COMMENT

The Time is Now:
The Urgent Need for Discovery Rule Reforms

Submitted to the
Civil Rules Advisory Committee

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

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I. Introduction & Summary.

This Supplemental Comment is respectfully submitted to emphasize to the Civil Rules Advisory Committee our shared view that: (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.

In the face of unprecedented challenges, the American model – often touted as the premier legal system for the administration of civil justice – has witnessed the complete erosion of Rule 1. Hundreds of millions of dollars are being spent by corporate litigants in America on unnecessary discovery and preservation because that is the only rational response to the uncertainty created by unnecessarily broad and inconsistent standards that provide sparse guidance. Careful rulemaking essentially has been

relegated to *de facto* inconsistent common law rules arising from disparate court decisions that are inadequate to meet the challenges of exponentially increasing levels of information. The current lack of guidance as to reasonable preservation conduct (and standards for sanctions) in the context of cross-border discovery for U.S. based litigation have left organizations and individuals "between a rock and a hard place," and have resulted in undue cost and burden that makes a mockery of meaningful access to "just, speedy and inexpensive" resolution of disputes in an increasingly global marketplace.

We submit that this Committee has the appropriate authority and responsibility to enact straightforward procedural rules to provide cost-efficient civil justice – clear, direct rules to help curb systemic excesses – that will reduce costs and eliminate unnecessary burdens in discovery.

A. The Time for Reform Is Now. Substantial real world information has been presented to the Committee about the serious harm that the lack of clear, concise preservation and discovery rules is causing businesses – even businesses at the pinnacle of the high technology community. Time has shown that these problems will not go away simply because the parties cooperate or meet with the court to mediate their differences. On the contrary, the issue is only likely to worsen with the ever increasing amount of electronically stored information ("ESI") and the new, diverse means with which it is transmitted and stored. The courts **and** the parties need clear rule-based guidance to navigate the often unknown territory of preservation and discovery. This need extends not only to domestic disputes, but also to an increasingly significant number of cross-border disputes brought before U.S. tribunals.

B. Data Suggest Rule Reforms Will Create An Economic Wellspring. LCJ's members are very familiar with the high costs of preservation and discovery under the current system and are beginning to investigate the benefits that would flow from rule reforms. This section preliminarily estimates the positive results that would follow from new rules in three areas: trigger, scope, and sanctions. It concludes that if new bright line rules were adopted in these three areas, there could be potential cost savings of several billions of dollars. Reducing the high burden and cost of over-preserving, over-collecting, and over-processing ESI—both domestically and globally—will provide a general economic and societal benefit and preserve scarce judicial resources.

C. The Rules Must Include A Clear Trigger for the Duty to Preserve. One of the most significant problems regarding the preservation of ESI is that determining when the preservation duty arises is incredibly difficult. It may sound very simple, but it can literally be a billion dollar issue. Preserving information relating to too many events, too early may cost millions in storage; saving too little, too late can cost even more in sanctions and damage to reputation. In the absence of guidance in the rules about when and what to save, the duty to preserve is a very expensive guessing game. A better, uniform standard is needed: one that more pragmatically articulates the events and times that trigger the duty to preserve information. A bright line rule that triggers the duty to preserve only when there is a "reasonable expectation of the certainty of litigation" substantially lessens the uncertainty surrounding the commencement of the duty to preserve. Even modest clarification as to the standard by which preservation conduct will be judged will provide substantial benefit in terms of U.S. and global cost and risk reduction.

D. The Scope of Preservation Needs Clear, Concise Boundaries. The time to end the Era of Endless Preservation is here. Specific limitations are needed to combat the expansion of the preservation obligation and the unacceptable burdens and costs it imposes on parties involved in or anticipating litigation. Failure to adopt clear, concise rules on the scope of the preservation obligation will only

prolong the injustice and expense that litigants experience today. We would surely also regret the failure to take this unique opportunity to inform the global preservation and sanctions dialogue, and to impact the development of global preservation and sanctions standards. The time has come for definitive action to identify clear boundaries on the scope of preservation and to focus on the evidence that really matters, namely information that is relevant and material to the claims and defenses in the case. Guidance also is required to define when holds end – when a party is no longer subject to a retention obligation.

E. A Sanctions Rule Should Require Willful, Prejudicial Conduct. Sanctions for failing to preserve or produce relevant and material information should be determined by intent to prevent use of the information in litigation, not by the inadvertent failure to follow some procedural step. Therefore, our proposed rule 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.

II. Discovery Reform Is Needed Now.

The need for revision of the discovery provisions of the rules is urgent and immediate.[1] In particular, parties need clear rule-based guidance to responsibly comply with unnecessarily broad and inconsistent preservation obligations. The problems are not symptomatic of changing technology or records management inefficiencies. In the past, memories faded, documents were lost and the administration of justice continued. Parties that destroyed evidence for the purpose of keeping it out of the hands of an opponent were duly punished. Now, however, potential litigants are forced to preserve information that may be only remotely relevant to the case of a yet unnamed putative class member. Courts have presided over ancillary litigation simply to determine if reasonable efforts were taken to prevent the loss of a single email – often without regard to the efforts and costs expended to preserve significant amounts of highly probative, still available evidence. Parties (particularly business litigants), seek to comply with their legal expectations. The current lack of clear and consistent rules results in uncertainty and hugely wasteful over-preservation.

Hoping that the parties work together to agree on self imposed evidentiary boundaries or waiting for silver bullet technology tools are not the answers. Rule 26(f) conferences can be beneficial in some cases, but are no substitutes for clear guidelines in the rules. In fact, many decisions, especially concerning preservation, must be made long before there are opposing counsel who may meet and confer. Continuing education and more active judicial management are also not the answer. *Ad hoc* individual court rules and disparate developing case law have created additional uncertainty. Companies are forced to spend millions of dollars to meet varying and rapidly evolving requirements of the most stringent preservation rulings and individual court rules. This is particularly true in the international context, where additional guidance as to preservation standards and sanctions criteria would significantly reduce a burgeoning area of legal risk and cost of compliance.

Contrary to unsupported assertions from some in the plaintiff bar, corporate litigants are **not** looking for permission to hold "shredding parties" to willfully destroy evidence to keep it out of the hands of

[1] *See* LCJ White Paper, Reshaping the Rules of Civil Procedure for the 21st Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure (May 2, 2010) ("White Paper"); LCJ Comment, A Prescription for Stronger Medicine: Narrow the Scope of Discovery (September 1, 2010) ("Stronger Medicine"); LCJ Comment, A Prescription for Stronger Discovery Medicine: The Danger of Tinkering Change and the Need for Meaningful Action (August 18, 2011) ("Danger of Tinkering") and authorities cited therein.

opponents. To the contrary, they are looking for guidance from the rules of procedure that will bring some relief from astronomical costs associated with a civil justice system gone astray. The current system seems preoccupied with preserving all potentially relevant evidence and permitting discovery of ESI that appears to have little relation to outcome determinative litigation facts or the conduct of potential litigants' businesses and activities. Leaving these challenges entirely to case by case adjudication is adding to the problems, not helping to solve them. In our view, the rule making process is best suited to providing the missing guidance desperately sought by well intentioned litigants.[2]

A. Tinkering Change Cannot Keep Up With Exponentially Expanding Levels of ESI.

Opponents of meaningful rule amendments have argued that only modest efforts are necessary to tackle current problems. Suggestions have included 1) mandating more cooperation among counsel; 2) "putting teeth" in the meet and confer process; 3) expansion of meet and confer pilot projects requiring submission of detailed preservation and e-discovery plans; 4) expansion of pilot projects similar to the 7th Circuit and the U.S. District Court for the Southern District of New York; 5) increased reliance on judicial management and more proactive, earlier court involvement; and 6) application of the proportionality test of Rule 26 to ease unreasonable burdens placed on litigants as suggested by The Sedona Conference®[3] and Judges Rosenthal[4] and Grimm[5] in recent opinions. Each of these efforts is appropriate and LCJ is not suggesting that any of them be discontinued. Instead, we contend that in practice these efforts, in themselves or as a whole, have failed to address the underlying problem. The collective experience of Corporate America and its defense counsel is that these efforts have not, cannot, and will not significantly alleviate the enormous costs, burdens and unintended consequences that unnecessary preservation has imposed on them.

One very recent case, clearly demonstrates that only meaningful rule amendments will change the current state of uncertainty and lack of national uniformity. *Pippins v. KPMG*[6] highlights the urgent need for rule amendments that will supply guidance on a national scale. Absent a paradigm shift in the approach to preservation and discovery issues, the problems articulated by LCJ here and in prior submissions will only worsen.

In *Pippins*, KPMG sought to narrow the scope of its preservation obligations regarding a very broad and expensive category of ESI – whether it was required to retain the physical hard drive for every former employee who might be a putative member of the alleged class action (composed of current and former KPMG auditors). KPMG was not asking for permission to halt all preservation.[7] At the time of the motion, KPMG was preserving just under three-quarters of a *billion* pages of potentially relevant ESI, not including potentially relevant ESI being preserved elsewhere at KPMG.[8] KPMG first conferred with

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[2] *See* LCJ Comment, Preservation—Moving the Paradigm to Rule Text, (April 1, 2011) ("Preservation—Rule Text"); LCJ Comment, *Preservation—Moving the Paradigm* (Nov. 1, 2010) ("Moving the Paradigm").

[3] The Sedona Conference® Commentary on Proportionality in Electronic Discovery (2010).

[4] *Rimkis Consulting Group, Inc. v. Cammarata*, 668 F.Supp.2d 598, 613 (S.D.Tex. 2010) (Rosenthal, J.).

[5] *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 522-23 (D.Md. 2010) (Grimm, J.).

[6] *Pippins v. KPMG LLP*, 2011 WL 4701849 (S.D.N.Y. Oct. 7, 2011) (Cott, J.).

[7] KPMG also feared potential exorbitant e-discovery costs relating to the large volume of ESI stored on the hard drives. KPMG estimated discovery costs per hard drive in an approximate range of $7,368 – $11,255 (if data is reduced using agreed search terms) to $45,414 – $74,562 (if search terms are not used). These costs were related to the average hard drive yielding 1 GB of potentially relevant data (if search terms were used) to 5 GB of potentially relevant data (if search terms were not used). 1 GB of data would yield 37,500 pages of data and 5 GB would yield 281,250 pages of data.

[8] 281,250 pages multiplied by 2,500 hard drives results in 703,125,000 pages of ESI.

plaintiffs' counsel to reach a compromise on the extent of the preservation. No agreement could be reached (plaintiffs' counsel sought to sample the hard drives which would have involved KPMG disclosing confidential client related information).

After multiple unsuccessful counsel conferences and mediation sessions with the court, KPMG moved for a protective order that would permit it to preserve a representative sample of the hard drives. Magistrate Judge Cott determined that every potential plaintiff (current and former KPMG audit staff) across the country may be a "key player" in the litigation. Therefore, KPMG was required to preserve more than 2,500 hard drives of departing employees at a cost of $600 each[9] because the hard drives *might* contain information related to the hours worked by these individuals.

The expense of preserving the information was estimated to exceed the value of the case. The Order noted that: "relevance" in the context of discovery is "an extremely broad concept…." and that proportionality did not apply in the preservation context of the case absent a specific rule requiring its application. The court also refused to shift costs because there was no proof that the hard drives were of marginal relevance or that the expense of preservation could be considered an undue burden.

Judge Cott was critical of applying proportionality to preservation decisions in the absence of a specific rule:

> However, courts have recognized that in the context of preservation, "this [proportionality] standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle." *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010) (considering numerous preservation failures in the context of sanctions). ***Accordingly, "[u]ntil a more precise definition [of proportionality] is created by rule," prudence favors retaining all relevant materials.*** *Id.* (citing *Zubulake IV,* 220 F.R.D. [212,] 218 [S.D.N.Y. 2003]).[10]

Here a well intentioned company engaged in extensive negotiations and participated in court supervised mediation in an effort to narrow the scope of preservation. Some advocates for little or no reform have suggested that this is the very path that is the solution to problems associated with the current state of the rules and case law. Many commentators would agree that this was an appropriate response to plaintiffs' failure to agree to reasonable limits on the scope of preservation – court intervention to determine the scope of preservation in a pending lawsuit. Yet, the court felt constrained to adhere to a "save everything" mentality.

We respectfully suggest that *Pippins* is not an outlier. Unfortunately, it is representative of the severe preservation burdens faced by corporate litigants in America. Faced with the mere possibility of sanctions (or a preservation order like *Pippins*) corporations are spending millions to ensure that everything remotely related to a potential lawsuit is saved. *Pippins* is based on the absence of rule based guidance to govern preservation of enormous amounts of ESI. It is also based on current case law that is focused on preventing the loss of a single potentially relevant piece of ESI, no matter the cost. This paradigm must be changed - or the problems faced by KPMG and other companies will be experienced by virtually every

[9] KPMG's preservation efforts totaled 1.5 million dollars, a cost that would continue to rise because 7,500 additional employees fit the putative class. See Declaration of Thomas Keegan, Case 1:11-cv-00377-CM-JLC, ECF No. 92, Filed August 12, 2011("Keegan Dec.").

[10] *Pippins*, 2011 WL 4701849 at p. 6 (emphasis added).

civil litigant in the not too distant future.

In *Pippins*, KPMG had expended more than $1,500,000 towards the preservation of a relatively finite number (2800) of hard drives, at the time it sought relief (undoubtedly that figure was increasing on a daily basis) not including costs to process and review these items. Each of these hard drives (plus another 1000 units, which plaintiffs were demanding be preserved) was estimated to yield up to 5 gigabytes of data, depending on search terms, which would cost up to $300 per gigabyte to properly process, for a further total of $5,700,000. Review to ensure compliance with confidentiality requirements and avoid privileged material could cost up to approximately $70,000 per hard drive.[11]

Thus, KPMG's potential costs, utilizing the most conservative estimates in the record, would amount to almost $21,000,000 simply to preserve, process, and review the hard drives (with only remote prospects that the drives would result in the discovery of meaningful data).[12] This burden was disregarded by the *Pippins* court as unworthy of consideration, all in the interests of avoiding loss of any *potentially* relevant piece of data. Again, this was a case in which a finite, although rather large, universe of data was involved. The costs that could be required in a case in which much larger collections of data were implicated would literally be beyond belief.

B. The Problem Is Not The Technology; It Is The Absence Of Guidance In The Rules.

As repeatedly articulated by LCJ, the rules' paradigm must be shifted from saving every piece of potentially relevant information to only saving information that is both relevant and material to the litigation claims and defenses. Vast quantities of potentially relevant ESI are reaching incomprehensible volumes and every potential litigant will be affected. In the not too distant future individual *pro se* litigants and small mom and pop businesses will be struggling with ESI just as the largest multinational companies are struggling now. Indeed, as personal devices such as cellular phones and personal computers become more ubiquitous along with the emergence of social media and cloud computing, the volume of ESI will continue to grow, even for individual or unsophisticated litigants. We are headed for even larger icebergs and a change in course is necessary to avoid total disaster. This is particularly true as "Cloud Computing" and mobile computing blur traditional legal notions of "care, custody and control," resulting in new challenges for managing cross-border conflicts between data privacy and discovery.[13]
For these reasons, the concept of materiality has an important role to play in the rules. It is no longer enough that ESI might be relevant; it must also be material. Put another way, it is not enough for ESI to have a possible relationship to the issues of the litigation. The ESI must be necessary to the case; the outcome of the litigation must depend on it.

For example, the extraordinary storage capabilities of a common array of consumer electronic devices is staggering. By owning one iPhone™, one iPad™ and one laptop computer, a single individual litigant may own, need to preserve, and struggle with electronic discovery of the equivalent of 27,072 banker

[11] *See* Keegan Dec.., *supra* note 9.
[12] *Id.* at ¶ 30.
[13] M. James Daley, "Information Age 'Catch 22': The Challenge of Technology to Cross-Border Discovery and Data Privacy," The Sedona Conference Journal, v. 12, Fall 2011.

boxes of information.[14] This equals approximately 135 *million* pages of information.[15] The amount of ESI an individual is capable of storing is continuing to increase at an alarming rate. As the cost of storage goes down and the amount of ESI goes up all litigants will be faced with increased costs associated with over preservation and e-discovery.

Most businesses cannot survive without a basic level of computer technology. A small "mom and pop" business using just one entry level server, two iPhones™ and two laptop computers is faced with approximately nine times the storage capacity of the single pro se litigant example above. One mom and pop company may own, need to preserve and struggle with electronic discovery of the equivalent of 243,072 banker boxes of information.[16] This equals approximately 1.2 *billion* pages of information.[17]

Concern has been expressed that problems with information retention for litigation purposes may be but one part of a more generalized information management issue in this technological age that cannot adequately be addressed by rule. Viewing preservation problems as but one symptom of society's apparent inability to deal with a deluge of information is a myopic view of the preservation and discovery problems facing companies doing business in America. As discussed in other LCJ submissions, preservation is not as simple as flicking a switch. Many businesses invest millions of dollars (and for some businesses, tens of millions of dollars) to design and implement efficient and cost effective information management systems to support the work of their employees. These carefully designed systems however often must be compromised and contorted to meet the vague and illogical preservation requirements imposed by the *de facto* rules currently in place. Businesses are perfectly capable of managing their records unfettered by the current overly broad and burdensome preservation and discovery requirements.

As detailed by Microsoft[18] and LCJ, in fact, preservation is a huge and expensive burden that is stifling innovation, influencing business driven decision making, and limiting access to our civil justice system. As the Committee also heard during the Mini Conference, the costs being imposed by the lack of clear and uniform standards is forcing many corporations to spend millions of dollars on preservation activities in lieu of real jobs and improved and less expensive products and services. Dealing with ESI under current discovery principles is truly an example of the tail wagging the dog.

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[14] Owning a 64 GB iPhone™, 64 GB iPad™ and a laptop containing a 1 TB hard drive, equals a total of 1,128 GB of potentially relevant information. Microsoft's August 29, 2011 letter to the Advisory Committee equates 1 GB of data with 24 banker boxes. Multiplying 24 banker boxes by 1,128 GB of data equals 27,072 banker boxes. Assuming 5,000 unstapled pages fit into a banker box, this amount of ESI is equivalent to 135,360,000 pages of potentially relevant ESI. As of October 21, 2011 the cost of a 1 TB internal hard drive for a laptop was $139.99 at a popular online retailer. http://www.newegg.com/Product/Product.aspx?Item=N82E16822136545

[15] *Id.*

[16] One small company owning two 64 GB iPhones™, two laptop computers containing a 1 TB hard drive each, equals a total of 2,128 GB of potentially relevant information. Adding an entry level small business server holding 8 TB of data, equals a total of 10,128 GB of potentially relevant information. Using Microsoft's figures: 1 GB of data equates to 24 banker boxes; multiplying 24 banker boxes by 10,128 GB of data equals 243,072 banker boxes. Assuming 5,000 unstapled pages fit into a banker box, this amount of ESI is equivalent to 1,215,360,000 pages of potentially relevant ESI. As of October 21, 2011, an "entry level" server for small businesses containing 8 TB of storage capacity cost $3,534.05 at a popular computer retailer. http://configure.us.dell.com/Dellstore/config.aspx?c=us&ccc=true&cs=04&dm=true&fb=1&l=en&oc=BESW5T2&prod=false&vw=classic

[17] *Id.*

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

The problem is not records management. Record keeping principles[19] and practices are not the issue. The problem is that preservation requires the suspension of records management and it is the suspension of these principles that is the issue. Preservation, by definition, is an exception to usual business practices.[20] Businesses typically seek to minimize the retention of records to support a well-managed records retention program. However, preservation expectations frustrate this goal. As a result, companies are now preserving records that no longer serve the business needs of the company – but for the remote possibility that a yet unknown opponent will argue someday that the record should have been kept. It is an unfortunate consequence of the current state of the rules that companies are unable to deploy new technology and software because the legal department deems the risk of inadvertent destruction of potentially relevant evidence too high. In the absence of uniform guidance, rather than evolving to meet the challenges, courts are clinging to the notion that it is better to be safe than sorry, regardless of cost.

It is certainly true that the information explosion, discussed elsewhere in this submission, has dramatically altered the ways companies and individuals keep records. However, retention in the context of litigation has necessarily created distinct challenges, and different consequences, from those encountered in other business and regulatory situations.

Thus, whatever issues may confront a party with respect to information retained for business purposes, retention for litigation must of necessity be treated differently. For one thing, as pointed out in the Memorandum on Preservation/Sanctions issues in the November meeting materials, consequences of failure to retain information may be inconvenient or even expensive in a business context, but these pale in comparison with the possibly devastating sanctions imposed by a court. For another, retention procedures in business contexts seldom involve keeping everything about a given subject or transaction, while this is a common requirement in lawsuits. Litigation information must be specially identified, processed, reviewed and ultimately produced, all at significant expense. Preservation activity, therefore, requires significant separate resources to meet the differing preservation duties and obligations established by myriad courts across the country. Retention methods for litigation purposes are often very different from those used for business purposes.

Concern also has been voiced that in view of the rapid changes in technology, rule changes at present would be counterproductive. This is incorrect. What truly would be counterproductive would be to maintain the current discovery system, which many authorities agree is in great need of repair. Ongoing improvements in information technology should not serve as an excuse for failure to deal with a critical situation now. Rather, clarification of standards by which preservation will be judged—both domestically and abroad—would provide a significant benefit in terms of cost and risk reduction. This is particularly critical as new systems and technologies develop; clear rules are needed to ensure that this technology moves in concert with legal obligations.

Rather than focusing judicial attention on the merits of an action, the lack of specific rules addressing preservation combined with the current expansive scope of discovery, has resulted in an *ad hoc* patchwork

[19] "Records are created, received and used in the conduct of business activities. To support the continuing conduct of business, comply with the regulatory environment, and provide necessary accountability, organizations should create and maintain authentic, reliable and useable records, and protect the integrity of those records for as long as required. To do this organizations should institute and carry out a comprehensive records management programme [sic]…." ISO15489-1:2001, 7.1 Principles of records management [programs].

[20] "Records pertaining to pending or actual litigation or investigation should not be destroyed." ISO 15489-1:2001, 9.9 Implementing disposition.

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 as proposed by LCJ are designed to provide 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 practical.

C. Meaningful Discovery Amendments and New Preservation Rules Are Necessary to Solve Existing Problems.

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. LCJ has long supported reform of the discovery rules to render the process more efficient, less costly, and less time-consuming. LCJ's White Paper pointed out that numerous prior rule amendments unfortunately failed to achieve meaningful progress towards alleviating discovery problems.[21] Thus, the White Paper called for significant changes in the scope of discovery, preservation requirements and sanctions provisions, as well as amendments to the pleading and cost allocation rules.

Noted commentators agreed:

> *A pattern has developed. The discovery rules are continually tweaked . . . but they are never subject to a complete overhaul. The amended rules then fall victim to the siren song of liberal discovery. Ultimately, the amendments intended to result in discovery containment are rendered wholly ineffective. Then, the process starts over because the courts, practitioners, and the rulemakers remain concerned about the cost and burden of discovery.*[22]

LCJ respectfully urges, as others have, that the time has come to break this pattern by narrowing the scope of discovery.[23] LCJ also pointed out the problems resulting from the lack of consistent standards governing preservation of information and why excessive and unreasonable preservation requirements are burdening both civil litigants and the court system itself.[24] The White Paper laid out a comprehensive program for improvements in the discovery process, including narrowing the scope of discovery to matters supporting proof of claims or defenses, comporting with the proportionality requirement currently in the rules, and clarifying provisions for preservation of information.[25]

As corporate and defense counsel practicing throughout the nation, it is puzzling to hear concerns being voiced as to whether the problems in discovery are really serious enough to warrant immediate and significant changes to the rules. At least in part, some of this concern stems from reports by district judges that they see discovery disputes and sanctions motions only rarely. The question has been raised

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[21] *See* White Paper, *supra* note 1.

[22] Henry S. Noyes, Good Cause is Bad Medicine for the New E-Discovery Rules, 21 HARV. J.L. &TECH. 49, 63-64 (2007); Richard Esenberg, A Modest Proposal for Human Limitations on Cyberdiscovery, (January 4, 2011), available at: http://ssrn.com/abstract=1735122 (forthcoming in Fla. L. Rev.)

[23] *See* sources cited at note 1 *supra*.

[24] *Id.*

[25] "Preservation of ESI is an unfortunate consequence of the information explosion and unfettered discovery that the 2006 E-Discovery Amendments have not addressed. Ancillary litigation involving preservation has risen at an alarming rate. Court-by-court, district courts have created ad hoc "litigation hold" procedures that have destroyed national uniformity. Preservation issues are decided on a case-by-case basis, with little guidance for parties in federal court." White Paper at xii-xiii.

whether the relative infrequency of these disputes is an indication that the discovery system is in fact working reasonably well. Some judges report that discovery disputes and sanctions motions are filed in only about 1% of the cases before them. We believe that statistic supports the existence, rather than the non-existence, of the problem. The problem is that the current system drives over preservation and over production of information. Discovery disputes and sanctions motions typically involve alleged failures to produce information. We believe it would be erroneous to conclude that there is no problem with over preservation and over production based on the fact that there are very few motions complaining of, in effect, under production.

It would be a serious mistake to use the frequency of filing of sanctions motions as an indicator of the effectiveness of the discovery provisions of the federal rules. Preservation problems begin well before the cases ever appear on the dockets of district courts, let alone before they appear before district judges on motions for sanctions. Careful parties must set up comprehensive and expensive programs even before litigation commences to protect themselves from the risk endemic in the current model.

Consider the details, the minutiae, of the preservation of ESI. Preservation plagues parties to civil lawsuits, particularly corporate parties, although this discomfort probably never becomes apparent to a court. Many businesses engage in millions of transactions and receive myriad customer communications. These include inquiries, claims, and even lawsuits, all with varying degrees of information about the source of the complainant's concern. Given the differing standards for preservation among the district courts, and the difficulty applying the standards that do exist, companies preserve much more information than actually turns out to be necessary. This is done, of course, at significant expense. This is especially true in the global arena. In fact, the mere fact of preservation pursuant to a legal hold is considered "processing" of information by the European Union, and most other countries with data protection and privacy regulations.[26] Therefore, any additional guidance as to the standard by which preservation conduct will be judged and consequences in the form of sanctions for failure to meet such standards will provide a substantial level of predictability and guidance that currently cannot be articulated in an international context.

Responsible companies are risk averse. Thus, when confronted with the choice to preserve or not to preserve, with even the slightest possibility of sanctions as a result of non-preservation, companies will choose to over-preserve, even though the vast majority of information will never be needed for litigation, much less for business purposes. The time for reform is now. Litigants and the legal system will benefit substantially by adoption of the rule amendments advocated by LCJ.

III. Rule Reforms Have the Potential to Be an Economic Wellspring.

Typically rule makers ask how much rules will cost as part of the routine rulemaking process. Here, the question is "How much will discovery rule reforms reduce the costs of civil litigation in the federal courts?" The answer: the savings of adopting meaningful preservation rules could be measured in the billions of dollars for business and individual litigants.

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[26] *See* Directive of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (95/46/EC), available at: http://ec.europa.eu/justice/policies/privacy/index_en.htm

While it is impossible to perfectly predict the cost savings that proposed rules could achieve, there are some strong indications in the data made available at the Dallas mini-conference that the cost savings could be very large. Below, the effect of each aspect of the LCJ rule proposals -- trigger, scope, and sanctions -- is considered and cost savings from adoption of these rules are conservatively estimated. Although there are many versions of each rule proposal, this analysis uses the language proposed in LCJ Comments. The most conservative estimate for the savings from a single rule change is $500 million; another estimate for a single rule change is $5 billion; and for some rules changes the savings may be larger, but are harder to quantify. Thus, savings of $5 billion or $10 billion would represent the most conservative estimate.

A. Savings From a Preservation Trigger Rule.

> **LCJ proposed Rule 26.1** " The duty to preserve information relevant and material to the claims and defenses in civil actions and proceedings in the United States district courts applies only if the facts and circumstances create the reasonable expectation of the certainty of litigation."[27]

A rule governing the "trigger" of the preservation duty would provide much needed guidance for companies that currently are forced to preserve vast amounts of data, even in the absence of litigation, because of uncertainty about whether the preservation duty applies in a given situation. There are at least two ways to attempt to quantify the benefits of a rule that provides clear guidance on the question of trigger.

The first method is to consider the percentage of preservation costs that could be avoided under the proposed rule for the trigger. Some evidence of the potential cost savings was provided in a letter from Microsoft Corporation submitted to the Discovery Subcommittee.[28] In this letter, counsel for Microsoft explained that only about one-third of their litigation holds are for active litigation. This implies that about two-thirds of Microsoft's litigation holds are done out of a decision to "over preserve" because of uncertainty about whether preservation is required, even though no litigation has begun. The proposed rule, which would require preservation only when there is a "*reasonable* expectation of the *certainty* of litigation" (emphasis added), could reduce preservation costs by up to 67 percent.[29]

While different companies may be affected differently by such a proposed rule, all should be affected by a large amount. A different company at the Dallas mini-conference stated that about 40% of their holds are not for active litigation.[30] For this company, a clear trigger rule could reduce preservation costs by up to 40%. Regardless of whether the savings are 40% or 67%, a clear trigger rule would have dramatic impact in reducing the costs of preservation.

The second method is to estimate the dollar value of savings. One company at the Dallas mini-conference gave the example of one matter for which there was no litigation currently pending, and thus there was no adverse party with which to negotiate the scope of preservation. The company has already spent $5 million and is spending $100,000 per month on an ongoing basis for preservation.[31] Under the proposed

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[27] *See* text *infra* at 16-17, notes 49-52.
[28] *Microsoft Letter*, *supra* note *18*.
[29] Some preservation costs, for example the cost of new litigation-hold-management software, will not be affected by the reduction in litigation holds. But all the costs of identifying and interviewing custodians, issuing holds, complying with holds, storing and collecting data for preservation purposes, and so on will be reduced by up to two-thirds.
[30] Richard Marcus, *Notes: Mini-Conference on Preservation and Sanctions, Dallas, Texas, Sept. 9, 2011*.
[31] *Id*.

trigger rule above, these disproportionate expenses would not be incurred because there is no reasonable expectation of the certainty of litigation. This single matter has cost one company over $5 million. If just 100 of the largest 1000 companies have only *one* matter like this one, the total savings from these matters alone would be *$500 million*.

B. Savings From Preservation Scope Rules.

> **LCJ proposed Rule 26.1(b)(2)** "The duty to preserve information extends to information in the person's possession, custody or control used in the usual course of business or conduct of affairs of the person."
>
> **LCJ proposed Rule 26.1(b)(3)** "... a person need not preserve the following categories of electronically stored information, absent an order or agreement based on a showing by the person requesting preservation of substantial need and good cause:
>
> (a) deleted, slack, fragmented, or other data accessible only by forensics;
> ...
>
> (f) backup data that are substantially duplicative of data that are more accessible elsewhere;
>
> (g) physically damaged media; or
>
> (h) legacy data remaining from obsolete systems that is unintelligible on successor systems."[32]

A rule governing the scope of the preservation duty would generate substantial cost savings as well. Because companies are uncertain about what scope of preservation is required, they are forced to preserve ESI that is costly to preserve and collect, but of little or no potential value to any litigation. One area where this is a particularly acute problem is with legacy data and other forms of ESI from which it is hard to access, search, and retrieve data. Companies report that a disproportionate amount of their time and money spent on preservation is devoted to these forms of ESI.[33] A rule that makes clear that these disproportionate expenses are not necessary would save many companies millions of dollars each.

C. Savings From Limits On Key Custodians Of Information.

> **LCJ proposed Rule 26.1(b)(6)** "The duty to preserve information is limited to information under the control of a reasonable number of key custodians of information not to exceed ten."

Another example of significant cost savings would be a rule clarifying the maximum number of key custodians whose information would be required to be preserved. As the Microsoft letter discussed above explained, "Microsoft is overly-inclusive when it comes to selecting custodians and placing them under hold."[34] This over-preservation is the result of uncertainty about the scope of preservation.

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[32] *See* Preservation—Rule Text, *supra* note 2.
[33] William H.J. Hubbard, Preliminary Report on the Preservation Costs Survey of Major Companies (Civil Justice Reform Group 2011).
[34] Microsoft Letter, *supra* note 18.

In Microsoft's case, it has 14,805 separate custodian litigation holds in 329 matters, which amounts to 45 custodians per matter.[35] If preservation was limited to 10 custodians per matter, the cost savings would be very large. If each custodian spends a total of 3 hours responding to a litigation hold and preserving ESI, the proposed rule would save 34,545 hours of employee time. This is time saved by employees in Microsoft's business units, not even including the time that lawyers and paralegals would save. In monetary terms, if employees make $50 per hour on average, the costs saved would exceed $1.7 million, not including the time of lawyers and paralegals, for a single company.

Other companies may have even higher savings. In a recent preservation cost report, one company's five year sample of litigation holds contained 43,011 holds for 390 distinct matters.[36] This averages to 110 holds per matter, which means this company's savings would be even higher than Microsoft's. A survey of Global 1000 companies in 2008 found that on average each company had 980 new matters initiated each year.[37] Among these companies, who have on average more new matters than Microsoft, the savings would again be greater. If Microsoft saves $1.7 million on 329 matters, then 1000 companies, each of which has 980 new matters in a year, could save over *$5 billion*.[38]

There may be cases where it is appropriate to preserve ESI from more than 10 custodians. Nonetheless, most cases will not have these exceptional circumstances, and the proposed rule will create major cost savings. A good example was given at the Dallas mini-conference. A company described a case with less than $4 million at stake. The company had identified 57 custodians and had spent $3 million on the case, but the other side had not even reviewed most of the documents produced.[39] Clarity on the scope of preservation would avoid cases like this one with preservation costs totally out of proportion to the case.

D. Savings From A Preservation Sanctions Rule.

> **LCJ proposed Rule 26.1(e)** "The sole remedy for failure to preserve information is under Rule 37(e)."
>
> **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. ..."[40]

By requiring willful destruction before a court can issue sanctions, this proposed rule would clarify one of the biggest sources of uncertainty and fear that companies face even though they are continually engaged in good-faith, diligent efforts to preserve relevant information for litigation. The savings from this rule are harder to quantify, because the threat of sanctions permeates every part of the preservation process, as well as the discovery process as a whole. A recent report on preservation costs provides some evidence of overbroad preservation that is caused by uncertainty about sanctions. A surveyed company reported that data is collected in only 14% of matters with preservation, and fewer than 10% of custodians with holds have data collected from them.[41] Similarly, in the case of Microsoft, only 27% of custodians with holds

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[35] *Id.*
[36] Hubbard, *supra* note 33.
[37] *Moving the Paradigm, supr*a note 2.
[38] Saving $1.7 million on 329 matters is saving over $5,150 per matter. 1000 companies times 980 matters times $5,150 per matter equals $5.05 billion.
[39] Marcus, *Notes, supra* note *30.*
[40] *See* Preservation—Rule Text, *supra* note 2.
[41] Hubbard, *supra* note 33.

have data collected from them.[42] New rules that protect companies that make responsible, good-faith judgments about preservation should allow companies to scale back the over-preservation that currently occurs.

Also, the ratio of preserved data to data used as evidence in litigation is about 340,000 to 1.[43] Clarity in the rules governing sanctions could reduce this ratio. For example, a new ratio of 200,000 to 1 (still a huge ratio) would mean a reduction in the costs of preservation of about 40%. This should also reduce the costs of later stages of discovery, such as collection, processing, and review if less ESI is entering the discovery process because of less over-preservation.

E. Huge Savings Are Possible from LCJ's Suggested Rule Changes.

The costs of discovery are large, both domestically and globally. A 2008 survey of litigation costs of Fortune 200 companies found that in large cases that went to trial, the average cost of discovery in these cases varied across companies, but ranged from $621,880 to $2,993,567—not including preservation costs.[44] Given the billions that companies and individuals spend on discovery every year, the savings could be billions as well. Internationally, sanctions imposed by foreign entities for violations relating to unauthorized processing (i.e., preservation) of ESI have been increasing, and even minor violations are receiving fines of $450,000 per occurrence in Spain and Italy. Dialogue with the Data Protection Commissioners from such countries as part of The Sedona Conference® Working Group 6 on International Disclosure and Data Privacy suggest that any additional clear guidance in the form of U.S. rules—even in recognizing a need to balance competing international data privacy interests—would be helpful in reducing risk and cost in this area.

Proposed rules governing trigger, scope, and sanctions will save significant costs that the current rules are imposing on companies and others. The proposed rules quoted above each will lead to large cost savings, which are projected to total in the billions of dollars. Clear and specific rules governing the duty to preserve are the key to achieving these savings.

Finally, it is worth noting that although these proposed rules will greatly reduce some costs of preservation, the proposed rules will not affect all of the costs that parties must bear to preserve information and collect it for discovery. A previous submission has noted that 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.[45] Thus, even with rules reform, large companies will still have to spend millions on systems to preserve and collect information within the scope of their preservation obligations. Nonetheless, meaningful rule reforms will create billions in cost savings per year for companies. These billions of dollars represent money that can be invested in new jobs, new and improved products, and savings that can be passed on consumers.

Accordingly, rules on preservation should address three issues: the time at which the duty to preserve begins; the scope of material to be preserved; and the application of (and standard by which) sanctions should be imposed for spoliation of evidence. The next section will address an appropriate standard for determining when the preservation obligation should commence.

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[42] Microsoft Letter, *supra* note 18.
[43] *Id.*
[44] LCJ *Comment Supplementing the White Paper Submitted to the 2010 Litigation Conference* (Lawyers for Civil Justice 2010).
[45] Hubbard, *supra* note 33.

IV. The Rules Must Include A Clear Trigger for the Duty to Preserve.

Unfortunately, the earliest actions taken in a judicial matter – preservation of potential evidence (or, put another way, proactive efforts to prevent spoliation) – are not addressed by the rules of procedure. Instead, an *ad-hoc* judge-made framework currently provides a set of obligations designed to police the preservation of materials that may be needed for litigation. This inconsistent provision of obligations in the common law has made it impossible to comply with the laudable goal of Rule 1. Not too long ago, the rule in this area was simply "do not destroy material relevant to a dispute." In the past decade, however, that rule somehow shifted into an affirmative duty to preserve material that may become relevant to a dispute and to prevent the inadvertent disposal of material due to otherwise appropriate recycling efforts. The system had shifted from a system of professionalism – in which litigants and attorneys were presumed to have acted in good faith and not destroyed material pertinent to a dispute – to a system of suspicion and monitoring – in which it is presumed that litigants and their attorneys, unless constantly monitored, reminded, overseen and policed, will engage in regular spoliation.

The current body of law relating to the preservation and spoliation of ESI undermines "the just, speedy, and inexpensive determination of every action and proceeding" and is crafted without sufficient evidence that such a substantial shift in the law is necessary. In fact, the Federal Judicial Center's own data indicates that spoliation is not a problem in the vast majority of cases. [46] Thus, the evidence does not justify the far-reaching and expensive preservation obligations in 99.985% of the cases that result in the over-preservation that companies are driven to in an effort to comply with amorphous common law standards.

Indeed, as the Committee heard in Dallas, two-thirds of the matters currently on "litigation hold" at one preeminent technology company are not even related to active litigation.[47] Another company noted that 40% of their litigation holds were not related to active litigation.[48] By tailoring their preservation efforts to the "lowest common denominator," companies tend to preserve much more material than is necessary in many more matters than will ever result in active litigation, and for greater cost and burden than is appropriate for the benefit gained – if there is any benefit at all.

As a result, cases are being settled, discontinued or not brought in the first place. The cost of preservation is too high. The risk of spoliation sanctions is too great. The impact of ancillary litigation proceedings on discovery disputes is too debilitating. The few high profile sanctions decisions have forced litigants to spend billions of dollars to address an undefined and largely non-existent spoliation risk.

A. A Proposed Trigger Rule.

> **Rule 26.1. Duty to Preserve Information.** The duty to preserve information relevant and material to the claims and defenses in civil actions and proceedings in the United

[46] In the FJC's study, out of 131,992 cases examined, motions for spoliation of evidence were filed in only 209 cases: a paltry occurrence rate of 0.15%. These motions were related to ESI only 53% of the time, and sanctions were granted in only 23% of the ESI spoliation motions. In other words, sanctions for spoliation of ESI were granted in only 20 cases out of 131,992: sanctions for ESI spoliation were warranted in only 0.015% of the cases examined. Report to the Judicial Conference, Advisory Committee on Civil Rules, "Motions for Sanctions Based Upon Spoliation of Evidence in Civil Cases," Federal Judicial Center, 2011.

[47] *See* Microsoft Letter, *supra* note 18.

[48] *See* text *supra* at note 30.

States district courts applies only if the facts and circumstances create the reasonable expectation of the certainty of litigation.

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 confidently determine the commencement of the preservation obligation under the current varying interpretations of that standard. A better standard is needed that more pragmatically articulates the events and time at which the duty to preserve information is triggered. We propose a "bright line" standard based on the reasonable expectation of the certainty of litigation.

This proposal strikes an appropriate balance between specific and general provisions, avoiding the extremes of language which are so general as to be essentially meaningless, and those that are so specific that they risk becoming obsolete even before they are given effect. The proposed Rule 26.1 aims to create a general standard for the start of the duty to preserve while at the same time providing concrete guidance with specific instances defining and exemplifying what "reasonably certain" might mean in a given situation that should be explained in the Committee Note to the Rule.[49]

As stated in our earlier Preservation Comments, the *ad hoc* patchwork of preservation obligations created by individual district courts creates burdens on litigants far beyond what could be considered reasonable. The first goal of the proposed rule is to eliminate the current practice by which each district court formulates its own standards concerning what constitutes a trigger of the duty to preserve information, replacing it with a standard applicable to all federal civil actions generally.

The statement that the duty to preserve information commences when litigation may be "reasonably anticipated"[50] can be subject to many interpretations. The reported cases provide many different understandings of which circumstances may or may not give rise to a reasonable anticipation of litigation.[51] Potential defendants face the immediate reality that they will not know the definition of "reasonable anticipation" unless and until they are sued and a Judge appointed to the case, events that may be several years away and occur in more than one jurisdiction. In today's litigious environment, virtually any action or absence of action, particularly on the part of a company or individual conducting a wide-ranging business, could possibly subject that company or individual to a lawsuit or threat of a lawsuit. In this context, a standard that litigation be "reasonably anticipated" loses meaning, becomes almost impossible to apply, and creates great uncertainty.

Our proposed Rule 26.1 would replace this uncertainty with a more definite, objective standard, related to the *reasonable* expectation of the *certainty* of litigation. Then – within the commentary to the rule – we

[49] For example: The facts and circumstances enumerated below may often, but will not always, give rise to the reasonable expectation of the certainty of litigation. For instance, receipt of a written notice of a cognizable claim will not give rise to a duty to preserve absent an indication that litigation is reasonably certain to occur. (1) Service of a complaint or other pleading; or (2) Receipt by the party against whom the claim is made of a written notice of a cognizable claim setting out specific facts supporting the claim [or other reproducible communication indicating an intention to assert a claim]; or (3) Service of a CID or similar instrument; or (4) Receipt of a written notice or demand to preserve information related to a specifically enumerated notice of a cognizable claim; or (5) The occurrence of an event that results in a duty to preserve information under a statute, regulation, or rule.

[50] *See Victor Stanley, Inc. v. Creative Pipe, Inc*, MJG-06-2662, 2010 WL 3530097 at pp. 22-23 (D. Md. Sept. 9, 2010).

[51] *See Zubulake v. UBS Warburg LLC* ("Zubulake IV"), 220 F.R.D. 212, 216 (S.D.N.Y. 2003); *see also, Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001); *Sylvestri v. General Motors Corp*., 271 F.3d 583 (4th Cir. 2001); *Pension Committee of Univ. of Montreal Pension Plan v. Banc of America LLC*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010). *But see, Goodman v. Praxair Services, Inc.*, 2009 U.S. Dist. LEXIS (D. Md. July 17, 2009); *Treppel v. Biovail Corp*., 233 F.R.D. 363, 371 (S.D.N.Y. 2006).

seek to clarify the existence of and the beginning point of a duty to preserve. The commentary provides five specific examples of events that may "create the reasonable expectation of the certainty of litigation" and trigger the duty to preserve.

B. A Reasonable Expectation of the Certainty of Litigation.

As indicated in example (1), the receipt of a complaint in most instances is an event that triggers the commencement of a duty.[52] In example (2), receipt of a claim which specifically says what the source of the complainant's dissatisfaction is, could give rise to notice that litigation is reasonably certain. Example (3) reflects the reality that service of a CID or similar instrument can also trigger the duty to preserve. However, complaints, claims, production requests and the like which are vague, unclear and indefinite should not automatically trigger the duty. Example (4) concerns the receipt of a written demand to preserve information. Such a demand must provide clear indications that the filing of an action is imminent, describe the nature of the claims and the information sought to be preserved, and give an indication that litigation is reasonably certain to occur. Example (5) makes reference to the numerous requirements for record-keeping imposed by statutes, regulations, local ordinances and the like.

We believe that the standard "reasonable certainty" is much more definite and provides a "bright line" by which parties, particularly businesses generating large volumes of data, can evaluate their business practices, ascertain their litigation responsibilities, and determine whether or not a preservation duty has been triggered. Requiring that there be a "reasonable certainty" of litigation would at least reduce, if not eliminate, the proliferation of costly, and in many cases unnecessary, holds in matters which do not actually result in litigation. Such a change would certainly and substantially reduce risk and cost with respect to processing and transfers of information in the context of cross-border discovery.

V. The Scope of Preservation Needs Clear, Concise Boundaries.

> *Although some cases have suggested that the definition of what must be preserved should be guided by principles of "reasonableness and proportionality," this standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle.* ***Until a more precise definition is created by rule,*** *a party is well-advised to "retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches. In this respect, "relevance" means relevance for purposes of discovery, which is "an extremely broad concept."*[53]

A. The Rules Should Define Specific Preservation Responsibilities.

There is no doubt that the cost of preservation is a major contributor to the rising costs of civil litigation generally and of discovery in particular. 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. Moreover, experience has shown that left unchecked, the problems will only grow. Indeed, for almost twenty years this Committee has recognized the danger the

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[52] *See* Letter from Robert D. Owen to Hon. David G. Campbell, October 24, 2011 available at: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/RobertOwenAdvCommSubmissionfinal.pdf.

[53] *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010) (citations omitted, emphasis added). *See also Pippins, supra* at note 6.

information explosion presents to our civil justice system.[54] 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 too do the problems of discovery and more specifically, the problems associated with the preservation of ESI potentially available in discovery. Unless specific guidelines are provided to define the proper preservation of the expanding universe of ESI that must be saved for discovery, the "proper purpose of discovery—the gathering of *material* information"[55] — will soon be obscured by the process.

The problems are not just the product of the post-modern age and evolving technology. The problems with preservation, notably its significant costs and burdens, are greatly exacerbated by 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 scope of discovery[56] — an ambiguous standard that has plagued practitioners and the Committee for many years.[57] 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[58] in order to narrow their preservation obligation. Litigants are essentially caught between the "rock" of ambiguous standards and the risk of sanctions for failure to adequately preserve; and the "hard place" of expending incredible resources to preserve information which often has no business purpose and which is unlikely to be used in litigation.[59] This has been described by The Sedona Conference as a "Hobson's choice:"

> A producing party can face a Hobson's choice between the burden of the costs of preservation and the risk of sanctions for failing to do so. Parties engaged in ongoing, recurrent litigation can also face a serial preservation duty dilemma in

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[54] 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.").

[55] Introduction, Model Order Regarding E-Discovery in Patent Cases, 2 (2011) (emphasis added) available at*:* http://www.cafc.uscourts.gov/announcements.

[56] 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 nonprivileged 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."

[57] *See* Stronger Medicine *supra* note 1

[58] *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010) ("Case law has developed guidelines for what the preservation duty entails. Unfortunately, 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. This is what causes such concern and anxiety, particularly to institutional clients such as corporations, businesses or governments, because their activities-and vulnerability to being sued-often extend to multiple jurisdictions, yet they cannot look to any single standard to measure the appropriateness of their preservation activities, or their exposure or potential liability for failure to fulfill their preservation duties. 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.").

[59] Recall the startling statistic that that, 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, *supra* note 18 (explaining that in an average case at Microsoft, 48,431,250 pages are preserved, 141,450 pages are produced and only 142 are actually used and noting that 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.").

> which preserved data sources ***that would not be kept for any other reason*** may become subject to preservation duties in subsequent litigation.[60]

As has been discussed in prior comments to this Committee, the right to discovery is not absolute.[61] In this post-modern age, even if the right to discovery were absolute, it would be an impossible obligation to fulfill; there is simply too much data. Despite this widely acknowledged fact, the myth of full disclosure is consistently reinforced by the courts through the imposition of sanctions where information has become unavailable, even, for example, through automatic document retention programs. Consequently, parties often default to drastic over-preservation at great expense.

Unfortunately, the same ambiguity in the rules that causes those directly involved in specific litigation to engage in such over-preservation has expanded its zone of influence to affect the judgment of those making everyday *business* decisions for a given company or organization. For example, Microsoft has reported to the Committee that it's "preservation obligations also have a negative impact on the company's ability to implement new systems and technologies."[62] It reports that "[e]ach new technology or system must be evaluated for its potential impact on the company's preservation obligations," that "[i]n some cases, legacy systems must be maintained to ensure that no data is lost," and that "ever-changing case law can sometimes hamper the implementation of sound business decisions."[63] Similarly, it was reported by unidentified "corporate general counsel" at the Dallas mini-conference that "[i]t has gotten to the point where the tech. people want to design efficient systems and the legal people tell them they can't use the most efficient setups because of preservation demands."[64] Other comments at the mini-conference echoed a similar sentiment:

- "The existence of so many litigation holds means that the information management activity is sometimes hobbled by litigation imperatives."[65]
- "[T]he risk of sanctions is driving his handling of what should be business problems."[66]
- "All companies may be deterred from adopting innovative business methods because of preservation imperatives."[67]
- "The legal department shouldn't dictate IT standards."[68]
- "Right now, preservation complications are affecting hiring and firing at companies that are unable to be efficient in producing the goods and services we need because of the difficulties caused by preservation."[69]

Such comments illustrate the failure of modern discovery to achieve the clear goals of Rule 1. It is neither just nor inexpensive to require a party to preserve large volumes of information, much of

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[60] The Sedona Conference, Commentary On: Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible 4, n. 10 (July 2008) (emphasis added).
[61] *See* Preservation Rule Text, *supra* note 2 at 14-16.
[62] *See* Microsoft Letter, *supra* note 18 at 6.
[63] *Id.*
[64] Marcus, *Notes*, *supra* note *30*.
[65] *Id.* at 8.
[66] *Id.*
[67] *Id.* at 14.
[68] *Id.* at 16.
[69] *Id.* at 24.

which is no longer of use to the business and most of which is unlikely to be used in "reasonably anticipated" litigation. Instead, parties on "both sides of the 'v'" should focus on the information most likely to be useful in the litigation, that is, *information that is relevant and material to the claims and defenses in the case.*

B. The Proposed Preservation Rule Focuses on Material Information.

The preservation rule that has been proposed by LCJ, for example, identifies the subject matter to be preserved as "any information that is relevant and material to a claim or defense to a claim" and proceeds to specifically identify categories of electronically stored information that need not be preserved, absent a showing of substantial need and good cause. Such a rule allows 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.[70]

The severe and unjustified impact of the preservation obligation on businesses involved in litigation cuts deeply in favor of the adoption of a rule that puts identifiable boundaries around the scope of preservation. A rule is needed to provide *specific*, *affirmative* guidance to parties regarding what should and should not be preserved. Moreover, as LCJ has previously commented, the adoption of a general rule which merely codifies the current amorphous standards of reasonableness and proportionality would do little to address the problems of preservation. Indeed, as Magistrate Judge Grimm has acknowledged, "courts have tended to overlook the importance of proportionality in determining whether a party has complied with its duty to preserve evidence in a particular case . . . ."[71] More generally, since 1983 the Federal Rules have, with little success,

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[70] The proposed new Rule 26.1(b) would provide:

(b) Scope of Duty to Preserve. A person whose duty to preserve information has been triggered under Rule 26.1(a) must take reasonable and proportional steps to preserve the information as follows:

(1) Subject matter. The person must preserve any information that is relevant and material to a claim or to a defense to a claim;

(2) Sources of information to be preserved. The duty to preserve information extends to information in the person's possession, custody or control used in the usual course of business or conduct of affairs of the person;

(3) Types of information to be preserved. The duty to preserve information extends to all documents, electronically stored information, or tangible things within Rule 34(a)(1), but a person need not preserve the following categories of electronically stored information, absent an order or agreement based on a showing by the person requesting preservation of substantial need and good cause:

(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; or

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

(4) Form for preserving electronically stored information. A person under a duty to preserve information must preserve that information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. The person need not preserve the same electronically stored information in more than one form.

(5) Time frame for preservation of information. The duty to preserve information is limited to information created during the two years prior to the date the duty arose.

(6) Number of key custodians whose information must be preserved. The duty to preserve information is limited to information under the control of a reasonable number of key custodians of information not to exceed ten.

[71] *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010).

mandated the consideration of the principle of proportionality, as currently articulated in Rule 26(b)(2)(C). Rather, courts have continued to cling to the traditional notion of broad and liberal discovery.[72]

Pippins v. KPMG LLP,[73] discussed in depth earlier in this Comment, illustrates the urgent need for a rule setting forth a particularized scope or boundary for the preservation obligation. *Pippins* clearly illustrates two key aspects of the preservation problem. First, courts are reluctant to apply the principle of proportionality to preservation, despite the mandate of Rule 26(b)(1) that "[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(C)." This reluctance is also seen in the context of the scope of discovery more generally, as discussed in LCJ's Comment, *A Prescription for Stronger Medicine: Narrow the Scope of Discovery*. Second, cooperation, though necessary to a successful exchange of discovery, is not the silver bullet it is often made out to be. As noted by the court, extensive negotiations between the parties failed to resolve the issue. This is often the case. While the reasons for this are varied and complex, the parties' inability to agree on limitations to the scope of preservation and to the scope of discovery more generally can be traced, in many cases, to one or the other's mistaken belief that the right to discovery is absolute or that discovery is easily accomplished. This is particularly true, as shown in *Pippins*, where one party has little to preserve, relative to the obligations of their adversary.[74]

Accordingly, a rule outlining specific limitations to the boundaries of preservation must be adopted. Specific limitations will no doubt garner opposition among those who are convinced that any restriction on discovery will result in their inability to prove their claims and defenses — a position directly contradicted by the widely accepted premise that the right to discovery is not absolute. Proposed limits on the number of custodians or the age of materials subject to preservation have been called unworkable, or even "impossible" to define. Similar concerns were voiced in years past when limits were imposed on the number and length of depositions and on the number of interrogatories. As Chief Judge Randall R. Rader observed in recent comments at the Eastern District of Texas Judicial Conference, "[w]hen default numbers with limits on depositions were first included in the Federal Rules, veteran lawyers panicked that these limits were arbitrary and would prevent the discovery of critical information."[75] However, Judge Rader went on to point out that "[a]fter two decades of experience, few question the wisdom of these limits" and that the "era of the endless deposition is fortunately over."[76] Recalling the success of such limitations, the Federal Circuit recently recommended presumptive limitations on the number of email custodians from whom discovery may be requested, as well as the number of search terms that may be employed as to each custodian.[77]

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[72] *See* Stronger Medicine, *supra* note1.

[73] *See* text *supra* at note 6 *et seq.*

[74] *See also, Hopson v. The Mayor and City Council of Baltimore*, 232 F.R.D. 228, 245 (D. Md. 2005) ("The days when the requesting party can expect to 'get it all' and the producing party to produce whatever they feel like producing are long gone. In many cases, such as employment discrimination cases or civil rights cases, electronic discovery is not on a level playing field. The plaintiff typically has relatively few electronically stored records, while the defendant has an immense volume of it. *In such cases, it is incumbent upon the plaintiff to have reasonable expectations as to what should be produced by the defendant*." [emphasis added]).

[75] 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 (Sept. 27, 2011).

[76] *Id.*

[77] An E-Discovery Model Order, (CAFC 2011), available at: http://www.cafc.uscourts.gov/images/stories/announcements/Ediscovery_Model_Order.pdf

More generally, critics of a particularized rule have argued that "substantial preservation would still be necessary." They have questioned whether the fact specific nature of the preservation duty coupled with its pre-litigation implications (i.e., preservation decisions are often made before a case has been filed) will inevitably result in over-preservation, regardless of the specificity with which reasonable boundaries are outlined. "Thus, even if the scope of preservation were narrowed by rule, potential litigants would face difficult issues about the appropriate amount of information to preserve. If they are as risk-averse as some have suggested, they most likely would still err on the side of over-preservation."[78] Such arguments are red herrings. They seek to make the perfect the enemy of the good. Indeed, the implication underlying these objections is that because perfection is unobtainable, failure is acceptable. Such reasoning cannot be allowed to derail efforts in favor of much needed and widely supported change.

The time to end the *Era of Endless Preservation* is here. Specific limitations are needed to combat the expansion of the preservation obligation and the unacceptable burdens and costs it imposes on parties involved in or anticipating litigation. Moreover, as illustrated in *Pippins* proportionality is too "amorphous" to be helpful as a rule. Indeed, the court in *Pippins* specifically indicated the need for "a more precise rule"—one more precise than the principle of proportionality that was contemplated and then rejected as inapplicable *because of its lack of specificity*. Failure to act, or perhaps worse, to take insufficient action to provide the much needed *specific guidance* as to the appropriate scope of preservation will only prolong the injustice and expense that litigants report today. The time has come for definitive action to identify clear boundaries on the scope of preservation and to focus on the evidence that really matters, namely information that is *relevant and material to the claims and defenses in the case.*

VI. The Power to Award Sanctions Needs National Consistency and Clarity.

One of the clearest messages to emerge from the corporate attendees at the Dallas Mini-Conference was the highly negative *in terrorem* effect that the possibility of a sanctions order has on most responsible American corporations and the individual employees who are internally responsible for making preservation decisions. One global head of litigation explained that the mere existence of an order awarding "sanctions" against his company – regardless of the monetary costs embedded in the award – would do irreparable damage to his company's standing and brand, and so massive efforts and expense are devoted to avoiding even the possibility of such an award. Left unsaid but implied was the damage to the careers of in-house individuals responsible for making preservation decisions that would result were the company to suffer a sanctions award for failing to preserve.

Opponents of any change point to the low number of reported sanctions motions and decisions as evidence that no change is necessary and the claim of an increased flux of spoliation motions and decisions is unfounded. The numbers reported, however, in the FJC Study do not capture the threats of spoliation that are common place in today's litigation. Those threats are made in letters and "meet and confers" – not necessarily formal motions.

As a result, regardless of the infrequency of sanctions motions and awards, and regardless of the financial impact and costs of the sanctions awards themselves, the companies spend millions of dollars on over-preserving merely "potentially" relevant material. Two major corporations

[78] Agenda Materials for the November 7-8 Meeting of the Advisory Committee on Civil Rules, Tab 3, at 63, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf.

represented at the Mini Conference told the Committee that two-thirds and 40%, respectively, of their litigation holds pertained to matters where actions had not been commenced. 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.[79]

This present state of the common law in the sanctions area is a classic example of the injustice than can result when the law's commands are inconsistent and unclear. Questions of trigger, scope, duration and manner of preservation are currently either unresolved or inconsistent across jurisdictions, sometimes even within a single jurisdiction. Our present preservation regimen is, of course, the common law result of individual decisions rendered in singular cases at the district court level. Thus, rulings are not only inconsistent from circuit to circuit, they are inconsistent even within single districts.[80] There are no Supreme Court cases on preservation. Circuit Court cases on the issue are rare. Because of the nature of discovery disputes, this condition is unlikely to change in the future.

The same condition exists with respect to sanctions rulings. The Second Circuit allows sanctions to be awarded for mere negligence, while the Fifth Circuit does not. A company operating in both circuits will not know in which court it might face an accusation of spoliation and request for a sanctions award. The inconsistency among jurisdictions only compounds the difficulties companies currently face when instituting pre-litigation holds, when no attorney with whom negotiations might take place has definitively stepped forward to speak for the plaintiffs and when no court is vested with jurisdiction to resolve disputes over preservation.

The core point is that negligence should not support an award of terminating sanctions, spoliation instruction, or indeed any "sanction" at all. In this era of exploding data volumes, proliferating mobile and web-based storage devices, and the ease with which electronic information is disseminated, the number of potential sources of data has literally exploded and it is increasingly easy innocently to overlook sources of data that in hindsight can be made to appear purportedly relevant to a court. If parties pursue their preservation obligations diligently, competently and in good faith, the fact that they make a mistake should not create an inference that the lost material was prejudicial to their case. The common law of spoliation presumed that someone who destroyed evidence had a reason to do so, and rightly allowed or instructed juries to conclude that what was destroyed was helpful to the spoliator's adversary. But while that presumption was reasonable when an obviously important piece of evidence was destroyed, the presumption is not reasonable in the present day with its vast quantities of data spread over innumerable devices in the context of a radical affirmative duty to preserve everything possibly relevant to a lawsuit that has not yet been filed.

Parties who are trying to game the system by attempting to wipe their hard drives with Evidence Eliminator, or systematically destroying all documents related to patent litigations shortly to be

[79] See *supra* at 10-14.

[80] For example, one decision holds that standing alone the failure to issue a written litigation hold notice is "at a minimum, grossly negligent," *Pension Committee*, 685 F. Supp.2d 456, 477 (S.D.N.Y. 2010), while another decision in another court sanctions oral litigation hold notices, *Steuben Foods, Inc. v. Country Gourmet Foods, LLC*, No. 08-CV-561S(F), 2011 WL 1549450, at *4 (W.D.N.Y. Apr. 21, 2011)("Nor will the court find that the failure to issue a written litigation hold justifies even a rebuttable presumption that spoliation has taken place."). Judge Scheindlin has stated publicly that "there are enormous differences" among the federal circuits and as between state and federal courts. "Panel Urges Caution on Sanctions for Failure to Preserve Data," New York Law Journal, Oct. 13, 2010, available at http://tinyurl.com/NYLJ-Sanctions (last visited Oct. 22, 2011). That the law on preservation is inconsistent across the country is by now not even arguable.

filed, do deserve punishment. We have no quarrel with the results in those cases. Our point is that the present state of the law lumps people who make simple mistakes in with the bad actors. Our proposed rules on sanctions would move the law towards clarity and consistency, punishing the bad actor but not the document manager acting in good faith.

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. Thus, we believe it is entirely appropriate to require that sanctions, if awarded at all, be awarded only pursuant to clear and consistent rules.

Sanctions on a party for failing to preserve or produce relevant and material electronically stored information 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.[81]

Rule 37(e) should embody the principle that sanctions awards be permitted only upon proof, by the movant, 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 just going to get increasingly difficult to define and to apply.

What is urgently needed, then, is what we propose: 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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[81] Proposed Rule 37**: (e) Sanctions for failure to preserve information.** 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. The determination of the applicability of this rule to sanctions must be made by the court. The party seeking sanctions bears the burden of proving the following: **(1)** a willful breach of the duty to preserve information has occurred; **(2)** as a result of that breach, the party seeking sanctions has been denied access to specified information, documents or tangible things; **(3)** the party seeking sanctions has been demonstrably prejudiced; **(4)** no alternative source exists for the specified information, documents or tangible things; **(5)** the specified electronically stored information, documents or tangible things would be relevant and material to the claim or defense of the party seeking sanctions; **(6)** the party seeking sanctions promptly sought relief in court after it became aware or should have become aware of the breach of duty.

Draconian discovery requirements are unreasonable, and often do not comport with the operating needs of the company involved, or with good business practices. Our recommendations have the aim of restoring a measure of balance and fairness to discovery procedures. Predictability, rationality, and a lessening of the burden on the courts should result from their adoption. This promises substantial risk and cost reduction, both domestically and abroad, and more fully achieves our common goal of "just, speedy, and inexpensive" resolution of disputes.

CONCLUSION

LCJ, DRI, FDCC, IADC, and the many defense trial lawyers and corporate counsel who contributed to the preparation of this Comment respectfully urge the Rules Committee to develop meaningful rules governing discovery and preservation to address the urgent and immediate need to control the excessive and unnecessary litigation costs and burdens faced by American businesses. We look forward to continued participation in the Committee's efforts.

Respectfully submitted,

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