

**COMMENT**

**Preservation – Moving The Paradigm  
Submitted to the  
Civil Rules Advisory Committee**

**SUPPLEMENTING THE WHITE PAPER  
SUBMITTED TO THE  
2010 LITIGATION CONFERENCE**

**On behalf of  
Lawyers for Civil Justice  
DRI – Voice of the Defense Bar  
Federation of Defense & Corporate Counsel  
International Associate of Defense Counsel**

**November 10, 2010**

# Preservation – Moving The Paradigm

## SUPPLEMENTAL COMMENT TO THE WHITE PAPER: RESHAPING THE RULES OF CIVIL PROCEDURE FOR THE 21<sup>ST</sup> CENTURY SUBMITTED TO THE 2010 LITIGATION CONFERENCE

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### I. Introduction

This Supplemental Comment is respectfully submitted to reemphasize to the Civil Rules Advisory Committee our view that: bold action is needed to fix real problems related to preservation of information in litigation; those problems exist for plaintiffs, defendants and third-parties; the problems, although real, are not readily quantifiable; and rule making solutions exist that do not violate the Rules Enabling Act. We also address the questions raised in the Discovery Subcommittee's memorandum on "Preservation/Sanctions Issues."

As detailed in our White Paper, *Reshaping the Rules of Civil Procedure for the 21<sup>st</sup> Century* (May 2, 2010) (*Reshaping the Rules*), the current *ad hoc* patchwork of preservation obligations created by individual courts is creating burdens on litigants far beyond what anyone would consider reasonable. The current paradigm involving preservation and spoliation of electronically stored information (ESI) is undermining the "just, speedy and inexpensive" determination of actions. Cases are being settled, discontinued or not brought in the first place because the cost of preservation is too high, the risk of spoliation sanctions is too great, and the impact of ancillary litigation proceedings on discovery disputes is too debilitating. While the rise in spoliation decisions coupled with some high profile sanctions decisions may appear to some as not sufficient to require changes to the Federal Rules, we respectfully submit that these cases are merely the tip of the iceberg. They have forced litigants to spend millions of dollars to address an unquantifiable risk in a computing system that was not designed for litigation holds. Meaningful rule amendments would supply the guidance necessary to help solve these increasingly serious and costly problems that our members see in everyday litigation.

We applaud the priority placed on preservation by the Committee. We believe, however, that it is important to reemphasize some key points. First, the way individual litigants and companies create, store and dispose of business records has changed significantly with the advent of technology. Second, complying with expectations of preservation standards developing around the country is not as easy to honor as flipping a switch, buying more digital storage or distributing a litigation hold notice. Third, determining when the duty to preserve exists (the trigger) although important is relatively easy

compared to the tremendous difficulty encountered in determining the scope of what to preserve. Fourth, rather than engage in extensive efforts to litigate what might be missing, courts should instead focus on what exists related to a claim or defense. Lastly, sanctions for apparently missing evidence should be determined by intent to prevent use of the data in litigation, not by the inadvertent failure to follow some procedural step like issuing a written notice, failing to identify a key custodian, failing to identify an electronic storage location or failing to anticipate a specific request for ESI.

## **II. The Proliferation of Data Requires a New Approach**

In the digital age information is fluid – not static. In other words, the very benefits of ESI (the speed at which it is created, shared, stored and destroyed) make it extraordinarily difficult to identify and preserve. The volume of electronic data is increasing at an exponential rate (some estimate the total volume of all data ever created will double in the next year due to the proliferation of electronic data). Real world examples and empirical data demonstrating the magnitude of the problems faced by our members in dealing with preservation issues can be found in *Reshaping the Rules* and in Section III. A., *infra*.

Rather than recognize the basic challenge presented by technology some leading cases have placed a disproportionate burden on businesses by requiring preservation of *all potentially* relevant data without considering proportionality. Disputes related to preservation have focused on what was lost, rather than focusing on what still exists. Cases discussing deliberate efforts to destroy documents sometimes conflate the general requirements for preservation into what is clearly a case of deliberate misconduct. The resulting confusion caused by case law creating ever-expanding notions of preservation duties borne of concerns about deliberate misconduct, has created untenable and unnecessary burdens and exponential cost increases. Litigants and courts have spent untold hours trying to fathom “reasonable efforts” to preserve, which is a problem that is magnified by the idiosyncrasies of corporate systems that literally force a unique analysis by the court for each case before it -- certainly one of the reasons why the confusion in the case law is so problematic and is likely to continue to worsen.

Instead of focusing on the intent to destroy evidence, the focus has been on whether the party had a reasonable approach and methodology to address preservation and if the apparent lack of preservation was due to negligence or an inordinate amount of prejudice. Given the complexities of modern information systems the current preservation obligations doom companies to failure. Most skilled lawyers can argue an opponent failed to properly preserve some undiscovered pocket of ESI for many reasons; one key custodian was missed, a network location was overlooked or a laptop of a former employee was misplaced irrespective of good faith efforts to preserve the information.

In response, well intentioned companies have fashioned detailed, time consuming and costly preservation procedures, often requiring individual employees (multiplied many-fold) to expend significant, resource consuming efforts to preserve data in systems that are designed to limit email mailboxes and to otherwise manage the overwhelming volume

of electronic data. Other companies have created multi-million dollar computer storage systems solely to preserve data for the purposes of litigation. Instead of the law evolving with changing technology, the law is imposing costly changes on litigants that force both changes in best practices in managing information as well as forcing information management tools to conform to the singular requirements of preservation. To make matters worse the changes undertaken to meet the developing and varied preservation standards provide no certainty to litigants. No matter what efforts are taken, some piece of ESI is likely to be lost or inadvertently destroyed during preservation and discovery due to the complexity of information management (i.e. if a computer is lost or stolen). The fluid nature of digital information is the very antithesis of preservation. The current preservation—spoliation paradigm must change.

### A. The Civil Rules Should Adapt to the 21<sup>st</sup> Century

The tail is indeed wagging the dog. Under the current state of the law, litigants are not simply refraining from their usual course of conduct in order to preserve evidence. Companies are not being merely inconvenienced by being asked to keep some data around a little longer than usual. Preservation according to recent case law is not simply about adding storage capacity or turning off the automatic deletion features of an email system. As we will discuss, preservation is about a litany of affirmative and costly steps with no legitimate business purpose other than to fit the round peg of ESI preservation into the square hole of spoliation law.

The current preservation and spoliation paradigm has not evolved to meet the demands of litigation in the 21<sup>st</sup> Century. A doctrine developed in the 17<sup>th</sup> Century – spoliation – is being applied in circumstances unimagined when it was developed. The doctrine of spoliation is often traced back to *Armory v. Delamirie*.<sup>1</sup> In *Armory* a goldsmith takes a stone from a ring found by a young boy. When the boy brings a lawsuit to recover the value of the stone, the goldsmith claims in defense that the stone is lost, but nevertheless worthless. The goldsmith is punished with an inference that the stone was destroyed to prevent its use in the lawsuit. All would agree that the intentional destruction of the stone should be punished. This is because:

[t]he law, in hatred of the spoliator, baffles the destroyer, and thwarts his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrongdoer by the very

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<sup>1</sup> See e.g. *Goodman v. Praxair*, 2009 WL 1955805, \*17 (D.Md. Jul. 7, 2009) (J. Grimm) (quoting *Pomeroy v. Benton*, 77 Mo. 64, 86 (1882)); Magistrate Judge Grimm aptly noted in *Goodman*: “Indeed, the origin of the doctrine of spoliation is often traced back to the 288-year-old case of *Armory v. Delamirie*, 93 Eng. Rep. 664 (K.B. 1722). See, e.g., *Sullivan v. Gen. Motors Corp.*, 772 F. Supp. 358, 360 n.3 (N.D. Ohio 1991) (“At least two federal courts have traced the origins of [the spoliation doctrine] to *Armory v. Delamirie* . . . .”) [citations omitted]; Lawrence B. Solum & Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 *Emory L.J.* 1085, 1087 & n.4 (1987) (noting that an unfavorable inference for spoliation of evidence is of “ancient lineage”) (citing *Armory*, 93 Eng. Rep. 664) (citations omitted)).

means he had so confidentially employed to perpetrate the wrongdoing.<sup>2</sup>

At its core, the doctrine of spoliation appeals to common sense and logic. A wrongdoer that willfully destroys evidence – for the purpose of thwarting the judicial process – should not benefit from an intentional act of destruction. In a world dominated by tangible things, application of the law of spoliation involved a simple question. Did someone intentionally destroy something to keep it out of the hands of an adversary or the court?

During the two millennia following *Armory* memories faded, documents were misplaced and lawsuits continued unabated by costly ancillary litigation. If a key piece of evidence was destroyed or lost, courts meted out various punishments for the wrongdoer or unusually careless party. Critical evidence was missing and the law stepped in to right a perceived wrong – punishment of a wrongdoer or redress for a severely prejudiced party.

Recently this simple question – was evidence destroyed to prevent its use in litigation – has evolved into a question of whether enough was done to prevent the destruction of evidence regardless of motive. Instead of determining whether a willful destruction occurred, courts are asking whether a party took reasonable steps to prevent the destruction of ESI. In the age of technology, answering this question is a complicated and burdensome process for the litigants and the court. By focusing on the process of preservation rather than the end result, well intentioned judges are turning the doctrine of spoliation upside down.

Rather than looking at intentional conduct, and then fashioning a remedy, courts are starting from the premise that it is necessary to examine the actions taken to prevent the alleged destruction of missing evidence. Misplacing a computer (a surprisingly common event in large multinational corporations) results in ancillary litigation over whether enough was done to prevent the loss of the computer. We submit, however, that courts should focus on the remaining evidence and whether the missing computer was the only place where sufficient evidence can be found.

If we fast forward to the present, a modern day goldsmith may suffer a similar fate as his 17<sup>th</sup> Century counterpart, even if the stone is found. Assume the boy argues the stone found is not his stone. Assume further that the records of the shop are kept electronically on a small computer network: the location where the stone was stored, an appraisal of the stone and appraisals of similar stones. The shopkeeper having found the stone produces it, but fails to implement a written litigation hold. As a result all relevant records except the stone are inadvertently destroyed. While arguably the most relevant piece of evidence has been recovered – the stone – all other evidence has been lost. Should an adverse inference charge be given because no other evidence exists? If the goldsmith's records were destroyed after litigation was commenced is the destruction gross

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<sup>2</sup> *Id.* citing *Pastorello v. City of New York*, 2003 U.S. Dist. LEXIS 5, at \*7 (S.D.N.Y. April 1, 2003) (quoting *Pomeroy v. Benton*, 77 Mo. 64, 86 [1882]).

negligence or willful? What if through no fault of the goldsmith his computer system crashed after litigation was commenced, but before he made a copy of the electronic records?

The modern version of *Armory* may seem silly, but it aptly illustrates how the doctrine of spoliation has been expanded to cover ESI rather than the development of procedural tools – equally unimagined in the 17<sup>th</sup> Century – to address preservation in a digital age.

Faced with the current state of preservation law how does a modern goldsmith avoid an adverse inference instruction? Is it enough to preserve the stone? Should appraisals be preserved? Should all appraisals be kept or is it enough to preserve those of similar stones? What time frame should be used? Is it enough to go back three years before the lawsuit? Should appraisals be preserved going forward? Should the computers where the appraisals are kept be preserved? Should the entire network be preserved or just the file locations where the appraisals are kept? What if appraisals are emailed to customers, should the emails be preserved? What if the goldsmith worked on appraisals on his home computer, a Black Berry™, smart phone, I-Phone™ or I-pad™? What if a thumb drive or removable USB hard drive exists that contains some appraisals? Should the analysis depend on the jurisdiction?

Does the goldsmith need to issue a written litigation hold? Does the goldsmith's lawyer interview the key custodians? Does the goldsmith issue quarterly reminders of the hold to his employees? Is it enough to verbally instruct his employees not to destroy evidence? Should he hire a vendor to collect ESI or should a vendor make duplicate "images" of the computers, storage devices, network server and email server? Can the goldsmith simply make copies himself of the electronic records? What if the value of the stone is \$10.00? What if the value of the stone is \$100,000.00? What if the value of the stone is \$1,000,000.00? Does it matter if the lawsuit against the goldsmith is by an individual plaintiff, a business or a class of similarly situated plaintiffs? Does it matter if this is the goldsmith's first lawsuit or if it is his one-hundredth lawsuit? Does it matter if the goldsmith is a sole proprietor or a nationwide chain of goldsmith stores?

Since we are in the modern age, we cannot forget about the boy. What if he was deposed and testified that he kept electronic records of rings he finds on a laptop? Does the boy have similar obligations? What if he emailed his mother about the ring and the record is stored on a jointly used home computer? Should the boy issue a written litigation hold to his mother or is it enough to tell his mother not to destroy emails on the jointly used home computer? What if the mother is not told and the email is destroyed? Maybe the boy took a picture of the ring using his smart phone and sent the picture as a text message to his mother? If the boy and his mother destroy the messages after the lawsuit is commenced, but before he is deposed should the boy face sanctions?

The legal merits of the modern day *Armory* have not changed – a boy suing a goldsmith over the value of a stone. Only the technology surrounding the claim has changed. Should litigants be forced to ask the litany of preservation questions in every case? We firmly believe that these questions are asked in more cases than is appreciated.

We also believe that there must be a better way to deal with ESI destroyed by bad actors, lost by negligent actors or inadvertently lost by well intentioned actors than the system of *ad hoc* preservation rules being developed across the country. Rules must be developed to shift the paradigm of preservation. Courts should be guided by rules that focus attention on preservation closely tied to relevant evidence. The focus of alleged spoliation should start with available evidence before examining what is missing.

## **B. The Duty to Preserve Should be Codified in the Rules**

Federal courts agree at the circuit level and at the district level that the duty to preserve is triggered when litigation is initiated, *reasonably anticipated*<sup>3</sup> or *reasonably foreseeable*<sup>4</sup>. We believe that there appears to be common acceptance of terms such as “reasonable anticipation of litigation” or “reasonably foreseeable litigation.” For the purposes of a preservation rule, however, we suggest that the Committee might want to consider more of a bright line standard such as litigation that is “reasonably certain”, or a similar term that gives greater guidance as to whether or not litigation should be anticipated. Such a standard would avoid the circumstance of proliferation of holds in cases which do not result in litigation. We believe that such a standard better and more pragmatically articulates the time at which the duty to preserve information is triggered. We also believe that most litigants exposed to the standard would agree that it is a standard that can be met, analyzed in most cases and understood under most factual scenarios. And, although we will continue our own investigation into the practicality and fairness to all litigants of such a standard, we respectfully submit that it is a standard that can and should be considered by the Committee for codification in the Rules.

### **1. Trigger Events Are a Small Part of The Problem**

We believe that clearly stated codification of the current case law with illustrative comments on when the duty to preserve is triggered will go a long way toward removing some of the uncertainty surrounding preservation issues. We believe that “reasonable certainty of litigation” is a standard that would supply litigants, their lawyers, and judges with more practical guidance in identifying trigger events, and, therefore, is worthy of consideration by the Committee. It surely would make it very difficult to claim ignorance over when the duty to preserve has been triggered (although when disputed, it is often with 20/20 hindsight). The duty resides along a fact specific continuum ranging from no knowledge of future litigation to absolute knowledge of a filed lawsuit. One method to enable an opposing party to gain a level of certainty regarding a preservation trigger is to provide a notice letter to create a clearer trigger event.

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<sup>3</sup> *Victor Stanley, Inc. v. Creative Pipe, Inc.*, No. MJG-06-2662, 2010 WL 3530097, at \*22–23 (D. Md. Sept. 9, 2010) (“[t]he common law imposes the obligation to preserve evidence from the moment that litigation is reasonably anticipated.” (citations omitted)).

<sup>4</sup> *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010) (“Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another’s use as evidence *in pending or reasonably foreseeable litigation.*” (emphasis added)).

Litigants have learned over the past few years that the failure to recognize well known trigger events will not be excused (such as a credible threat to sue letter, catastrophic event, preparing to initiate a lawsuit or the actual filing of a lawsuit) and that other circumstances in the middle of the continuum are to be analyzed on a case by case basis. If the balance tips toward reasonable anticipation of litigation then the duty exists. If litigation is remote or not likely, then the duty does not exist. If it is a close call, the safe course is to preserve evidence, but this judgment call also should be subject to a more certain standard and avoidance of “Monday morning quarterbacking”.

These types of decisions involving legal judgment are subject to reasoned analysis and many courts looking at the same set of facts are likely to reach similar conclusions. While some anomalies may remain, results divergent from the expected results take place in all aspects of the law. The risk of failing to preserve at the right moment can be quantified and acted on accordingly. Risk averse organizations will err on the side of caution and preserve more readily. Organizations less risk averse may err on the side of business as usual and forego preservation, despite the knowledge that someday preservation may be deemed to have been required. Again, the risk analysis is moderately quantifiable and can be accepted or rejected with known consequences for a litigant. Such a determination, however, does not constitute a deliberate effort to destroy information; it is simply a determination of balancing the costs and difficulties in preservation (when most preservation events never result in later collection and production of evidence) versus the risk of potential loss of information early in a matter.

Absent a duty to preserve litigants are free to destroy information as they see fit.<sup>5</sup> Trigger event cases are largely disputes over when the duty arose, rather than if the duty arose. Proponents of spoliation motions attempt to seek to create a duty to preserve long before an opponent began preserving evidence. Opponents work to establish that the duty to preserve arose on or about the time they began preserving evidence. If ESI is destroyed without any preservation efforts (such as issuing a litigation hold) the date the duty attached is immaterial to the analysis for purposes other than determining how much information was lost or destroyed.

Regardless of the standard used to establish a trigger event, whether a duty to preserve exists will remain fact specific, but can be aided by adoption of a more certain standard.

## **2. A Codification of The Duty To Preserve Should Create More Predictability**

Clear lines are developing and codification of the rule can be accompanied by commentary that illustrates, by way of example, scenarios that are trigger events and scenarios that are clearly not trigger events. Such guidance accompanied by a concise definition of the duty to preserve is a solution that all litigants and their lawyers should be

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<sup>5</sup> Arthur Andersen LLP v. United States, 544 U.S. 696, 125 S.Ct. 2129, 2135 (2005) document retention policies are appropriate and created “to keep certain information from getting into the hands of others, including the Government.”

able to meet in most all circumstances with a small area of genuine disagreements. In other words, organizations are learning the circumstances requiring preservation. Attempting to design a bright line rule different from the one emerging is laudable, but a consensus among stakeholders may prove difficult.

If the Advisory Committee supplies guidance by way of commentary, most events giving rise to the duty to preserve can be articulated. The analysis of other trigger events not specifically discussed in the commentary will, nevertheless, likely be guided by the commentary. By providing guidance in support of a codified preservation rule, litigation over the date the duty to preserve arose will be minimized. In addition, stakeholders can work toward a consensus of when the duty to preserve exists as a national uniform policy, rather than subjecting the analysis to different interpretations by district courts.

The other benefit of codifying the existing duty to preserve standard is the ability to create commentary illustrating logical boundaries to the duty to preserve relating to other aspects of preservation that encompass the preservation—spoliation paradigm

Guidance can be provided in the commentary on issues such as:

**a. Duration and Ongoing Duty**

Examples of reasonable limits on pre-litigation time frames (such as two years prior to the lawsuit) can be articulated as guidance. Also, circumstances involving the on-going duty to preserve can be given (such as an ongoing copyright infringement case). The determination to preserve does not last forever. In many cases it might appear that litigation is possible only to determine later that the risk is more remote, warranting a relaxation of a hold. However, if litigation does occur many years later, the analysis should focus on both the initial determination and facts as well as the later decision to relax the hold when the circumstances indicated litigation was no longer likely or reasonably anticipated.

**b. Litigation Hold Notices**

Litigation hold notices and *ad hoc* procedures should not be necessary. Parties should be permitted to preserve in a manner of their choosing. Notices should be recommended as advisable, but not necessary and the commentary should note this option. Examples can be given of cases where a notice may be necessary (such as litigation involving hundreds of custodians) and cases where a notice may not be required (a single plaintiff or a small business with a few employees).

**c. Work Product Doctrine Would Not Be Affected**

Efforts to preserve should be presumptively protected from discovery on the basis of attorney-client privilege or the work product doctrine. The types of information that should nevertheless be shared among litigants can be articulated in commentary. The commentary would guide courts with the type of information that should be exchanged

and the types of information that should not be exchanged because it may reveal the thoughts of counsel or disclose litigation strategy.

#### **d. Sanctions Will Be Guided By Culpability and Proportionality**

Although discussed more fully below, examples of how sanctions should be determined under the sanctions rule that we propose can be given in commentary. The advisory committee can use commentary to place the emphasis on culpability (were the actions of a party intentional for the purpose of preventing the use of information in litigation) and proportionality. (Did the company have an overall good faith approach to manage preservation obligations and was the scope of ESI preserved reasonable in light of the amount in controversy or the costs of preservation.) Emphasis can also be placed on analyzing the volume and type of existing evidence. For example, if most all relevant information resides in duplicate form, or is nevertheless in the possession of a litigant through other means, the loss of a laptop or deletion of duplicative information should be excused.

#### **C. The Scope of Preservation Should be the Focus of Rulemaking**

**Determining what to preserve is the most difficult question facing litigants once the duty to preserve exists.** By way of illustration, judgment calls can be made based on a given set of facts as to whether the duty to preserve has been triggered. Trigger event judgments are subject to reasoned analysis pursuant to the reasonable anticipation of litigation standard. At the opposite end of the spectrum, however, determining the scope of preservation is governed by widely varying standards. Terms like “reasonably related” and “likely to lead to discoverable information” offer litigants little guidance on which to make judgment calls about the boundaries of the scope of preservation. Problems are compounded at the ‘threat’ or inception of litigation stage when little is known about the nature of the putative claim.

We respectfully submit that the focus of the Committee should be on providing guidance articulating the reasonable scope of preservation. As we will discuss, given the *ad hoc* rules developing around implementing litigation holds, guidance on the scope of preservation can provide real world relief to litigants suffering with the myriad of preservation questions presented by modern litigation.

The scope of preservation, in its current state, provides for the greatest amount of uncertainty and unquantifiable risk for litigants and their lawyers. It also has some unintended consequences. For example, if an organization preserves large volumes of data with little or no connection to the ultimate litigation, then the organization must contend with the added costs of sifting through piles of preserved data to determine what is relevant to the litigation and to identify and segregate privileged information. Added costs of e-discovery can be in the hundreds of thousands or tens of millions of dollars. If an organization preserves too little it is subject to accusations of spoliation and the risk of

ancillary litigation. Little guidance is offered by case law describing a safe middle ground.

Even more troublesome, however, are the risks well intentioned organizations face even when following the strictest *ad hoc* rule in good faith to implement a litigation hold. If, despite best efforts an organization misses a key custodian, a single storage device or remote network location, the organization may have minimized the risk of sanctions but is not immune from them. Still other organizations may not interpret the claims or defenses as broadly as its adversary or a court especially at early litigation stages. Miscalculating the scope derides the efforts of the most careful litigants; no matter how diligent they were and no matter how much data was preserved. Additionally, the scope of the matter typically evolves over time. The determination at the outset should not be judged based on facts learned much later. Additionally, the determination of the scope of the matter usually trails the battles over claims of spoliation.

Lastly, only two courts have considered the application of proportionality to the scope of preservation pursuant to FRCP Rule 26(b)(2)(C) although neither court specifically analyzed its application.<sup>6</sup> While it seems obvious that the scope of preservation should be tied to the amount in controversy, the costs of preservation, need for the information and other factors articulated in Rule 26(b)(2)(C), it remains an unsettled point that leads to over preservation. However, the challenge of preservation starts when the trigger takes place; judicial guidance on proportionality does not engage until long after initial preservation decisions are required.

Focusing the Committee's efforts on the scope of discovery will have the greatest impact on controlling the preservation problem and changing the preservation paradigm.

### **1. Eliminate The "Gotcha Game"**

Rules addressing the scope of preservation can have the greatest impact on the costs associated with preservation and minimizing the risk of sanctions if an organization preserves data in good faith. By developing a set of guidelines in the commentary or basic rules regarding the scope of preservation, litigants taking certain enumerated minimum steps can rest assured that they are immune from sanctions or that sanctions are unlikely. This can minimize the gotcha game.

The "gotcha game" was fully described in *Reshaping the Rules*. In short, a litigant requesting information seeks wide ranging preservation pre-suit through an overly broad demand for preservation. If a recipient fails to take action in response or to preserve remotely relevant data, ancillary litigation can ensue testing the boundaries of the scope of preservation. The proponent of such ancillary litigation "wins" if relevant data was lost or destroyed regardless of the efforts taken to preserve ESI. Currently there is no disincentive for a requester to lodge other than an overly broad request, and there is an incentive for the responder to seek to comply with such an overly broad request in an

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<sup>6</sup> *Rimkus v. Cammarata*, 688 F. Supp. 2d. 598 (S.D. Tex. Feb 19, 2010); *Victor Stanley II*, 2010 WL 3530097

effort to avoid potential sanctions even at significant cost. A concern over lost data (feigned or real) is unlikely to result in a movant being sanctioned for waste of judicial resources. There is no downside to playing the game.

## **2. Promote Cooperation Through Well Defined Preservation Rules**

Using the rules and commentary to create a good faith foundation and general guidelines for determining scope can also promote cooperation. A litigant in the vast majority of cases will be on notice of the scope of preservation expected by both parties. If a litigant does nothing and an opponent follows a newly defined rule or scope described in commentary, an appropriate amount of relevant data will exist to be used to prosecute or defend a claim. If the nature of the litigation requires a broader scope, a specific demand can be made by the opposing party early in the proceeding (although just because a party demands broad preservation does not mean the demand is appropriate).

At any stage of the litigation (pre or post suit) potential parties will be in a position to analyze the new procedurally defined scope and work toward expanding or contracting the scope.

At the least, scope expectations suggested by the rules will provide a base line framework for discussion. A party seeking to expand the scope will need to articulate a reason why an expanded scope is needed. Concurrently, a party faced with an expansive and overly broad preservation demand should be permitted to avoid sanctions should it adhere to the scope expectations suggested by the rules. Therefore, parties who need more preservation will be forced to come forward more quickly to work out the necessary scope of preservation with an opposing party or seek court intervention to expand the expected scope of preservation. Both scenarios increase cooperation, rather than create disincentives to cooperation.

## **3. Focus Judicial Resources on the Merits of Claims**

In the same vein, creating minimum scope expectations will help shift the paradigm from what was inadvertently lost to what was kept. At the risk of oversimplification, if the goldsmith from our example preserves the stone, then the focus of the court can be on what else is necessary to reach the merits of the claim. Does the party really need the appraisal, all similar appraisals or all appraisals regardless of time? If the rules provide that preservation of ESI in existence from two years prior to a trigger event is satisfactory then the focus can be on why three, four or five years prior to the trigger event is important and why it should be preserved now that the court is involved.

Again, by providing minimum scope guidance the paradigm shifts to what is needed for the parties to reach the just, speedy and inexpensive resolution of the case. Expanding the scope necessarily focuses the court's attention on the claims, defenses and what is needed to prove them. Moving beyond the minimum scope will require some support by a party tied to its ability to support its claim or defense. In most cases expanding the

scope should not be necessary. The merits and needs of the case will be the focus, not what is missing.

#### **4. Focus Preservation Disputes on Available Relevant Data**

Establishing by rule and example, minimum scope expectations will drive the analysis in preservation disputes. By shifting the paradigm to what exists and what will actually assist the finder of fact in reaching a decision on the merits, rather than what was destroyed or by providing protections for litigants meeting the minimum requirements, an adversary will be required to negotiate an expanded scope or seek judicial intervention to expand the scope. This allows a preservation dispute to ripen faster and allows the court to focus on available relevant data. If the case warrants an expanded scope, arguments will focus on what exists, not what should have existed. It sounds like a simple proposition but it is a very necessary paradigm shift.

#### **5. Spoliation Must Require Bad Faith / Willful Conduct**

To increase the focus on what exists rather than what was destroyed traditional spoliation law and sanctions should be reserved for cases of bad faith or willful conduct tied to the intent to destroy information for the purposes of preventing its use in litigation. Traditional spoliation law will exist in the realm for which it was designed – bad actors destroying evidence because they know it is bad. Cases of wiping of ESI, disposal of a key computer or other willful destruction of a key piece of necessary evidence with a culpable mind will continue to coexist with preservation rules and commentary designed for the 21<sup>st</sup> Century.

#### **6. Tie the Scope of Preservation to Rule 26(b)(2)(C)**

We respectfully submit that the scope of discovery should be tied to the limitations on discovery contained in FRCP Rule 26(b)(2)(C). In its present form the Rule states:

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs

of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

By tying the court's analysis to subsection iii, proportionality will be used to analyze the burdens of preservation versus the factors articulated in a rule. As stated earlier only two courts have raised the issue, although not directly analyzing the use of proportionality within the context of the case. As a result a litigant that preserves a core of relevant materials can weigh the likelihood of an opponent arguing that more tangential ESI should have been preserved. In some cases the scope should be wider than other cases. Specifically incorporating proportionality into preservation rules also will cause courts to focus on the merits of a claim and what is needed by the litigants to prosecute a claim or defense. This will help shift the preservation—spoliation paradigm towards what exists rather than what is missing.

Further, a potential litigant is in a better position to weigh the burdens and expense of preservation against the factors articulated in subsection iii of the rule. Parties will evaluate proportionality when making decisions regarding how and whether to preserve information, particularly information not directly related to the merits. As a result judgment calls can be made based on the risks of not preserving ESI seemingly outside the scope of relevant materials. As contained within our trigger event discussion above, these are the sorts of risk assessments litigants and their lawyers are comfortable making. Under the current paradigm, however, risks are associated with the loss of one email. This in turn causes a leave no stone unturned preservation analysis. The current paradigm necessarily dooms even careful litigants to failure. Avoiding sanctions should be based on predictable factors so long as good faith preservation is undertaken in response to a trigger event.

#### **7. Make the Determination on Spoliation an issue for the Court.**

The recent decisions in *Pension Committee* and *Rimkus* place part of the determination of preservation and spoliation with the jury considering the merits. This process creates a significant risk that jury trials will become distracted with the challenging and often prejudicial issues of whether and how a party has met their preservation obligations. We believe that a rule defining preservation obligations should also clarify that the determination of whether a party has violated its obligations under the rule should rest with the court and not the finder of fact. The determination and appropriate sanctions should be adjudicated prior to trial when possible and any factual determinations related to the issue should be narrowly focused. Additionally, the commentary should explain that the scope of any discovery related to a party's compliance with preservation should also be very narrowly construed.

### **III. Preservation Problems Are Real**

#### **A. Real World Examples Were Cited in *Reshaping the Rules***

A number of real world examples, along with empirical data supporting the need for reform were contained in *Reshaping the Rules*.

- Patrick Oot, former Director of Electronic Discovery and Senior Counsel at Verizon, believes that there is a worrisome “creep toward over-protectiveness and unreasonableness” in the scope of litigation holds at many organizations that have attempted to put a “hold” policy in place.<sup>7</sup> Specifically, there is a tendency to identify too many employees as holders of relevant ESI. This leads to excessive retention of ESI that attorneys will eventually review at significant cost.<sup>8</sup>
- Jason R. Baron stated in a paper: “I believe the explosive growth of information is transforming the litigation system, and that the current paradigm is broken.”<sup>9</sup>
- Specific examples of problems facing companies as they work to define the scope of preservation were given.
- A study of global 1000 companies was cited.

Unfortunately the problems are getting worse and the cost to implement litigation holds continues to grow as a drain on well intentioned companies. Statistics contained in *Reshaping the Rules* bear repeating.

A survey of Global 1000 companies with revenue over \$5 billion was conducted between October 2007 and March 2008.<sup>10</sup> The survey demonstrates with empirical data that the

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<sup>7</sup> Institute for the Advancement of the American Legal System, *E-Discovery: A View from the Front Lines* 9 (2008).

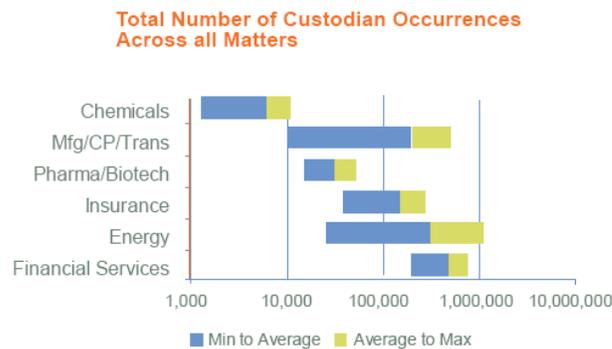
<sup>8</sup> *Id.* (As some of our advisors note, devising an appropriate litigation hold is an art, not a science. For a variety of reasons, discovery in a case can be delayed and many parties fail to understand what exactly needs to be preserved until discovery has begun in earnest. Accordingly, lawyers tend to err on the side of over-retention.)

<sup>9</sup> Jason R. Baron, *E-discovery and the Problem of Asymmetric Knowledge*, Presentation at the Mercer Law School Symposium: Ethics and Professionalism in the Digital Age (Nov. 7, 2008), in 60 Mercer L. Rev. 863 (2009); Am. College of Trial Lawyers & Inst. For the Advancement of the Am. Legal Syst., *Interim Report A-2* (2008) (23% of those surveyed “indicated that the civil justice system is broken”).

<sup>10</sup> Compliance, Governance and Oversight Council, *Benchmark Survey on Prevailing Practices for Legal Holds in Global 1000 Companies* (2008), available at <http://www.cgoc.com/events/benchmarkwebinar>. The Survey was produced by the Compliance Governance and Oversight Counsel ([www.cgoc.com](http://www.cgoc.com)), a community of corporate practitioners in retention, preservation and privacy. This community has been focusing on litigation hold issues since 2004. Benchmarking data was collected from corporations with revenue ranging from \$5 billion to well over \$150 billion in virtually all industry sectors, including: Biotechnology, Chemicals, Consumer Products, Energy, Financial Services, High Tech, Insurance, Manufacturing, Pharmaceutical and Transportation sectors, with Energy and Financial Services comprising 50% of the total. The companies manage a wide range of legal matters and legal holds. Matter types include commercial litigation, government investigations and inquiries, intellectual property disputes, government contract disputes, investigations, subpoenas, EEOC claims, employee “slip-and-falls” and mass tort litigation.

burden on American companies to implement litigation holds is very high. The survey highlights the changes in processes and technology within the surveyed companies, the impact of those changes on reducing risk and cost, and the methodologies used to issue litigation holds, manage preservation, and conduct e-discovery.<sup>11</sup>

While a few companies had only two dozen new matters per year, the majority of companies surveyed had far more new matters each year. The average was 980 new matters initiated each year, with an average of 5,100 open matters at any given time across all industries. 80% of the companies issued litigation holds for every matter, while 20% used early case assessments of various factors to determine which matters required associated litigation holds.<sup>12</sup>



The survey discusses the tasks involved to implement a litigation hold pursuant to current case law requirements. Based on the data collected the survey includes a hypothetical look at the tasks involved to manage litigation holds across two hundred matters by one large organization over one year. The survey projected a staggering 60,000 tasks to simply send out a written litigation hold notice with quarterly reminders.

**Level of documentation for 200 matters with 75 custodians each for one year.**

<i>Task</i>	<i>Burden</i>
Initial notice and quarterly reminders	60,000 tasks
Affirmative responses from custodians	60,000 tasks
Manual and phone follow up — 25% of custodians	15,000 follow ups
Collection of 1,000 files (email, desktop) per custodian — 50% of custodians	7,500,000 files
Manual and phone follow up — 25% of collections	1,875 follow ups
In-house tracking per notice, custodian, follow up	2.5 people or 5,250 hours
Tracking with collections included	5 people or 9,963 hours

Included in the survey is one corporation’s public hearing testimony before the Civil Rules Advisory Committee during the public comment phase for the 2006 Amendments:

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

“I’m from a company that has 15,000 active litigations. In the year 2004, which was a slow year, we got new litigations at the rate of 225 a month. A few other numbers.

We operate in 200 countries in the world. We have 306 offices around the world, 70 of them in the U.S. We generate 5.2 million e-mails a day, about half of that in the U.S. We have 65,000 desktop computers around the world and 30,000 laptop computers. These are for our employees, about half of those in the U.S. We have, in addition to the 65,000 desktops and 30,000 laptops, we have between 15,000 and 20,000 Blackberries and PDAs around the world. We have 7,000 servers worldwide, 4,000 of them in the U.S. We have 1,000 to 2,000 networks worldwide, about half of those in the U.S. We have 3,750 e-collaboration rooms. I assume that they’re chat room type things, for people to be working on documents simultaneously. About 3,000 of those are in the U.S. We have 3,000 databases; 2,000 of those in the U.S. Our total storage of information that we now have is 800 terabytes; 500 terabytes in the U.S. One terabyte equals 500 million pages. 500 terabytes equals 250 billion pages. 800 terabytes equals 400 billion pages.

I don’t have worldwide figures on the disaster recovery system. The latest figures I have on the disaster recovery systems in the U.S. is that we generate 121,000 backup tapes for disaster recovery purposes. If we were ever to get an order, and we never have, that told us that we would have to stop all of our backup tapes, just the replacement of the backup tapes would cost 1.98 million dollars a month. That’s over 20 — that’s about 24 million dollars a year.<sup>13</sup>”

In a follow up survey, CGOC analyzed the growing problem of IT costs associated with an exponentially expanding universe of data.<sup>14</sup> The conclusions reached echo the concerns previously raised. Although the perception may be that IT costs are marginal, in reality IT costs are rising to keep up with an ever expanding digital universe. The universe is often left undisturbed to avoid the risks associated with litigation publicized by recent high profile spoliation cases. The survey aptly summarizes the disconnect between perception and reality in the legal world:

Although not a specific question on the survey, but a contributor to organizational challenges, the widely-held perception in the CGOC legal community is that IT costs are trivial, declining naturally as a function of technology

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<sup>13</sup> *Id.* (citing Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure (testimony of [Charles A.] Beach, [Exxon]) January 28, 2005. Mr. Beach explained in an interview conducted by John J. Jablonski on March 15, 2010, that his testimony regarding volume of printed pages was based on a bytes to plain text conversion. Conversion rates for other types of documents, such as spreadsheets, images and e-mails varies.).

<sup>14</sup> Compliance, Governance and Oversight Council, *Information Governance Benchmark Report in Global 1000 Companies* (2010).

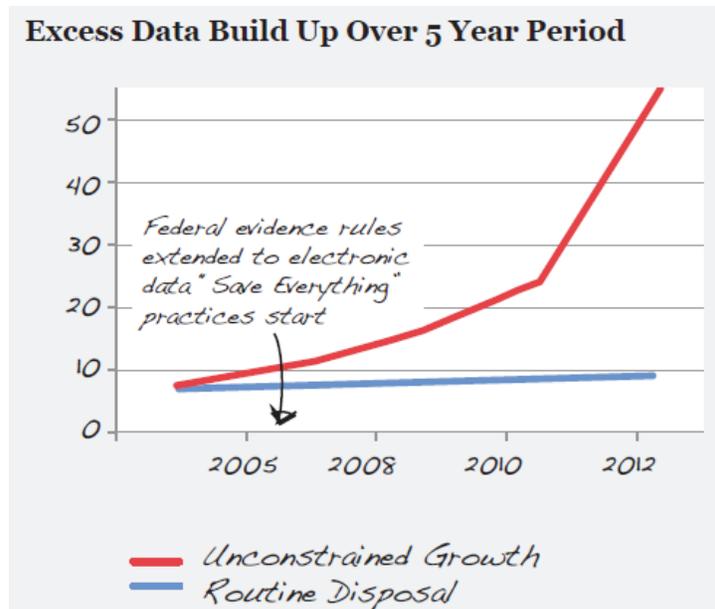
advances rather than headcount or budget reductions, and remain unaffected by blanket legal holds or “keep everything” approaches to mitigating legal risk.

\* \* \*

In fact, IT spend is increasing faster than revenue, despite brute-force 2009 expense reductions of 0.9% on average in response to economic conditions. CIOs are under intense pressure to reduce costs. It is increasingly difficult to balance the ever-increasing costs of running operations in which data volume doubles every 18 months with making strategically important technology investments.

As one respondent put it, “Our data volume grew by 875% in the last five years, but our budget shrank. Something has got to give.” This sharp rate increase in data accumulation coincides with the *Zubulake* opinions on legal holds and the emergence of “keep everything” in lieu of more precise legal hold definition and execution — unintended consequences which most companies face as evidenced in legacy data build-up. With high average IT costs (as high as 12% in financial services), over-managing information is a gross waste of capital resources. At the same time, consumer attitudes toward actual or perceived corporate wrong doing are extremely hostile, driving the risk of improper record destruction into the “Court of Public Perception.”

The unintended consequence of over preservation in dollars and volume of data is in stark contrast to the perception that it is easy to preserve data. Even more shocking is how apparent the increase in the volume of data correlates to *Zubulake* and the 2006 e-discovery amendments to the Federal Rules of Civil Procedure when presented in graphic form:



To put the staggering statistics into perspective we are aware of a number of companies that have implemented specific technologies created solely to meet preservation challenges costing millions of dollars. Commercially available litigation hold software can cost hundreds of thousands of dollars to implement. Litigation hold software often does nothing more than provide litigation hold notices to custodians, track compliance and keep an inventory of all litigation holds implemented at a company.

As a specific example, we are aware of one company that undertook a recent preservation project that included well over \$7,000,000 in infrastructure costs associated with preservation and collection tools, not including the personnel devoted to managing those tools. In addition, it has been reported to us that one company's experience includes the compilation of statistics that show that only approximately 10% of individuals subject to a pending litigation hold have their data collected. Less than 10% of the data collected is actually reviewed for litigation. Therefore, approximately 1% of the total volume of material being preserved is actually used in litigation. At the same company, at any point in time, about 3-5% of all employees are subject to a litigation hold and the average person subject to a litigation hold has about 20 gb of data impacted by the hold.

Thus, preservation of all data for individuals subject to holds, results in retention of massive amounts of information, the vast majority of which will never be used in the proceeding. Notwithstanding the impression that this over preservation comes at little or no costs, the reality is that with sophisticated technology systems, the costs of preserving data is significant and becoming more difficult. Additionally, as more companies seek to develop best practices to manage the huge growth in data; these practices involve placing limits on mailbox sizes and following records retention practices to delete materials that

are no longer needed.<sup>15</sup> Preservation requirements frustrate these efforts and result in inefficient, time consuming and costly efforts to preserve information

## **B. Sanctions Motions Are Not An Accurate Measure of the Problem**

A number of factors prevent the analysis of an increase in sanctions motions as an accurate measure of the problem. Litigants are forced to make a cost-benefit analysis when faced with the specter of spoliation sanctions. In higher stakes litigation, it may be impossible to adequately reach settlement and a sanctions motion may be unavoidable. In more common forms of litigation, it is easier to justify a settlement rather than the expense of broad preservation or the costs associated with defending a sanctions motion. In other litigation the high cost of e-discovery – even where broad preservation has taken place – can force a company to resolve the claim rather than continue to defend a case on the merits.

Another problem is the development of a cottage industry designed to avoid sanctions. Software, archive systems and IT infrastructure are being developed and deployed at a staggering rate. Recently a Silicon Valley investment bank created a new sector with a mandate to buy legal IT companies for investment purposes. Law Technology News reported that MergerTech, a San Ramon, California based investment banking firm that targets small and midsize technology companies, has established a new practice area dedicated to legal, compliance, and information management. Why?

"The abundance of investment capital and the rapid growth of legal technology software and service companies has created an environment of rapidly intensifying M&A transactions," says executive vice president Prashant Dubey, the leader of the new unit. "We have a number of buyer mandates from private equity firms and strategic buyers focused on applying their capital to the legal technology marketplace," advises the company, which focuses on mergers and acquisitions of tech and tech-enabled companies "from \$5M to \$100M in valuation."<sup>16</sup>

Companies are spending an inordinate amount of money to avoid sanctions. Instead of risking a legal test of their litigation hold procedures or the scope of a litigation hold, companies are spending time and money to preserve broadly rather than face spoliation allegations.

Another problem is the nature of legal preservation itself. Companies are hesitant to discuss or publish their preservation efforts for fear that an adversary will use the media report or account of a litigation hold business process against the company in litigation.

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<sup>15</sup> Arthur Andersen LLP v. United States, 544 U.S. 696, 125 S.Ct. 2129, 2135 (2005) document retention policies are appropriate and created "to keep certain information from getting into the hands of others, including the Government."

<sup>16</sup> <http://www.law.com/jsp/lawtechnologynews/index.jsp>

This makes it difficult to quantify the real world cost of preservation. But as discussed above, the costs are real and in some instances the costs are staggering.

### **C. Testimony or Submissions – A Useful Tool For Measuring the Problem**

We respectfully submit that the Committee should seek out firsthand accounts of practical preservation hurdles. Through testimony of experts in the field, consultants or lawyers involved in significant preservation projects, the Committee may be able to glean information in a way that does not jeopardize the confidentiality of the processes being implemented throughout the United States.

## **IV. Workable Solutions Are Attainable**

We believe that amending the federal rules in two key ways, along with commentary designed to provide guidance on application of the rules can provide greater confidence litigants and their lawyers are looking for to make practical preservation decisions. The decisions would be based on the merits of the case and have practical judicially enforced boundaries. We believe, as we urged in the White Paper, that codifying the duty to preserve, creating a predefined scope of preservation, and limiting sanctions to willful conduct are solutions that can work.

### **A. Rule 26(h) Preservation**

Proposed new Rule 26(h) would provide:

#### **Rule 26. . .**

#### **(h) Preservation**

##### **(1) Duty to Preserve**

Preservation of documents, intangible things and electronically stored information, unless otherwise ordered by the court, is limited to matters that would enable a party to prove or disprove a claim or defense, and must comport with the proportionality assessment required by Rule 26(b)(2)(C). All preservation is subject to the limitations imposed by Rule 26(b)(2)(C). The court may specify conditions for preservation.

##### **(2) Specific Limitations on Electronically Stored Information.**

Absent court order demonstrating that the requesting party has (1) a substantial need for discovery of the electronically stored information requested and (2) preservation is subject to the limitations of Rule 26(h)(1), a party need not preserve the following categories of electronically stored information:

(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 transferring 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.

## **B. Rule 37(e)**

We propose that existing Rule 37(e) be replaced with the following:

### **Rule 37. . .**

**(e) Electronically Stored Information.** Absent willful destruction for the purpose of concealment, a court may not impose sanctions on a party for failing to preserve or produce relevant electronically stored information for the purpose of preventing its use in litigation. The determination of sanctions under this rule must be made by the court.

## **C. The Proposed Rules do not Regulate Pre-Litigation Conduct**

The rules we propose do not regulate pre-litigation conduct, but act as a limitation on the court's inherent power to facilitate the just, speedy and inexpensive resolution of cases. Judge Rosenthal has noted that while Rule 37(e) "does not set preservation obligations," it does tell judges that a spoliation claim involving ESI "cannot be analyzed in the same way as similar claims involving static information."<sup>17</sup> The Rule provides guidance even when a duty to preserve arises prior to the commencement of litigation because of the

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<sup>17</sup> Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery after December 1, 2006*, 116 Yale L. J. 167, 174 (supp. 2006).

likelihood of litigation.<sup>18</sup> The Committee Note to Rule 37(e) notes that good faith in the routine operation of an information system “may” involve a party’s intervention to prevent the loss of information.

Despite the authority to create appropriate procedural rules governing the enforcement of preservation duties, other courts view sanctions for pre-litigation spoliation as an exercise of the court’s inherent power<sup>19</sup> not the provisions of the Federal rules.<sup>20</sup> The Supreme Court has affirmed lower court use of sanctions despite the fact that some activity may have occurred before suit was commenced.<sup>21</sup> In *Chambers v. NASCO*,<sup>22</sup> the Supreme Court held that lower courts have the power to “fashion an appropriate sanction for conduct which abuses the judicial process,”<sup>23</sup> but “the exercise of the inherent power of lower federal courts can be limited by statute and rule, for [t]hese courts were created by act of Congress.”<sup>24</sup> In *Chambers* the Court held that procedural rulemaking to control litigation is appropriate. While explicit preservation rules may appear like regulation of pre-litigation conduct, they in fact govern the effect of the conduct on the litigation before the court.

Allegations of spoliation, including the destruction of evidence in pending or anticipated litigation, are addressed in federal courts through the inherent power to regulate the litigation process even if the conduct occurs before a case is filed or if, for another reason, there is no statute or rule that adequately addresses the conduct.<sup>25</sup> If a rule applies a federal court should apply it – rather than rely upon its inherent power.<sup>26</sup> In the absence of a specific rule addressing preservation duties and how to punish the failure to preserve ESI relevant to litigation, courts are clearly applying their inherent power.

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<sup>18</sup> Thomas Y. Allman, *Inadvertent Spoliation of ESI after the 2006 Amendments: The Impact of Rule 37(e)*, 3 Fed. Cts. Law Rev. 25, 31 (2009) (collecting cases).

<sup>19</sup> Gregory P. Joseph, *Sanctions: The Federal Law Of Litigation Abuse* § 26(E)(3) (4th ed. 2008). “[I]nherent powers of federal courts are those which ‘are necessary to the exercise of all others.’” *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (quoting *United States v. Hudson*, 11 U.S. 32, 34 (1812)); see also *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 562-63 (3d Cir. 1985); *In re Stone*, 986 F.2d 898, 901-02 (5th Cir. 1993).

<sup>20</sup> *Goodman v. Praxair Services, Inc.*, 632 F. Supp. 2d 494, 505-06 (D. Md. 2009)(in absence of court order, the “Court’s ability to impose any sanction must derive from its inherent authority to regulate the litigation process, rather than from any sanction prescribed by the Federal Rules of Civil Procedure.”).

<sup>21</sup> *Chambers v. Nasco*, 501 U.S. 32 (1991). The majority in *Chambers* approved the use of inherent sanctioning power in that case, while denying that it addressed pre-litigation conduct. See *id.* at 55, n.17.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 44.

<sup>24</sup> *Id.* at 48.

<sup>25</sup> *Rimkus*, 2010 WL 645253, citing *Chambers*, 501 U.S. at 43-46; *Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1408 (5th Cir. 1993) (summary calendar).

<sup>26</sup> *Rimkus*, 2010 WL 645253 (If an applicable statute or rule can adequately sanction the conduct, that statute or rule should ordinarily be applied, with its attendant limits, rather than a more flexible or expansive “inherent power”) [citing] *Chambers*, 501 U.S. at 50); see *Klein v. Stahl GMBH & Co. Maschinefabrik*, 185 F.3d 98, 109 (3d Cir. 1999) (“[A] trial court should consider invoking its inherent sanctioning powers only where no sanction established by the Federal Rules or a pertinent statute is ‘up to the task’ of remedying the damage done by a litigant’s malfeasance . . . .”); *Natural Gas Pipeline Co. of Am.*, 2 F.3d at 1410 (“When parties or their attorneys engage in bad faith conduct, a court should ordinarily rely on the Federal Rules as the basis for sanctions.”).

<sup>26</sup> *Id.*

The federal rules should be amended to supply guidance and authority for addressing preservation issues. As the Supreme Court explained in *Chambers*,<sup>27</sup> there would rarely be a need to rely on inherent powers, since the Rules would be “up to the task.”<sup>28</sup>

**D. The Proposed Preservation Rules Govern “The Manner And The Means” By Which Litigant’s Rights Are Enforced**

In *Shady Grove Ortho. Assoc. v. Allstate Ins. Co.*<sup>29</sup>, the Supreme Court recently addressed the authority granted to it by Congress to promulgate procedural rules for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them:

In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, 28 U.S.C. § 2072(a), but with the limitation that those rules “shall not abridge, enlarge or modify any substantive right,” § 2072(b).

We have long held that this limitation means that the Rule must “really regulat[e] procedure, -- the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them,” . . . The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. . . . What matters is what the rule itself *regulates*: If it governs only “the manner and the means” by which the litigants' rights are “enforced,” it is valid; if it alters “the rules of decision by which [the] court will adjudicate [those] rights,” it is not.<sup>30</sup>

So long as a rule governs “the manner and means’ by which the litigants rights are ‘enforced,’ it is valid”<sup>31</sup> Here, because Rule 26(h) is built on the notion that certain categories of information are not generally discoverable in federal court litigation, and therefore, parties should not incur the cost of preserving those categories of information absent a court order or specific request, it passes constitutional muster under *Shady Grove*. The Court there went on to detail many instances of rules, similar to proposed Rule 26(h) that were in compliance with § 2072(b).<sup>32</sup>

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<sup>27</sup> *Chambers*, 501 U.S. at 32; *Degen v. United States*, 517 U.S. 820, 823 (1996)(reversing sanctions based on use of inherent power in light of ample authority under Federal Rules to manage discovery in civil suits).

<sup>28</sup> *Chambers*, 501 U.S. at 50.

<sup>29</sup> *Shady Grove Ortho. Assoc. v. Allstate Ins. Co.*, 2010 U.S. LEXIS 2929 (U.S. Mar. 31, 2010).

<sup>30</sup> *Id.* at \*26-27 (citations omitted).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at \*27.

## V. Many Concerns can be Addressed by Providing Guiding Commentary

As articulated above, we believe that commentary to a codification of the preservation rule can work to provide much needed uniformity, restore fairness and reduce the costs of preservation. Many of the concerns raised in submissions to the Duke Conference amount to the lack of uniform case law, procedural rules or official guidance on the depth and breadth of obligations associated with the duty to preserve.

A good example of the type of commentary that would be beneficial is contained in the recently released Sedona Conference<sup>®</sup> Commentary on Legal Holds: The Trigger and The Process (September 2010). The Commentary contains numerous examples of trigger event scenarios and guidance on the scope of preservation. Similar comments could be referenced in Committee Notes to guide application of preservation amendments to the rules.

Regarding trigger events, the commentary should be used to show when the duty to preserve is not triggered:

***Illustration i:*** An organization receives a letter that contains a vague threat of a trade secret misappropriation claim. The letter does not specifically identify the trade secret. Based on readily available information, it appears that the information claimed to be the misappropriated trade secret had actually been publicly known for many years. Furthermore, the person making the threat had made previous threats without initiating litigation. Given these facts, the recipient of the threat could reasonably conclude that there was no credible threat of litigation, and the entity had no duty to initiate preservation efforts.<sup>33</sup>

And the commentary should be used to show when the duty to preserve is triggered:

***Illustration ii:*** An organization receives a demand letter from an attorney that contains a specific threat of a trade secret misappropriation claim. Furthermore, the organization is aware that others have been sued by this same plaintiff on similar claims. Given these facts, there is a credible threat of litigation, and the organization has a duty to preserve relevant information. The duty to preserve on the part of the potential plaintiff arises no later than the date of the decision to send the letter, and, in some circumstances, may arise earlier.<sup>34</sup>

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<sup>33</sup> Commentary on Legal Holds, Guideline 1, Illustration ii.

<sup>34</sup> Commentary on Legal Holds, Guideline 1, Illustration ii.

Regarding the scope of preservation, commentary should be used to demonstrate the reasonable scope of preservation. Using the factors outlined in our proposed rule illustrations could be given on what is reasonable in certain types of cases. Examples of over preservation can also be used. These examples will help guide court analysis of the scope of preservation.

## **VI. Conclusion**

As detailed in *Reshaping the Rules of Civil Procedure for the 21<sup>st</sup> Century*, the current *ad hoc* patchwork of preservation obligations created by individual courts is creating burdens on litigants far beyond what anyone would consider reasonable. As detailed above, the current paradigm involving preservation and spoliation of ESI is undermining the “just, speedy and inexpensive” determination of actions. It has forced litigants to spend millions of dollars to address an unquantifiable risk in computing systems that were not designed for litigation holds. Meaningful rule amendments would supply the guidance necessary to help solve these increasingly serious and costly problems that our members see in everyday litigation.

Respectfully submitted,

**Lawyers for Civil Justice**

**DRI - The Voice of the Defense Bar**

**Federation of Defense & Corporate Counsel**

**International Association of Defense Counsel**