

PRESERVATION/SANCTIONS ISSUES

This memorandum is designed to introduce participants at the Sept. 9, 2011, mini-conference on preservation and sanctions issues to the questions that have been discussed by the Discovery Subcommittee over the past year.

Shortly after the May 2010 Duke Conference, the Discovery Subcommittee began discussing and evaluating the elements of a possible rule presented by the E-Discovery Panel during the Duke event. As that discussion revealed, there are significant rulemaking challenges for a rule that attempts overtly and solely to regulate pre-litigation preservation. Alternatively, a “back end” sanctions rule might not present the same difficulties that could arise with a “front end” preservation rule. But to the extent the concerns voiced by those who favor a preservation rule could be addressed in the sanctions context, it might be that such a rule could provide much benefit without raising questions about the scope of rulemaking authority. On the other hand, it could be that such a “backward looking” sanctions rule might itself raise concerns about whether it intruded too far into pre-litigation preservation decisions. The scope and significance of limitations on rulemaking authority remain somewhat uncertain.

At the same time, the Subcommittee found that it was also quite uncertain about the real-life dynamics of preservation problems and about whether rules would really provide significant solace for those concerned with these problems. As a very general matter, it seems clear that many are concerned that preservation obligations may often seem far too broad, and that huge expense has resulted from that overbreadth, particularly because the standard for severe sanctions is unpredictable and inconsistent across the nation. But the reasons for the huge expenses, and the components of them, are less clear, as are the nature of measures that would relieve these pressures. At least some preservation-rule ideas seem initially to be quite general, and perhaps they would not provide the solace sought. Others may be so specific that they would be superseded by technological change or would be inapplicable in broad categories of cases.

Given this variety of concerns, the Subcommittee’s conclusion was that it needed more knowledge, and that the way to gain that needed insight would be to hold this conference. To introduce the ideas it has identified thus far, the Subcommittee has developed three general categories of rulemaking approaches, introduced below in an order that does not indicate their priority or any preference in the eyes of the Subcommittee:

Category 1: Preservation proposals incorporating considerable specificity, including specifics regarding digital data that ordinarily need not be preserved, elaborated with great precision. Submissions the Committee has received from various interested parties provide a starting point in drafting some such specifics. A basic question is whether it is necessary (or really useful) to include such specifics in rules to make them effective in solving the problems reportedly resulting from overbroad preservation expectations. At least, they could create very specific presumptions about what preservation is necessary. Perhaps they could be equally precise about the trigger. It might be that any such precision would run the risk of being obsolete by the time that a rule became effective, or soon thereafter.

Category 2: A more general preservation rule could address a variety of specific concerns, but only in more general terms. It would, nonetheless, be a “front end” proposal including specifics about preservation in the form of directives about what must be preserved. Compared to Category 1 rules, then, the question would be whether something along these lines would really provide value at all. Are they too general to be helpful?

Category 3: This approach would address only sanctions, and would in that sense be a “back end” rule. It would likely focus on preservation decisions, making the most serious sanctions unavailable if the party who lost information acted reasonably. In form, however, this approach would not contain any specific directives about specific preservation issues. By articulating what would be “reasonable,” it might cast a long shadow over preservation without purporting directly to regulate it. It could also be seen as offering “carrots” to those who act reasonably, rather than relying mainly on “sticks,” as a sanctions regime might be seen to do.

The remainder of this memorandum introduces an initial set of drafts of the three categories of rule exemplars. These drafts are provided for illustrative purposes only -- they do not represent the Subcommittee’s considered views, and are offered only for purposes of fostering discussion. Some provisions in the Category 1 sketch closely resemble those in the Category 2 sketch because they are in some ways parallel. Footnotes raise a number of questions, but should be included only once even though they focus on rule-amendment ideas that recur later in the package.

Before turning to the specific exemplars, it seems worthwhile to reiterate the Subcommittee has reached no conclusion on whether rule amendments would be a productive way of dealing with preservation/sanctions concerns, much less what amendment proposals would be useful. The purpose of this conference is to provide a basis for making such judgments.

CATEGORY 1

Detailed and specific rule provisions

The concept behind this category is that rules with specifics would be beneficial. A key consequence of having such rules is that they can apprise parties about what they must do in ways that are very specific, providing a level of guidance that more general rules would not. But at the same time, this specificity may produce serious costs if it means that anything not specifically provided for is either beyond regulation or never required. Coupled with these concerns are concerns about transitory terms and technologies. To the extent the specifics are likely not to be important in five or ten years, or that other factors will be equally or more important, they may not be reasonable choices for rules that could not go into effect until the end of 2014 and that cannot be amended in less than three years.

Rule 26.1. Duty to Preserve Discoverable Information

- (a) **General Duty to Preserve.** [In addition to any duty to preserve information provided by other law,]¹ every person who reasonably expects [is reasonably certain]² to be a party³ to

¹ The goal of this rule is not to supersede any existing duty to preserve information. A Committee Note would probably illustrate some of the kinds of sources of law that may bear on particular situations but also say that the illustrative listing was just that, and not complete.

An alternative could be to prescribe a duty to preserve and then assert that it supersedes all other duties. But those duties are numerous and emanate from many sources, both state and federal. Purportedly nullifying them would be a difficult business, particularly since much litigation does not end up in federal court, and in some instances could not constitutionally end up in federal court.

Indeed, the entire notion of supersession may strain the limits of the Rules Enabling Act process. Could a rule supersede state law on preservation as asserted in litigation in state courts, or by state administrative agencies? Even with regard to litigation in the federal courts, it may be that a Civil Rules cannot limit remedies provided by state law for violation of a state preservation requirements.

Given these uncertainties about the effect of a Civil Rules, it is not clear whether such a rule could provide the sort of reassurance about preservation that some hope it could provide.

² Would the bracketed phrase be preferable?

³ Should this be limited to prospective parties? Could a Civil Rule impose a preservation duty on a third-party witness to an accident? Some states have recognized a tort of “spoliation” under some circumstances, but that suggests Enabling Act issues. On the other hand, we probably would say that, after service with a federal-court subpoena for specified information, such a third-party witness would have a duty to preserve the material requested by the subpoena even if it objected to producing it. The federal court’s power to enforce subpoenas should reach that far.

an action cognizable in a United States court⁴ must preserve discoverable [electronically stored]⁵ information as follows.

(b) Trigger for Duty to Preserve. The duty to preserve discoverable information under Rule 26.1(a) arises only if a person becomes aware of one of the following facts or circumstances that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court]:^{6 7}

(1) Service of a pleading or other document asserting a claim;⁸ or

⁴ This formulation is modeled on Rule 27(a), which speaks of a petitioner who “expects to be a party to an action cognizable in a United States court” and of “persons whom the petitioner expects to be adverse parties.”

⁵ One question is whether this duty to preserve should be limited to electronically stored information. On the one hand, that appears to be the main focus of current concerns emphasized to the Committee. On the other hand, other material remains very important in much litigation, and many recent sanctions cases involve more traditional sources of information.

⁶ At least one problem with this formulation is that it includes awareness that the action might be in a federal court. Since subdivision (a) imposes a duty only on those who reasonably expect to be a party of an action in federal court, saying that again here may be harmful; the only duty we are talking about here is the one in (a). For actions brought in state court, it seems fair to assume that some preservation duty would arise also, even though not based on this rule.

⁷ The whole thrust of this approach is that it can identify in advance, at least by fairly specific category, all the events that would justify imposing a preservation duty. As noted below, including a “catch-all” final category may seem desirable because it would build in some flexibility, but that would seem to undermine the basic purpose of the rule. Absent that, however, one might expect fierce litigation about whether given events actually fall into one of the listed categories.

⁸ This need not be a claim against this person, presumably. Under Rule 15(c)(1)(C), relation back may apply to a claim later asserted against an original nonparty who “should have known that the action would have been brought against it, but for a mistake concerning the proper party’s identity.” See *Krupski v. Costa Crociere, S.p.A.*, 130 S.Ct. 2485 (2010) (applying Rule 15(c)(1)(C) to uphold relation back of claim against added defendant). Indeed, in this situation the need to preserve may arise after the commencement of the action but long before the formal assertion of a claim against this party.

But the Rule 15(c)(1)(C) analogy is far from perfect. That rule is concerned primarily with limitations policies, not evidence preservation. Relation back does not involve a “duty” to preserve; it only preserves claims that would otherwise be barred by the passage of time when the party who could assert the limitations defense had adequate notice so that it should have taken precautions such as preserving its evidence. Put differently, the party who succeeds in obtaining relation back for an amended claim does not thereby also acquire a right under Rule

- (2) Receipt of a notice of claim or other communication -- whether formal or informal -- indicating an intention to assert a claim; or
- (3) Service of a subpoena or similar demand for information; or
- (4) Retention of counsel, retention of an expert witness or consultant, testing of materials, discussion of possible compromise of a claim⁹ or taking any other action in anticipation of litigation;¹⁰ or
- (5) Receipt by the person of a notice or demand to preserve discoverable information;¹¹ or
- (6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, contract, or knowledge of an event that calls for preservation under the person's own retention program.¹²

15(c) to argue that the other side therefore should have preserved the evidence it wants to use to support its added claim.

⁹ This terminology is meant to track Evidence Rule 408.

¹⁰ This provision draws on Rule 26(b)(3) for the general notion of “anticipation of litigation.” It is worth noting that this is the one most likely to be important to plaintiffs, who do not usually await notice of a claim by others since they are the claimants. But whether the duty to preserve should arise at the same moment Rule 26(b)(3) protection attaches might be debated. Equating the inception of work product protection with the trigger for the preservation duty may mix two very different things.

¹¹ This is very open-ended. It does not purport to address the scope of the obligation to preserve, but only the trigger. It does not focus on the form of this notice, but does focus upon “receipt,” which presumably means the demand is directed to the person to whom the duty will thereupon apply. It is worth noting, however, that delivery of such a notice to *A* might be regarded as sufficient to notify *B* of the need to preserve. At the same time, it could be that only a specific demand to preserve would be covered.

¹² Including this provision might be said somewhat to undercut subdivision (a) above, for that provision was designed to specify a duty to preserve imposed by the rules without regard to what other sources of law require. Yet it may well be that failure to comply with other legal requirements would be a legitimate consideration for a preservation requirement imposed by the rules. To the extent subdivision (c) below is the sole definition of the scope of the duty to preserve, making another law (which may have a different scope) the trigger could cause difficulties. Would that trigger also determine the resulting scope of preservation?

[(7) Any other {extraordinary} circumstance that would make a reasonable person aware of the need to preserve information.]¹³

- (c) **Scope of Duty to Preserve.** A person whose duty to preserve discoverable information has been triggered under Rule 26.1(b) must take actions that are reasonable under the circumstances to preserve discoverable information [taking into account the proportionality criteria of Rule 26(b)(2)(C)] {considering the burden or expense of preservation, the likely needs of the case, the amount likely to be in controversy, the parties' resources, the importance of the issues at stake in the action, and the potential importance of the preserved information in resolving the issues}¹⁴ as follows:

The reference to the person's own retention program was not suggested by the Duke panel, but does appear in cases. See *Kerkendall v. Department of the Army*, 573 F.2d 1318, 1325-27 (Fed. Cir. 2009) (upholding adverse inference for destruction of documents by government agency in violation of its own retention program).

Whether this category of triggers should be included is debatable on its merits. Would including it tend to deter parties from adopting preservation rules of their own? If the sole focus of this rule is on the preservation obligation that flows from the prospect of litigation, why does an entirely unrelated preservation obligation -- even if imposed by rule or statute -- matter? At least arguably, it would seem odd that a party who violates a statutory or regulatory obligation and as a result deprives the opposing party of material evidence, can claim that it had no pertinent duty to preserve.

¹³ Because this rule is designed as an all-encompassing catalog of the triggers that invoke the rule's preservation obligation, it may be important to include such a "catch-all" provision to cover situations that did not occur to the drafters. But to the extent the catch-all is really flexible, it may rob the entire rule of its supposed value in protecting the party that does not preserve. How is the potential litigant to know whether something that occurs fits into this provision?

Would it be helpful to add the word "extraordinary"? Without the qualifier, item (7) could swallow the others. But does the qualifier really help? Can the person possibly subject to a preservation duty determine what a court will later regard as satisfying this standard? And how about the sloppy manufacturer whose goods often fail. Is it "ordinary" for another failure to occur, leading to serious personal injury? If so, does that mean these events are not really "extraordinary"?

¹⁴ The bracketed provision is intended to raise the issue of proportionality. Many agree that proportionality concepts should be crucial in determining what is a reasonable preservation regime. But merely saying that preservation should be "proportional" may not be very useful to a potential litigant who may have only the haziest notion what the claim involves and whether serious damages have occurred.

Assuming one wants to invoke proportionality, one could simply say the preservation must be "proportional." To add some specificity, however, the alternatives in text either invoke

- (1) ***Subject matter.*** [Alternative 1] The person must preserve information relevant to any claim or defense that might be asserted in the action to which the person might become a party or to a defense to such a claim;¹⁵
- (1) ***Subject matter.*** [Alternative 2] The person must preserve any information that constitutes evidence of a claim or of a defense to a claim;¹⁶
- (1) ***Subject matter.*** [Alternative 3] The person must preserve any information that is relevant to a subject on which a potential claimant has demanded preservation;¹⁷
- (1) ***Subject matter.*** [Alternative 4] The person must preserve information that a reasonable person would appreciate should be preserved under the circumstances;¹⁸
- (2) ***Sources of information to be preserved.*** [Alternative 1] The duty to preserve under Rule 26.1(a) extends to information in the person’s possession, custody or

Rule 26(b)(2)(C) or paraphrase the criteria in Rule 26(b)(2)(C)(iii).

¹⁵ The notion here is to invoke the scope of discovery or right under Rule 26(b)(1). Note that this scope may include such things as other similar incidents, impeaching material, and additional items that may not, on their face, relate to the claim raised.

¹⁶ The effort here is to narrow the scope to what the rulemakers were trying to identify as “core information” in 1991 when initial disclosure was first proposed. This phraseology is different, and raises difficulties about deciding what is “evidence.” For example, does that exclude hearsay? In general, hearsay is discoverable under Rule 26(b)(1) whether or not admissible.

¹⁷ This would impose a very narrow requirement to preserve; unless a party giving notice of a claim has said something about preserving information there would be no duty. This sort of provision would seem to encourage broad demands to preserve in advance of litigation, probably not a desirable thing. Among other things, the person who receives such a demand has no immediate way to challenge the demand, as could happen in regard to undue demands during a Rule 26(f) conference, for those can be submitted to the judge for resolution if needed. Perhaps more significantly, it would impose no duty to preserve unless a demand to preserve were made, seemingly disadvantaging those who don’t have lawyers. A lesser point on that score is that it would cause uncertainty about whether there had been such a demand.

¹⁸ This alternative invokes one of the suggestions of the Duke Panel. It may be circular, and seems to provide very little guidance to the party subject to the duty to preserve.

control¹⁹ that is reasonably accessible to the person;²⁰

- (2) ***Sources of information to be preserved.*** [Alternative 2] The duty to preserve under Rule 26.1(a) extends to information in the person's possession, custody or control that is routinely accessed in the usual course of business of the person;²¹ the following types of information are presumptively excluded from the preservation duty unless otherwise agreed by the parties or ordered by the court:

¹⁹ This invokes Rule 34(a)(1)'s definition of the scope of the duty to produce in response to a Rule 34 request.

²⁰ The last clause invokes a version of Rule 26(b)(1)(B)'s exemption from initial discovery of electronically stored information that is "not reasonably accessible because of undue burden or cost."

It is debatable whether any such limitation should be included in a preservation rule. In the Committee Notes to Rules 26(b)(2)(B) and 37(e) in 2006, an effort was made to distinguish between the duty to preserve such information and the duty to provide it in response to discovery. The notion is that preservation imposes a smaller burden than restoration, and ensures that the material will be there if the court later orders production.

Another issue here (already mentioned above) is the question of preserving allegedly privileged material. To the extent that the trigger for the duty to preserve under Rule 26.1 corresponds to the "in anticipation of litigation" criterion of Rule 26(b)(3), for example, much material generated in trial preparation activity might fall within the duty to preserve. Does the fact that a party claims it need not produce this material exempt it from preservation? Ordinarily, as emphasized in Rule 26(b)(5), the decision whether a claim of privilege is valid is for the court, not the party; if the court cannot examine the material because it no longer exists, that is a problem.

Another issue has to do with whether it is desirable to expand the Rule 26(b)(2)(B) standard (at least as to preservation) to discoverable information that is not electronically stored. Hard copy information may be difficult to access or locate, but Rule 26(b)(2)(B) does not provide any exemption from providing it in response to a discovery request. Should preservation be treated differently?

²¹ The idea here is to invoke something that was frequently discussed in relation to preservation around a decade ago -- limiting duties to provide discovery to that electronically stored information that is regularly used by the party. The phrasing used here is borrowed from Rule 34(b)(2)(E)(i) regarding production of electronically stored information.

A different issue is how this duty should be phrased for individual nonbusiness litigants, such as individual plaintiffs. The idea should probably be to look to what they access and use on a regular basis, such as their active email accounts. But what if they have a cache for discarded items. Should that be included?

- (A) Deleted, slack, fragmented or unallocated data on hard drives;
 - (B) Random access memory (RAM) or other ephemeral data;
 - (C) On-line access data such as temporary internet files;²²
 - (D) Data in metadata fields that are frequently updated, such as last opened dates;
 - (E) Information whose retrieval cannot be accomplished without substantial additional programming, or without transferring it into another form before search and retrieval can be achieved;
 - (F) Backup data that substantially duplicate more accessible data available elsewhere;
 - (G) Physically damaged media;
 - (H) Legacy data remaining from obsolete systems that is unintelligible on successor systems [and otherwise inaccessible to the person]; or
 - (I) Other forms of electronically stored information that require extraordinary affirmative measures not utilized in the ordinary course of business;²³
- (3) ***Types of information to be preserved.*** The duty to preserve under Rule 26.1(a) extends to documents, electronically stored information, or tangible things within

²² This provision would not preclude a court order that such information must be preserved. See, e.g., *Columbia Pictures Indus. v. Bunnell*, 245 F.R.D. 443 (C.D. Cal. 2007) (order directing defendant to preserve server access data on downloading of material protected by plaintiff's copyright that would otherwise not be preserved).

²³ This specific listing is taken from submissions to the Advisory Committee. Besides asking whether it is sensible and complete, one might also ask whether a list this specific is likely to remain current for years.

Rule 34(a)(1).²⁴

- (4) ***Form for preserving electronically stored information.*** A person under a Rule 26.1(a) duty to preserve electronically stored information must preserve that information in a form or forms in which it is ordinarily maintained.²⁵ The person need not preserve the same electronically stored information in more than one form.²⁶
- (5) ***Time frame for preservation of information.*** The duty to preserve under Rule 26.1(a) is limited to information [created during] {that relates to events occurring during }

[*Alternative 1*] __ years prior to the date of the trigger under Rule 26.1(b)²⁷

²⁴ The Duke panel suggested including a provision about types of information to be preserved. It did not suggest limitations on the Rule 34(a)(1) scope of the duty to produce, and this initial effort therefore uses that provision as a guide. One possibility mentioned above is that backup tapes or the like could be excluded. But it may be that the scope of the duty provision already suffices for that purpose, and also that excluding backup materials may be unwise.

In a related vein, should preservation duties extend to “land or other property possessed or controlled” by the person, which is subject to discovery under Rule 34(a)(2)? Although that form of discovery is probably much rarer than document discovery, when it does matter preservation may be important.

²⁵ This provision is borrowed from Rule 34(b)(2)(E)(ii). If “ordinarily maintained” includes the form in which information is preserved for litigation purposes, this could be circular.

²⁶ This provision corresponds to Rule 34(b)(2)(E)(iii).

²⁷ This provision has at least two problems. One is that it tracks backward from the date of the triggering event. It is not necessarily obvious that this should be the pertinent event, but in one sense it seems logical -- ordinarily preservation can’t be expected to occur until that triggering event occurs. Of course, there might be multiple triggers, which would probably present additional complications.

A second difficulty is that it calls for the rules to specify a time period for this duty. Statutes of limitation vary considerably for different kinds of claims, and from jurisdiction to jurisdiction. That variability suggests the difficulty that might attend an effort to set a specific all-encompassing limitation here. In addition, some cases -- such as a groundwater contamination case -- may concern events that occurred decades ago. A lawsuit for breach of an old contract likewise could require discovery regarding events that occurred many years in the past. Suggesting that information about such events need not be preserved because they are

[*Alternative 2*] the period of the statute of limitations prior to the date of the trigger under Rule 26.1(b)²⁸

[*Alternative 3*] a reasonable period under the circumstances.²⁹

- (6) ***Number of key custodians whose information must be preserved.***³⁰ The duty to preserve under Rule 26.1(a) is limited to information [possessed by] {under the control of} the [number] {a reasonable number of} key custodians in the person's organization who are [most likely to possess] {best positioned to identify} information subject to preservation under Rule 26.1(c).³¹

beyond a rule-specified time frame would present obvious problems. A time-period limitation also might foster arguments about the limits of the rulemaking power.

²⁸ This approach might be preferred to setting a specific limit in a rule because it would borrow from other sources of law. But the borrowing experience for limitations periods has sometimes been an unhappy one. For limitations periods for federal claims lacking congressionally-set limitations, the task produced much disarray and finally Congress adopted the four-year limit in 28 U.S.C. § 1658. But that statute applies only to federal claims created by Congress after its effective date; for those already in existence, borrowing of limitations periods remains the rule.

An additional difficulty here is that the person subject to the duty to preserve must make predictions to use this approach. One is to determine what claim would be asserted; a pre-litigation notice may suggest a variety of claims that have different limitations periods. And the limitations period for a given claim may differ significantly in different jurisdictions, so there is a potential choice-of-law guess involved in the forecast. Beyond determining the pertinent limitations period there is also the possibility that a court would rule that the limitations period was tolled until prospective plaintiffs discovered their claims, or on grounds of estoppel or fraudulent concealment. Predicting how a court might resolve those issues would be very difficult.

²⁹ Given the difficulties mentioned in relation to the other two approaches, this might be preferred. But one could object that it provides limited or no guidance.

³⁰ This sort of provision was suggested by the Duke Panel. It is not clear that “key custodian” is a definite enough term, but it is the one proposed by our panelists. If we want to adopt something along this line, there should be careful consideration about what term to use. The Committee Note could elaborate on what is meant. For one court’s use of the “custodian” term, see *Edelen v. Campbell Soup Co.*, 265 F.R.D. 676, 684 (N.D.Ga. 2010) (“Plaintiff then proposed a request that encompasses 55 custodians and 55 search terms over a three-year period.”).

³¹ This provision is a very halting first effort that bristles with issues. The question of how to define “key custodian” has already been mentioned. The question whether we are talking about “possession” or “control” of the information or something else seems somewhat tricky.

- (d) **Ongoing duty.** *[Alternative 1]* The person must take reasonable measures to continue to preserve information subject to preservation under Rule 26.1(c) from the date the obligation to preserve is triggered under Rule 26.1(b) until [the expiration of the statute of limitations if no suit is filed by that date] {the termination of litigation if a suit is filed}.³²
- (d) **Ongoing duty.** *[Alternative 2]* The person must take reasonable measures to preserve information received after the trigger date specified in Rule 26.1(c) unless it notifies [the

Choosing a number is another challenge. Shouldn't that depend on the size and makeup of the organization? In addition, might it not depend on the type of information involved? Isn't there always a risk that 20/20 hindsight will suggest that somebody else is an obvious choice who was overlooked? The alternative of saying "a reasonable number" may be more reasonable but not reassuring to the person seeking certainty about what to do to satisfy preservation obligations. How is the person to make this determination with confidence? Perhaps the answer is to designate twice as many as are minimally necessary. But even then there is the argument that somebody really important was overlooked.

A different question is whether this should excuse preservation by anyone who is not a "key custodian." Are those the individuals who were most involved in the events that matter in the suit, or the individuals who are officially designated as "custodians" in the organization? If the latter, could it be that there is no need to preserve information possessed by the people most involved? Does that bear on what is an adequate litigation hold?

It seems that what we are talking about is the whole scope of information to be preserved pursuant to Rule 26.1(c). Are there likely to be different custodians for different types of information?

This topic seems to relate to the time factor identified in Rule 26.1(c)(5). Are we talking about holders of specified positions in the organization, or the specific individuals? If the former (more likely), how should we deal with the hiring, promotion, and firing of specific holders of these positions, and with revisions in the organizational structure during the pertinent period?

Another question has to do with a litigation hold. Does the listing in this rule identify the only people who should be directed to retain information in a litigation hold? Our sense is that normally the notice of a hold should be directed to a larger group, but perhaps the goal here is to guard against requiring that effort.

Finally, how would this provision apply to parties that are not organizations? Are family members of individual litigants also custodians?

³² The need to specify how long the duty to preserve remains in effect would seem to arise in situations where litigation is not filed. Where litigation is filed, the duration of the duty is more clear. And yet, as noted above, determining when the statute of limitations expires presents difficult issues about which limitations period to apply and whether it has been tolled.

person requesting preservation] {all reasonably identifiable interested persons} that it is not engaged in ongoing preservation.³³

- (e) **Remedies for failure to preserve.** The sole remedy for failure to preserve information is under Rule 37(e).³⁴

**Rule 37. Failure to Make Disclosures
or to Cooperate in Discovery; Sanctions**

* * * * *

- (e) **Sanctions for failure to preserve [electronically stored] {discoverable} information.**

³³ This alternative attempts to provide an out for those who wish to curtail the ongoing burden. But one serious difficulty is determining who should be notified that preservation is not ongoing. Does it apply only when the trigger is a demand for preservation? It does not seem to answer the question what the preserving person must do when the person who is notified objects to cessation of preservation. If anyone can dispense with preservation by giving notice, would everyone (who is advised by a lawyer) immediately give such notice?

³⁴ This hypothetical provision is designed as a bridge to possible amendments to Rule 37, as explored more fully below. The goal is to make clear that Rule 26.1 does not purport to do more than set ground rules in relation to litigation that actually occurs in federal court. Thus, one could not argue for any adverse consequence due to failure to preserve except in a pending case in federal court. By the time that argument occurs, there is no big problem with the authority of a federal court to address the problem. And there seems to be no problem with the idea that it may apply federal legal principles in determining whether a person has failed to preserve. So Rule 26.1 becomes more an advance warning that may limit federal principles of preservation than an all-purpose intrusion into the already crowded realm of preservation.

A court may not impose sanctions³⁵ [under these rules]³⁶ on a party for failure to preserve information if the party has complied with Rule 26.1. The following rules apply to a request for sanctions for violation of Rule 26.1:³⁷

(1) ***Burden of proof.*** The party seeking sanctions has the burden of proving that:

(A) a violation of Rule 26.1 has occurred;

(B) as a result of that violation, the party seeking sanctions has been denied access to specified electronically stored information, [documents or tangible things];³⁸

³⁵ A perennial question is to determine what is a “sanction.” For example, to what extent is a directive to restore backup tapes to locate materials that were inappropriately deleted a “sanction.” To many, it might seem a curative measure. For a thoughtful examination of such issues under the current rule, consider *Major Tours, Inc. v. Colorel*, 720 F.supp.2d 587 (D.N.J. 2010), in which Judge Simandle was presented with plaintiffs’ argument that because defendants had failed to preserve emails they had to restore all backup tapes to see if some of the lost emails could be found on the tapes. Judge Simandle rejected this argument that failure to preserve is dispositive on the question under Rule 26(b)(2)(B) whether to order restoration of backup tapes. Instead, that is just one of many factors, and he declined to make such an order in this case, upholding the magistrate judge’s decision that good cause did not exist for restoring the tapes despite the failure to preserve. Turning the situation around, would the conclusion that the preservation rule was not violated preclude ever ordering restoration of backup tapes?

³⁶ This phrase was inserted in Rule 37(e) by the Standing Committee in 2004, and permits sanctions pursuant to “inherent authority” or based on other sources of law while limiting sanctions under Rule 37(b) or other Civil Rules. Whether that limitation should endure if the rules themselves include a more expansive (and affirmative) set of preservation provisions, like hypothetical Rule 26.1, is not certain.

³⁷ Note that including a provision like this could obviate reliance on “inherent authority” to support sanctions like those listed in Rule 37(b) in cases in which failure to preserve did not violate any court order. A Committee Note could presumably say something like: “Given the introduction of a specific basis in Rule 37 for imposition of sanctions, and specific provisions in Rule 26.1 regarding the scope of the preservation duty, there should no longer be occasion for courts to rely on inherent authority to support sanctions in cases in which a party has failed to preserve discoverable information.”

³⁸ This criterion was suggested by the Duke Panel. The abiding problem is that one does not know what was there before the inappropriate deletion occurred; that makes it rather difficult for the party seeking sanctions (which has presumably not breached its responsibilities under the rules) to specify what it lost.

This factor seems to address the same thing as the harmlessness provision in current Rule

- (C) no alternative source exists for the specified electronically stored information [documents or tangible things];³⁹
 - (D) the specified electronically stored information [documents or tangible things] would be [relevant under Rule 26(b)(1)] {relevant under Evidence Rule 401} [material] to the claim or defense of the party seeking sanctions;⁴⁰
 - (E) the party seeking sanctions promptly sought relief in court after it became aware of the violation of Rule 26.1.⁴¹
- (2) ***Selection of sanction.*** If the party seeking sanctions makes the showings specified in Rule 37(e)(1), the following rules apply to selection of a sanction:

37(c)(1), but to put the burden with regard to that issue on the party seeking sanctions. Perhaps harmlessness is a better way of putting it; doing so would presumably shift the burden of proof to the party resisting sanctions.

Relatedly, it might be noted that this factor can cut differently for parties with and without the burden of proof. In at least some instances, parties with the burden of proof may lose *because* they no longer have evidence they lost. True, parties without the burden of proof may find their cases weakened due to loss of evidence that would have been helpful to them, but in at least some instances there may be an important difference between parties depending on who has the burden of proof.

³⁹ This resembles the current harmlessness criterion, and seems an important focus; to the extent alternative sources of information (or sources of alternative information) exist, there seems little reason for the sorts of sanctions listed in Rule 37(b)(2)(A). As noted above, however, measures designed to extract such information from those sources (e.g., backup tapes) might be called “sanctions” by some. Moreover, since the exact contours of the lost information are usually unknowable, it may be impossible to determine whether there is an alternative source of that information.

⁴⁰ Again, the moving party’s difficulty in specifying what was lost presents something of a conundrum on this subject.

It is not clear that this provision adds usefully to (B), which focuses on the harm to the party seeking sanctions.

⁴¹ This provision does not call for initial attempts to confer with the other side to obtain the nonjudicial solution to the problem. It might be said in a Committee Note that informal communication seems like a good way to explore the availability of other sources of information, but given that hypothetical subdivision (e) is only about sanctions of a rather serious sort, it may be that the time for conferring has passed.

- (A) the court may employ any sanction listed in Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information,⁴² but must select the least severe sanction necessary to redress [undo the harm caused by] the violation of Rule 26.1;⁴³

⁴² As noted, an adverse inference instruction is not included in the Rule 37(b)(2) listing. It is therefore addressed separately, but that does not explain how it should be ranked among the others in terms of "severity." Another issue might be the extent to which Fed. R. Evid. 301 (on presumptions) affects the use of this sanction.

In the same vein, one could consider listing other possible "sanctions" in this new provision. No effort has yet been made to chart these waters.

⁴³ This is a first effort to stratify sanctions. It seems from the ordering in Rule 37(b)(2)(A) that the list there goes from less severe to more severe. It is worth re-emphasizing, however, that an adverse inference instruction is not explicitly included on the list in Rule 37(b). Presumably that sanction is available also. Should sanctions be limited to those listed in Rule 37(b)?

Calibrating the severity of sanctions might sometimes be difficult. Consider, for example, Judge Gershon's reaction to arguments against using an adverse inference instruction:

In its papers, defendant repeatedly refers to adverse inferences and deemed findings as "severe" sanctions, but the case law is clear that these sanctions are not properly considered "severe." In this context, the term "severe" refers to sanctions of dismissal and contempt, not to the more limited sanctions imposed here.

Linde v. Arab Bank, Inc. 269 F.R.D. 186, 199 n.11 (S.D.N.Y. 2010).

Another point with regard to adverse inferences is that they are not all the same. Some may command the jury to find certain facts established, or even to find certain claims established. Others may be entirely permissive, simply telling the jury that if they find that a party lost something it should have retained the jury may infer that this lost item would help the other side if it concludes that the party was trying to get rid of harmful evidence. Even without an instruction, a lawyer could make that argument to the jury; having the judge endorse the possibility with a jury instruction is no doubt important to the lawyer but very different from a "severe" adverse inference instruction.

In re Oracle Corp. Securities Litig., 627 F.3d 376 (9th Cir. 2010), illustrates the range of adverse inferences possible, and also points out that they can be important at the summary judgment stage, not just in jury instructions. Plaintiffs in that securities fraud suit established that defendants willfully failed to preserve the email and other materials from Larry Ellison, Oracle's CEO. When defendants moved for summary judgment, the district court therefore gave the plaintiffs the benefit of an adverse inference that the lost materials would have proved Ellison's knowledge of any material facts plaintiffs were able to establish. But plaintiffs did not persuade Judge Illston that there were any material factual disputes, and she granted defendants' summary-judgment motion.

On appeal, plaintiffs urged that the district court should have used an adverse inference sufficient to establish their prima facie case and therefore to defeat the summary-judgment

- (B) *[Alternative 1]* the court may not impose a sanction listed in Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information unless the party seeking sanctions establishes that the party to be sanctioned violated Rule 26.1 [negligently] {due to gross negligence} [willfully] {in bad faith} [intending to prevent use of the lost information as evidence];⁴⁴
- (B) *[Alternative 2]* the court must not impose a sanction if the party to be sanctioned establishes that it acted in good faith in relation to the violation of Rule 26.1;⁴⁵
- (C) the court must be guided by proportionality, making the sanction proportional to the harm caused to the party seeking sanctions and the

motion. The 9th Circuit disagreed (id. at 386):

Over 2.1 million documents were produced during discovery. Although Ellison's email account files were not produced, the documents that were produced contained numerous email chains in which Ellison's correspondence was contained. If there were material issues of fact supporting securities fraud, Plaintiffs should have been able to glean them from the documents actually produced, the extensive deposition testimony, and the written discovery between the parties. An adverse inference would then properly apply to establish that Ellison must have known of those damaging material facts. Plaintiffs' problem here lies in the dearth of admissible evidence to show fraud.

The court added that an adverse inference sanctions "should be carefully fashioned to deny the wrongdoer the fruits of its misconduct yet not interfere with that party's right to produce other evidence." Id. at 386-87.

⁴⁴ This is an effort to incorporate a showing of state of mind into the criteria for sanctions. Either here or in a Committee Note, one could address the significance of a litigation hold. That is not included in the draft rule language in part because it seems so difficult to determine what a "litigation hold" is, and also because the question whether adequate follow-up occurred could often be important.

The Duke panel urged that "[t]he state of mind necessary to warrant each identified sanction should be specified." Doing that seems quite difficult -- given the range of sanctions listed in Rule 37(b)(2)(A), the range of states of mind identified above, and the variety of facts arising in different cases.

⁴⁵ This is an effort to shift the state-of-mind inquiry from being a matter to be proven to support sanctions into being a matter of defense for the party resisting sanctions.

level of culpability⁴⁶ of the party to be sanctioned.

- (3) ***Payment of Expenses.*** Instead of or in addition to imposing a sanction, the court must order the party in violation of Rule 26.1, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the violation, unless the violation was substantially justified or other circumstances make an award of expenses unjust.

CATEGORY 2

The concept behind this category is that it may be desirable and possible to devise more general rules regarding preservation. A key consideration here is whether rules of such generality will actually be useful to parties making preservation decisions, particularly before litigation begins. (After litigation begins, they can at least apply to the court for clarification about what they should be doing.)

Rule 26.1. Duty to Preserve Discoverable Information

- (a) **General Duty to Preserve.** [In addition to any duty to preserve information provided by other law,] every person who reasonably expects [is reasonably certain] to be a party to an action cognizable in a United States court must preserve discoverable [electronically stored] information in as follows.
- (b) **Trigger for Duty to Preserve. [Alternative 1]** The duty to preserve discoverable information under Rule 26.1(a) arises when a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court].
- (b) **Trigger for Duty to Preserve. [Alternative 2]** The duty to preserve discoverable information arises when a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court] such as:

⁴⁶ This phrase is far from ideal, but attempts to capture what is meant.

- (1) Service of a pleading or other document asserting a claim; or
 - (2) Receipt of a notice of claim or other communication -- whether formal or informal -- indicating an intention to assert a claim; or
 - (3) Service of a subpoena or similar demand for information; or
 - (4) Retention of counsel, retention of an expert witness or consultant, testing of materials, discussion of possible compromise of a claim or taking any other action in anticipation of litigation; or
 - (5) Receipt of a notice or demand to preserve discoverable information; or
 - (6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, contract, or the person's own retention program.
- (c) **Scope of Duty to Preserve.** A person whose duty to preserve discoverable information has been triggered under Rule 26.1(b) must take actions reasonable under the circumstances to preserve [discoverable information]⁴⁷ in regard to the potential claim of which the person is or should be aware, [taking into account the proportionality criteria of Rule 26(b)(2)(C)] {considering the burden or expense of preservation, the likely needs of the case, the amount likely to be in controversy, the parties' resources, the importance of the issues at stake in the action, and the potential importance of the preserved information in resolving the issues}.⁴⁸

⁴⁷ One suggestion from the Duke panel was to specify a different preservation duty for parties and nonparties. In the pre-litigation context, this seems particularly challenging since nobody is yet a party. Whether there should be a distinction on this ground is debatable in any event. For example, should it matter if, under Rule 15(c), the nonparty is one that should have realized it would have been sued?

⁴⁸ The idea here is to invoke the concept of relevance as a defining factor for the duty to preserve. Using it might raise several problems. For one thing, the claim involved has not been made in a formal way. For another, relevance is a very broad concept. Indeed, one might need to address whether this means relevant to the claim or defense or to the subject matter, topics last addressed in the 2000 amendments to Rule 26(b)(1).

Another question that might arise at this point is whether allegedly privileged materials must be preserved. Those are not within the scope of discovery, but the court can't pass on

- (d) **Ongoing duty.** The person must take reasonable measures to continue to preserve information subject to preservation under Rule 26.1(c) for a reasonable period after the date the obligation to preserve is triggered under Rule 26.1(b).
- (e) **Remedies for failure to preserve.** The sole remedy for failure to preserve information is under Rule 37(e).

**Rule 37. Failure to Make Disclosures
or to Cooperate in Discovery; Sanctions**

* * * * *

- (e) **Sanctions for failure to preserve [electronically stored] {discoverable} information.**
A court may not impose sanctions [under these rules] on a party for failure to preserve information if the party has complied with Rule 26.1. The following rules apply to a request for sanctions for violation of Rule 26.1:
 - (1) ***Burden of proof.*** The party seeking sanctions has the burden of proving that:
 - (A) a violation of Rule 26.1 has occurred;
 - (B) as a result of that violation, the party seeking sanctions has been denied access to specified electronically stored information, [documents or tangible things];
 - (C) no alternative source exists for the specified electronically stored information [documents or tangible things];
 - (D) the specified electronically stored information [documents or tangible things] would be [relevant under Rule 26(b)(1)] {relevant under Evidence Rule 401} [material] to the claim or defense of the party seeking sanctions;

whether discarded materials were indeed privileged. This problem will be mentioned again below.

- (E) the party seeking sanctions promptly sought relief in court after it became aware of the violation of Rule 26.1.
- (2) ***Selection of sanction.*** If the party seeking sanctions makes the showings specified in Rule 37(e)(1), the following rules apply to selection of a sanction:
- (A) the court may employ any sanction under Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information but must select the least severe sanction necessary to redress [undo the harm caused by] the violation of Rule 26.1;
- (B) *[Alternative 1]* the court may not impose a sanction under Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information unless the party seeking sanctions establishes that the party to be sanctioned violated Rule 26.1 [negligently] {due to gross negligence} [willfully] {in bad faith} [intending to prevent use of the lost information as evidence];
- (B) *[Alternative 2]* the court must not impose a sanction if the party to be sanctioned establishes that it acted in good faith in relation to the violation of Rule 26.1;
- (C) the court must be guided by proportionality, making the sanction proportional to the harm caused to the party seeking sanctions and the level of culpability of the party to be sanctioned.
- (3) ***Payment of Expenses.*** Instead of or in addition to imposing a sanction, the court must order the party in violation of Rule 26.1, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the violation, unless the violation was substantially justified or other circumstances make an award of expenses unjust.

CATEGORY 3

This approach relies entirely on a “back end” rule provision and has no specific preservation provisions. It is intended to authorize Rule 37(b) sanctions whenever a party does not reasonably preserve, and so should generally make reliance on inherent authority unimportant.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(g) FAILURE TO PRESERVE DISCOVERABLE INFORMATION; REMEDIES

- (1) If a party fails to preserve discoverable information that reasonably should be preserved in the anticipation or conduct of litigation, the court may[, when necessary]⁴⁹:
- (A) permit additional discovery;
 - (B) order the party to undertake curative⁵⁰ measures; or
 - (C) require the party to pay the reasonable expenses, including attorney’s fees,⁵¹

⁴⁹ Whether this qualification is helpful could be debated. The idea is to authorize various responses to the loss of data that would not be characterized as “sanctions.” Saying they may be used only “when necessary” might suggest that discovery orders more generally are subject to that limitation. Even Rule 26(b)(2)(B) would not necessarily condition an order to restore inaccessible sources on a showing of “necessity,” much as that consideration could matter to judges considering what to do about backup tapes and the like.

⁵⁰ Does “curative” have a commonly understood meaning? Would “other remedial” give greater flexibility? The goal here is to emphasize that orders that otherwise not be made are justified due to the loss of data. Again, this is not a “sanction,” but an effort by the court to minimize the possible harm to a litigant’s case resulting from another party’s loss of data.

⁵¹ Would this possibility tend to encourage claims of spoliation? It might be that one could, by succeeding on a spoliation argument, get a “free ride” for discovery one would otherwise be doing at one’s own expense. Hopefully, it should be clear that discovery is made necessary by the loss of data, and not something that would happen in the ordinary course. But will there be many instances in which that is not clear?

caused by the failure.

- (2) Absent extraordinary circumstances [irreparable prejudice],⁵² the court may not impose any of the sanctions listed in Rule 37(b)(2) or give an adverse-inference jury instruction⁵³ unless the party's failure to preserve discoverable information was willful or in bad faith and caused [substantial] prejudice in the litigation.
- (3) In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith,⁵⁴ the court may consider all relevant factors, including:
- (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;⁵⁵

⁵² This proviso is designed to authorize sanctions in the absence of fault in cases like *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001), where the loss of the data essentially preclude effective litigation by the innocent party. One question is whether such instances are truly extraordinary. If they happen with some frequency, this may be the wrong phrase.

The term irreparable prejudice may be preferable to focus on the real concern here. It would be important, however, to ensure that this be limited to extremely severe prejudice. Most or all sanctions depend on some showing of prejudice. Often that will be irreparable unless the "curative" measures identified in (g)(1) above clearly solve the whole problem. The focus should be on whether the lost data are so central to the case that no cure can be found.

⁵³ Is this too broad? Adverse inference instructions can vary greatly. General jury instructions, for example, might tell the jury that it could infer that evidence not produced by a party even though it should have had access to the evidence supports an inference that the evidence would have weakened the party's case. Is that sort of general instruction, not focusing on any specific topic, forbidden? How about the judge's "comment on the evidence" concerning lost evidence but not in the form of a jury instruction? Would this rule forbid attorney argument to the jury inviting to make an adverse inference if there were no instruction at all on the subject?

⁵⁴ Combining an evaluation of reasonableness and willfulness or bad faith in one set of factors is attractive. Often the circumstances that bear on reasonableness also will bear on intent. Would it help to add other factors that bear directly on intent, but also may bear on reasonableness? Examples might include departure from independent legal requirements to preserve, departure from the party's own regular preservation practices, or deliberate destruction.

⁵⁵ Is this treatment sufficient to substitute for provisions about "trigger" like the ones in Category I or Category II. If those provide useful detail, would it be desirable to add similar detail here?

- (B) the reasonableness of the party’s efforts to preserve the information, including the use of a litigation hold and the scope of the preservation efforts;⁵⁶
- (C) whether the party received a request that information be preserved, the clarity and reasonableness⁵⁷ of the request, and — if a request was made — whether the person who made the request or the party offered to engage in good-faith consultation regarding the scope of preservation;
- (D) the party’s resources and sophistication in matters of litigation;⁵⁸
- (E) the proportionality of the preservation efforts to any⁵⁹ anticipated or ongoing litigation; and
- (F) whether the party sought timely guidance from the court⁶⁰ regarding any

⁵⁶ The use of “scope” is designed to permit consideration of a variety of factors. The Committee Note would elaborate about breadth of subject matter, sources searched (including “key custodians:), form of preservation, retrospective reach in time, and so on. Cases are likely to differ from one another, and “scope” will hopefully permit sensible assessment of an array of circumstances.

⁵⁷ Does this mean that an unreasonable request imposes a lesser duty than a reasonable request? Should clarity be the test here, since reasonableness of preservation efforts is already addressed in (B)?

⁵⁸ This consideration seems important to address the potential problem of spoliation by potential plaintiffs who may realize that they could have a claim, but not that they should keep their notes, etc., for the potential litigation. Are resources a useful consideration here? A wealthy individual might be quite unfamiliar with litigation. Is this somewhat at war with considering whether the party obeyed its own preservation standards? Making those relevant to the question of whether preservation should have occurred may be seen to deter organizations from having preservation standards. It is unclear how many organizational litigants -- corporate or governmental -- actually have such standards. Does the fact they exist prove that this litigant is “sophisticated”?

⁵⁹ This is broad, but probably the right choice. If the party reasonably anticipates multiple actions, proportionality is measured in contemplating all of them. A party to any individual action should be able to invoke the duty of preservation that is owed to the entire set of reasonably anticipated parties.

⁶⁰ This implicitly applies only when there is an ongoing action. Do we need anything more than a Committee Note to recognize that it is difficult to seek guidance from a court before there is a pending action? What if there is a pending action, and the party reasonably should anticipate further actions — is it fair to consult with one court (perhaps chosen from among many), pointing to the overall mass of pending and anticipated actions, and then invoke that court’s

unresolved disputes concerning the preservation of discoverable information.

* * * * *

Besides the footnoted questions, the Category 3 approach is intended generally to permit consideration of the extent to which the backwards shadow of such a rule would reassure and give direction to those making preservation decisions. Would it only do so if it absolutely precluded sanctions (absent “irreparable prejudice”) in the absence of proof of bad faith or willfulness? Would it adequately ensure a uniform treatment of these issues nationwide, or possibly be interpreted in keeping with the existing (and seemingly inconsistent) precedents in the area?

guidance when addressing other courts?