the first place—even attempted to rationalize the respondent-centric model of cost allocation that has dominated federal court practice since the Rules' original promulgation. Were one actually to consider the issue afresh, it would be difficult to understand the assumptions inherent in a respondent-based allocation model."[96]

The cost allocation rule proposed by LCJ will force a more realistic assessment of cases before they are filed, and will create more realistic incentives to settle meritorious cases before the completion of discovery, helping to ease over-crowded court dockets but making those cases that

[93] Id. at 19.
[94] Allen, *supra* note 83.
[95] Redish *supra* note 70 at 12-13.
[96] Redish, *supra* note 70 at 7.

are litigated to conclusion more fair to both sides and more likely to be resolved on the merits, through settlement or judgment, without the perverse incentives created by the current system.

> "The drafters of the Rules, of course, were only human, and humans make mistakes—especially in the process of revolutionizing an entire system. In the discovery process, their first mistake was their failure even to consider the question of to whom discovery costs were to be appropriately attributed in the first instance. Their second mistake was their flawed implicit assumption that the costs were properly to be attributed not to the party who is best able to economically internalize the costs and benefits of discovery, but to the party who has little or no control over those decisions. It is now time to correct their errors—and get ready to wish them a happy birthday."[97]

V. ***Conclusion***

For almost 20 years, the Rules Committee has recognized the danger the information explosion poses to our civil justice system. In that time, the problems of discovery have worsened dramatically and, left unchecked, they will only continue to grow. Our system is crying out for national, policy-based solutions designed to provide uniform real world relief for real world problems. With this in mind, the Committee should give intense consideration to developing a package of interrelated rule amendments governing discovery, preservation, and cost allocation such as those proposed in this comment.

Respectfully submitted,

Lawyers for Civil Justice

[97] Redish *supra* note 70 at 14.