ADDENDUM TO AGENDA MATERIALS FOR THE MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES

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DUKE CONFERENCE SUBCOMMITTEE RULES SKETCHES

The most prominent themes developed at the 2010 Duke Conference are frequently summarized in two words and a phrase: cooperation, proportionality, and "early, hands-on case management." Most participants felt that these goals can be pursued effectively within the basic framework of the Civil Rules as they stand. There was little call for drastic revision, and it was recognized that the rules can be made to work better by renewing efforts to educate lawyers and judges in the opportunities already available. It also was recognized that many possible rules reforms should be guided by empirical work, both in the form done by the Federal Judicial Center and other investigators and also in the form of pilot projects. Many initiatives have been launched in those directions. Rules amendments remain for consideration. Some of them are being developed independently. The Discovery Subcommittee has come a long way in considering preservation of information for discovery and possible sanctions. Pleading standards are the subject of continual study. Other rules, however, can profitably be considered for revision. The sketches set out here reflect work by the Duke Conference Subcommittee after the Conference concluded. The early stages generated a large number of possible changes, both from direct suggestions at the Conference and from further consideration of the broad themes. More recently the Subcommittee has started to narrow the list, discarding possible changes that, for one reason or another, do not seem ripe for present consideration.

The proposals presently being considered are grouped in three roughly defined sets. They involve several rules and different parts of some of those rules. Standing alone, some may seem relatively inconsequential. But they have developed as part of an integrated package, with the thought that in combination they may encourage significant reductions in cost and delay. The package can survive without all of the parts — indeed, choices must eventually be made among a number of alternatives included for purposes of further discussion.

The first topics look directly to the early stages of establishing case management. These changes would shorten the time for making service after filing an action; reduce the time for issuing a scheduling order; emphasize the value of holding an actual conference of court and parties before issuing a scheduling order; and establish a nationally uniform set of exceptions from the requirements for issuing a scheduling order, making initial disclosures, holding a Rule 26(f) conference, and observing the discovery moratorium. They also would look toward encouraging an informal conference with the court before making a discovery motion. The last item in this set would modify the Rule 26(d) discovery moratorium by allowing discovery requests to be served at some interval after the action is begun, but deferring the time to answer for an interval after the scheduling order issues.

The next set of changes look more directly to the reach of discovery. They begin with alternative means of emphasizing the principles of proportionality already built into the rules. More specific means of encouraging proportionality are illustrated by models that reduce the presumptive number of depositions and interrogatories, and for the first time incorporate presumptive limitations on the number of requests to produce and requests for admissions. Another approach is a set of provisions to improve the quality of discovery objections and the clarity of responses. Other approaches do not rank as important parts of the overall package and are set out more tentatively. They can survive or fall away based on individual merit. These include emphasizing the value of deferring contention discovery to the end of the discovery period; reexamining the role of initial disclosures; and a more express recognition of cost-shifting as a condition of discovery.

The last proposal is really one item — a reflection on the possibility of establishing cooperation among the parties as one of the aspirational goals identified in Rule 1.

These proposals are illustrated by sketches of possible rules text. The sketches are just that, sketches. Variations are presented for several of them, and footnotes identify some of the more obvious questions that will need to be addressed as the sketches develop into specific recommendations for adoption.

These proposals are brought to the Committee now for guidance on the next steps in the development process. The Subcommittee has devoted more time to some of these proposals than to others. Some will deserve further refinement, while others will deserve to be discarded. And the books remain open for additions of new topics. Suggestions are welcome.

Another conference remains possible as a next step before recommending rules for publication. The conference could include topics in addition to this package; the topics addressed by the Rule 23 Subcommittee would be one obvious subject. This project deserves some attention now.

I. Scheduling Orders and Managing Discovery

A. Rules 16(b) and 4(m): Scheduling Order Timing & Conference

Two changes in Rule 16(b) scheduling-order practice can be presented together in one draft, along with a parallel change in Rule 4(m). The purpose of these changes is to reduce delay and enhance the process of managing a case.

One change is to accelerate the time when the court enters a scheduling order. The purpose is to speed the progress of a case. The change is illustrated by two provisions, one shortening the time allowed by Rule 4(m) to serve process, the other shortening the time to enter the order after service (or appearance).

The other change emphasizes the value of holding an actual conference, at least by telephone, before issuing a scheduling order. It may be that this proposal should be reshaped to require an actual conference in all cases, foreclosing reliance on the parties' Rule 26(f) report without a conference.

[4](m) ***Time Limit for Service.*** If a defendant is not served within ~~120~~ 60 days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause * * *.

[16](b) Scheduling.

(1) *Scheduling Order.* Except in categories of actions exempted by local rule,[1] the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f);[2] or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference with the court [in person] or by a means of contemporaneous communication[3] ~~by telephone,~~

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[1] The question whether to adopt a uniform national set of exemptions modeled on Rule 26(a)(1)(B) is addressed part I B.

[2] Do we want to insist on a conference even if the parties agree on a scheduling order? The court may want one, but it may be content to rely on an apparently sensible order that seemingly sensible lawyers have agreed upon. This question is discussed further below.

[3] This could be "telephone," as in the present rule, but there is no reason to exclude video conferencing, Skype, or other devices that may become easily accessible and convenient.

RLM raises a separate question about the present rule. Why

~~mail, or other means~~.

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of ~~120~~ 60 days after any defendant has been served with the complaint or ~~90~~ 45[4] days after any defendant has appeared.

Resetting the time to issue the scheduling order invites trouble when the time comes before all defendants are served. Later service on additional defendants may lead to another conference and order. Revising Rule 4(m) to shorten the presumptive time for making service reduces this risk. Shortening the Rule 4(m) time may also be desirable for independent reasons, encouraging plaintiffs to be diligent in attempting service and getting the case under way. There may be some collateral consequences — Rule 15(c)(1)(C) invokes the time provided by Rule 4(m) for determining relation back of pleading amendments that change the party against whom a claim is asserted. But that may not deter the change.

As sketched, Rule 16(b)(1)(A) carries forward unchanged, allowing a court to issue a scheduling order without a conference of any kind after receiving the parties' Rule 26(f) report. Subcommittee members believe a conference should be held in every case. "Effective management requires a conference." Even if the parties agree on a scheduling order, the court may wish to change some provisions, and it may be important to address issues not included in the report. There may be some resistance to requiring a conference in every case, but eliminating 16(b)(1)(A) deserves

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provide that the court may consult and enter the order without waiting for a Rule 26(f) report? Because there may be no Rule 26(f) report, or no timely report? Because the (b)(2) direction to issue the order "as soon as practicable" encourages what could become a court-supervised 26(f) conference? Perhaps the wish for voluntary party cooperation may yield to the opportunities of directed (if not coerced) cooperation?

[4] The 60 and 45 day periods have been adopted only for illustration. Each period has an impact on timing the Rule 26(f) conference. If Rule 26(f)(1) sets the conference "as soon as practicable — and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)." It seems likely that the parties should have more time to prepare for the 26(f) conference. That could be accomplished by setting the time for the conference, and for the 26(f) report, closer to the time for the scheduling order.

The Department of Justice is concerned that even 60 days after service is too soon — it has 60 days to answer, and often finds that time all too brief. Should a different time be specified, perhaps by reference to the cases enumerated in Rule 12(a)(2) and (3)?

serious consideration.

Whether or not Rule 16(b)(1)(A) is carried forward, it is desirable to eliminate the (b)(1)(B) provision allowing a conference to be held by "mail, or other means." Whatever "other means" are contemplated, it is better to require an actual face-to-face or voice-to-voice conference.

B. Uniform Exemptions: Rules 16(b), 26(a)(1)(B), 26(d), 26(f)

Rule 16(b) provides that scheduling orders are not required "in categories of actions exempted by local rule." This bow to local practices may have been important when the rule was adopted in 1983, a time when active case management was less familiar than it is today. A survey of the local rules was made in developing the 2000 amendments that, by Rule 26(a)(1)(B), added exemptions that excuse nine categories of proceedings from the initial disclosure requirements. Cases exempted from initial disclosure are further exempted from the Rule 26(f) conference and from the Rule 26(d) discovery moratorium, which is geared to the 26(f) conference. The FJC reported at the time that the exempted categories accounted for 30% of the federal docket.

It may be time to substitute a uniform set of exemptions from Rule 16(b) for the present reliance on local rules. There are obvious advantages in integrating exemption from the scheduling order requirement with the exemptions from initial disclosure, parties' planning conference, and discovery moratorium. Even if most local rules have come into close congruence with Rule 26(a)(1)(B), it could be useful to have a uniform national standard.[5] At the same time, it is not yet apparent whether any serious losses flow from whatever degree of disuniformity persists.

If a uniform set of exemptions is to be adopted, it seems sensible simply to rely on the initial disclosure exemptions now in place. No dissatisfaction with the list has appeared, although that may be in part a function of ambivalence about initial disclosure practice. The main question may be location: should the list remain where it has been for several years, relying on incorporation by cross-reference in Rule 16(b)? That may be the conservative approach. On the other hand, there is an aesthetic attraction to placing the list in Rule 16(b), so all cross-references are backward. But several counters appear. The first is familiarity — people are accustomed to the present system. Changing Rule 16(b) to adopt a cross-reference is simple, and avoids amending Rules 26(a)(1)(B), (d), and (f) to cross-refer to Rule 16(b). And little harm is done — indeed some good may come of it — if a court inadvertently enters a scheduling order where none is required. If pursued, the change would look like this:

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[5] The uniform standard might be supplemented by allowing for additional exemptions by local rule to account for local variations in discovery practice. If local experience shows little discovery and little need for management in a category of cases, an additional exemption might not seem to be a threat to uniformity. It is easy to add a local-rule option to Rule 16(b). But that might add clutter to Rules 26(d) and (f) if the categories exempt from scheduling orders by local rule are also to be exempt from the discovery moratorium and the parties' conference.

(b) SCHEDULING.

(1) *Scheduling Order*. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) ~~categories of actions exempted by local rule~~, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order: * * *

The alternative of listing the exemptions in Rule 16(b) could be accomplished by adding a new paragraph, as either a new (4) before present (4) on modifying a schedule, or as a new (5) at the end of the rule. This illustration includes a redundant cross-reference in (b)(1) to reflect the familiar concern that efficient drafting too often falls before the sins of sloppy reading:

(b) SCHEDULING.

(1) *Scheduling Order*. Except in a proceeding exempted by Rule 16(b)(5), the district judge * * *

(5) *Proceedings Exempt from Mandatory Scheduling Order*. The following proceedings are exempt from Rule 16(b)(1):

(A) an action for review on an administrative record;

(B) a forfeiture action in rem arising from a federal statute;

(C) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(D) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(E) an action to enforce or quash an administrative summons or subpoena;

(F) an action by the United States to recover benefit payments;

(G) an action by the United States to collect on a student loan guaranteed by the United States;

(H) a proceeding ancillary to a proceeding in another court; and

(I) an action to enforce an arbitration award.

If desired, Rule 26(a)(1)(B) could be deleted, amending Rule 26(a)(1)(A):

(A) *In General*. Except ~~as~~ in a proceeding exempted from a mandatory scheduling order by Rule 16(b)(5) ~~by Rule 26(a)(1)(B)~~ or as otherwise stipulated or ordered by the court, a party must * * *

Rules 26(d)(1) and (f)(1) would be amended to substitute Rule 16(b)(5) for Rule 26(a)(1)(B) in the cross-references.

C. Informal Conference With Court Before Discovery Motion

Participants at the Duke Conference repeated the running lament that some judges — too many from their perspective — fail to take an active interest in managing discovery disputes. They repeated the common observation that judges who do become involved can make the process work well. Many judges tell the parties to bring discovery disputes to the judge by telephone, without formal motions. This prompt availability to resolve disputes produces good results. There are not many calls; the parties work out most potential disputes knowing that pointless squabbles should not be taken to the judge. Legitimate disputes are taken to the judge, and ordinarily can be resolved expeditiously. Simply making the judge available to manage accomplishes effective management. A survey of local rules showed that at least a third of all districts have local rules that implement this experience by requiring that the parties hold an informal conference with the court before filing a discovery motion.

It will be useful to promote the informal pre-motion conference for discovery motions. The central question is whether to encourage it or to make it mandatory. Encouragement is not likely to encounter significant resistance. Making it mandatory, even with an escape clause, is likely to encounter substantial resistance from some judges. Both approaches are sketched here. The first illustration adds the conference to the Rule 16(b)(3) list of subjects that may be included in a scheduling order. This reminder could serve as a gentle but potentially effective encouragement, particularly when supplemented by coverage in judicial education programs. The second illustration imposes on the parties an obligation to request a pre-motion conference, but leaves the court free to deny the request. This approach could be strengthened further by requiring the court to hold the conference, but it likely is not wise to mandate an informal procedure against a judge's preferred management style. The sketch places this approach in Rule 7, but it could instead be added to Rule 26, perhaps as a new subdivision (h). That choice need not be made now.

Rule 16(b)(3)(B)(v)

(3) * * *

(B) *Permitted Contents.* The scheduling order may: * * *

(v) direct that before filing a motion for an order relating to discovery the movant must request an informal conference with the court.

[present (v) and (vi) would be renumbered]

Rule 7(b)(3) [or 26(h)]

(3) *Conference for Discovery Motion.* Before filing a motion

for an order relating to [disclosure or] discovery[6] the movant must [attempt to resolve the questions raised by the motion by meeting and conferring with other parties when required by these Rules and][7] request [an informal conference with the court][a Rule 16 conference with the court]. The motion may be filed if the request is denied or if the conference fails to resolve the issues [that would be] raised by the motion.

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[6] Many rules refer to "discovery" without embellishment. It may be better to use this generic term than to attempt to refer to the discovery rules by number — e.g., "a motion under Rules 26 through 37 or 45." A Rule 27 proceeding to perpetuate testimony, for example, is commenced by a "petition." At the same time, it expressly provides for a motion to perpetuate testimony pending appeal, Rule 27(b). A catalogue of discovery rules would also have to wrestle with such matters as Rule 69(a)(2) discovery in aid of execution, which may invoke "the procedure of the state where the court is located." On the other hand, a generic reference to "discovery" might seem to invoke procedures for getting information from persons in foreign countries, or for providing discovery in aid of foreign proceedings. E.g., 28 U.S.C. §§ 1782, 1783. This might be "discovery under these rules." In a related vein, RLM asks whether these puzzles justify reconsideration of the decision in the Style Project to abandon the index section, most recently Rule 26(a)(5), that provided a list of discovery methods. That would provide an indirect definition, distinguishing discovery from disclosure and shortcircuiting arguments that, for example, Rule 36 requests to admit are not a "discovery" device.

RLM also asks whether this language covers submission to the court for a determination of privilege or protection as trial-preparation material after receiving the information in discovery and then receiving a Rule 26(b)(5) notice of the claimed protection. If Rule 26(b)(5) contemplates that the "determination" is itself an order, then the submission is a request for an order and, by Rule 7(b)(1), is a "motion." If the "determination" is something less than an order, then we need decide whether we want to require a pre-submission conference.

[7] RLM asks how this relates to the requirement that parties meet and confer before making a discovery motion. There is much to be said for requiring the meet-and-confer before the pre-motion conference. This presents a tricky drafting issue. The attempt in rule text is a place-keeper, no more. Some motions relating to discovery do not seem to require a pre-motion "meet and confer." In addition to Rule 26(b)(5)(B), noted above, Rule 26(b)(3)(C) provides a request to produce a witness statement and a motion to compel if the request is refused.

He also asks whether the rule should elaborate on what sorts of submissions should be made to the court in requesting the pre-motion conference. That may be more detail than we want.

D. Discovery Before Parties' Conference

These changes would enable a party to launch discovery requests before the Rule 26(f) conference, but defer the obligation to respond to a time after the conference. The idea is that the conference may work better if the parties have some idea of what the actual first wave of discovery will be. In addition, there are signs that at least some lawyers simply ignore the Rule 26(d) moratorium, perhaps because of ignorance or possibly because of tacit agreement that it is unnecessary. The Subcommittee has rejected an approach that would enable a party to serve a deposition notice, interrogatories, production requests, and requests to admit with the complaint. That form might operate primarily for the advantage of plaintiffs; defendants might not have enough time to develop discovery requests, particularly if the times for the Rule 26(f) conference and Rule 16(b) conference and order are shortened. The surviving approach introduces some delay between filing — or, more likely, service or appearance by a defendant — and the first discovery requests. Drawing careful time lines will be an important part of this approach.

Rule 26(d): Waiting Period

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before [20 days after service of the summons and complaint on any defendant,]{45 days after the complaint is filed or 20 days after any defendant appears, whichever is later}[8] ~~the parties have conferred as required by Rule 26(f),~~ except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Sequence. Unless the parties stipulate, or~~, on motion,~~[9] the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

Rule 30(a)

[8] The suggested periods are first approximations. If we set the scheduling conference at 60 days after any defendant is served, and set the Rule 26(f) conference 14 days before the scheduling conference, the window for initiating discovery requests is reduced. Some workable compromise must be found.

[9] This change was suggested during general discussion of discovery before the Rule 26(f) conference. The only purpose is to make clear the general understanding that ordinarily parties may stipulate to something the court can order.

* * *

(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition[10] and:

(i) the deposition would result in more than [10]<u>[5]</u> depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition ~~before the time specified in Rule 26(d)~~ <u>less [fewer] than 14 days after a scheduling order enters under Rule 16(b),</u> unless the <u>proceeding is exempted from [initial disclosure under Rule 26(b)(1)(B)]{Rule 16(b)} or unless</u> the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and to be unavailable for examination in this country after that time; or * * * [11]

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[10] It may be asked whether the parties should be allowed to stipulate out of these limits. The burdens of discovery do not fall on the parties alone. Allowing the parties to stipulate to a second deposition of the same deponent without the deponent's consent may seem particularly troubling. Perhaps this should be: "(A) if ~~the parties have not stipulated to the deposition and~~:

[11] These choices suggest several questions. Should the delay be geared to the scheduling order, or instead to the Rule 26(f) conference? What is the appropriate time -- it is tempting to adopt the 30 days allowed to answer interrogatories or demands to produce, but there are so many variations of circumstances that it may be better to set a fairly short restraint on the deposition moratorium.

Note that the draft does not limit the time when the notice of the deposition is given. That can be at any time. RLM suggests that these deposition provisions may become more important if Rule 26(d) is changed to allow discovery before the Rule 26(f) conference; the drafts defer the time to respond, both for depositions and for Rules 33, 34, and 36.

It is difficult to guess what to do about carrying forward the present provision that exempts from the Rule 26(d) moratorium a proceeding exempted from initial disclosure by Rule 26(a)(1)(B). Those proceedings are also exempt from the Rule 26(f) conference (is that a good idea?), but do not seem to be exempt from Rule 16(b). Not, that is, unless a local rule exempts them. A sketch

Rule 31(a)(2)(A)(iii)

Rule 31(a)(2)(A) would, as now, mirror Rule 30(a)(2)(A), except that, as now, Rule 31 would not include a provision for deponents departing the country:

> **(iii)** the party seeks to take the deposition ~~before the time specified in Rule 26(d)~~ less than 14 days after a scheduling order is entered under Rule 16(b), unless the proceeding is exempted from [initial disclosure under Rule 26(b)(1)(B)]{Rule 16(b)}; or * * *

Rule 33(b)(2)

> **(2)** ***Time to Respond.*** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories or within 30 days after any scheduling order is entered under Rule 16(b), whichever is later.[12] A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 34(b)(2)(A)

> **(2)** ***Responses and Objections.***
>
> **(A)** *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or within 30 days after a scheduling order is entered under Rule 16(b), whichever is later. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

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adopting uniform exemptions from all these rules is set out inpart I B.

[12] If local rules exempt the case from the scheduling order requirement, it is likely that the case also is exempt from initial disclosure, thus exempt from Rule 26(f), and by that exempt from the Rule 26(d) moratorium. So far so good. But it remains possible that a local rule may exempt from Rule 16(b) a case that is not exempt from initial disclosures, not exempt from Rule 26(f), and thus not exempt from the Rule 26(d) moratorium. Drafting for that case will be awkward. But the difficulty will disappear if we amend Rule 16(b) to defeat the local rule exemptions, replacing it with the same exemptions that Rule 26(a)(1)(B) sets for initial disclosures. That still leaves the possibility that a scheduling order will issue in a case exempt from the requirement, but that seems covered by the proposed rule text — the answer is due 30 days after the scheduling order enters.

Compare the Rule 30 and 31 drafts, which propose alternatives gearing the time for depositions to the exemptions in either Rule 16(b) or Rule 26(a)(1)(B).

Rule 35

There is no apparent need to revise Rule 35 for this purpose.

Rule 36(a)(3)

(3) ***Time to Respond; Effect of Not Responding.*** A matter is admitted unless, within 30 days after being served or within 30 days after a scheduling order is entered under Rule 16(b), whichever is later, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

Rule 45(a)(1)(A)(iii)

(iii) command each person to whom it is directed to do the following at a specified time and place:[13] attend and testify;[14] produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises;[15]

[13] Rule 45 governs trial subpoenas as well as discovery subpoenas. That may be part of the reason why it does not specify times to respond. And note the implication of Rule 45(c)(2)(B) — an objection to a subpoena duces tecum "must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served."

[14] It seems sensible to adopt the same time limit as Rules 30 and 31; can that be done by cross-reference?

[15] Same question: can this be done by cross-referring to the time limits in Rule 34?

II. Other Discovery Issues

A. Proportionality: Rule 26(b)(1)

Both at the Duke Conference and otherwise, laments are often heard that although discovery in most cases is conducted in reasonable proportion to the nature of the case, discovery runs out of control in an important fraction of all cases. The rules provide for this. Rule 26(b)(2) is the most explicit provision, and also the most general. Rule 26(b)(2)(C) says that "On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed * * * if it determines * * * that the burden or expense outweigh the likely benefit." Rule 26(g)(1)(B)(iii) provides that signing a discovery request, response, or objection certifies that it is "neither unreasonable nor unduly burdensome or expensive," considering factors that parallel Rule 26(b)(2)(C). Rule 26(b)(1), after describing the general scope of discovery, concludes: "All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)." This sentence was adopted as a deliberate redundancy, and preserved in the Style Project despite valiant efforts by the style consultants to delete it. Rules 30, 31, 33, and 34 expressly incorporate Rule 26(b)(2).

The question is whether still greater prominence should be accorded the proportionality limit, hoping that somehow one more rule behest to behave reasonably will revive a faltering principle. There is ample reason to doubt the efficacy of revising or adding to concepts that already are belabored in deliberately redundant rule text. And there is always a risk that any variation in rule language will provoke arguments — even successful arguments — that the meaning has changed.

The Subcommittee believes that for the time being it may make most sense to emphasize the principles of Rule 26(b)(2)(C) without seeking to add new concepts. Adding an express reference to "proportionality," for example, could easily lead to one more class of blanket objections and an increase in nonproportional arguments about proportionality. The first alternative sketched below seems likely to be the most desirable next step. The additional sketches are preserved, however, to prompt further discussion.

The simplest strategy is to move proportionality into a more prominent place in Rule 26(b)(1). That could be done in many ways. The simple cross-reference could be moved up, perhaps to the first sentence:

> Unless otherwise limited by court order, <u>and subject to [the limitations imposed by] Rule 26(b)(2)(C)</u>, the scope of discovery is as follows:

This approach could be seen as no more than a style change. But it is more. It expressly qualifies the broad general scope of discovery. Invoking present (b)(2)(C) reduces the risk of

unintended consequences. But it may stand a good chance of producing the intended consequences.

Much the same thing could be done in a slightly different style form, and with the same observations:

> * * * the scope of discovery is as follows: Parties may obtain discovery, within the limitations imposed by Rule 26(b)(2)(C), regarding any nonprivileged matter that is relevant to any party's claim or defense * * *.

This approach seems to tie (b)(2)(C) more directly to the scope of discovery. Either alternative could encourage courts to view proportionality as an essential element in defining the proper scope of discovery.

A bolder approach would introduce some form of the word "proportionality," perhaps standing alone:

> Parties may obtain discovery, proportional to the reasonable needs of the case, regarding any nonprivileged matter that is relevant to any party's claim or defense * * *

This version is at least consistent with retaining the cross-reference to Rule 26(b)(2)(C) at the end of (b)(1).

"Proportionality" also could be added to the text of Rule 26(b)(2)(C)(iii):

> The burden or expense of the proposed discovery outweighs its likely benefit and is not proportional to the reasonable needs of the case, considering ~~the needs of the case,~~ the amount in controversy, * * *

If 26(b)(2)(C)(iii) were revised this way, it likely would be desirable to make a parallel change in Rule 26(g)(1)(B)(iii), so that signing a discovery request, objection, or response certifies that it is

> proportional to the reasonable needs of the case, and is neither unreasonable nor unduly burdensome or expensive, considering ~~the reasonable needs of the case,~~ prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.[16]

[16] Should "the parties' resources" or "and the importance of the discovery in resolving the issues" be added to complete the parallel to (b)(2)(C)(iii)?

B. Limiting the Number of Discovery Requests

The Duke Conference included observations about approaching proportionality indirectly by tightening present presumptive numerical limits on the number of discovery requests and adding new limits. These issues deserve serious consideration.

Many studies over the years, many of them by the FJC, show that most actions in the federal courts are conducted with a modest level of discovery. Only a relatively small fraction of cases involve extensive discovery, and in some of those cases extensive discovery may be reasonably proportional to the needs of the case. But the absolute number of cases with extensive discovery is high, and there are strong reasons to fear that many of them involve unreasonable discovery requests. Many reasons may account for unreasonable discovery behavior — ineptitude, fear of claims of professional incompetence, strategic imposition, profit from hourly billing, and other inglorious motives. It even is possible that the presumptive limits now built into Rules 30, 31, and 33 operate for some lawyers as a target, not a ceiling.

Various proposals have been made to tighten the presumptive limits presently established in Rules 30, 31, and 33, and to add new presumptive limits to Rule 34 document requests and Rule 36 requests to admit. The actual numbers chosen for any rule will be in part arbitrary, but they can reflect actual experience with the needs of most cases. Setting limits at a margin above the discovery actually conducted in most cases may function well, reducing unwarranted discovery but leaving appropriate discovery available by agreement of the parties or court order.

Illustration is easy for Rules 30(a)(2)(A)(i) and 30(d)(1):

(a) When a Deposition May Be Taken. * * *
(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):
(A) if the parties have not stipulated to the deposition and:
(i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 31 or by the plaintiffs, or by the defendants, or by the third-party defendants; * * *

(d) Duration; Sanction; Motion to Terminate or Limit
(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to [~~one day of 7~~ 4 hours in a single day][one day of ~~7~~ 4 hours].

A parallel change would be made in Rule 31(a)(2)(A)(i) as to the number of depositions. Rule 31 does not have a provision parallel to the "one day of 7 hours" provision in Rule 30(d)(1).

Rule 33(a)(1) is even simpler:

> **(1)** Unless otherwise stipulated or ordered by the court, a party may serve on another party no more than ~~25~~ 15 interrogatories, including all discrete subparts.

(This could be made more complicated by adding a limit for multiparty cases — for example, no more than 15 addressed to any single party, and no more than 30 in all. No one seems to have suggested that. The complication is not likely to be worth the effort.)

Things are not so simple for Rule 34. It may not be as easy to apply a numerical limit on the number of requests; "including all discrete subparts," as in Rule 33, may not work. This question ties to the Rule 34(b)(1)(A) requirement that the request "must describe with reasonable particularity each item or category of items to be inspected." Counting the number of requests could easily degenerate into a parallel fight over the reasonable particularity of a category of items. But concern may be overdrawn. Actual experience with scheduling orders that impose numerical limits on the number of Rule 34 requests suggests that parties can adjust to counting without any special difficulty. If this approach is followed, the limit might be located in the first lines of Rule 34(a):

> **(a) In General.** A party may serve on any other party ~~a~~ no more than [25] request~~s~~ within the scope of Rule 26(b):
> * * *
> **(3)** Leave to serve additional requests may be granted to the extent consistent with Rule 26(b)(2).

This form applies to all the various items that can be requested — documents, electronically stored information, tangible things, premises. It would be possible to draft a limit that applies only to documents and electronically stored information, the apparent subject of concern. But either way, there is a manifest problem in setting numerical limits. If a car is dismembered in an accident, is it only one request to ask to inspect all remaining parts? More importantly, what effect would numerical limits have on the ways in which requests are framed? "All documents, electronically stored information, and tangible things relevant to the claims or defenses of any party?" Or, with court permission, "relevant to the subject matter involved in this action"? Or at least "all documents and electronically stored information relating to the design of the 2008 model Huppmobile"? Still, the experience of judges who adopt such limits in scheduling orders suggests that disputes about counting seldom present real problems.

The next complication is to integrate this limit with Rule 45.

If Rule 45 is not changed, a party could sidestep a Rule 34 limit by simply serving a Rule 45 subpoena to produce rather than a Rule 34 request. This might be addressed in Rule 34 alone: "no more than 25 requests under this rule or in Rule 45 subpoenas and within the scope of Rule 26(b) * * *." That would leave nonparties subject to more than 25 requests, however counted. Perhaps that is tolerable because of the Rule 45(c)(2)(B)(ii) direction to protect a nonparty against significant expense. Or an express limit might be adopted, perhaps in Rule 45(c)(1):

> **(1)** *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena, and unless otherwise stipulated or ordered by the court the subpoena may command production and inspection of no more than 25 documents, categories of electronically stored information,[17] tangible things, or premises [described with reasonable particularity]. * * *

An alternative might be to put the limit in Rule 45(a)(1)(A), subdividing present item (iii):

> **(A)** *Requirements — In General.* Every subpoena must: * * *
>
> **(iii)** command each person to whom it is directed to ~~do the following~~ attend and testify at a specified time and place;
>
> **(iv)** command each person to whom it is directed to produce no more than 25 documents, categories of electronically stored information, tangible things, or premises [described with resonable particularity]; and * * *

(The awkwardness of these alternatives might be reduced by reviving the recently abandoned proposal to integrate the production elements of Rule 45 into Rule 34, but that is not a likely option.)

Rule 36 requests to admit could be limited by a model that conforms to Rule 33. Rule 36(a)(1) would begin:

> **(1)** *Scope.* A party may serve on any other party ~~a~~ no more than [25] requests to admit, including all discrete subparts, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: * * *

[17] This obviously needs better drafting: a number of electronically stored information does not work. The alternatives will all be cumbersome at best. Time enough for that if the proposal advances further.

That simple version lacks grace, and also lacks any provision to change the number by agreement or court order. Adding that wrinkle suggests that the limit might better be adopted as a new paragraph, probably (2):

> **(2)** *Number.* Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit on any other party, including all discrete subparts [, and no more than 50 requests to admit in all].

An all-encompassing limit to 25 requests may go too far with respect to Rule 36(a)(1)(B) requests to admit the genuineness of any described documents. Applying a numerical limit only to Rule 36(a)(1)(A) requests to admit the truth of facts, the application of law to fact, or opinions about either, suggests different drafting approaches. One that should not be ambiguous, but may seem that way to some:

> **(1)** *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:
>
> **(A)** no more than 25 matters of facts, the application of law to fact, or opinions about either; and
>
> **(B)** the genuineness of any described documents.

If there is a risk that hasty readers might extend the limit from (A) to (B), cross-referencing might do the job, leaving all of paragraph (1) as it is now and adding a new (2):

> **(2)** *Number.* Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit under Rule 36(a)(1)(A) on any other party, including all discrete subparts.

C. Discovery Objections and Responses

The common laments about excessive discovery requests are occasionally met by protests that discovery responses often are incomplete, evasive, dilatory, and otherwise out of keeping with the purposes of the rules. Several proposals have been made to address these problems. The Subcommittee has not yet considered these proposals in detail, but believes they deserve serious consideration going forward.

RULE 34: SPECIFIC OBJECTIONS

Two proposals have been advanced to improve the quality of discovery objections. The first would incorporate in Rule 34 the Rule 33 requirement that objections be stated with specificity. The second would require a statement whether information has been withheld on the basis of the objection.

Rule 33(b)(4) begins: "The grounds for objecting to an interrogatory must be stated with specificity." Two counterparts appear in Rule 34(b)(2). (B) says that the response to a request to produce must state that inspection will be permitted "or state an objection to the request, including the reasons." (C) says: "An objection to part of a request must specify the part and permit inspection of the rest." "[I]ncluding the reasons" in Rule 34(b)(2)(B) may not convey as clearly as should be a requirement that the reasons "be stated with specificity." If the objection rests on privilege, Rule 26(b)(5)(A) should control. But for other objections, it is difficult to understand why specificity is not as important for documents, tangible things, and entry on premises as it is for answering an interrogatory. Even if the objection is a lack of "possession, custody, or control," the range of possible grounds is wide.

It would be easy to draft Rule 34(b)(2)(B) to parallel Rule 33(b)(4):

> **(B)** *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state [the grounds for objecting {to the request} with specificity] [an objection to the request, including the specific reasons.]

RULE 34: STATE WHAT IS WITHHELD

Many Conference participants, both at the time of the Conference and since, have observed that responding parties often begin a response with a boilerplate list of general objections, and often repeat the same objections in responding to each individual request. At the same time, they produce documents in a way that leaves the requesting party guessing whether responsive documents have been withheld under cover of the general objections. (The model Rule 16(b) scheduling order in the materials provided by the panel on Eastern District of Virginia practices reflects a similar

concern: " * * * general objections may not be asserted to discovery demands. Where specific objections are asserted to a demand, the answer or response must not be ambiguous as to what if anything is being withheld in reliance on the objection.)

This problem might be addressed by adding a new sentence to Rule 34(b)(2)(C):

> **(C)** *Objections*. An objection to part of a request must specify the part and permit inspection of the rest. An objection [to a request or part of a request] must state whether any responsive [materials]{documents, electronically stored information, or tangible things <or premises?>} are being withheld [under]{on the basis of} the objection.

RULES 34 AND 37: FAILURE TO PRODUCE

Rule 34 is somewhat eccentric in referring at times to stating that inspection will be permitted, and at other times to "producing" requested information. Common practice is to produce documents and electronically stored information, rather than make it available for inspection. Two amendments have been proposed to clarify the role of actual production, one in Rule 34, the other in Rule 37.

Rule 34(b)(2)(B) would be expanded by adding a new sentence:

> **(B)** *Responding to Each Item*. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.[18] If the responding party elects to produce copies of documents or electronically stored information [in lieu of]{rather than} permit inspection, the response must state that copies will be produced, and the production must be completed no later than the date for inspection stated in the request.[19]

Rule 37(a)(3)(B)(iv) would be amended to provide that a party seeking discovery may move for an order compelling an answer if:

> **(iv)** a party fails to produce documents or fails to respond that inspection will be permitted — or

[18] This sentence would be amended to include a specificity requirement under the proposal described earlier in this section.

[19] Requiring complete production by the time stated for inspection may give a slight advantage to the requesting party — work with the produced copies often will be easier than inspection. But that seems a quibble.

fails to permit inspection — as requested under Rule 34.

RULE 26(G): EVASIVE RESPONSES

Rule 26(g) provides the counterpart of Rule 11 for discovery. Signing a discovery request, response, or objection certifies that it is consistent with the Rules. It also certifies that a request, response, or objection is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation. Those strictures might seem to reach evasive responses. And it has been protested that adding an explicit prohibition of evasive responses will simply provide one more occasion to litigate about discovery practices, not about the merits. Nonetheless, it may be useful to add an explicit prohibition to 26(b)(1)(B)(i). By signing, an attorney or party certifies that the request, response, or objection is:

(i) not evasive, consistent with these rules , and warranted * * *.

D. Rules 33 and 36: Contention Discovery

Discussion at the Conference and elsewhere suggests that contention discovery can be misused. Some observations doubt the value of any contention discovery. Others reflect concern with the timing of contention discovery, arguing that it should be postponed to a time when the completion of other discovery makes it feasible to frame contentions with some assurance. The proposals sketched here focus on the timing question.

Contention discovery was added to Rules 33 and 36 in 1970. What has become Rule 33(a)(2) provides:

> An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

The 1970 Committee Note elaborated on the timing question:

> Since interrogatories involving mixed questions of law and fact may create disputes between the parties which are best resolved after much or all of the other discovery has been completed, the court is expressly authorized to defer an answer. Likewise, the court may delay determination until pretrial conference, if it believes that the dispute is best resolved in the presence of the judge.

Similarly, Rule 36(a)(1)(A) provides for requests to admit the truth of "facts, the application of law to fact, or opinions about either." The Committee Note is similar to the Rule 33 Note:

> Requests for admission involving the application of law to fact may create disputes between the parties which are best resolved in the presence of the judge after much or all of the other discovery has been completed. Power is therefore expressly conferred upon the court to defer decision until a pretrial conference is held or until a designated time prior to trial. On the other hand, the court should not automatically defer decision; in many instances, the importance of the admission lies in enabling the requesting party to avoid the burdensome accumulation of proof prior to the pretrial conference.

It has been suggested that this open-ended approach to timing should be tightened up by requiring court permission to submit contention interrogatories or requests to admit until the close of all other discovery. That would preserve the opportunity for early contention discovery, but not permit it as freely as the present rules.

The question is whether early contention discovery is so often misused as to justify a change. An illustration of the potential values of early contention discovery is provided by one of the cases cited in the 1970 Committee Note to Rule 33. The FELA plaintiff in Zinsky v. New York Central R.R., 36 F.R.D. 680 (N.D. Ohio 1964), alleged that at the time of his injury his duties were in furtherance of interstate commerce. The railroad defendant denied all allegations of the complaint. The plaintiff then served an interrogatory asking whether at the time of the accident, etc. There is a very real prospect that the denial of the commerce element was pro forma. Confronted with the interrogatory, there is a reasonable chance the railroad will admit the commerce element, putting that issue out of the case. Alternative forms of discovery aimed at showing that the New York Central really is engaged in commerce, at the nature of the plaintiff's duties in relation to the defendant's commerce, and so on, would impose substantial burdens, often serving little purpose.

As the Committee recognized in generating the 1970 amendments, the other side is equally clear. There may be no point in using contention discovery to supplement the pleadings until discovery is complete as to the issues underlying the contention discovery. Developing pleading practice may have a bearing — to the extent that fact pleading increases, there may be still better reason to defer the switch from pleading to discovery as a means of framing the parties' contentions.

Practical experience and judgment are called for. If early contention discovery is misused often enough to be a problem, either because it makes too much supervisory work for the courts or because the parties suffer through the battle without court intervention, it may be time to revise the rules.

One other difficulty must be noted. The 1970 Committee Note to Rule 33 observed: "Efforts to draw sharp lines between facts and opinions have invariably been unsuccessful * * *." The Note to Rule 36 was similar: "it is difficult as a practical matter to separate 'fact' from 'opinion' * * *." The Notes seem to assume that it is easier to separate law-application issues from fact or opinion, but that depends on clear analysis. Remember that "negligence" is treated as a question of fact to be decided by a jury, and to be reviewed for clear error when decided in a bench trial. The drafts that follow make no attempt to depart from the vocabulary adopted in 1970. They are offered without taking any position on the question whether it is better to leave the present rules unchanged, relying on specific case management to achieve proper timing in relation to the needs and opportunities presented by specific cases.

Revising Rule 33(a)(2) can be done directly, or it might be done in combination with Rule 33(b)(2) so as to avoid the need to resolve a seeming inconsistency.

Rule 33(a)(2) Alone

(2) *Scope.* * * * An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but ~~the court may order that~~ the interrogatory need not be answered until ~~designated~~ [all other discovery is complete] [the close of discovery on the facts related to the opinion or contention] or until a pretrial conference or some other time designated by stipulation [under Rule 29] or court order.

Rules 33(a)(2), (b)(2) Together

(a)(2) *Scope.* * * * An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the interrogatory need not be answered until the time set under Rule 33(b)(2) ~~until designated discovery is complete, or until a pretrial conference or some other time~~.

(b)(2) *Time to Respond.* The responding party must serve its answers and any objections within 30 days after being served with the interrogatories, but an answer to an interrogatory asking for an opinion or contention relating to fact or the application of law to fact need not be served until [all other discovery is complete][the close of discovery on the facts related to the opinion or contention]. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 36

Rule 36 time provisions make for more difficult drafting. A temporary illustration may suffice. Rule 36(a)(1) is amended to enable cross-reference in (a)(3):

(a)(1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(2) relating to:
(A) facts or opinions about fact~~,~~;
(B) the application of law to fact, or opinions about facts or the application of law to fact ~~either~~; * * *

(a)(3) *Time to Respond; Effect of Not Responding.* A matter is admitted unless, within 30 days after being served — or for a request under Rule 36(a)(1)(B){within 30 days after}[all other

discovery is complete][the close of discovery on the facts relevant to the request] — the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

E. Initial Disclosures

Conference reactions to Rule 26(a)(1) initial disclosures can be roughly described. Many participants thought the practice innocuous — it does not accomplish much, but does not impose great burdens. Some believe that any burden is too great, since so little is accomplished; given the limited nature of the disclosures, discovery is not reduced. And there is always the risk that an absent-minded failure to disclose will lead to exclusion of a witness or information. Still others believe that there is a real opportunity for good if the disclosure requirement is expanded back to resemble the form that was reflected in the rules from 1993 to 2000. They point out that the scope of initial disclosures was reduced only as a compromise to help win approval of the amendment that deleted the opportunity to opt out of initial disclosure requirements by local rule.

The starting point of any effort to reinvigorate initial disclosures likely would be the 1993 version. As to witnesses, it required disclosure "of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information." The provision for documents was similar, but limited to those within the possession, custody, or control of the party. That went far beyond the present rule, which covers only witnesses and documents "the disclosing party may use to support its claims or defenses." One hope for the 1993 version was that it would encourage particularized pleading for the purpose of forcing broader disclosures. Whether or not that function was served, developing pleading practices may lower any hopes in this direction. The broader purpose was to anticipate the first wave of inevitable discovery, simplifying and expediting the process. The list of exemptions added in 2000 could work to improve this substitute for discovery by reducing the number of cases in which disclosure is required even though the parties would have pursued less, or even no, discovery. Still, the 1993 version would provide no more than a starting point. More work would need to be done before attempting even a sketch of a new disclosure regime.

The Subcommittee has not found much reason to take up initial disclosure practice at present. But the question deserves to be carried forward for broader comment.

F. Cost Shifting (Discovery only)

Both at the Duke Conference and otherwise, suggestions continue to be made that the discovery rules should be amended to include explicit provisions requiring the requesting party to bear the costs of responding. Cost-bearing could indeed reduce the burdens imposed by discovery, in part by compensating the responding party and in part by reducing the total level of requests. But any expansion of this practice runs counter to deeply entrenched views that every party should bear the costs of sorting through and producing the discoverable information in its possession. The Subcommittee is not enthusiastic about cost-shifting, and does not propose adoption of new rules. But the topic is both prominent and important. These sketches are carried forward — and may deserve to be carried forward for some time — to elicit broader discussion.

Rule 26(c) authorizes "an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *." The list of examples does not explicitly include cost shifting. Paragraph (B) covers an order "specifying terms, including time and place, for the disclosure or discovery." "Terms" could easily include cost shifting, but may be restrained by its association with the narrow examples of time and place. More importantly, "including" does not exclude — the style convention treats examples as only illustrations of a broader power. Rule 26(b)(2)(B), indeed, covers the idea of cost shifting when the court orders discovery of electronically stored information that is not reasonably accessible by saying simply that "[t]he court may specify conditions for the discovery." The authority to protect against undue expense includes authority to deny discovery unless the requesting party pays part or all of the costs of responding.

Notwithstanding the conclusion that Rule 26(c) now authorizes cost shifting in discovery, this authority is not prominent on the face of the rules. Nor does it figure prominently in reported cases. If it is desirable to encourage greater use of cost shifting, a more explicit provision could be useful. Rule 26(b)(2)(B) recognizes cost shifting for discovery of electronically stored information that is not reasonably accessible from concern that Rule 26(c) might not be equal to the task. So it may also be desirable to supplement Rule 26(c) with a more express provision.

The suggestion that more explicit provisions would advance the use of cost shifting does not answer the question whether advance is desirable. Cost shifting will be highly controversial, given the still strong tradition that a party who has discoverable information should bear the cost of retrieving it. (Rule 45(c)(2)(B)(iii) protects a nonparty against significant expense in responding to a subpoena to produce.) Becoming accustomed to cost shifting in the realm of electronically stored information may not

reduce the controversy, in part because the fear of computer-based discovery makes it easier to appreciate the risks of overreaching discovery requests.

If a cost-shifting order enters, it is important to consider the consequences if the party ordered to bear an adversary's response costs prevails on the merits. Prevailing on the merits does not of itself mean that the discovery was justified. It may be that none of the discovered information was used, or even usable. Or it may have had only marginal value. On the other hand, the fact that discovery materials were not used, whether to support motions, summary judgment, or at trial, does not mean the discovery was unjustified. The materials may have had value for many pretrial purposes, and may have been winnowed out only to focus on the most compelling materials. Or the discovered information may have led a party to abandon a position that otherwise would have been pursued further, at additional cost. The most likely outcome is discretion to excuse part or all of the costs initially shifted to the requesting party. Rather than characterize the shifted costs as "costs" for Rule 54(d), this discretion can be directly built into the cost-shifting rule. The discretion could easily defer actual payment of the shifted costs to a time well after the discovery is provided and a bill is presented.

A conservative approach might do no more than add an express reference to cost shifting in present Rule 26(c)(1)(B):

> **(1)** *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *
> **(B)** specifying terms, including time and place <u>or the allocation of expenses</u>, for the disclosure or discovery; * * *

A more elaborate approach might add a new paragraph I:

> **(I)** <u>requiring that the requesting party bear part or all of the expenses reasonably incurred in responding [to a discovery request],[20] including terms for payment and subject to reconsideration [at any time before final judgment].[21]</u>

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[20] one reason to add the language in brackets is to avoid any confusion as to disclosure; Rule 26(c) seems haphazard in alternating between "disclosure or discovery" and simply "discovery."

[21] The bracketed phrase is a place-keeper. Reconsideration may be appropriate even as the discovery continues — the yield of important information may justify reverting to the assumption that

Still greater elaboration is possible, attempting to list factors that bear on a cost-bearing order. A relatively safe approach to that would be to build cost-bearing into Rule 26(b)(2)(C), adopting all of the factors in that rule:

> **(C)** *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule — or require the requesting party to bear all or part of the expenses reasonably incurred in responding — if it determines that: * * *

---

a party who has discoverable information must bear the costs of uncovering it and providing it. And the allocation of expenses may be strongly influenced by the outcome on the merits. Perhaps the deadline should extend beyond entry of final judgment — a Rule 59(e) motion to alter or amend the judgment might be appropriate. If so, it might help to include an express cross-reference.

It may not be necessary to add a provision for reassessment after appeal. Certainly the appellate court can review the order. And a remand that does not address the issue should leave the way open for reconsideration by the trial court in light of the outcome on appeal.

RLM adds this question, by analogy to a division of opinions under Rule 11. Some courts impose sanctions for filing an action without reasonable inquiry, even though subsequent proceedings show support for the positions taken. Might a comparable approach be justified when the response to an unreasonable discovery request yields information that could properly be requested? Something may turn on an ex post diagnosis of the difficulty of reaching the responsive information by a better-focused request, including an attempt to guess whether a better-focused request could have been framed in terms that would defeat a narrowing interpretation and result in failure to produce the proper material.

III. COOPERATION: RULE 1

The wish for reasonable proportionality in discovery overlapped with a broader theme explored at the Conference. Cooperation among the parties can go a long way toward achieving proportional discovery efforts and reducing the need for judicial management. But cooperation is important for many other purposes. Discovery is not the only arena for tactics that some litigants lament as tactics in a war of attrition. Ill-founded motions to dismiss — whether for failure to state a claim or any other Rule 12(b) ground, motions for summary judgment, or other delaying tactics are examples.

It is easy enough to draft a rule that mandates reasonable cooperation within a framework that remains appropriately adversarial. It is difficult to know whether any such rule can be more than aspirational. Rule 11 already governs unreasonable motion practice, and there is little outcry for changing the standards defined by Rule 11.[22] And there is always the risk that the ploy of adding an open-ended duty to cooperate will invite its own defeat by encouraging tactical motions, repeating the sorry history of the 1983 Rule 11 amendments.

Despite these reservations, the Subcommittee is interested in adding rule language that encourages cooperation. The aspiration of the Civil Rules is articulated in Rule 1. Rule 1 now addresses the courts, but it could be amended to include the parties.

An illustration of a Rule 1 approach can be built out of the ACTL/IAALS pilot project rules:

> * * * [These rules] should be construed, ~~and~~ administered, and employed by the court and parties to secure the just, speedy, and inexpensive[23] determination of every action and proceeding[, and the parties should cooperate to achieve these ends].[24]

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[22] Nor is there any sense that the 1993 amendments softening the role of sanctions should be revisited, despite the continuing concern reflected in proposed legislation currently captioned as the Lawsuit Abuse Reduction Act.

[23] Here the ACTL/IAALS proposal would ratchet down the expectations of Rule 1: "~~speedy, and inexpensive~~ timely, efficient, and cost-effective determination * * *."

[24] The ACTL/IAALS version is much longer. The court and parties are directed to "assure that the process and costs are proportionate to the amount in controversy and the complexity and importance of the issue. The factors to be considered by the court * * * include, without limitation: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation."

or:

> * * * [These rules] should be construed and administered by the court to achieve the just, speedy, and inexpensive determination of every action and proceeding. The parties should cooperate to achieve these ends.

There is something to be said for a purely aspirational rule. But extending it to the parties — and thus to counsel — may be an invitation to sanctions, beginning with admonishments from the bench. Moving beyond that to more severe consequences should be approached with real caution.

RLM adds a healthy note of skepticism. Does a duty to cooperate include some obligation to sacrifice procedural opportunities that are provided by the Rules? How much sacrifice? Is the obligation to forgo available procedures deepened if an adversary forgoes many opportunities, and defeated if an adversary indulges scorched-earth tactics? Is it conceivable that an open-ended rule could be read to impose an obligation to settle on reasonable terms — that is, terms considered reasonable by the court?

APPENDIX

Various parts of the same rules are affected by proposals made for different purposes. This appendix lays out the full set of changes rule by rule, leaving alternative sketches to footnotes in an effort to improve clarity of illustration.

Rule 1

* * * [These rules] should be construed, ~~and~~ administered, and employed by the court and parties to secure the just, speedy, and inexpensive determination of every action and proceeding [, and the parties should cooperate to achieve these ends].[25]

Rule 4

[4](m) ***Time Limit for Service.*** If a defendant is not served within ~~120~~ 60 days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause * * *.

Rule 7(b)(3) [or 26(h)]

(3) *Conference for Discovery Motion.* Before filing a motion for an order relating to [disclosure or] discovery the movant must [attempt to resolve the questions raised by the motion by meeting and conferring with other parties when required by these Rules and] request [an informal conference with the court][a Rule 16 conference with the court]. The motion may be filed if the request is denied or if the conference fails to resolve the issues [that would be] raised by the motion.[26]

Rule 16

[16](b) SCHEDULING.

(1) *Scheduling Order.* Except ina proceeding exempted by Rule

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[25] A simpler alternative is sketched in Part III.

[26] A simpler version is set out as Rule 16(b)(3)(B)(v) below.

16(b)(5) ~~categories of actions exempted by local rule~~,[27] the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference with the court [in person] or by a means of contemporaneous communication ~~by telephone, mail, or other means~~.

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of ~~120~~ 60 days after any defendant has been served with the complaint or ~~90~~ 45 days after any defendant has appeared.

(3) * * *

(B) *Permitted Contents.* The scheduling order may: * * *

(v) direct that before filing a motion for an order relating to discovery the movant must request an informal conference with the court.[28]

[present (v) and (vi) would be renumbered] * * *

(5) *Proceedings Exempt from Mandatory Scheduling Order.* The following proceedings are exempt from Rule 16(b)(1):

(A) an action for review on an administrative record;

(B) a forfeiture action in rem arising from a federal statute;

(C) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(D) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(E) an action to enforce or quash an administrative summons or subpoena;

(F) an action by the United States to recover

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[27] This version moves the list of exemptions from Rule 26(a)(1)(B) to Rule 16(b). The alternative is to cross-refer in Rule 16(b)(1): "Except in a proceeding exempted from initial disclosure under Ruel 26(a)(1)(B) * * * ."

[28] A more complex and nearly mandatory alternative is set out as Rule 7(b)(3) above.

benefit payments;

(G) an action by the United States to collect on a student loan guaranteed by the United States;

(H) a proceeding ancillary to a proceeding in another court; and

(I) an action to enforce an arbitration award.

Rule 26

(a)(1)(A) *In General*. Except ~~as~~ in a proceeding exempted from a mandatory scheduling order by Rule 16(b)(5) ~~by Rule 26(a)(1)(B)~~ or as otherwise stipulated or ordered by the court, a party must * * *

(b)(1) *Scope in General*. Unless otherwise limited by court order, the scope of discovery is as follows: Paries may obtain discovery, within the limitations imposed by Rule 26(b)(2)(C), regarding any nonprivileged matter that is relevant to any party's claim or defense * * *.[29]

(c)(1) *In General*. * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *[30]

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before

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[29] Several alternatives are described in Part II A.

[30] The alternatives sketched in Part II F are intriguing: One would add a new paragraph to Rule 26(c)(1), describing an order

(I) requiring that the requesting party bear part or all of the expenses reasonably incurred in responding [to a discovery request], including terms for payment and subject to reconsideration [at any time before final judgment].

The other would include cost sharing in the general proportionality provisions of Rule 26(b)(2)(C):

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule — or require the requesting party to bear all or part of the expenses reasonably incurred in responding — if it determines that: * * *

[20 days after service of the summons and complaint on any defendant,]{45 days after the complaint is filed or 20 days after any defendant appears, whichever is later} ~~the parties have conferred as required by Rule 26(f),~~ except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B),[31] or when authorized by these rules, by stipulation, or by court order.

(2) Sequence. Unless the parties stipulate, or~~, on motion,~~ the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(f)(1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 16(b)(5) ~~26(a)(1)(B)~~ or * * *"

(g)(1)(B)(i) *Signature Required; Effect of Signature.* [By signing, an attorney or party certifies that a discovery request, response, or objection is:] not evasive, consistent with these rules, and warranted * * *.

Rule 30

(a)(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition ~~before the time specified in Rule 26(d)~~ less [fewer] than 14 days after a scheduling order enters under Rule 16(b), unless the proceeding is exempted from [initial disclosure under Rule 26(b)(1)(B)]{Rule 16(b)} or unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and to be unavailable for

[31] This would become Rule 16(b)(5) if the exemptions are moved from Rule 26(a)(1)(B).

examination in this country after that time; or * * *

(d) Duration; Sanction; Motion to Terminate or Limit

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to [~~one day of 7~~ 4 hours in a single day][one day of ~~7~~ 4 hours].

Rule 31

(a)(2)(A)(iii) [Rule 31 parallels 30(a)(2)(A)] the party seeks to take the deposition ~~before the time specified in Rule 26(d)~~ less than 14 days after a scheduling order is entered under Rule 16(b), unless the proceeding is exempted from [initial disclosure under Rule 26(b)(1)(B)]{Rule 16(b)}; or * * *

Rule 33

(a)(1) *Number.* Unless otherwise stipulated or ordered by the court, a party may serve on another party no more than ~~25~~ 15 interrogatories, including all discrete subparts.

(a)(2) *Scope.* * * * An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the interrogatory need not be answered until the time set under Rule 33(b)(2) ~~until designated discovery is complete, or until a pretrial conference or some other time~~.

(b)(2) ***Time to Respond.*** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories or within 30 days after any scheduling order is entered under Rule 16(b), whichever is later, but an answer to an interrogatory asking for an opinion or contention relating to fact or the application of law to fact need not be served until [all other discovery is complete][the close of discovery on the facts related to the opinion or contention]. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 34

(a) In General. A party may serve on any other party ~~a~~ no more than [25] request~~s~~ within the scope of Rule 26(b): * * *

(3) Leave to serve additional requests may be granted to the extent consistent with Rule 26(b)(2).

(b)(2) *Responses and Objections.*

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after

being served or within 30 days after a scheduling order is entered under Rule 16(b), whichever is later. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state [the grounds for objecting {to the request} with specificity] [an objection to the request, including the specific reasons.] If the responding party elects to produce copies of documents or electronically stored information [in lieu of]{rather than} permit inspection, the response must state that copies will be produced, and the production must be completed no later than the date for inspection stated in the request.

(C) *Objections.* An objection to part of a request must specify the part and permit inspection of the rest. An objection [to a request or part of a request] must state whether any responsive [materials]{documents, electronically stored information, or tangible things <or premises?>} are being withheld [under]{on the basis of} the objection.

Rule 36

(a)(1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts or opinions about fact~~,~~;

(B) the application of law to fact, or opinions about facts or the application of law to fact ~~either~~; * * *

(2) *Number.* Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit under Rule 36(a)(1)(A) on any other party, including all discrete subparts.[32]

(3) *Time to Respond; Effect of Not Responding.* A matter is admitted unless, within 30 days after being served — or for a request under Rule 36(a)(1)(B){within 30 days after}[all other discovery is complete][the close of discovery on the facts relevant to the request] — the party to whom the request is directed serves on the requesting party a written answer or objection addressed

[32] Alternative sketches of this numerical limit are set out in Part II B.

to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

Rule 37

(a)(3)(B)(iv) [A party seeking discovery may move for an order compelling an answer if:] a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

Rule 45

(a)(1)(A)(iii) [Every subpoena must:] command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises;[33]

(c)(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena , and unless otherwise stipulated or ordered by the court the subpoena may command production and inspection of no more than 25 documents, categories of electronically stored information, tangible things, or premises [described with reasonable particularity]. * * *[34]

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[33] Several questions are asked in part I D, notes 13 to 15, about addressing time limits for subpoenas. Rule text has not yet been sketched.

[34] An alternative:

(A) *Requirements — In General.* Every subpoena must: * * *

(iii) command each person to whom it is directed to ~~do the following~~ attend and testify at a specified time and place;

(iv) command each person to whom it is directed to produce no more than 25 documents, categories of electronically stored information, tangible things, or premises [described with resonable particularity]; and * * *

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TAB A-2

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U. S. Department of Justice

Civil Division

Assistant Attorney General *Washington, D.C. 20530*

March 6, 2012

The Honorable David G. Campbell
Chair, Advisory Committee on Civil Rules
United States District Court
623 Sandra Day O'Connor
United States Courthouse
401 West Washington Street
Phoenix, Arizona 85003

Dear Judge Campbell:

The Department of Justice ("the Department") respectfully submits its further thoughts regarding potential changes to the Federal Rules of Civil Procedure ("Federal Rules" or "rules") concerning the preservation of information and sanctions that would result from the failure to preserve. The Department continues to believe that at this time any change to the Federal Rules is premature. There are several ongoing efforts to study issues surrounding preservation which may inform the Committee's analysis. Further, preliminary results from an internal survey the Department recently conducted suggest that preservation sanctions are rarely sought, awarded, or threatened, and thus rule changes may not ultimately be needed. Finally, questions remain regarding the unanticipated consequences of a rules change and how such a change would achieve actual cost savings. Accordingly, the Department respectfully urges the Committee not to propose any changes to the Federal Rules regarding preservation or related sanctions at this time.

Ongoing Efforts that May Inform Consideration of Any Changes to the Federal Rules

The Department believes that there is substantial work underway that may inform the Committee's consideration of any proposed change to the Federal Rules. Specifically, we draw the Committee's attention to the following:

- The pilot projects of the Seventh Circuit and the Southern District of New York;
- The ongoing Federal Judicial Center (FJC) surveys regarding use of the current rules;
- The Committee's analysis of Rule 37(e); and
- The Department's ongoing evaluation within the federal government of preservation needs.

We note that the pilot projects in particular may offer valuable insight into the issues being explored by the Committee. The pilot projects look at various ways of handling the scope of discovery and

controlling the cost of discovery and litigation, including preservation. The Seventh Circuit's electronic discovery pilot project began in May 2009. The first phase was limited to five district court judges, eight magistrate judges, and 93 civil cases. The second phase, expanding the pool of judges, is not yet completed (it will end in May 2012), and the third phase has yet to begin.

The Southern District of New York's pilot project for complex cases began in November 2011. One of its requirements is for parties to discuss preservation of documents in the Rule 26 conference.[1] Rule 26(f)(2) already requires parties to discuss "any issues about preserving discoverable information," however, the S.D.N.Y. pilot project provides explicit guidance on this requirement and, it is presumed, will monitor how such discussions affect the usefulness and costs of discovery. The results of these pilot projects may shed further light on the preservation and discovery questions before the Committee.

Preliminary DOJ Survey Results Contribute New and Valuable Data

The Department is uniquely situated to assess how new preservation and/or sanctions rules would impact a wide range of litigants, as approximately one-third of all federal civil cases involve the United States as either a plaintiff or a defendant. The Department recently conducted an internal survey (DOJ Survey) of civil litigators' experience with preservation and sanctions issues.[2] The survey was distributed to the Department's components with the largest number of civil litigators and responses were anonymous. It did not attempt to obtain a random sample of all attorneys at the Department.[3] The DOJ Survey results are preliminary, as the Department continues to seek responses from additional components, analyze the data, and pursue additional fact-finding on preservation and general e-discovery matters.

1. *Preservation Sanctions are Never or Rarely Sought*

The DOJ Survey provides further support for FJC's findings that sanction motions and orders are rare.[4] The DOJ Survey results show that 97.7 percent of respondents reported that opposing counsel had not filed a motion for sanctions against them personally for failure to preserve information during the survey period (only 0.8 percent had been the subject of such a motion); 91.7 percent of respondents reported that opposing counsel had not filed a motion for sanctions against DOJ or the client government agency for failure to preserve information during the survey period (only 6.8 percent reported that opposing counsel had filed such a motion); and 97.2 percent of respondents reported that they had not

[1] See http://www.nysd.uscourts.gov/cases/show.php?db=notice_bar&id=261.

[2] The DOJ Survey queried respondents for their sanctions and preservation experience from 2006 (i.e. when the E-Discovery Amendments to the Federal Rules of Civil Procedure went into effect) to the present [hereinafter referred to as "the survey period"].

[3] Survey results were received from the Civil Division, United States Attorneys' Offices, the Environment and Natural Resources Division, and the Tax Division. Responses were received from 656 attorneys, reflecting a combined response rate of 33 percent from the components that participated. Of the respondents, 42 percent reported that they typically litigate as defense counsel, 23 percent that they typically litigate as plaintiff counsel, and 35 percent that they typically litigate as both defense and plaintiff counsel. *See* Appendix A.

[4] The FJC analysis (based on data from 19 districts and the 131,992 cases filed in 2007 and 2008 in those districts) showed that requests for spoliation sanctions were relatively rare (in just 0.15 percent of cases in the study districts), and sanctions were granted even more rarely (in only 18 percent of the 0.15 percent cases). *See* Motion for Sanctions Based Upon Spoliation of Evidence in Civil Cases, Report to the Judicial Conference Advisory Committee on Civil Rules, Emery G. Lee III, 2011.

filed a motion for sanctions against opposing counsel or opposing parties for failure to preserve information during the survey period (only 1.2 percent had filed such a motion). *See* Figures 1, 2, and 3.

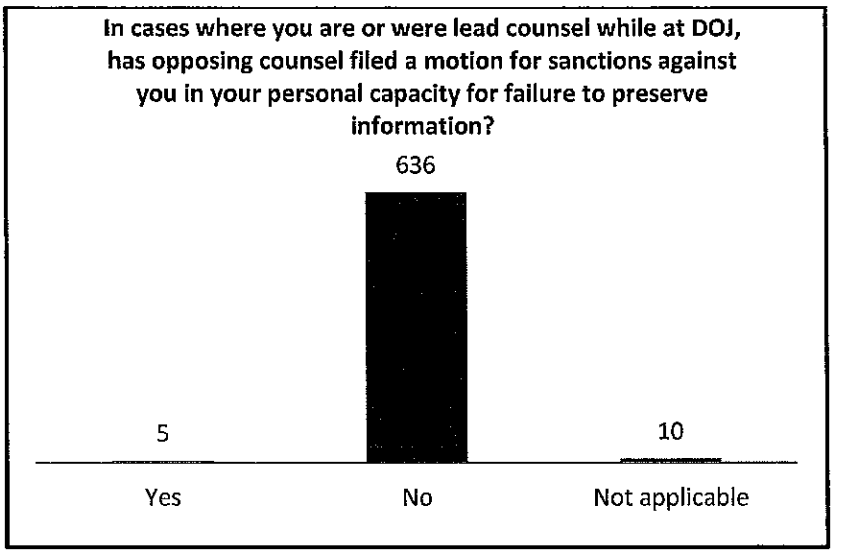

Figure 1.

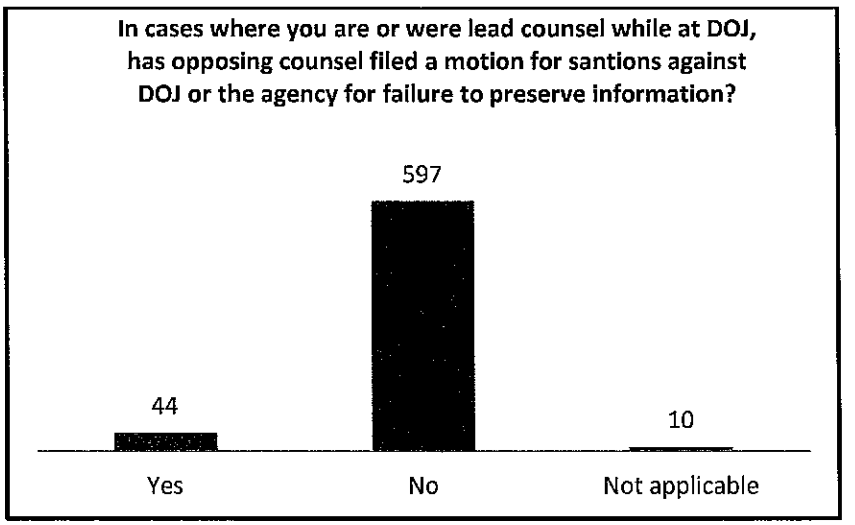

Figure 2.

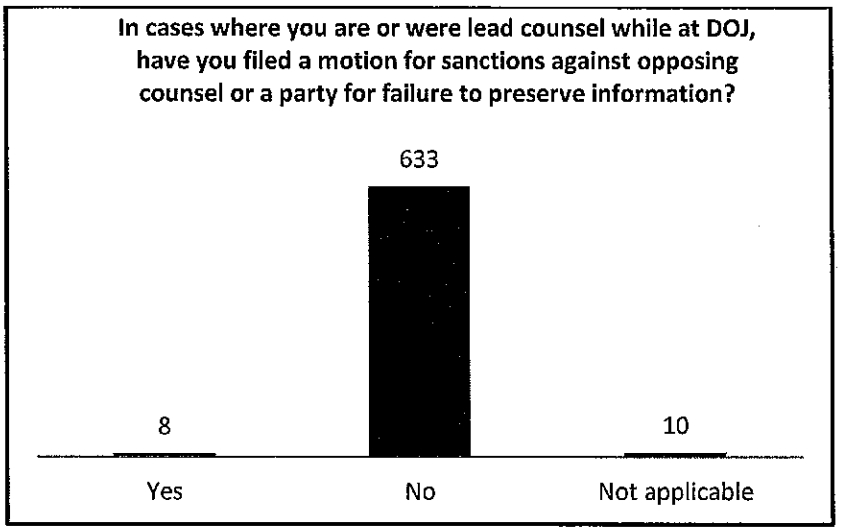

Figure 3.

2. *Preservation Sanctions are Never or Rarely Awarded*

Further, 97.8 percent of respondents reported that neither they nor the agency they represented had been sanctioned by a court for failure to preserve information during the survey period (only 0.6 percent reported that they or their client government agency had been sanctioned for this reason), and 98.0 percent reported that neither opposing counsel nor opposing parties had been sanctioned by a court for failure to preserve information (only 0.3 percent reported that opposing counsel or an opposing party had been sanctioned for this reason). *See* Appendix A.

3. *Threats of Sanctions are Not Commonplace*

The DOJ survey also examined litigants' behavior outside of the courtroom. Notably, 75.6 percent of respondents reported that during the survey period opposing counsel had never threatened to file a motion for sanctions against them personally or the agency they represented for failure to preserve information; 14.7 percent reported being threatened "rarely"; 7.2 percent reported being threatened "sometimes"; 0.8 percent reported being threatened "often"; and no respondents reported being threatened "always." *See* Figure 4.

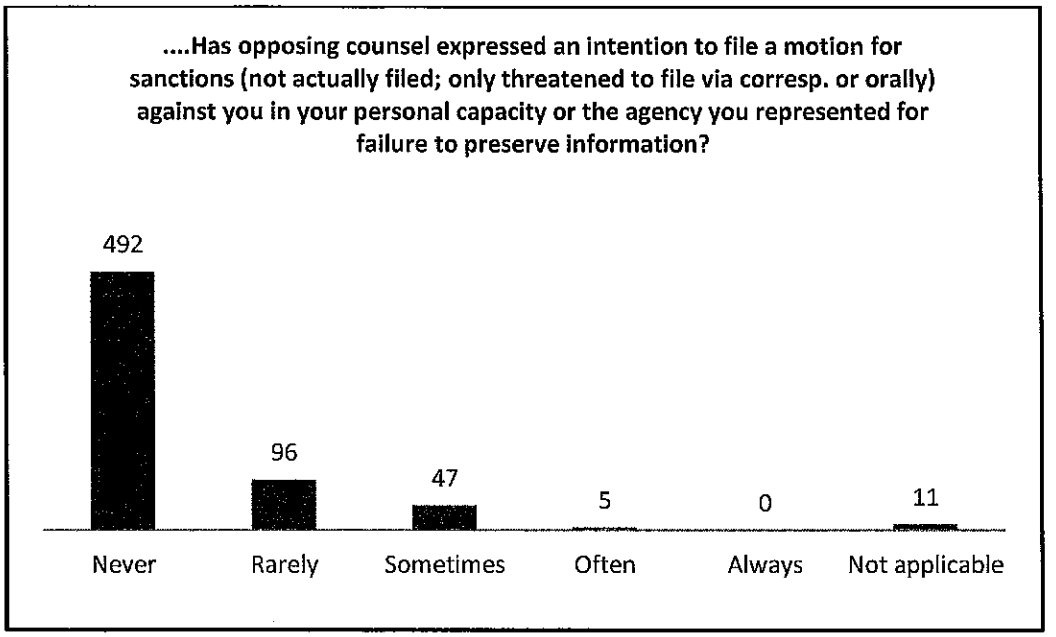

Figure 4.

Further, 89.4 percent of respondents reported that during the study period they had never threatened an opposing counsel or party with sanctions for failure to preserve information; 7.7 percent reported that they had done so "rarely"; 1.4 percent reported that they had done so "sometimes"; and no respondents reported doing so "often" or "always." *See* Figure 5.

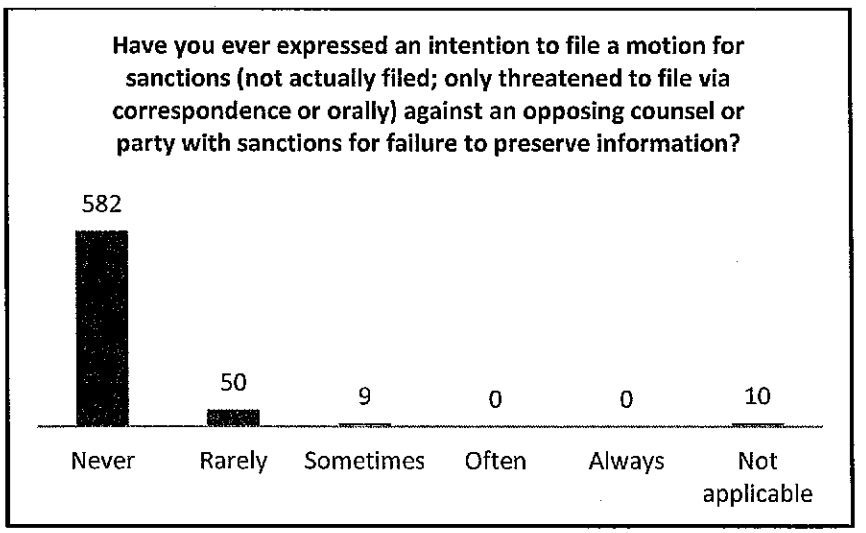

Figure 5.

The DOJ survey results suggest that the threats of sanctions motions by counsel for failure to preserve information may not be as prevalent in civil litigation as some would claim.

4. *Current Rules Are Not Being Fully-Utilized*

Finally, the Department continues to question whether litigants are using effectively the existing rules and available litigation tools. While 82 percent of respondents in a recent ABA survey stated that

discovery is too expensive, the same study reported that "61% of respondents believe that counsel do not typically request limitations on discovery under available mechanisms."[5] The DOJ Survey also suggests that the current rules are not being used adequately.[6] Indeed, in a series of questions that deliberately made no mention of the new requirements emanating from the 2006 E-Discovery Amendments—including the requirement that parties discuss issues about preserving discoverable information during the Rule 26 conference, *see* Fed. R. Civ. P. 26(f)(2), 26(f)(3), & 26(f)(3)(C)—only 48 percent of respondents reported that in their experience, document preservation was "typically discussed at the Rule 26(f) conference." *See* Appendix A. In addition, only 42 percent of respondents reported that they "typically negotiate the scope of document preservation with opposing counsel." *See id.*

Remaining Questions

The Department believes that further study of the unintended consequences of any potential rules change and of the cost savings claimed by proponents of a rules change would help inform the Committee on how to proceed. With regard to unintended consequences, the Department believes that several questions remain:

- How will a new sanctions rule relate to state ethics and disciplinary proceedings? A new sanctions rule may place attorneys in a difficult position of either running afoul of a new rule of Federal procedure or their state bar authority.
- How will a new preservation or sanctions rule interact with or affect substantive tort law, and other statutes and regulations? Would legislation need to be amended to accommodate any changes to the Federal Rules that affect document retention, or would a new rule have to undergo repeated amendments over time?
- Would a new rule increase sanctions motions? In the DOJ Survey, respondents expressed concern that if there was a new Federal Rule specifically permitting sanction for failure to preserve, this may increase the occurrence of sanctions motions. *See* Appendix A. Increased motions practice may further test the already strained resources of the judiciary and lead to wasteful satellite litigation.

With regard to cost savings, the Department believes that the current studies of the costs of preservation fail to recognize that a duty to preserve will remain even if a new rule is enacted. The costs of preservation programs and document retention software, for example, will still need to be incurred.

A more accurate estimate of the potential cost savings of a preservation rule would have to take the claimed costs of document preservation and subtract the following: (1) the cost of saving documents that will still be required to be preserved pursuant to a litigation preservation obligation (based in case law or a

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[5] ABA Section of Litigation, *Member Survey on Civil Practice: Full Report* 3 (American Bar Ass'n 2009), http://www.abanet.org/litigation/survey/docs/report-aba-report.pdf.

[6] As Judge Grimm has written, ". . . the existing Rules provide all of the necessary tools to achieve the changes in practice that have eluded us for decades. Without behavioral change in the key participants in the civil justice system, however, even sweeping modifications to the Rules will not foster achievement of the desired goal. We might wish first to change the Rulers (judges) and the Ruled (lawyers) before reverting to yet another effort to change the Rules." The Hon. Paul W. Grimm, *The State of Discovery Practice in Civil Cases: Must the Rules Be Changed to Reduce Costs and Burden, or Can Significant Improvements Be Achieved Within the Existing Rules?*, 12 SEDONA CONF. J. 47, 49 (2011).

new rule); (2) the cost of saving documents to meet independent regulatory and statutory obligations; (3) the cost of saving documents for business needs; and (4) the cost of saving documents the party would itself want to save to support its case. This analysis has yet to be done and would help inform the analysis of projected cost savings in both pre-litigation and litigation contexts.

Finally, the Department questions whether litigants will truly reduce their "over preservation" if a sanctions or preservation rule is enacted. Litigants will still be exposed to possible sanctions in state court and uncertainty will remain in how a federal court will interpret a rule, even if there is a national standard. Litigants and their counsel will continue to be risk averse, particularly in cases where there is potentially great exposure or reputational risk.

Conclusion

In light of the foregoing, and the reasons stated in the Department's September 7, 2011 letter, we continue to believe that a rules change is not needed at this time.[7] We thank the Committee for the opportunity to share our perspective, and look forward to continuing to work together on this important issue.

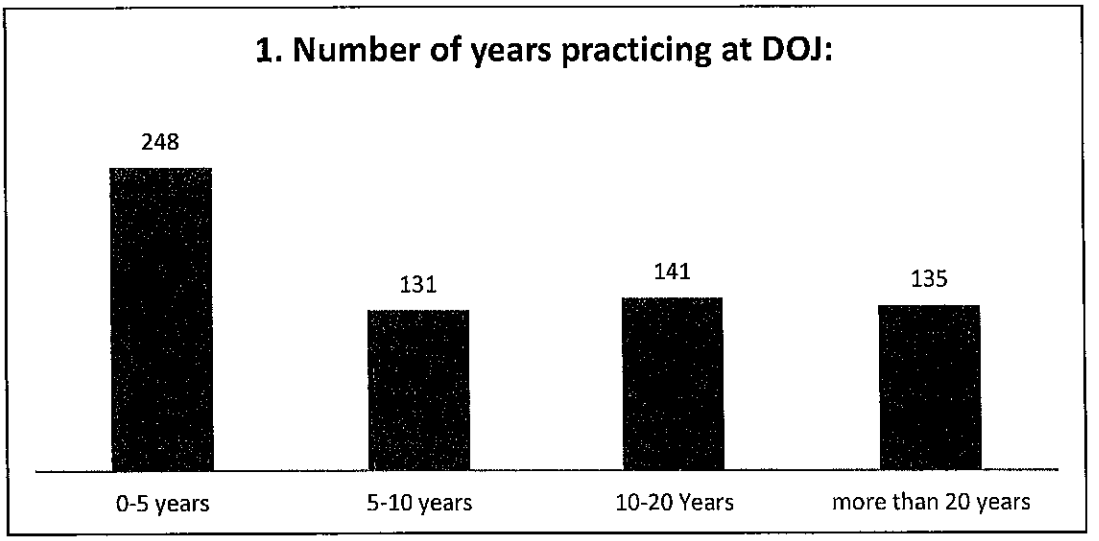
Sincerely,

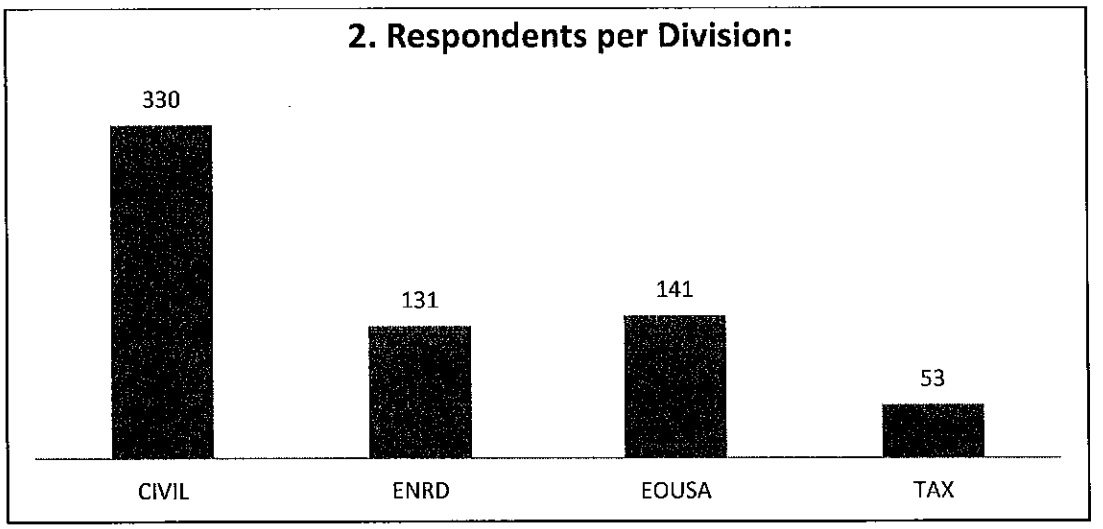
Tony West
Assistant Attorney General

[7] The Department understands that there may be some discussion of evaluating not just preservation but the scope of discovery. The Department does not currently have a position on whether the scope of discovery should be examined, however, its preliminary assessment is that the scope of discovery may be tied to the preservation analysis. The Committee may want to evaluate all of these related issues together before determining whether to move forward on any preservation rule suggestions. A mini-conference, for example, addressing the scope of discovery and how it inter-relates to preservation, may be informative before the Committee decides to proceed with drafting any potential rule language.

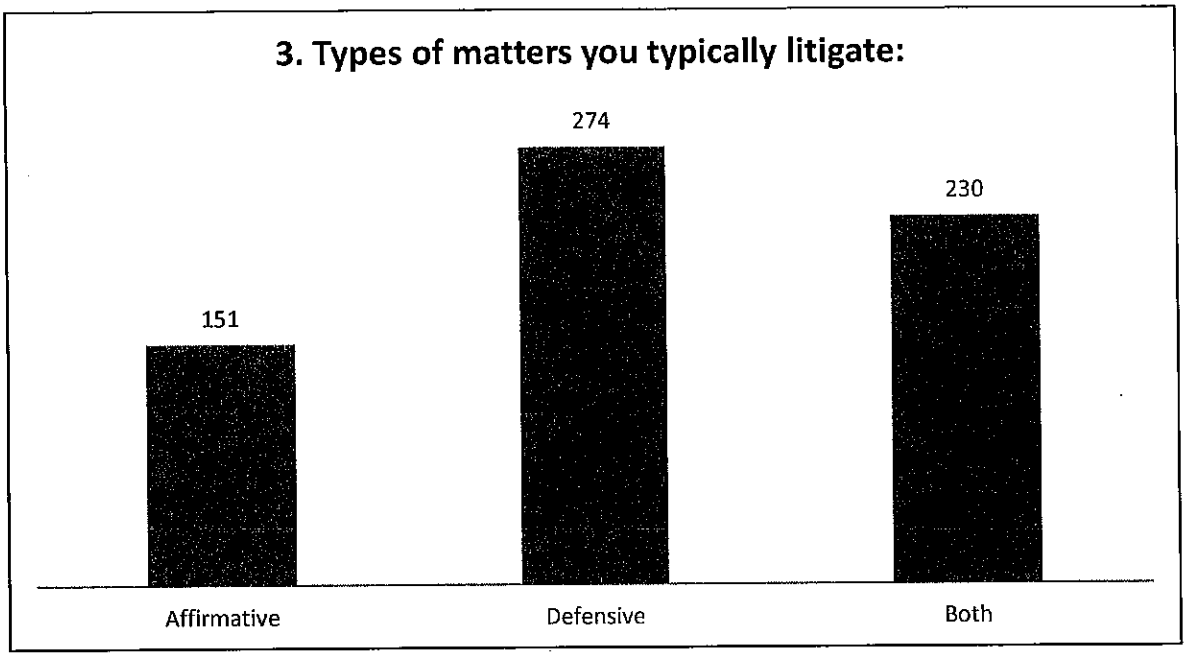
Appendix A

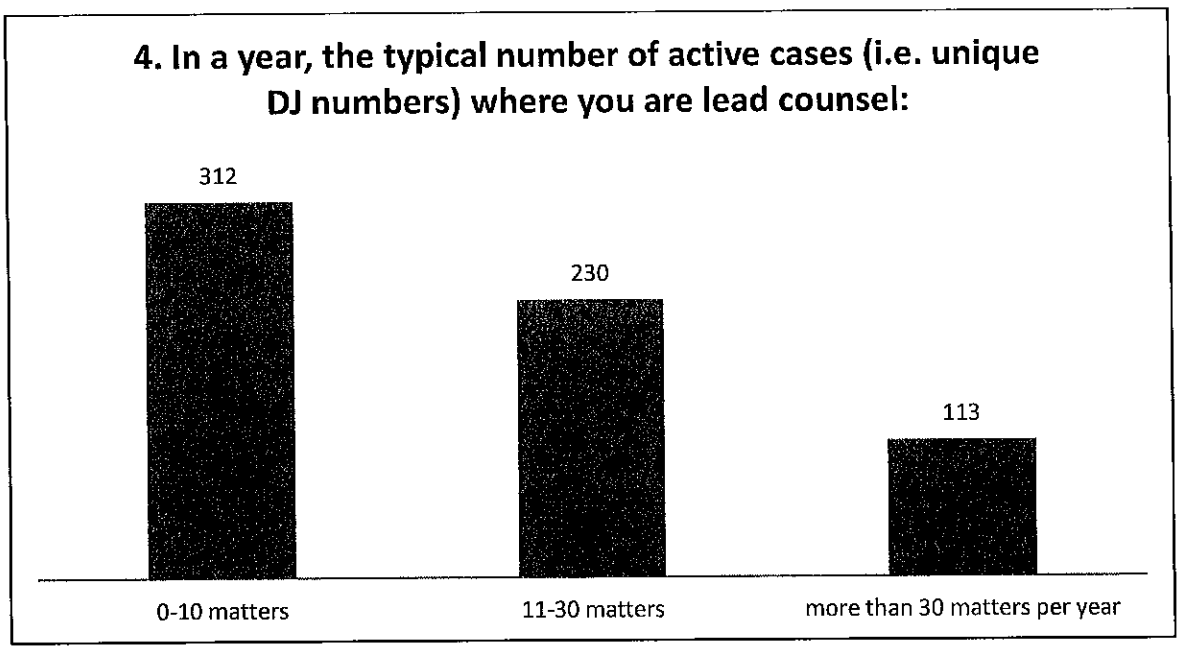
DOJ Survey Results and Survey Questions

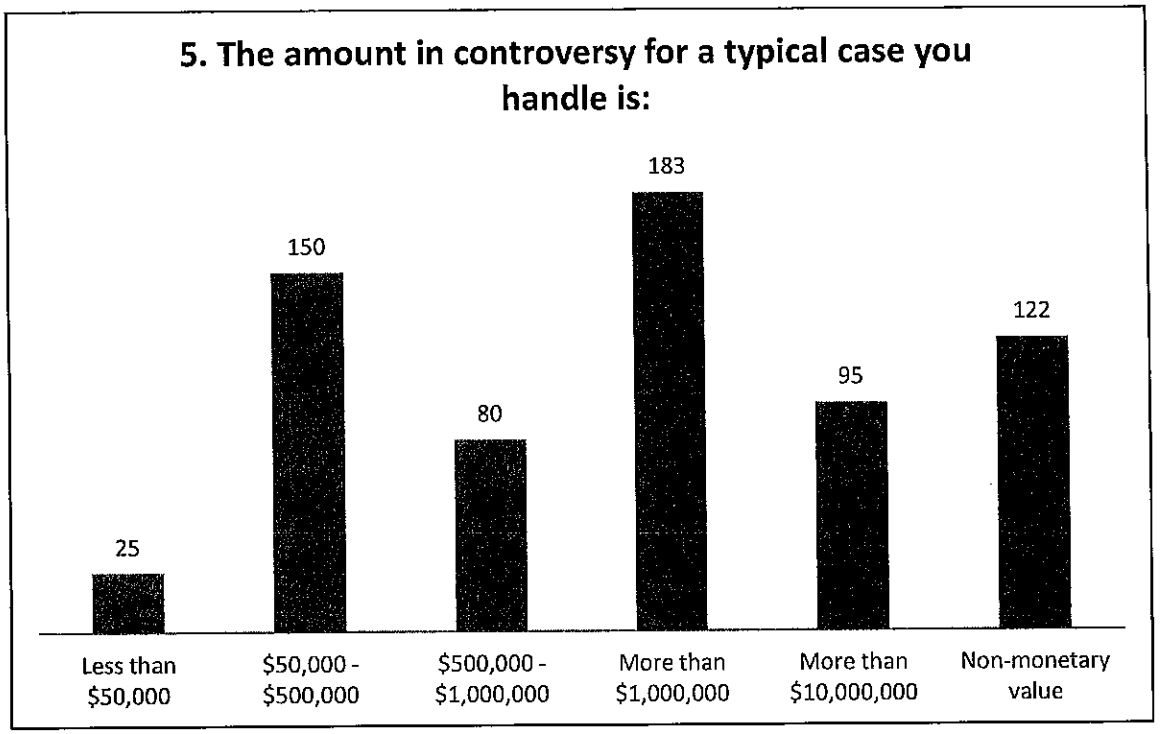


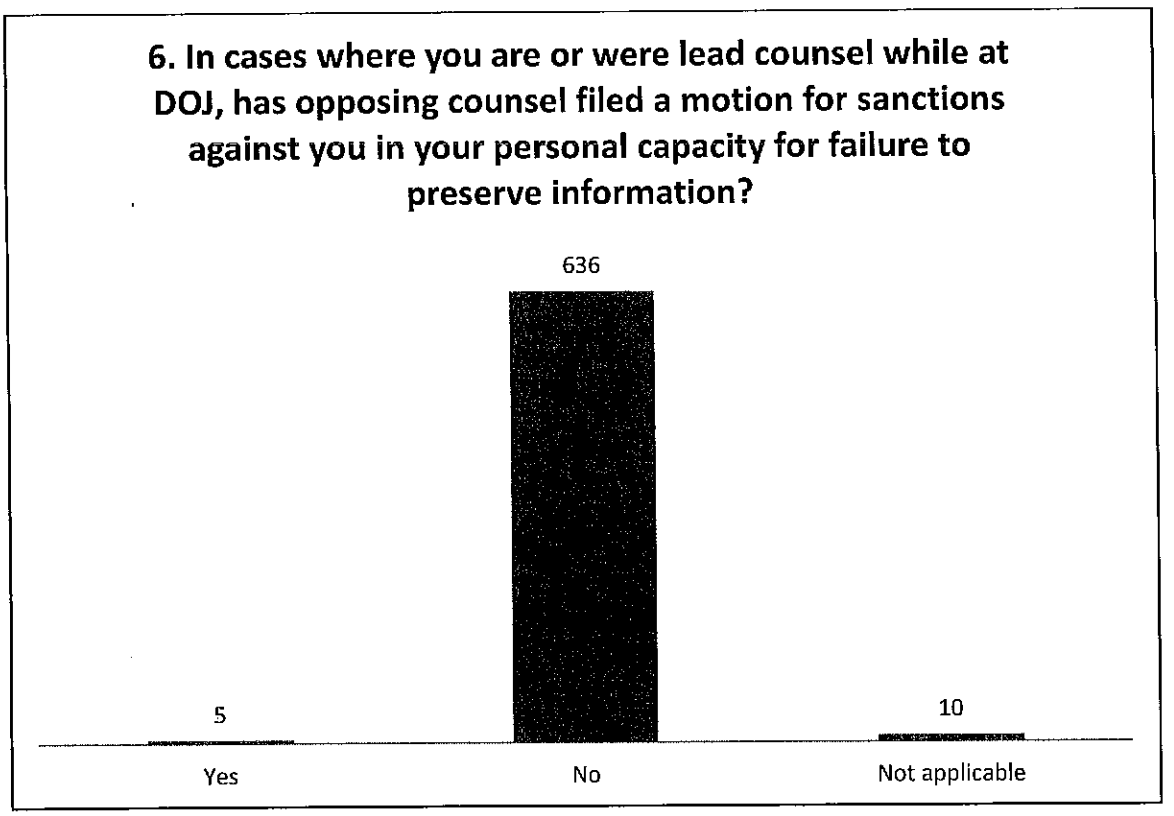


Note, Question 2 asked respondents to specify their "branch," *i.e.*, the sub-component within their Division. *See* Survey Questions/Instrument below. For purposes of reporting demographic information, we have consolidated responses by division.

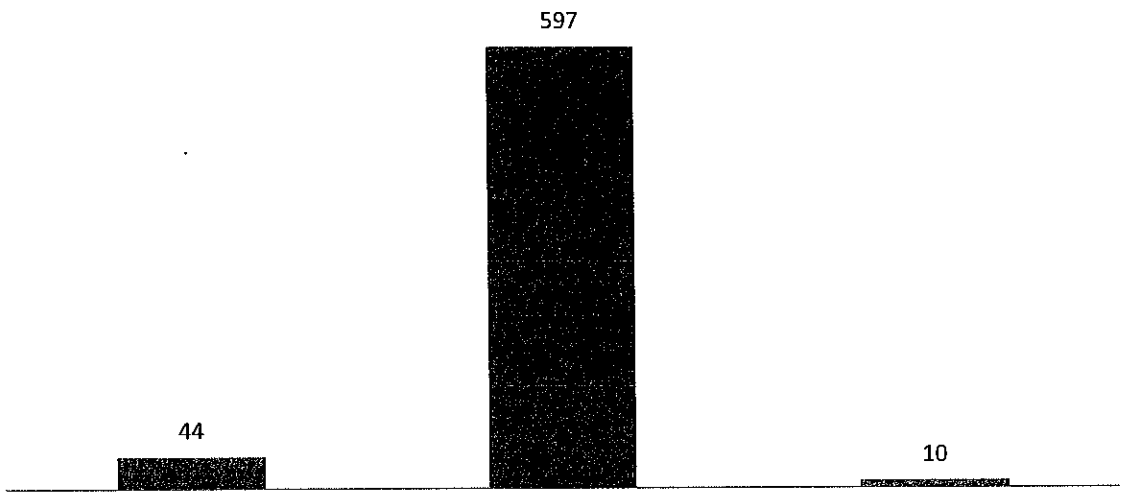

3. Types of matters you typically litigate:
151
274
230
Affirmative
Defensive
Both


4. In a year, the typical number of active cases (i.e. unique DJ numbers) where you are lead counsel:
312
230
113
0-10 matters
11-30 matters
more than 30 matters per year

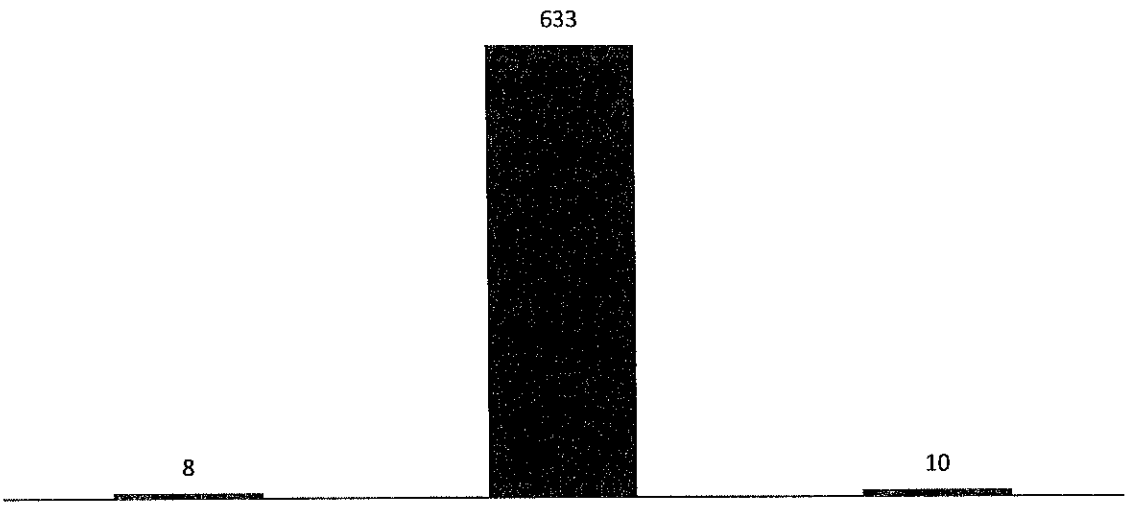

5. The amount in controversy for a typical case you handle is:
25
150
80
183
95
122
Less than $50,000
$50,000 - $500,000
$500,000 - $1,000,000
More than $1,000,000
More than $10,000,000
Non-monetary value


6. In cases where you are or were lead counsel while at DOJ, has opposing counsel filed a motion for sanctions against you in your personal capacity for failure to preserve information?
5
636
10
Yes
No
Not applicable

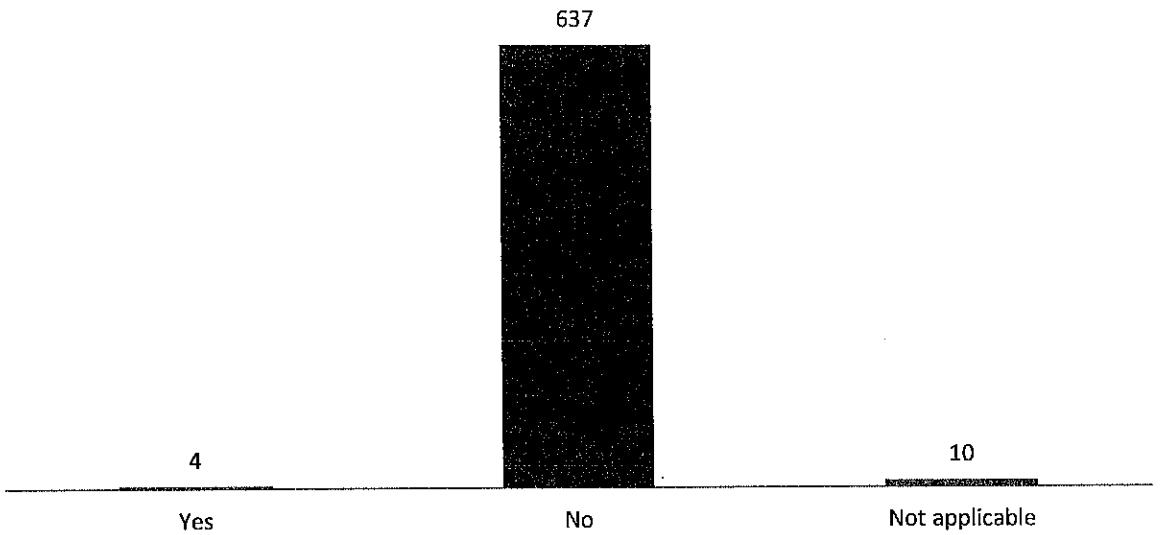
7. In cases where you are or were lead counsel while at DOJ, has opposing counsel filed a motion for santions against DOJ or the agency for failure to preserve information?



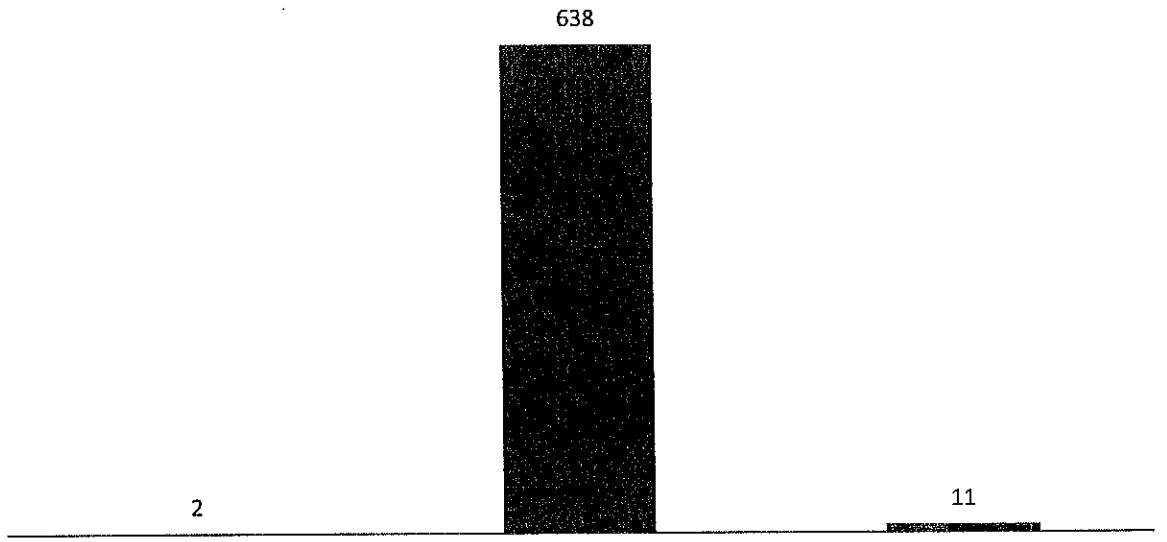
8. In cases where you are or were lead counsel while at DOJ, have you filed a motion for sanctions against opposing counsel or a party for failure to preserve information?



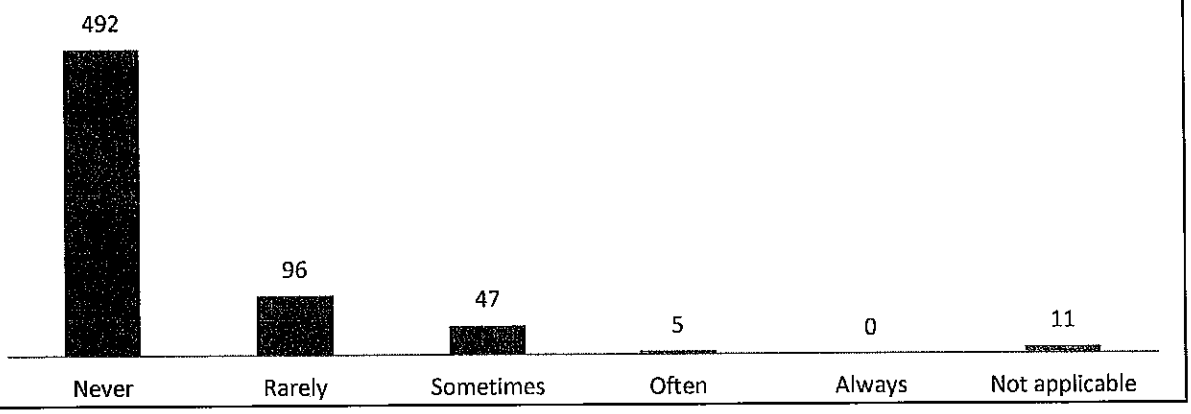
9. In cases where you are or were lead counsel while at DOJ, has a court sanctioned you in your personal capacity or the agency you represented for failure to preserve information?



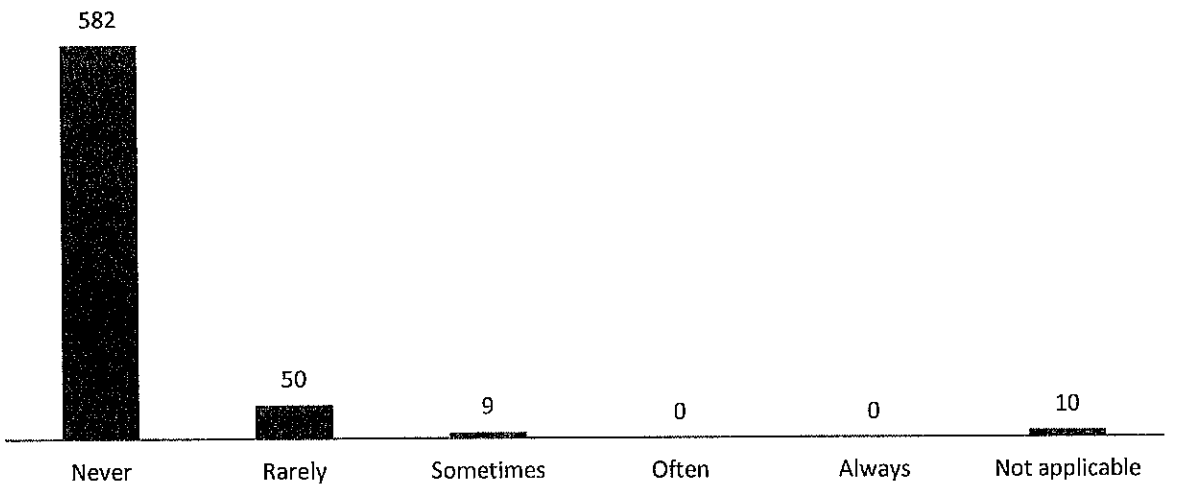
10. In cases where you are or were lead counsel while at DOJ, has a court sanctioned opposing counsel or the opposing party for failure to preserve information?



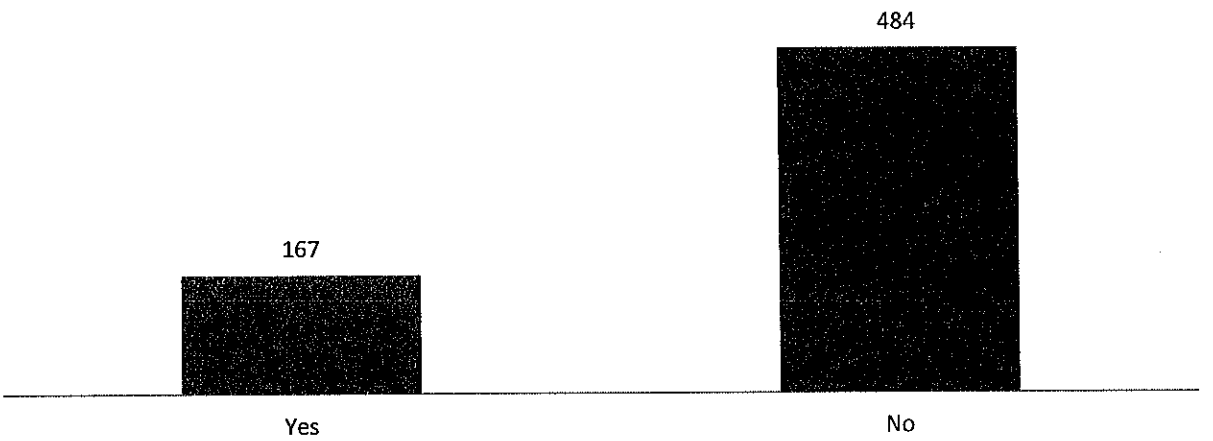
11. ....has opposing counsel expressed an intention to file a motion for sanctions (not actually filed; only threatened via corresp. or orally) against you in your personal capacity or the agency you represented for failure to preserve information?



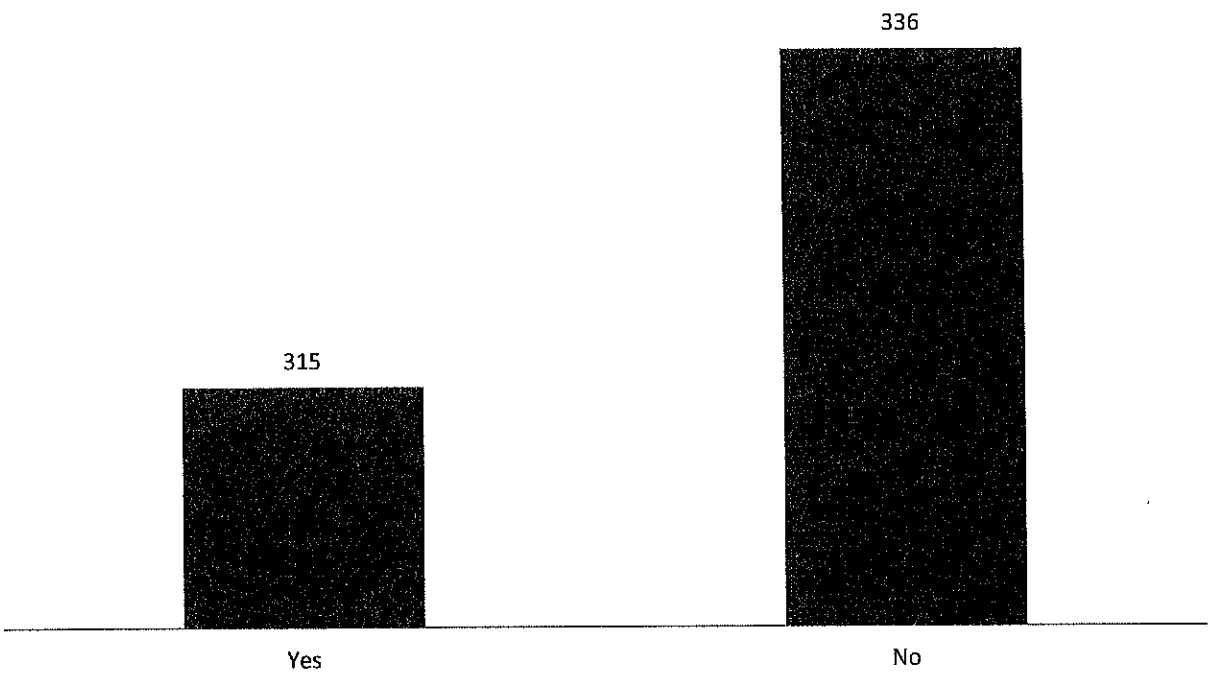
12. Have you ever expressed an intention to file a motion for sanctions (not actually filed; only threatened to file via correspondence or orally) against an opposing counsel or party with sanctions for failure to preserve information?

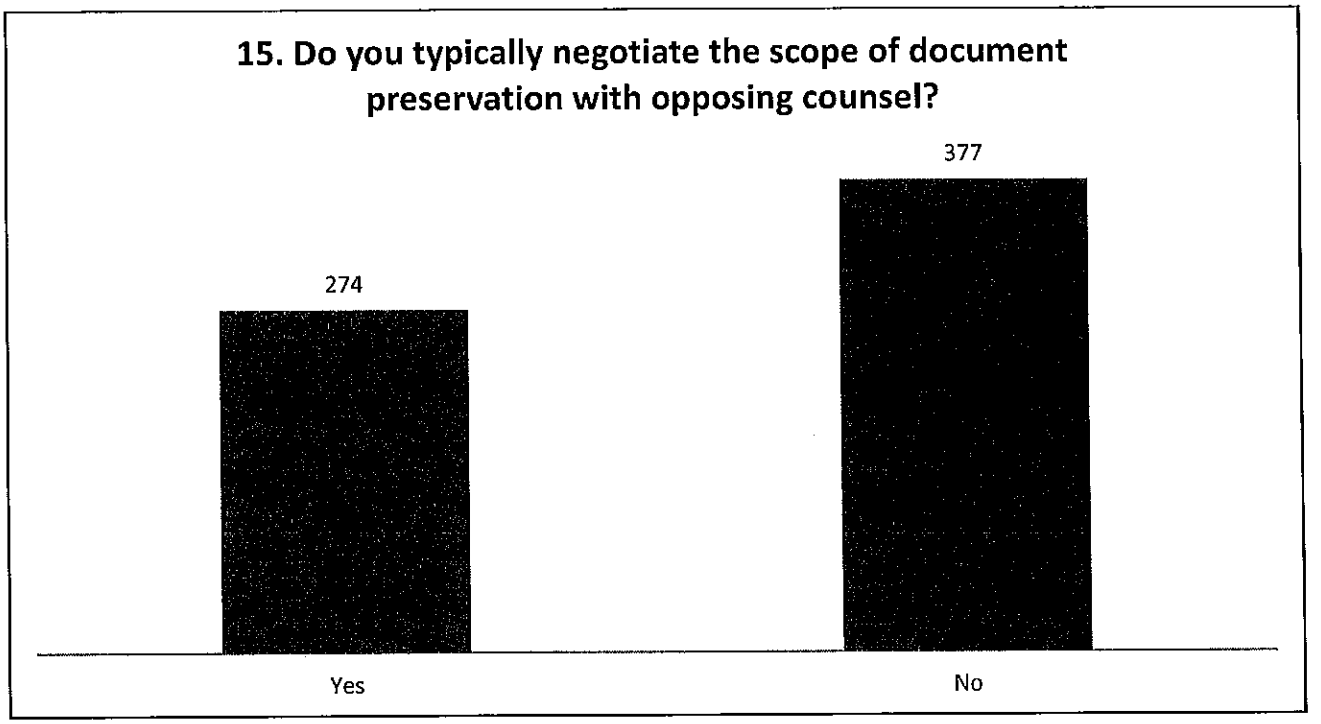


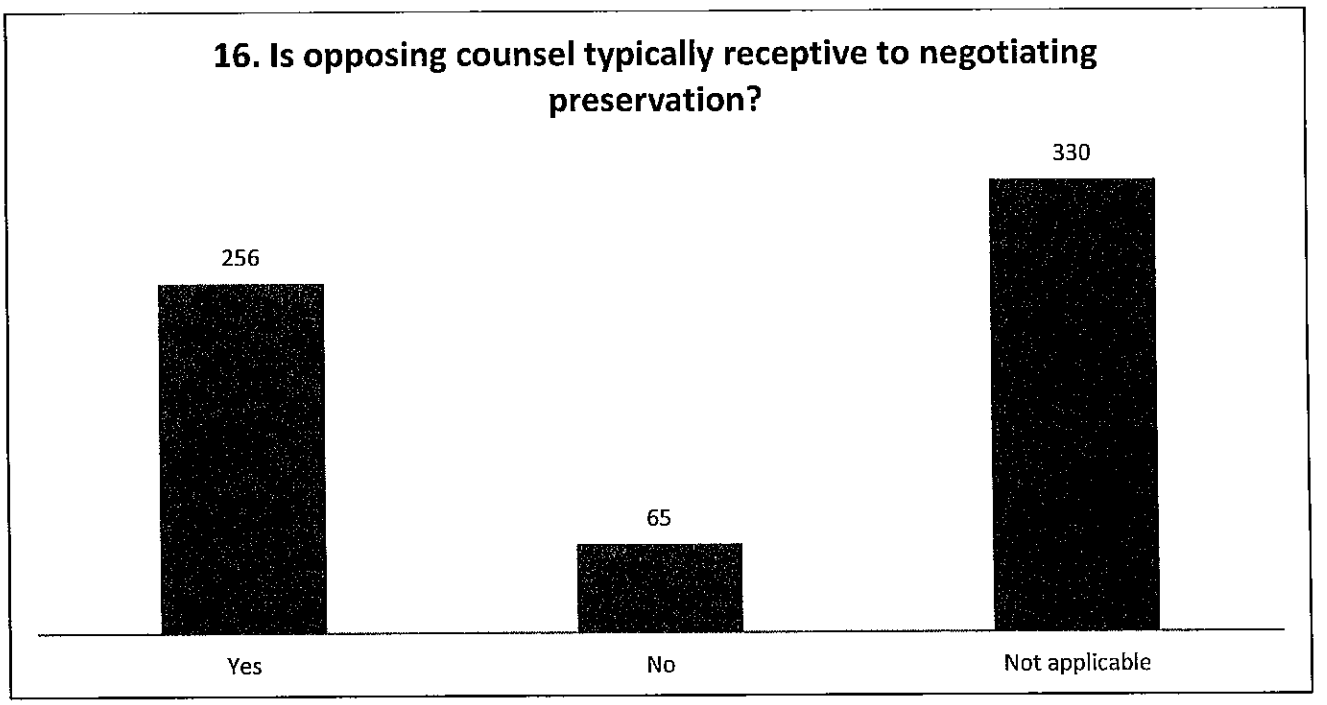
13. In your cases have issues relating to whether or when a preservation duty is triggered been the subject of a dispute between you and opposing counsel?



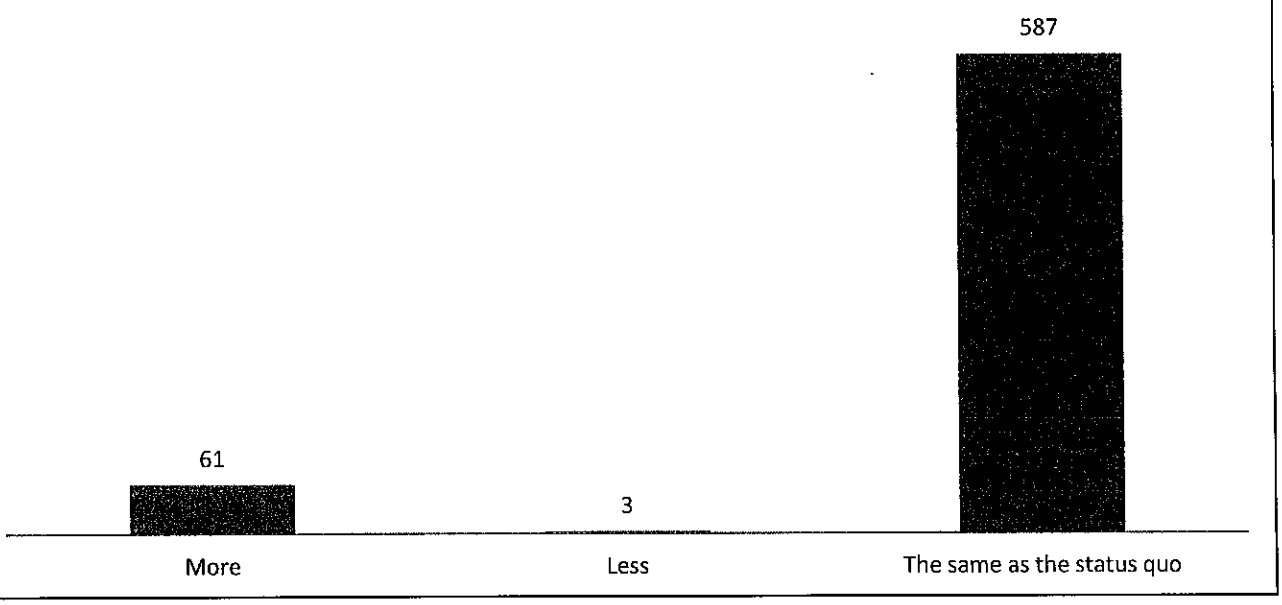
14. In your experience is document preservation typically discussed at the Rule 26(f) conference?



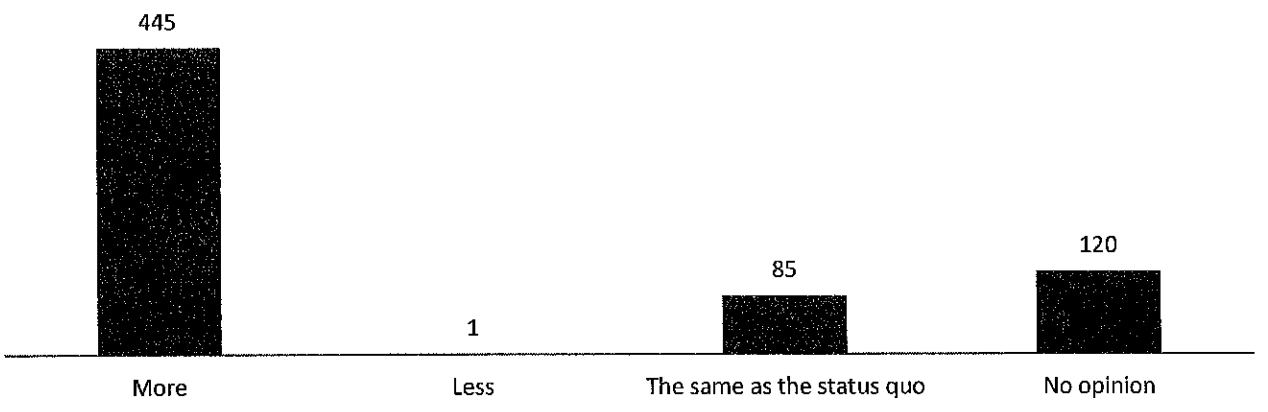

15. Do you typically negotiate the scope of document preservation with opposing counsel?
274
377
Yes
No

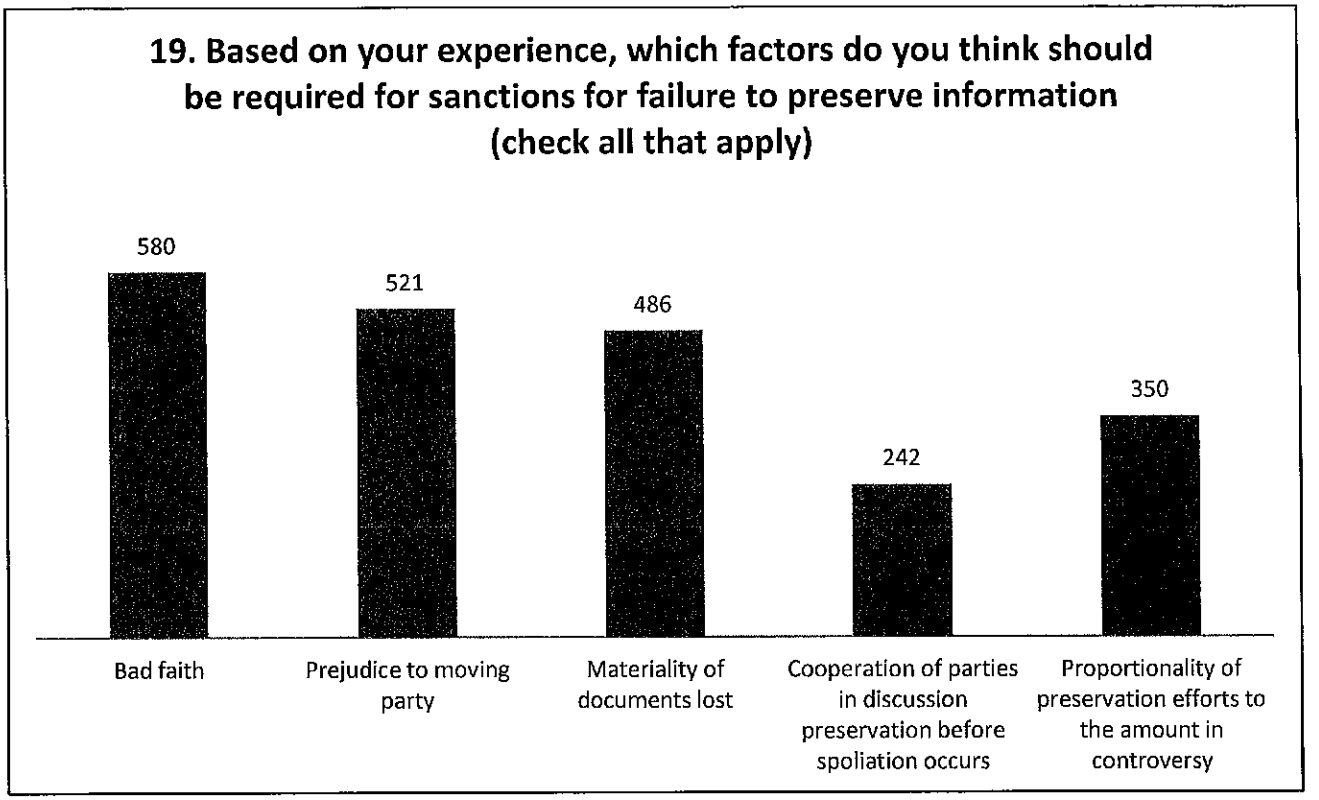

16. Is opposing counsel typically receptive to negotiating preservation?
256
65
330
Yes
No
Not applicable

17. If there were a new Federal Rule of Civil Procedure specifically permitting sanctions for failure to preserve information would you seek sanctions:



18. Based on your experience, if there were a new Federal Rule of Civil Procedure specifically permitting sanctions for failure to preserve information do you think opposing counsel would seek sanctions:





Note, for completeness, we are providing the responses to Question 19. However, we determined before data collection was complete that due to the wording of Question 19 the results may not provide complete information about the respondents' views on this question.

* indicates a required field

1. Number of years practicing at DOJ: *

- ☐ 0-5 years
- ☐ 5-10 years
- ☐ 10-20 years
- ☐ more than 20 years

2. Your branch *

3. Types of matters you typically litigate: *

- ☐ Affirmative
- ☐ Defensive
- ☐ Both

4. In a year, the typical number of active cases (i.e. unique DJ numbers) where you are lead counsel: *

- ☐ 0-10 matters
- ☐ 11-30 matters
- ☐ more than 30 matters a year

5. The amount in controversy for a typical case you handle is: *

- ☐ Less than $50,000
- ☐ $50,000-$500,000
- ☐ $500,000-$1,000,000
- ☐ More than $1,000,000
- ☐ More than $10,000,000
- ☐ Non-monetary value

The following questions refer to your experience within the past five years (i.e. since the e-discovery amendments to the Rules of Civil Procedure in 2006).

NOTE: The term "sanction" as used below refers to court ordered sanctions as found in Rule 37 (c) (including but not limited to awarding costs, precluding evidence, ordering adverse

inference instructions, awarding default judgments, or referring for disciplinary proceedings). Curative remedies/case-management tools, such as the court ordering additional discovery or depositions, do not qualify as a "sanction" when responding to the questions below.

6. In cases where you are or were lead counsel while at DOJ. Has opposing counsel filed a motion for sanctions against you in your personal capacity for failure to preserve information? *

- Yes
- No

7. In cases where you are or were lead counsel while at DOJ. Has opposing counsel filed a motion for sanctions against DOJ or the agency for failure to preserve information? *

- Yes
- No

8. In cases where you are or were lead counsel while at DOJ. Have you filed a motion for sanctions against opposing counsel or a party for failure to preserve information? *

- Yes
- No

9. In cases where you are or were lead counsel while at DOJ. Has a court sanctioned you in your personal capacity or the agency you represented for failure to preserve information? *

- Yes
- No

10. In cases where you are or were lead counsel while at DOJ. Has a court sanctioned opposing counsel or the opposing party for failure to preserve information? *

- Yes
- No

11. In cases where you are or were lead counsel while at DOJ. Has opposing counsel expressed an intention to file a motion for sanctions (not actually filed; only threatened to file via correspondence or orally) against you in your personal capacity or the agency you represented for failure to preserve information? *

- Never
- Rarely
- Sometimes

- ☐ Often
- ☐ Always

12. Have you ever expressed an intention to file a motion for sanctions (not actually filed; only threatened to file via correspondence or orally) against opposing counsel or party with sanctions for failure to preserve information? *

- ☐ Never
- ☐ Rarely
- ☐ Sometimes
- ☐ Often
- ☐ Always

13. In your cases have issues relating to whether or when a preservation duty is triggered been the subject of a dispute between you and opposing counsel? *

- ☐ Yes
- ☐ No

14. In your experience is document preservation typically discussed at the Rule 26(f) conference? *

- ☐ Yes
- ☐ No

15. Do you typically negotiate the scope of document preservation with opposing counsel? *

- ☐ Yes
- ☐ No

16. Is opposing counsel typically receptive to negotiating preservation? *

- ☐ Yes
- ☐ No
- ☐ Not applicable

17. If there were a new Federal Rule of Civil Procedure specifically permitting sanctions for failure to preserve information would you seek sanctions: *

- ☐ More
- ☐ Less

- [ ] The same as the status quo

18. Based on your experience, if there were a new Federal Rule of Civil Procedure specifically permitting sanctions for failure to preserve information do you think opposing counsel would seek sanctions: *

- [ ] More
- [ ] Less
- [ ] The same as the status quo
- [ ] No opinion

19. Based on your experience, which factors do you think should be required for sanctions for failure to preserve information (check all those that apply) *

- [ ] Bad faith
- [ ] Prejudice to moving party
- [ ] Materiality of documents lost
- [ ] Cooperation of parties in discussion preservation before spoliation occurs
- [ ] Proportionality of preservation efforts to the amount in controversy

TAB A-3

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>Dear Judge Campbell and Judge Grimm,
>
>I have reviewed the draft of Rule 37(g) included in the briefing book for
>the upcoming meeting in Ann Arbor. I want to offer for your consideration
>a short alternative draft, Rule 37(g) bis, which I have attached. It draws
>heavily on the draft text. I urge you to consider its form as well as its
>substance.
> The draft applies to all evidence, not simply electronic
>evidence. It establishes, under the rules, a duty to preserve. It treats
>this and other duties that arise under federal law differently from duties
>that arise under law applicable in diversity cases.
> The draft treats preservation as a matter of duty, breach,
>and remedy. It provides that any breach of a federal duty be subject to
>remedies that make a litigant whole, as the duties are in part owed to the
>litigant. Certain make-whole remedies, including adverse instructions, are
>precluded if a breaching party shows affirmatively that its conduct does
>not warrant such a remedy.
> Upon a showing that a breach was willful, or that a court
>order was breached, sanctions, which include remedies that go beyond making
>a litigating party whole or orders that deter future misconduct, are
>authorized. These sanctions remedy serious breaches of duties owed to the
>court.
> I believe that a regime like this makes both duties and the
>consequences of breaching them more clear. I also believe it avoids some
>knotty problems of authority under the Rules Enabling Act. I hope it
>assists your efforts. I would be happy to provide further commentary at
>your request. I look forward to seeing both of you next week.
>
>John Vail
>Vice President and Senior Litigation Counsel
>Center for Constitutional Litigation, PC
>777 6th Street, NW, Suite 520
>Washington, DC 20001
>direct 202 944 2887
>fax 202 965 0920
>john.vail@cclfirm.com
>

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Rule 37(g) *bis* –

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Remedies[1] and Sanctions

* * * * *

(g) Duties to Preserve Discoverable Information[2]; Remedies for Breach; Sanctions

(1) Duties arising under law applicable in diversity cases[3]

When a court is sitting in diversity and a party breaches a duty, arising from applicable state or foreign law, to preserve discoverable information, the court will apply applicable state or foreign law to remedy the breach.

(2) Other duties

(A) A party has a duty under these rules to preserve discoverable information that reasonably should be preserved in the anticipation or conduct of litigation. To remedy any breach of this duty, or of any other duty to preserve evidence not described in (1) and not reduced to a court order[4], the court may:

(i) permit additional discovery;

(ii) order the breaching party to undertake curative [other remedial] measures;

(iii) require the breaching party to pay the reasonable expenses, including attorney's fees, caused by the failure.

(B) If the court finds that the remedies in (A) do not suffice to remedy the breach, the court may apply any other remedy, including adverse-inference jury instructions,

---

[1] "Remedies," which in this draft address negligent breaches of duties, are distinguished here from "sanctions," which need not be so closely tailored to the breach of duty, as they address misconduct beyond negligence.

[2] The general term, discoverable information, is used here because the duty defined at (2) applies to all information, not simply ESI.

[3] Duties to preserve, and remedies for their breach, imposed by state law define rights and rules of decision regarding their breach. *See, e.g., Boyd v. Travelers Insurance Co.,* 166 Ill.2d 188, 195, 209 Ill.Dec. 727, 652 N.E.2d 267 (1995) (recognizing breach of the duty as tortious under a traditional negligence analysis). They can be outcome-determinative and require respect in the federal system. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 1442 (2010) (a federal rule is invalid "if it alters 'the rules of decision by which [the] court will adjudicate [] rights… ' ").

[4] This draft treats breaches of court orders, which specify particular conduct, differently from breaches of general duties. See (3), *infra.* In addition to state law described in (1), and the duty under these rules described in (2), duties to preserve evidence can arise under statute, regulation, or contract .

unless the breaching party demonstrates that it acted in good faith and that the breach was inadvertent. [5]

(i) In determining whether a breaching party acted in good faith the court may should 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;

(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;

(c) whether the party received a request that information be preserved, the clarity and reasonableness 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;

(e) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and,

(f) whether the party sought timely guidance from the court regarding any unresolved disputes concerning the preservation of discoverable information.

(3) Willful breaches, breaches in bad faith, or failure to abide by a court order to preserve evidence

(A) When a party breaches any duty to preserve evidence and the breach is shown to have resulted from willfulness or bad faith, or when a party fails to abide by an order to preserve evidence[6], in addition to fashioning remedies that make the non-breaching party whole, the court may sanction the breaching party by taking actions described in (b)(2) or by issuing other just orders.

[5] This section potentially excuses a breaching party from certain remedies. It is exculpatory and, as such, the burden of proving that the breach was pardonable is placed on the party seeking exculpation. *See, e.g.,* 2 McCormick On Evid. § 337 (6th ed.)

[6] Violation of the order is different from breach of the duty underlying the order. The latter is a breach of a duty owed to prospective litigants. *Boyd, supra n. 3.* The former is defiance of the authority of the court.

TAB A-4

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March 15, 2012

Hon. David G. Campbell
United States District Court
Sandra Day O'Connor U.S. Courthouse, Suite 623
401 West Washington Street, SPC 58
Phoenix, AZ 85003-2118

Hon. Mark R. Kravitz
United States District Court
Richard C. Lee United States Court House
141 Church Street
New Haven, Connecticut 06510

Hon. Paul W. Grimm
United States District Court
Garmatz Federal Courthouse
101 West Lombard St.
Baltimore, MD 21201

Dear Judges Campbell, Kravitz and Grimm:

On October 17, 2011, The Sedona Conference® transmitted a letter to Judge Campbell, in his role as Chair of the Advisory Committee on Civil Rules, regarding the ongoing and anticipated efforts of The Sedona Conference® to address some of the difficult issues presented by preservation and sanctions and the extent to which the crafting of new or modified rules might be appropriate or even feasible. In that letter, we reported on the discussion at our WG1 meeting in October, 2011 and advised that WG1 had determined to focus its efforts over the coming months as follows: "to explore in greater depth and detail the possibility of reaching consensus on whether and in what form there should be additional rulemaking, with particular emphasis on whether there should be a proposed national standard regarding remedies/sanctions for spoliation under Rule 37. We also will be considering potential modifications to Rules 16, 26(f) and perhaps Rule 26(c) to better

inform practitioners and judges of the specific points to be discussed and resolved – a point of discussion which had a groundswell of support."

In October, our hope and expectation had been to submit the end results of the outlined process in advance of the Advisory Committee's March 2012 meeting. We write this letter to advise you, in your respective roles in the rule-making process, as to the status of WG1's efforts.

In the more than four months since our last letter, two separate drafting teams comprised of 21 people in total have been working diligently in an attempt to reach consensus as to potential language for Rules 16, 26 and 45, and Rule 37(e), respectively. Each team, guided by two WG1 Steering Committee liaisons, has spent substantial hours drafting proposed language and participating in numerous and lengthy conference calls and/or in-person meetings. Members of the Steering Committee and staff of The Sedona Conference®, including Richard Braman, Kenneth Withers, John Rabiej and Howard Bergman, who are well-versed in the issues and/or good facilitators of dialogue, also have participated in various rounds of the discussions.

While the discussions have resulted in the circulation and consideration of proposed draft language among and between the two drafting teams, our work remains ongoing in light of the need for further dialogue to explore the best ways to achieve sustainable consensus. In particular, there appears to be general consensus that preservation must be reasonable and proportional, and that cooperation serves to assist in making that assessment. However, we have not yet reached consensus regarding the implementation or application of cooperation, including, for example incentives for all parties to be cooperative, penalties for failing to be cooperative or how judges will facilitate this to require all parties to be reasonable.

Still, The Sedona Conference® drafting teams remain committed to their mission to try and achieve consensus, with the hope that draft language for at least some of the referenced rules ultimately can be presented to you and the Advisory Committee on Civil Rules. The current drafts remain subject to further review, discussion and modification among the teams and by the Steering Committee and, most importantly, by the WG1 membership. At The Sedona Conference®, a critical component of the process of formalizing and publishing its work product is working group membership review and comment. In this instance,

WG1 members outside of the Steering Committee and drafting teams have yet to have the opportunity to engage in that process.

In short, despite our best intentions and efforts, it is simply not possible for us to provide substantive input from WG1 prior to the Advisory Committee's March 2012 meeting. While there is no guarantee, of course, that consensus will be reached with respect to all of the potential rules amendments, we hope to provide you with an update on our efforts in the next two months, including a firm date thereafter by which we expect to provide draft consensus language where possible.

We regret that we have been unable to supply our substantive comments in time for the upcoming Advisory Committee meeting and express our best wishes for a successful and productive meeting. We again thank the Committee for its important work in crafting rules to achieve efficient and fair judicial process for all.

Respectfully submitted,

The Steering Committee of WG1*

Jason R. Baron
William P. Butterfield
Conor R. Crowley
Maura R. Grossman
Sherry B. Harris
Timothy L. Moorehead
John J. Rosenthal
Ariana J. Tadler
Edward C. Wolfe
Thomas Y. Allman (Chair emeritus)
Jonathan M. Redgrave (Chair emeritus)

* The opinions expressed by WG1 Steering Committee members do not necessarily represent the views of any of their employers, clients, or any other organizations with which they are affiliated. In addition, members of WG1, including members of the Steering Committee, reserve the right to express their individual opinions and advocate proposals that may differ from that proffered by WG1.

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TAB A-5

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LAWYERS FOR CIVIL JUSTICE, DRI – VOICE OF THE DEFENSE BAR, FEDERATION OF DEFENSE & CORPORATE COUNSEL, INTERNATIONAL ASSOCIATE OF DEFENSE COUNSEL

COMMENT

To

THE CIVIL RULES ADVISORY COMMITTEE

March 15, 2012

NOW IS THE TIME FOR MEANINGFUL NEW STANDARDS GOVERNING

DISCOVERY, PRESERVATION, AND COST ALLOCATION

I. Introduction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The 2006 Amendments: An Incomplete Solution.

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

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

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

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

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

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

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

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

C. Impact of the Duke and Dallas Conferences.

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

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

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

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

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

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

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

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

D. What Is the Solution?

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

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

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

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

A. Runaway Discovery Costs Must Be Brought Under Control.

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

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

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

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

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

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

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

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

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

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

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

B. Now Is the Time for Meaningful Discovery Amendments.

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) deleted, slack, fragmented, or other data only accessible by forensics;

(b) random access memory (RAM), temp files, or other ephemeral data that are difficult to preserve without disabling the operating system;

(c) on-line access data such as temporary internet files, history, cache, cookies, and the like;

(d) data in metadata fields that are frequently updated automatically, such as last-opened dates;

(e) information whose retrieval cannot be accomplished without substantial additional programming, or without transforming it into another form before search and retrieval can be achieved;

(f) backup data that are substantially duplicative of data that are more accessible elsewhere;

(g) physically damaged media;

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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51 *Id.*

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

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

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

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

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

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

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

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[56] *See supra* note 25.

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

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

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

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

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

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

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

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[60] See LCJ proposed Rule 37(e) "Absent willful destruction for the purpose of preventing the use of information in litigation, a court may not impose sanctions on a party for failing to preserve or produce relevant and material information...."

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

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

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

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

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

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

A. The Cost Of Discovery Is Out Of Control.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Some States And Rules Already Require Requester Pays.

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

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

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

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

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

This situation was also addressed by Professor Esenberg:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. ***Conclusion***

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

Respectfully submitted,

Lawyers for Civil Justice

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

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To: The Hon. David G. Campbell, Chair, Advisory Committee on Civil Rules

Cc: The Hon. Paul W. Grimm, Chair, Subcommittee on Discovery

From: Thomas Y. Allman

Date: March 16, 2012

Re: Adapting Rule 37(e): The Decisive Issue

I. Introduction

It is noteworthy that one of the "sanctions-only" alternatives included in the Memorandum on "Sanctions/Preservation Issues"[1] for the March 22-23, 2012 Meeting is based on existing Rule 37(e). Many of us believe that the most efficacious approach to remedying spoliation angst is through Rule 37(e). That rule was enacted in response to the observation that a "fear of sanctions for inadvertent loss of [ESI]" ha[s] created "an unfair chilling effect and [encouraged] over-retention of information."[2] That problem remains, as we learned at Dallas.

However, the blunt fact is that courts have "all but read [the] safe harbor provision [of Rule 37(e)] out of the rules."[3] Of the cases decided under the existing rule, over 60% of those dealing with the issue apply mechanistic tests that avoid the intent of the rule.[4] The challenge, therefore, is to acknowledge and restore the original intent while providing adequate guidance for parties and the courts.

This Memorandum explores the evolution of Rule 37(e), including the recent clarification adopted by the State of Connecticut which can serve as a model. Some twenty-five states have now adopted Rule 37(e) - or some variant -as part of

[1] Memo, Sanctions/Preservation Issues, at 23-25 ("Adapting Rule 37(e)"), contained within Rule Committee Agenda Book, March 22-23, 2012, at pages 271-273 (hereinafter "Adapting Rule 37(e)"), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03.pdf.

[2] Thomas Y. Allman, Addressing State E-Discovery Issues through Rulemaking: The Case for Adopting the 2006 Federal Amendments, 74 DEF. COUNS. J. 233, 234 (July, 2007).

[3] Hardaway, Berger and Defield, E-discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age, 63 RUTGERS L. REV. 521, 566 (Winter 2011)("once the duty to preserve arises – and it arises as soon as litigation becomes foreseeable – any deletion of relevant data is, by definition, not in good faith").

[4] *See* Appendix. (Case nos. 2, 3, 4, 7, 9, 14, 15, 18, 20, 21, 22, 23, 30, 33, 34, 35, 37 & 38).

the "first-generation" e-discovery approach. The thirty-nine key decisions from federal or state courts dealing with the Rule are summarized in the Appendix.

II. Rule 37(e)

Rule 37(e) limits, in the absence of "exceptional circumstances," rule-based sanctions for losses of ESI resulting from "routine, good faith" operation of information systems. It was hoped that by putting a clear "stake in the ground" - a single, national approach to culpability - the unreasonable aspects of over-preservation in anticipation of litigation could be reduced.[5]

The Rules Advisory Committee adopted what is now Rule 37(e) by a 9-2 vote[6] to establish a new paradigm that inadvertent losses - even those caused by what some courts might consider negligent conduct - were not to be sanctioned if the party acted in "good faith."[7] The Committee rejected a negligence test[8] because "[i]t is unrealistic to expect parties to stop such routine operation of the computer systems as soon as they anticipate litigation [and] is also undesirable [because of the] greater accumulation of duplicative and irrelevant data."[9]

The Rule deals with losses of ESI resulting from the operation of electronic information systems. The examples given to Congress involved software which recycles, overwrites, alters or creates, discards or updates ESI.[10] It applies to losses occurring on large corporate systems as well as those on individual home

[5] The proposed Rules and Committee Notes were transmitted by the Chief Justice together with the Judicial Conference Report and explanatory remarks. *See* RULES TRANSMITTAL, 234 F.R.D. 219, 307 - 398 (April 12, 2006)(reproducing full text of Judicial Conference and Rules Advisory Committee Reports).
[6] Minutes, Civil Rules Advisory Committee, April 14-15, 2005, 43, lines 1848 – 1854 (reflecting text of motion to adopt Rule 37(f) and the fact that "motion passed, 9 yes, 2 no"); copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC0405.pdf.
[7] Changes Made [to Rule 37(f)] After Publication and Comment, RULES TRANSMITTAL, 234 F.R.D. 219, 375(2006)("The present proposal establishes an intermediate standard, protecting against sanctions if the information was lost in the "good faith" operation of an electronic information system").
[8] RULES TRANSMITTAL, 234 F.R.D. 219, 371 (2006)("[t]he text version adopted essentially a negligence test, requiring that the party seeking protection under the proposed rule have taken reasonable steps to preserve information after it knew the information was discoverable in the action").
[9] *Id*. 370.
[10] Introduction to Rule 37(f), RULES TRANSMITTAL, 234 F.R.D. 219, 370 (2006)(listing examples of information system operations which are covered by the Rule under current technology).

computers[11] operated by parties, whether they are plaintiffs or defendants, or by their employees or agents.[12]

The Problem

Unfortunately, however, the usefulness of Rule 37(e) markedly declined after early decisions[13] interpreted the Rule to require immediate "intervention" in routine operations by use of a litigation hold once a duty attached regardless of the lack of culpability.[14] The Advisory Committee Note to Rule 37(f)(2006) created this anomaly by stating that, *inter alia*, "[w]hen a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold."[15]

As one judge has put it, "if you don't put in [an effective] litigation hold when you should there's going to be no excuse if you lose information."[16]

Thus, in *Major Tours v. Colorel*, the court held that the Rule *requires* that "any automatic deletion feature should be turned off and a litigation hold imposed once litigation can be reasonably anticipated."[17]

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[11] Coburn v. PN II, Inc., 2010 WL 3895764, at *3 (n. 3)(deletions from a home computer by use of "cleaner" software are covered).
[12] Miller v. City of Plymouth, 2011 WL 1458491, at *3, n.1 (N.D. Ill. April 15, 2011)(involvement by system operators in accomplishing the task does not take the loss outside the scope of the rule).
[13] Burns, et.al., E-Discovery: One Year of the Amended Federal Rules of Civil Procedure, 64 N.Y.U. ANN. SURV. AM L. 201, 221 (2008)(citing "trend" which "appears to hold that litigants must disable [deletion] features to be able to take advantage of Rule 37(e)").
[14] Disability Rights v. WMTA, 242 F.R.D. 139, 146 (D.D. C. June 1, 2007); Peskoff v. Faber, 244 F.R.D. 54, 60 (D.D.C. August 27, 2007); United States v. O'Keefe, 537 F. Supp. 2d 14, at *22 (D.D.C. Feb. 18, 2008); Doe v. Norwalk Community College, 248 F.R.D. 372, 379 (D. Conn. July 16, 2007); In re Krause, 367 B.R. 740, 768 (Bky. D. Kan. June 4, 2007); Pandora v. Chamilia, 2008 WL 4533902, at *8, n.7 (D. Md. Sept. 30, 2008); Keithley v. Home Store, 2008 WL 3833384, at 4-*5 (N.D. Cal. Aug. 12, 2008); KCH Services v. Vanaire, 2009 WL 2216601 (W.D. Ky. July 22, 2009); In re Kessler, 2009 WL 2603104, at *18 (E.D. N.Y. March 27, 2009); Major Tours v. Colorel, 2009 WL 2413631, at *4 (D. N.J. Aug. 4, 2009); Wilson v. Thorn Energy, 2010 WL 1712236, at *3 (S.D. N.Y. March 15, 2010); Cannata v. Wyndham Worldwide Corporation, 2011 WL 3495987 (D. Nev. Aug. 10, 2011).
[15] Committee Note, Rule 37(f)(2006). The Note also states that "[g]ood faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation, if that information is subject to a preservation obligation."
[16] Panel Discussion, Sanctions in Electronic Discovery Cases: Views from the Judges, 78 FORDHAM L. REV.1, 30-31 (October, 2009)(Scheindlin, J).
[17] Major Tours v. Colorel, *supra*, 2009 WL 2413631, at *4 (D. N.J. Aug. 4, 2009).

III. Addressing the Issues

Since 2006, Rule 37(e) or a variant of it, has been adopted by Alabama,[18] Alaska,[19] Arizona,[20] Arkansas,[21] California,[22] Connecticut,[23] Indiana,[24] Iowa,[25] Kansas, Louisiana,[26] Maine,[27] Maryland,[28] Michigan,[29] Minnesota,[30] Montana,[31] New Jersey,[32] North Carolina,[33] North Dakota,[34] Ohio,[35] Oklahoma,[36] Tennessee,[37] Utah,[38] Vermont,[39] Wisconsin[40] and Wyoming.[41] It is part of the pending proposals in Massachusetts,[42] but not Florida.[43]

As explained in *Technical Sales v. Ohio Star Forge*,[44] one of reported decisions which "got it right,"[45] the rule "is intended to protect a party from

[18] ALA. R. CIV. P. Rule 37(g).
[19] ALASKA R. CIV. PROC. 37 (f)(2010).
[20] ARIZ. R. CIV. P. 37(g)(2010); ARIZ. FAM. LAW PROC. R. 65(E)(2010).
[21] ARCP Rule 26.1(e).
[22] CAL CODE CIV. PROC. §§ 1985.8(l); 2031.60(i); 2031.300(d); 2031.310(j); 2031.320(d)(2009)(extending the scope of the safe harbor to apply to "any attorney of a party" and broadening scope to include sanctions issued under inherent powers).
[23] Sec. 13-14 CONNECTICUT PRACTICE BOOK (2011)(eff. Jan. 2012).
[24] IND. R. TRIAL P. 37(e)(2010).
[25] IOWA R. CIV. P. 1.517(6)(2010).
[26] LA. C.C.P. ART. 1471 (2010)(B)(Acts 2008, No. 824, eff. Jan. 1, 2009).
[27] ME. R. CIV. P. 37(e)(2010).
[28] MD. RULE 2-433 (2010).
[29] MCR 2.302(B)(5)(2010) and MCR 2.313(E)(2010); *see* Gillett v. Mich. Farm Bureau, 2009 WL 4981193 (Mich. App. 2009)(safe harbor inapplicable since not in effect at time of court order).
[30] MINN. R. CIV. P. 37.05 (2010).
[31] MONT. CODE ANNO., Ch. 20, Rule 37(e)(2010)
[32] N.J. COURT RULES, R. 4:23-6 (2010).
[33] N.C. G.S. 1A 1, RULE 37 (2011).
[34] N.D. R. CIV. P. Rule 37(f) (2010).
[35] OHIO CIV. R. 37(F)(2011)(with the addition of "factors" to be considered in determining whether to impose sanctions).
[36] 12 OKLA. ST. § 3237(G)(2010)(broadened to include sanctions issued under inherent powers).
[37] TENN. R. CIV. P. Civ. P. 37.06(2)(2010).
[38] UCRP Rule 37(g)(2010)(acknowledging inherent power to sanction for spoliation)(*see also* Daynight v. Mobilight, 248 P.3d 1010 (C.A. Jan. 27, 2011).
[39] V.R.C.P: Rule 37(f) (2010).
[40] WIS. STATS. § 804.12(4m).
[41] WYO. R. CIV. PROC. Rule 37(f)(2010).
[42] MASS. RULE (PROPOSED) 37(f), copy at http://www.mass.gov/courts/sjc/docs/Rules/reporters-notes-comment-civil-proc-rules-051311.pdf.
[43] Florida, unique among the states, does not acknowledge a duty to preserve in anticipation of litigation, which is the most prominent generator of spoliation sanction allegations.
[44] 2009 WL 728520, at *8 (E.D. Mich. March 19, 2009).

sanctions where the routine operation of a computer system inadvertently overwrites potentially relevant evidence, not when the party intentionally deletes electronic evidence." At the most, the absence of an effective litigation "bear[s] on good faith,"[46] but does not define it, since something akin to bad faith is required to negate good faith. While a litigation hold is a useful best practice, it is best seen as presumptive evidence of compliance, not a condition precedent to satisfaction of the duty to preserve.[47]

Clarification

Connecticut was privy to the issues involving Rule 37(e) at the time it drafted its counterpart in 2011.[48] This includes the fact that Rule 37(e) was intended to reject the view of the Second Circuit as expressed in *Residential Funding Corp.* that a "culpable state of mind requirement" is satisfied "even [by] the negligent destruction of documents [or ESI]" because each party should bear the risk of its own negligence." [49]

Accordingly, the Connecticut Superior Court Practice Book, Section 13-14 (2011), effective in January, 2012, addressed the issue by providing clarification that a court:

> "may not impose sanctions on a party for failure to provide information, including electronically stored information, lost as the result of the routine, good-faith operation of a system or process in the absence of a showing of intentional actions designed to avoid known preservation obligations."[50]

Something along these lines could be usefully incorporated into any "sanctions-only" solution adopted by the Rules Committee, whether an enhanced

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[45] *See* Appendix (Case nos. 5, 6, 8, 12, 17, 24, 25, 26, 27, 28, 29 & 31).
[46] RULES TRANSMITTAL, 234 F.R.D. 219, 372 (2006)("The steps taken to implement an effective litigation hold bear on good faith").
[47] *See* Victor Stanley v. Creative Pipe, 269 F.R.D. 497, 524 (D. Md. Sept. 9, 2010)("intervention in routine operations [should be] unnecessary unless the failure to do so [was] intended to deprive another of the use of relevant evidence")(quoting from Author's post-Conference submission after the 2010Duke Conference).
[48] Thomas Y. Allman, Preservation Rulemaking After the 2010 Litigation Conference, 11 SEDONA CONF. J. 217, 228 (2010).
[49] 306 F. 3d 99, 107, 108 (2nd Cir. 2002)(a); *cf. e.g.,* Micron Technology v. Rambus, 645 F.3d 1311 (Fed. Cir. May 13, 2011); Vick v. Texas Employment Comm., 514 F. 2d 734, 737 (5th Cir. June 12, 1975).
[50] Sec. 13-14 CONNECTICUT PRACTICE BOOK (2011), at 107PB-110 PB, copy at http://www.jud.ct.gov/Publications/PracticeBook/PB_070511.pdf.

version of Rule 37(e), broadened as suggested, or as part of the "blended" approach to a more comprehensive Rule 37(e) as suggested by the Subcommittee in its recent "Sanctions/Preservation Issues" Memorandum.[51]

Inherent Power

As noted at the Dallas Mini-Conference, "[r]ule 37(e) is too cautious and limited. It should focus on bad faith [and] the current rule's limitation to sanctions 'under these rules' should be eliminated because it provides no limit on sanctions under the court's inherent power."[52]

It is important to "signal" to courts – many of whom missed the message[53] – that as a matter of policy, Rule 37(e) should be applied even in those cases where the court chooses to exercise its inherent powers. Rule 37(b)(2)(A) could also provide that the listed sanctions apply "[if a party] fails to obey an order to *preserve evidence* or provide or permit discovery and Rule 37(c)(1) could be amended to authorize sanctions if a party "fails to *preserve or* provide information *as required by these rules or by known preservation obligations"* (additional material in italics)." [54]

IV. Concluding Remarks

The drafters of the 2006 Amendments assumed that Rule 37(f), now Rule 37(e) had adequately codified the "common sense" observation that inadvertent conduct did not deserve severe sanctions. That has not turned out to be the case. It is time, therefore, to "finish the job."

[51] Adapting Rule 37(e), Agenda Book, at pages 271-273.
[52] See Dallas Minutes, at 17 (Allman remarks), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Materials/Notes%20from%20the%20Mini-Conference%20on%20Preservation%20and%20Sanctions.pdf.
[53] Johnson v. Wells Fargo Home Mortgage, Inc., 2008 WL 2142219, at *8 (D. Nev. May 16, 2008); Nucor v. Bell, 251 F.R.D. 191, 196 n. 3 (D.S.C. Feb. 1, 2008)(refusing to apply Rule 37(e) to sanctions issued under inherent power even if the conduct would otherwise be covered by the rule).
[54] *See* Chambers v. NASCO, 501 U.S. 32, 50 (1991)(a court should "ordinarily" rely on the Rules rather than inherent power); Kovilic Construction v. Missbrenner, 106 F.3d 768, 773 (7th Cir. 1997)(inherent power should be used "only when no direct conflict with laws or national rules of procedure").

APPENDIX: The cases

The cases are arranged by year of decisions, with individual cases within a year being alphabetized by use of the first name of the case.

2007

1. **(2007) Cache La Poudre (Mag.).** Cache La Poudre Feeds v. Land O'Lakes, 244 F.R.D. 614, 628, n. 13 (D. Colo. March 2, 2007)("newly enacted Rule 37(f) provides limited protection against sanctions where a party fails to provide [ESI] lost as a result of the routine, good-faith operation of an electronic information system." The court also noted that "[b]ad faith is the antithesis of good faith." (628, n.13).

2. **(2007) Columbia Pictures (Mag.).** Columbia Pictures Industries v. Bunnell, 2007 WL 2080419 (C.D. Cal. May 29, 2007), motion to revise denied at 245 F.R.D. 443 (C.D. Cal. Aug. 24, 2007)("[a] 'good faith' operation may require a party to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation"[citing Committee Note]) (*14).

3. **(2007) Disability Rights (Mag.)** Disability Rights Council v. WMTA, 242 F.R.D. 139 (D.D.C. June 1, 2007)("it is clear that this Rule [Rule 37(e)] does not exempt a party who fails to stop the operation of a system that is obliterating information that may be discoverable in litigation") (146).

4. **(2007) Doe.** Doe v. Norwalk Community College, 248 F.R.D. 372, 2007 WL 2066497 (D. Conn. July 16, 2007)(refusing to apply Rule 37(f) because Commentary to Rule indicates that "in order to take advantage of the good faith exception, a party needs to act affirmatively to prevent the system from destroying or altering information, even if such destruction would occur in the regular course of business."(378). Also, the defendants did not have one consistent, "'routine'" system in place, citing inconsistencies in applying policy. (378).

5. **(2007) Escobar.** Escobar v. City of Houston, 2007 WL 2900581 (S.D. Tex. September 29, 2007)(applying Rule 37(f) because "if the electronic communications were destroyed in the routine operation of the HPD's computer system, and if there is no evidence of bad faith in the operation of the system that led to the destruction of the communications, sanctions are not appropriate." (*18). The plaintiffs "do not point to specific evidence" in the record "demonstrating that the City knew that information relevant to the shooting was being destroyed because of the feature of the . . .system's routine operation that e-mails were destroyed after ninety days." Thus, "there is no showing that relevant electronic communications were destroyed or that the destruction occurred in bad faith." (*19).

6. **2007) Krause.** In re Krause**,** 367 B.R. 740 (Bkrtcy. D. Kan. June 4, 2007) ("willfully and intentionally" destroying ESI through use of software program is not engaging in a good faith routine operation of a computer. (767) [citing Rule 37(f) and quoting the Committee Note that a party is not permitted to exploit the routine operation to thwart discovery obligations].

7. **(2007) Pescoff (Mag.)** Peskoff v. Faber, 244 F.R.D. 54 (D.D.C. August 27, 2007)("not turning the automatic deletion feature off once informed of pending litigation may serve as a premise for additional judicial action, including a sanction, without offending amended Rule 37(f)") (*60).

8. **(2007) U&I (Mag.). U & I Corporation v. Advanced Medical Design,** 2007 WL 4181900 (M.D. Fla. Nov. 26, 2007)("[a]ccording to the Advisory Committee Note to Rule 37(f), Fed. R.Civ.P., this subsection applies to information lost due to the routine operation of an information system only if the operation was in good faith. An analysis of good faith depends on the circumstances of each case") (*6).

9. **(2007) United Medical.** United Medical Supply Company v. United States, 77 Fed. Cl. 257 (Fed. Cl. June 27, 2007)(the fact "[t]hat the Advisory Committee would need to adopt a limited 'good faith' exception to the imposition of sanctions belies the notion such sanctions should be imposed only upon a more traditional finding of 'bad faith") (270, n. 24).

2008

10. **(2008) John B. (6th Cir).** John B. v. Goetz, 531 F.3d 448 (6th Cir. 2008). "It is the responsibility of the parties to ensure that relevant ESI is preserved, and when that duty is breached, a district court may exercise its authority to impose appropriate discovery sanctions. See Fed. R. Civ. P. 37(b), (e)." (459).

11. **(2008) Johnson (Mag.).** Johnson v. Wells Fargo Home Mortgage, Inc., 2008 WL 2142219, at *8 (D. Nev. May 16, 2008). Court sanctioned a Plaintiff for reformatting hard drives under its inherent power (*2) and rejected Rule 37(e) because the conduct "was not in violation of any discovery order governed by Rule 37." (*3, n.1)

12. **(2008) Meccatech (Mag.)** Meccatech v. Kiser, 2008 WL 6010937 (D. Neb. April 2, 2008)(harsh sanctions recommended because "relevant [ESI] in the possession of the defendants was intentionally destroyed or withheld by them or their agents and was not 'lost as a result of the routine, good-faith operation of an electronic information system.' See Fed. R. Civ.P. 37(e)." The court concluded that "all the defendants acted in bad faith by intentionally destroying evidence" in "furtherance of their 'desire to suppress the truth") (*9).

13. **(2008) Nucor.** Nucor v. Bell, 251 F.R.D. 191 (D.S.C. Feb. 1, 2008)(Rule 37(e) is inapplicable "when the court sanctions a party pursuant to its inherent powers." (196 at n. 3) "Assuming *arguendo* that defendants' conduct would be protected under the safe-harbor provision, Rule 37(e)'s plain language states that it only applies to sanctions imposed under the Federal rules of Civil Procedure (e.g., a sanction made under Rule 37(b) for failure to obey a court order") (197 at n. 3).

14. **(2008) Pandora.** Pandora v. Chamilia**,** 2008 WL 4533902 (D. Md. Sept. 30, 2008)(Rule 37(e)(the "failure to preserve documents does not fall within the protected scope of Rule 37(e)" because the party had a duty to preserve at the time of the deletion [citing advisory committee note]) (*8, n. 7). The court conceded that "[w]hile the court cannot concluded that [the party] acted in bad faith, it does appear that [it] was grossly negligent in its failure to preserve evidence. *See Zubulake IV*, 220 F.R.D. at 220 ('once the duty to

preserve attaches, any destruction of documents is, at a minimum, negligent.')"(*9)].

15. **(2008) Riverside Healthcare (Bkrcy).** In re Riverside Healthcare, Inc., 393 B.R. 422 (M.D. La. Sept. 11, 2008). A court refused to sanction where a computer system had routinely deleted email since even if a duty to preserve existed, there was no proof that a "culpable state of mind" existed. (430) The court noted that Rule 37(f), renumbered as Rule 37(e) "limits a court's ability to sanction where loss of information results from good faith operation of [an] electronic information system." (429, n.21)

16. **(2008) Texas.** Texas v. City of Frisco**,** 2008 WL 828055 (E.D. Tex. March 27, 2008). The court noted that while the Rules "do not specifically address pre-suit litigation hold requests, "they contemplate that "parties will act in good faith in the preservation and production of documents. See Fed. R. Civ. P. 37. (*4).

17. **(2008) US v. O'Keefe (Crim.)(Mag.)** United States v. O'Keefe, 537 F. Supp. 2d 14 (D.D.C. Feb. 18, 2008)(in criminal case, Magistrate noted that Rule 37(e) is the analogue to the principle that destruction of evidence "pursuant to a neutral policy and without evidence of bad faith" does not violate the due process clause if it was destroyed before the defendants raised the "possibility that it was exculpatory and the government had no objective reason to believe that it was exculpatory") (*22).

2009

18. **(2009) Adams (Mag.).** Phillip M. Adams & Associates v. Dell, Inc., 621 F. Supp. 2d 1173 (D. Utah March 30, 2009)(rejecting arguments based on Rule 37(e) because expert report did not deal with good faith and did not show familiarity with the practices pointed out in the declarations of employees nor evaluate the risk of the fact that the "data is at the mercy of individual employee's backup practices." (1192). The court held that the information did not "demonstrate: that the loss of ESI was "within the safe harbor provision" (1192).

19. **(2009) Gillett (Michigan).** Gillett v. Michigan Farm Bureau, 2009 WL 4981193 (C.A. Mich. Dec. 22, 2009)(MCR 2.313(E) [Rule 37(e) counterpart] inapplicable because enacted after lower court ruling and, in any event, lower court had rejected the argument that the deletion was inadvertent, even though it did not find that that plaintiff had "acted in bad faith") (*1, *3).

20. (**2009) KCH Services.** KCH Services v. Vanaire**,** 2009 WL 2216601 (W.D. Ky. July 22, 2009)("continuing to delete and over-write, even after receipt of a preservation letter" is beyond the scope of 'routine, good faith operation of an electronic information system.'"[citing Rule 37(e)]. (*1). In any event "[w]hether the evidence was lost in good faith or was 'an intentional attempt to destroy evidence'" the plaintiff is "bereft of the very subject of the litigation as well as any e-mail correspondence contemporaneous to the software's installation and use") (*1).

21. **(2009)Kessler.** In re Kessler, 2009 WL 2603104, at *18 (E.D. N.Y. March 27, 2009)(District Judge adopted Magistrate Report without comment on Magistrate finding that Rule 37(e) is not applicable because the parties failed to take steps required to preserve as outlined in Rule 37(e) and "[t]he Advisory Committee Notes make it clear" that 'intervention in the routine operation of an information system' is "required" when a party is under a duty to preserve) (*18).

22. **(2009) Major Tours (Mag.).** Major Tours v. Colorel ("Major Tours I"), 2009 WL 2413631 (D. N.J. Aug. 4, 2009)("[t]he Advisory Committee comments to Fed. R. Civ. P. 37(e) further prescribe that any automatic deletion feature should be turned off and a litigation hold imposed once litigation can be reasonably anticipated") (*4).

23. **(2009) Mohrmeyer (Mag.).** Mohrmeyer v. Wal-Mart, 2009 WL 4166996 (E.D. Ky. Nov. 20, 2009)(Rule 37(e) was cited by analogy in holding that "it would be improper for this court to impose any type of sanction" where "evidence was discarded as a result of [a] routine, good-faith records management practices long before [the party] received any notice of the likelihood of litigation") (*3).

24. **(2009) Southeastern Mechanical (Mag).** Southeastern Mechanical Services v. Brody, 2009 WL 2242395 (M.D. Fla. July 24, 2009). (refusal to sanction failure to prevent "[t]he automatic overwriting of SMS's server backup tapes [which] was part of the company's routine document management policy" because "[i]n accordance with the traditional view that spoliation sanctions must be predicated on bad faith [Floeter, 2007 WL 486633], Rule 37(e) sanctions have been deemed inappropriate where electronic communications are destroyed pursuant to a computer system's routine operation and there is no evidence that the system was operated in bad faith." [citing *Escobar*, 2007 WL 2900581 at *18 "but see" *Peskoff*, 244 FRD 54, 60])(*3) "While SMS may have failed to implement a proper litigation hold, Defendant does not point to specific evidence in the record demonstrating that SMS intentionally destroyed the backup tapes in bad faith."(*3). "Thus, spoliation sanctions are not appropriate") (*4).

25. **(2009) Technical Sales.** Technical Sales v. Ohio Star Forge, 2009 WL 728520 (E.D. Mich. March 19, 2009). A court sanctioned a party for deletions of emails and files during the pendency of litigation and the party was aware that TSA was seeking a forensic examination. (*9). The court held that "[t]his rule [37(e)] is intended to protect a party from sanctions where the routine operation of a computer system inadvertently overwrites potentially relevant evidence, not when the party intentionally deletes electronic evidence." (*8).

2010

26. **(2010) Coburn (Mag.).** Coburn v. PN II, Inc., 2010 WL 3895764, at *3 (n. 3)(in assessing deletions from a home computer through use of "CCleaner," "destruction of emails as part of a regular good-faith function of a software application may not be sanctioned absent exceptional circumstances", citing Rule 37(e)). The court ultimately ruled, using its inherent powers, that it was not convinced that "the running of CClearner alone compels the conclusion that Coburn destroyed relevant evidence 'in bad faith, vexatiously, wantonly, or for oppressive reasons'") (*4).

27. **(2010) Olsen.** Olson v. Sax**,** 2010 WL 2639853 (E.D. Wis. June 26, 2010). In a title VII challenging a termination for theft, the court applied Rule 37(e) in refusing to sanction a failure to interrupt the overwriting of a surveillance digital video record hard drive that "essentially records in a loop" as part of Goodwill's normal retail store operations. The evidence indicated that the overwriting was "Part of Goodwill's routine good faith" operation of its video system and "there is no evidence that Goodwill engaged in the 'bad faith' destruction of evidence for the purpose of hiding adverse evidence," citing Trask-Morton v. Motel 6 Operating L.P., 534 F672, 681 (7th Cir. 2008). "Therefore, pursuant to Rule 37(e) of the Federal Rules of Civil Procedure, the Court denies Olson's motion for sanctions." (*3)

28. **(2010) Rimkus.** Rimkus Consulting v. Cammarta, 688 F. Supp. 2d 598 (S.D. Tex. Feb. 19, 2010.) In an action brought against former employees who had preemptively sued in Louisiana, the court held a purported two-week deletion policy would be left to the jury to evaluate under the jury instruction based on Fifth Circuit requirements [which require bad faith, as compared to other circuits to ascertain if they acted to prevent the use of the information in litigation.] The court described Rule 37(e), which it defined as applying to information not lost "through intentional acts intended to make evidence unavailable in litigation" (612) and concluded it did not apply here (642) because the deletion of email was not through the "routine, good faith operation" of the system (642) but the result of "intentionally deleted to prevent their use in anticipated or pending litigation." (607) The

court held that "a policy put into place after a duty to preserve had arisen, that applies almost exclusively to emails subject to that duty to preserve, is not a routine, good-faith operation of a computer system." (642). This "selectively implemented" policy led to the destruction of potentially relevant evidence and the jury will be instructed on the topic. (646-647).

29. **2010) Streit.** Streit v. Electronic Mobility Controls, 2010 WL 4687797 (S.D. Ind. Nov. 9, 2010). District Judge noted, after quoting Rule 37(e), that "[s]tated otherwise, a showing of bad faith by the non-moving party is a prerequisite to imposing sanctions for the destruction of [ESI]" for routine losses. The court cited a Seventh Circuit opinion Mathis, 136 F. 3d 1153, 1155 (7th Cir. 1998) for the proposition that "'bad faith' means destruction for the purpose of hiding adverse information." The court also noted that its power to sanction in inherent and not governed by rule or statue and ultimately concluded that plaintiffs had not shown that the overwriting of storage blocks on the automotive datalogger was caused by actions in bad faith (#2)

30. **(2010) Wilson (Thorn)(Mag.).** Wilson v. Thorn Energy**,** 2010 WL 1712237 (S.D. N.Y. March 15, 2010**)(**court refused to apply Rule 37(e) to the loss of a flash drive containing only copy of materials sought in discovery because its loss was not "routine" [not "overridden or erased as part of a standard protocol"] and, in any event, they had a "duty to make a copy of the files on the flash drive" and the "failure to do so means that they failed to act in good faith. Rule 37(e) consequently does not preclude an award of sanctions." (*3).

2011

31. **(2011) Bootheel.** Bootheel Ethanol Investments v. Semo Ethanol Cooperative, 2011 WL 4549626 (E.D. Miss. Sept. 30, 2011)(applying Rule 37(e) to an explanation that ESI was lost because a computer was inoperative due to a "failure of technology," at the time the party knew or should have known it contained discoverable information, the court held that its "inquiry on this matter therefore hinges on [the party's] intent" (*5) and while he probably did not act "in good faith by attempting to have the computer recovered himself (by taking it to Home Depot, which analyzed the computer free of charge)" before throwing it away, the court decided to hear "live testimony" about the issues at trial before make the final determination on whether an adverse inference was appropriate) (*5).

32. **(2011) Bryden (Mag.).** Bryden v. Boys and Girls Club of Rockford, 2011 WL 843907 (N.D. Ill. March 8, 2011). A Magistrate judge denied a motion for sanctions as premature, while noting that it "should not impose sanctions on a party for failing to preserved [sic] electronically stored information as a result of the routine, good-faith operation of an electronic information system [citing to R. 37(e)]. (*1).

33. **(2011) Cannata (Mag.)** Cannata v. Wyndham Worldwide Corporation, 2011 WL 3495987 (D. Nev. Aug. 10, 2011)("The Advisory Committee's comments to Rule 37(e) provide that any automatic deletion feature should be turned off once a litigation hold is imposed.").

34. **(2011) Daynight – Utah**. Daynight v. Mobilight, 248 P.3d 1010 (C.A. Utah Jan. 27, 2011)(under rule 37(g) of the Utah rules ["nothing in this rule limits the inherent power of the court to take *any action authorized by Subdivision (b)(2)*if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty] spoliation is on a qualitatively different level than a simple discovery abuse under rule 37(b)(2), which typically pertains only to a delay in the production of evidence." Here, the destruction of a laptop did not qualify for "good-faith exception" since the actions of throwing it off a building and running over it with a vehicle "unquestionably demonstrate bad faith and a general disregard for the judicial process") (*1).

35. **(2011) Kermode v. University of Mississippi,** 2011 WL 2619096 (S.D. Miss. July 1, 2011)(sanctions denied under Rule 37(e) because "the subject e-mails were apparently deleted as part of the e-mail system before reason existed to preserve them in another format") (*3).

36. **(2011) Miller v. City of Plymouth,** 2011 WL 1458491 (N.D. Ind. April 15, 2011)(Rule 37(e) applied broadly with respect to failure to retain video recording from police car. The opinion holds that mere human involvement does not prevent the operation from being included as a routine operation).

37. **(2011) Northington (Mag.).** Northington v. H & M International, 2011 WL 663055 (N.D. Ill. Jan. 12, 2011); report adopted by District Judge, 2011 WL 662727 (N.D. Ill. Feb. 14, 2011). (Rule 37(e) "addresses an aspect of culpability and good faith in the context of ESI" [noting that the Committee Notes "clarify that '[g]ood faith in the routine operation may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a duty to preserve") (*14).

38. **(2011) Point Blank.** Point Blank Solutions v. Toyobo Am., Inc., 2011 WL 1456029 (S.D. Fla. Apr. 5, 2011)(court noted in passing that "'Rule 37 authorizes the imposition of sanctions for failure to comply with the court's rules" and seemed to feel that Rule 37(e) required a party to take affirmative steps when information was subject to a duty to preserve, citing Fed.R.Civ.P. 37, advisory committee notes to 2006 amendments) (at *10).

39. **(2011) Viramontes.** Viramontes v. U.S. Bancorp**,** 2011 WL 291077 (N.D. Ill. Jan. 27, 2011) (Rule 37(e) restricts the imposition of sanctions when information is lost due to the routine operation of a party's computer system if the operation was in good faith." and "[w]ith these governing legal standards in mind and after review the record" (*3) that there was "no evidence that the emails were destroyed in bad faith, or, put another way, that the destruction was done by U.S. Bank for the purpose of hiding unfavorable information") (*5).

TAB A-7

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Early Stages of Litigation Attorney Survey

Report to the Judicial Conference Advisory Committee on Civil Rules

Emery G. Lee III

Federal Judicial Center
March 2012

Contents

Executive Summary

At the request of the Judicial Conference Advisory Committee on Civil Rules, the Federal Judicial Center designed and conducted a closed-case survey about the early stages of litigation, especially Federal Rules of Civil Procedure 26(f) and 16(b). The survey was sent to almost 10,000 attorneys of record in civil cases terminated in July–September 2011 and yielded a 36% response rate.

Key findings of the survey include:

- 72% of all survey respondents reported that, in the sampled case, they met and conferred with the opposing side to plan for discovery, as required by Rule 26(f). Among respondents also reporting a Rule 16(b) scheduling conference with a judge in the sampled case, the comparable figure was 92%.
- The most common method of conducting the Rule 26(f) meeting was by telephone or videoconference, reported by 86% of respondents with a meeting.
- Most respondents with a Rule 26(f) meeting in person and/or by telephone reported that the meeting lasted between 10 and 30 minutes.
- 71% of respondents with a Rule 26(f) meeting reported that the meeting assisted them in making arrangements to make initial disclosures in the sampled case, 60% reported that it helped in developing a proportional discovery plan, 50% reported that it helped them to better understand the opposing side's claims and/or defenses, 40% reported that they discussed discovery of electronically stored information, and 30% reported that the meeting increased the likelihood of a prompt resolution of the sampled case.
- Of the 40% of respondents reporting a discussion of discovery of electronically stored information at the Rule 26(f) meeting, 60% reported discussing preservation obligations.
- 50% of all respondents, and 60% of respondents with a Rule 26(f) meeting, reported a Rule 16(b) scheduling conference, either in person or by telephone, with a judge in the sampled case.
- Most respondents with a Rule 16(b) conference in person or by telephone reported that the conference lasted between 10 and 30 minutes.
- 94% of respondents with a Rule 16(b) conference also reported a scheduling order in the sampled case.
- Attorneys representing plaintiffs at least half of the time were asked whether their pleading practices have changed since the *Twombly* and *Iqbal* decisions. Half said yes, half said no. The most common change in pleading practices reported was including more factual detail in complaints, reported by 92% of those with changed practices.

Background

At its November 2011 meeting, the Judicial Conference Advisory Committee on Civil Rules requested that the Federal Judicial Center (FJC) design and conduct a survey[1] about the early stages of litigation, focused on Federal Rules of Civil Procedure 26(f) and 16(b). The survey was designed with the assistance of members and staff of the advisory committee. Because some parts of the survey touched upon case events that might occur in a relatively small subset of cases, such as the discussion of preservation obligations related to electronically stored information, the decision was made to survey a rather large sample of attorneys. A 24% sample was drawn from 29,627 civil cases terminated in July–September 2011, after excluding several nature-of-suit codes[2] and cases that terminated in less than 90 days. From those 7,134 cases, emails for 12,334 attorneys were drawn from the courts' records. After de-duplication, this yielded almost 10,000 attorney emails—9,978, to be precise, almost equally divided between plaintiff and defendant attorneys in the sampled cases. An email inviting these attorneys to answer the survey was sent in mid-January 2012, with one reminder email in late January. The survey drew 3,552 responses, for a response rate of 36%.

Rule 26(f) Meetings

Incidence of Rule 26(f) Meetings

In what percentage of cases are parties meeting and conferring to plan for discovery, as required by Rule 26(f)? This is not as straightforward a question as it may at first appear. Many cases terminate in a relatively short time, for example, and thus will not endure long enough for a meeting of the parties for this purpose. (Throughout this report, I will use the term "meeting," although parties may complete their Rule 26(f) obligations without, in fact, ever meeting in person. I will clarify when in-person meetings are meant.) Other cases terminate by default judgment—it would be difficult to meet with a defendant who does not answer.

The survey asked, "After the filing of the complaint and before the first Rule 16(b) conference (sometimes called a scheduling or case management conference), did you or any attorney for your client confer with opposing counsel—by telephone, correspondence, or in person—to plan for discovery in the named case (hereinafter "the conference")?" As can be seen in Table 1,[3] fully 72% of respondents answered yes, 21% no, and 7% declined to answer. Considering just the first two responses, 78% of respondents reported a Rule 26(f) meeting and 22% reported that there was no such meeting.

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1. My FJC colleagues Margaret Williams and George Cort provided invaluable assistance in conducting this research.

2. *See* Emery G. Lee III & Thomas E. Willging, Federal Judicial Center National, Case-Based Civil Rules Survey (Federal Judicial Center, October 2009) (hereinafter "Civil Rules Survey"), at 77, for a discussion of sampling methods. The sampled cases were drawn exclusively from original proceedings and removals from state court.

3. Tables are found in the Appendix.

It may be useful to compare this finding to other studies. Recently, the FJC survey of attorneys in recently closed complex cases in the Southern District of New York found that 59% of respondents reported a Rule 26(f) meeting; the comparable figure for respondents answering yes or no was 68%. The 2009 Civil Rules survey included the same question. In that survey, 83% of respondents indicated that a Rule 26(f) meeting had taken place in the sampled case.[4] The comparable figure for respondents answering yes or no was 86%. The 2009 results, however, are limited to respondents who also reported that some sort of discovery took place in the sampled case. That is probably the reason that the 2009 Civil Rules survey produces the highest percentage of respondents reporting a Rule 26(f) meeting of the three studies.

The lack of a Rule 26(f) meeting does not necessarily mean that the parties disregarded the rule. As can be seen in Table 1, Rule 26(f) meetings were reported by 92% of respondents who also reported a Rule 16(b) scheduling conference in the sampled case but by only 61% of respondents who reported that there was no Rule 16(b) scheduling conference. This suggests that the parties are planning for discovery in almost all cases that get as far as a Rule 16(b) scheduling conference.[5] Moreover, the survey followed up with respondents who indicated that no Rule 26(f) meeting had taken place in the sampled case (Table 2). The most common reason given (other than "other") was that the case had been resolved before a conference could be held, 30%. Another 12% of respondents indicated that the case was of a type exempted from Rule 26(f). Moreover, a large number of the other responses indicated that the case was not one in which a Rule 26(f) meeting would be likely to occur (e.g., remands, default judgments, review of an administrative record without discovery).

The survey included response options for the "why not" question that are, from a Rules-perspective, simply invalid. Relatively few respondents selected these options: 6% reported that the parties agreed to forgo the Rule 26(f) meeting in the sampled case, 5% that one side refused to meet, and 2% that, "As a general practice, I do not participate in those conferences." (That 2% comprised 17 attorneys.)

In sum, the available evidence suggests that Rule 26(f) meetings are being conducted in most civil cases—at least 70%—and that these meetings are being held in the vast majority of cases in which discovery takes place or a Rule 16(b) conference is held.

How Rule 26(f) Meetings Are Conducted

The most common form of meeting was by telephone or videoconference, reported by 86% of respondents with a Rule 26(f) meeting in the sampled case (Table 3). Conferring by correspondence, including email, was reported by 25% of respondents. Only 9% of respondents reported an in-person meeting as part of the

4. Civil Rules Survey, *supra* note 2, at 7.

5. An FJC study found that the average time from case filing to entry of the first docketed scheduling order was 4.1 months. *See* Emery G. Lee III, The Timing of Scheduling Orders and Discovery Cut-Offs (Federal Judicial Center, October 2011), at 2.

Rule 26(f) process. (And obviously, respondents could indicate multiple forms of meeting.)

Respondents reporting a telephonic and/or in-person meeting were asked to estimate how long, in total, the meeting(s) took. As can be seen in Table 4, the most common response was 10–30 minutes, reported by 54% of all respondents. Fully 73% of all respondents reporting a Rule 26(f) meeting by telephone and/or in-person reported that the meeting took 30 minutes or less.

Given the generally short amount of time reportedly spent in most Rule 26(f) meetings, it is not surprising that 74% of respondents reported that they were able to complete the meeting in a single conversation. Fully 96% of respondents reported that they had sufficient time to adequately plan for discovery prior to the Rule 16(b) conference.

The survey also asked, "Prior to the conference, did you receive any instruction from the court—beyond what is found in the national rules—on how to conduct the conference?" Fully 34% of respondents answered affirmatively. Of those respondents, 44% reported that the instructions were in the form of a local rule and/or standing order; 33%, an order in the case; 32%, the individual practices of the presiding judge; 6%, other communication from the court; and 2%, other (Table 5).

Attorney Evaluations of the Rule 26(f) Meeting

Respondents reporting a Rule 26(f) meeting in the sampled case were asked a series of questions to evaluate the helpfulness of the meeting:

- Did the meeting help you to understand better the opposing side's claims and/or defenses in the case?
- Did the meeting increase the chances of a prompt settlement or resolution of the case?
- Did the meeting help in making arrangements for initial disclosures in the case?
- Did the conference include discussion of electronically stored information?
- In retrospect, did the meeting help to develop a plan that kept the volume of discovery in the case proportional to the stakes?

Table 6 summarizes the responses to these questions (these are percentages for those answering yes or no only). The Rule 26(f) meeting was rated as most helpful in making arrangements for initial disclosures, with 71% of respondents reporting a Rule 26(f) meeting answering yes, and 60% reported that the meeting helped to develop a proportional discovery plan. Half of respondents reported the meeting helped them to better understand the opposing side's claims and/or defenses. Only 30% reported that the meeting increased the chances of a prompt settlement or resolution. (The 40% of respondents who reported a discussion of electronically stored information will be discussed in the next section.)

The survey followed up with both yes and no responses. Those answering yes were asked to rate, on a 5-point scale, from 1, very little, to 5, a great deal, how helpful the meeting was in achieving the goal specified in the prompt. For all four questions, the average rating was between 3.1 and 3.4—i.e., respondents tended to rate the meeting as helpful, but not greatly so.

For no answers, the survey provided respondents with a list of reasons why the conference might not have been helpful. The most common response, for each goal, was as follows:

- "I generally understood the opposing side's claims and defenses prior to the conference," 77% of no answers;
- "At least one party was not interested in settlement or resolution at this point," 60%;
- "The initial disclosure obligation was clear prior to conference," 58%;
- "Other" was the most common response to the proportionality question, 33%.[6]

Interestingly, lack of cooperation from opposing counsel was offered as an option for the no responses, but few respondents indicated that uncooperative counsel was the reason that the Rule 26(f) meeting was not useful. (For a complete breakdown, see Tables 7–10.)

Overall, 60% of all respondents, and 74% of respondents reporting a Rule 26(f) meeting in the sampled case, reported submitting a discovery plan to the court.

Electronic Discovery

As mentioned in the previous section, only 40% of respondents reported discussing discovery of electronically stored information as part of the Rule 26(f) meeting.[7] The survey then asked those respondents whether that discussion included discussion of any party's preservation obligations with respect to that information. Of those who discussed electronically stored information, 60% reported discussing preservation obligations. Overall, that means that just 25% of all respondents discussed electronic discovery issues at a Rule 26(f) meeting, and only 13% of all respondents discussed preservation obligations.[8]

Those who discussed preservation obligations were then asked how helpful that discussion was in defining their client's (asked of producing parties) or the opposing side's (requesting parties) preservation obligations. Fully 60% of producing parties and 74% of requesting parties reported that the discussion clarified preservation obligations (Table 11). The most common response as to why the

6. It is worth noting that many respondents had difficulty answering this particular question—fully 1 in 4 respondents reporting a Rule 26(f) meeting were unable to answer the "In retrospect" question yes or no.

7. For the sake of comparison, the FJC survey of attorneys in recently closed complex cases in the Southern District of New York found that no electronic discovery was planned in 46% of respondents' cases. The 2009 Civil Rules Survey found that about 1 in 3 respondents reported discussing electronically stored information at the Rule 26(f) meeting. *See* Civil Rules Survey, *supra* note 2, at 15.

8. Just to be clear, these percentages are of all survey respondents, regardless of whether they reported a Rule 26(f) meeting at all. These percentages must be taken into account in the design of future studies. If preservation is discussed in about one closed case for every 8 (13%), then any study of such discussions must begin with a relatively large sample size—unless, that is, some means to identify those cases in advance can be devised.

discussion did *not* provide clarification was that the preservation obligations were clear before the conference—89% of producing parties and 79% of requesting parties who said that the Rule 26(f) meeting did not help to clarify preservation obligations gave this as the reason (Tables 12–13).

As with the questions discussed in the previous section, respondents who indicated that the Rule 26(f) meeting helped to define preservation obligations were asked to rate on a 5-point scale its helpfulness in doing so. Again, respondents tended, on average, to give middling answers—3.1 for producing parties, 3.2 for requesting parties.

Rule 16(b) Conferences

Incidence of Rule 16(b) Conferences

Overall, 50% of all respondents reported that, in the sampled case, there was no Rule 16(b) conference, 31% reported an in-person meeting with a district or magistrate judge, and 19% reported a telephonic Rule 16(b) conference (percentages of respondents answering yes or no, excluding "Can't say" responses) (Table 14). Among respondents reporting a Rule 26(f) meeting in the sampled case, 39% reported that there was no Rule 16(b), 38% reported an in-person meeting with a district or magistrate judge, and 22% reported a telephonic Rule 16(b) conference.

Respondents answering that there was no Rule 16(b) conference were asked a follow-up question: "Why wasn't there a Rule 16(b) conference in person or by telephone?" The most common response was that the case was resolved before holding a conference, reported by 40% (Table 15). Another 24% of respondents reported that the case was not required to have a Rule 16(b) conference under a local rule or judicial order, and 12% of respondents indicated that the Rule 16(b) conference was conducted by correspondence. For 24% of respondents, the reason given for the lack of a Rule 16(b) conference was "other."

Overall, 55% of the Rule 16(b) conferences in the sampled cases were held in person, 34% by telephone, and 11% on the papers.

How Rule 16(b) Conferences Are Conducted

The survey identified 1,587 respondents reporting that a Rule 16(b) conference was held, either in person or by telephone, in a sampled case. These respondents overwhelmingly reported that lead counsel for both sides participated in the Rule 16(b) conference—84%, compared to 14% reporting lead counsel for one side only, and just 1%, reporting no lead counsel participation (Table 16). Respondents were split fairly evenly between those reporting that the conference was conducted by a district judge, 50%, or a magistrate judge, 47%, with an additional 3% (42 attorneys) reporting "other" (Table 17). These responses were sometimes "both," but included respondents reporting that a judge's law clerk, courtroom deputy, or secretary conducted the Rule 16(b) conference.

Respondents were asked whether the judge engaged in a substantive discussion of the sampled case at the Rule 16(b) conference (Table 18). Fully 63% of respondents with a Rule 16(b) conference answered yes, and 37% answered no. The

next question asked how long the Rule 16(b) conference lasted (Table 19). As with Rule 26(f) meetings, Rule 16(b) conferences tended to be 30 minutes or less in length. Indeed, 23% of respondents with a Rule 16(b) conference reported that the conference lasted less than 10 minutes. Most respondents, 57%, reported that the conference lasted between 10 and 30 minutes. Together, that means that 80% of the reported Rule 16(b) conferences lasted less than 30 minutes. An additional 17% of respondents reported a Rule 16(b) conference of 30 minutes to an hour, and 3% reported a conference of more than an hour in length.

The two previous questions can be analyzed together—respondents were more likely to report that the judge was substantively engaged in a conference that lasted more than 10 minutes (Table 20). Of those with a conference of less than 10 minutes, only 31% reported that the judge engaged with the substance of the case. That figure jumps to 69% of those reporting a conference of 10 to 30 minutes, 82% of those reporting a conference of 30 minutes to an hour, and 89% of those reporting a conference of more than an hour.

Respondents were asked whether the judge engaged in a discussion of the proportionality of discovery requests relative to the stakes and whether the judge limited discovery to make it more proportional in the sampled case. Just 24% and 16% of respondents, respectively, reported that the judge did so (Tables 21–22).

Scheduling Orders

Fully 94% of respondents with a Rule 16(b) conference reported that the judge entered a scheduling order after the conference (Table 23). The survey asked respondents whether the court set cut-off dates for fact discovery, reported by 79%, expert discovery, 70%, dispositive motions, 69%, amended pleadings, 65%, and joinder of additional parties, 59% (Table 24). Only 11% of respondents answered that the judge did not impose cut-offs for discovery in the sampled case.

Respondents were asked whether the judge adopted the parties' proposed discovery plan without modification, with minor modification, or with major modification (Table 25). The most common response was with minor modification, 57%, followed by without modification, 39%, and with major modification, 4%.

Respondents were also asked how often the scheduling order in the sampled case was modified (Table 26). The most common response was that the order was modified occasionally, reported by 50%, followed by the order was not modified but the case settled before deadlines were reached, 30%, the order was not modified and deadlines were enforced, 15%, and the order was modified frequently, 6%.

Respondents were asked to rate, on a 5-point scale, from 1, not all involved, to 5, very actively involved, how involved the presiding judge was in the management of the sampled case. Among all respondents, the average response was 2.6. Among respondents reporting a Rule 16(b) conference, the average response was 2.9. Among respondents reporting that the judge engaged in a substantive discussion of the case at the Rule 16(b) conference, the average response was 3.1.

Twombly/Iqbal Questions

Given the advisory committee's continued interest in the impact of *Twombly* and *Iqbal*, the survey asked attorneys primarily representing plaintiffs or representing plaintiffs and defendants about equally whether their pleading practices had changed since the Supreme Court's decisions in those cases (Table 27). Interestingly, half of respondents (answering yes or no) reported their pleading practices had changed, and half reported that they had not.

A follow-up question was asked of those reporting a change in pleading practices—specifically, how had their pleading practices changed as a result of the decisions? The most common answer, by far, was that plaintiff attorneys reported including more factual detail in complaints, reported by 92% of those with changed pleading practices (Table 28).

Appendix: Descriptive Tables

Table 1: After the filing of the complaint and before the first Rule 16(b) conference (sometimes called the scheduling or case management conference), did you or any attorney for your client confer with opposing counsel—by telephone, correspondence, or in-person—to plan for discovery in the named case?

Category of Respondent	Yes (%)	No (%)	Can't say (%)	N
2012 ESOL Survey				
All respondents	72	21	7	3,538
Respondents answering "yes" or "no"	78	22	-	3,284
Respondents answering "yes" or "no" with Rule 16(b) conference	92	8	-	1,478
Respondents answering "yes" or "no" without Rule 16(b) conference	61	39	-	1,513
SDNY Complex Survey				
All respondents	59	29	13	312
Respondents answering "yes" or "no"	68	32	-	274
2009 Civil Rules Survey				
Respondents with discovery	83	13	4	2,371
Respondents with discovery answering "yes" or "no"	86	14	-	2,276

Table 2: Why didn't you or an attorney for your client confer with opposing counsel to plan for discovery in the named case? (Select all that apply.)

2012 ESOL Survey Response	(%)
The case was resolved before the conference could take place	30
Scheduling difficulties	4
The parties agreed to forego the conference	6
One side refused to meet and confer	5
The conference was not required by the court (e.g., exception under Rule 26(a)(1)(B))	12
As a general practice I do not participate in these conferences	2
Other	45
N	734

Table 3: How was the Rule 26(f) meeting conducted? (Select all that apply.)

2012 ESOL Survey Response	(%)
In-person meeting	9
By telephone or videoconference	86
By correspondence, including via email	25
N	2,550

Table 4: If held in person or by telephone or videoconference, how long was the conference? If the conference was not completed in one session, please estimate the total time taken up by all the sessions?

2012 ESOL Survey Response	(%)
Less than 10 minutes	19
10–30 minutes	54
30 minutes–1 hour	20
More than 1 hour	8
N	2,326

Table 5: If respondent indicated that, prior to the Rule 26(f) meeting, s/he received instructions from the court on how to conduct the meeting, what form did those instructions take? (Select all that apply.)

2012 ESOL Survey Response	(%)
Local rule	44
Standing order	44
Individual practices of presiding judge	32
Order in particular case	33
Other communication from court	6
Other	2
N	861

Table 6: Attorney evaluations of Rule 26(f) meeting, percentage of respondents answering "yes," excluding non-responses.

2012 ESOL Survey Response	Yes (%)	*N*
Help you better understand the opposing side's claims and/or defenses?	50	2,287
Increase the chances of a prompt settlement?	30	2,185
Make arrangements for initial disclosures?	71	2,252
Include discussion of discovery of electronically stored information?	40	2,232
In retrospect, help to develop a proportional discovery plan?	60	1,901

Table 7: If the Rule 26(f) meeting did not help you to better understand the opposing side's claims and defenses, why not? (Select all that apply.)

2012 ESOL Survey Response	(%)
I generally understood the opposing sides' claims and/or defenses prior to the meeting	77
At least one side was no cooperative in discussing claims and/or defenses	6
At least one side was not adequately prepared to discuss claims and/or defenses	6
Opponent raised no defenses beyond factual denials	6
Claims and defenses were not discussed	19
Other	6
N	1,153

Table 8: If the Rule 26(f) meeting did not increase the chances of a prompt resolution or settlement, why not? (Select all that apply.)

2012 ESOL Survey Response	(%)
At least one party was not interested in settlement or resolution at that point	60
At least one side was not adequately prepared to discuss settlement at that point	23
At least one party lacked sufficient information at that point	24
The sides were very close to reaching settlement prior to conference	3
Other	13
N	1,522

Table 9: If the Rule 26(f) meeting did not help in making arrangements for initial disclosures, why not? (Select all that apply.)

2012 ESOL Survey Response	(%)
At least one side was not adequately prepared to discuss initial disclosures	14
At least one side was not cooperative in discussing initial disclosures	11
The parties agreed to forego initial disclosures	8
The initial disclosure obligation was clear prior to the meeting	58
Other	15
N	645

Table 10: If the Rule 26(f) meeting did not, in retrospect, help to develop a proportional discovery plan, why not? (Select all that apply.)

2012 ESOL Survey Response	(%)
Discussion failed to adequately address major claims or defenses in the case	15
Discussion failed to adequately address the parties' discovery needs	18
Factors that could not be anticipated complicated discovery	16
The parties could not agree on proportionality	17
At least one party was not cooperative at the meeting	12
At least one party was not adequately prepared	10
At least one party engaged in abusive discovery practices	10
The court allowed disproportionate discovery despite objections	4
Other	33
N	766

Table 11: Of those reporting discussion of preservation obligations with respect to electronically stored information at the Rule 26(f) meeting, percentage indicating that the discussion helped to clarify at least one side's obligations.

2012 ESOL Survey Response	Yes (%)	*N*
Your client's obligations		
Producing parties only	60	78
Producing and requesting parties	60	256
All producing parties	60	334
Opposing side's obligations		
Requesting parties only	83	72
Producing and requesting parties	71	226
All requesting parties	74	298

Table 12: If the Rule 26(f) meeting did not clarify your client's preservation obligations with respect to electronically stored information, why not? (Select all that apply.)

2012 ESOL Survey Response	(%)
My client's preservation obligations were clear prior to the conference	89
Opposing counsel was not cooperative in discussing preservation obligations	4
Opposing counsel was not adequately prepared to discuss preservation obligations	7
Factors that could not have been anticipated	2
Other	5
N	134

Table 13: If the Rule 26(f) meeting did not clarify the opposing side's preservation obligations with respect to electronically stored information, why not? (Select all that apply.)

2012 ESOL Survey Response	(%)
My opponent's preservation obligations were clear prior to the conference	80
Opposing counsel was not cooperative in discussing preservation obligations	9
Opposing counsel was not adequately prepared to discuss preservation obligations	10
Factors that could not have been anticipated	4
Other	5
N	78

Table 14: Was there a Rule 16(b) conference, either in person or by telephone, with the judge in the named case?

Category of Respondent	Yes, in person (%)	Yes, by telephone (%)	No (%)	N
All respondents	31	19	50	3,150
Respondents reporting Rule 26(f) meeting	38	22	39	2,296

Table 15: Why wasn't there a Rule 16(b) conference in person or by telephone? (Select all that apply.)

2012 ESOL Survey Response	(%)
The case was resolved before the conference could take place	40
The Rule 16(b) conference was conducted by correspondence	12
Case was not required to have Rule 16(b) conference under local rule or judicial order	24
Other	24
N	1,492

Table 16: Did lead counsel participate in the Rule 16(b) conference?

2012 ESOL Survey Response	(%)
For both sides	84
For only one side	14
For neither side	1
N	1,553

Table 17: Was the Rule 16(b) conference conducted by a district judge or a magistrate judge?

2012 ESOL Survey Response	(%)
District judge	50
Magistrate judge	47
Other	3
N	1,505

Table 18: Did the judge engage in a substantive discussion of the sampled case at the Rule 16(b) conference?

2012 ESOL Survey Response	(%)
Yes	63
No	37
N	1,427

`Table 19: How long did the Rule 16(b) conference last?

2012 ESOL Survey Response	(%)
Less than 10 minutes	23
10–30 minutes	57
30 minutes–1 hour	17
More than 1 hour	3
N	1,568

Table 20: Cross-tabulation of reported length of Rule 16(b) conference and whether judge engaged in a substantive discussion of the case (respondents answering "yes" or "no").

2012 ESOL Survey Response	Yes (%)
Less than 10 minutes	31
10–30 minutes	69
30 minutes–1 hour	82
More than 1 hour	89
N	1,417

Table 21: Did the judge engage in a discussion of the proportionality of discovery requests relative to stakes?

2012 ESOL Survey Response	(%)
Yes	24
No	76
N	1,346

Table 22: Did the judge limit discovery to make it more proportional?

2012 ESOL Survey Response	(%)
Yes	16
No	84
N	1,350

Table 23: Did the judge set cut-off or due dates for the following? (Select all that apply.)

2012 ESOL Survey Response	(%)
Fact discovery	79
Expert discovery	70
No cut-offs for discovery	11
Joinder of additional parties	59
Amended pleadings	65
Dispositive motions	69
Can't say	11
N	1,587

Table 24: After the Rule 16(b) conference, did the court enter a scheduling order?

2012 ESOL Survey Response	(%)
Yes	94
No	6
N	1,529

Table 25: Did the court adopt the parties' proposed discovery plan without modification, with minor modifications, or with major modifications? (Select the best option.)

2012 ESOL Survey Response	(%)
Without modification	39
With minor modification	57
With major modification	4
N	1,208

Table 26: How often did the court allow for modification of the schedule set in the scheduling order? (Select the best option.)

2012 ESOL Survey Response	(%)
Modified frequently	6
Modified occasionally	50
Not modified, but case settled before deadlines were reached	30
Not modified and deadlines were enforced	15
N	1,252

Table 27: Have your pleading practices changed since the Supreme Court's decisions in *Twombly* and *Iqbal*? (Limited to attorneys who reported that they typically represent plaintiffs or represent plaintiffs and defendants about equally, respondents answering "yes" or "no" only.)

2012 ESOL Survey Response	(%)
Yes	50
No	50
N	1,449

Table 28: How have your pleading practices changed since *Twombly* and *Iqbal*? (Select the best option.) (Limited to respondents answering that their pleading practices have changed.)

2012 ESOL Survey Response	(%)
More factual investigation prior to filing	28
More factual detail in complaints	92
Screen cases more carefully	25
Raise different types of claims	12
Other	6
N	724

TAB A-8

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THE FEDERAL JUDICIAL CENTER
THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
ONE COLUMBUS CIRCLE, N.E.
WASHINGTON, DC20002-8003

Joe Cecil
Research Division

TEL.: 202-502-4084
FAX: 202-502-4199
EMAIL: jcecil@fjc.gov

March 13, 2012

Memorandum

To: **Hon. David Campbell, Chair**
Advisory Committee on Civil Rules

From: **Joe Cecil**

Subject: **Proposed FJC Study of Dispositive Motions**

Overview: The Research Division proposes to undertake a study of the role of dispositive motions in civil litigation, assessing the rate at which such motions are filed, the judicial action taken in response to such motions, and the role of such motions in terminating civil litigation. This study will be structured to link to earlier studies over the past three decades to determine how motion practice has changed over time. The Center will seek opportunities for collaboration with legal scholars in the design of the project, the collection and the analysis of data in an effort to develop a consensus view of the role of dispositive motions and to identify issues for further research.

Need for a Study of Dispositive Motions: For the past thirty-five years the Federal Judicial Center has studied a range of pretrial pretrial practices in federal civil litigation, often at the request of the Advisory Committee on Civil Rules. Typically each study required the development of a separate sample of cases. For example, our recent studies of motions to dismiss for failure to state a claim and previous studies of summary judgment motions were undertaken as independent efforts. While these studies responded to the immediate concerns of the Advisory Committee, they presented a fragmented assessment of the role of dispositive motions in the pretrial process. The proposed study will examine the role of the full range of pretrial dispositive motions in civil litigation, the manner in which such motions interact, and the extent to which there have been changes in dispositive motion practice over time.

Recent improvements in access to electronic records allow the development of large samples of cases that can be structured to meet a wide range of research questions. This study will develop a data archive based on a sample of current cases that can be used to examine the full range of pretrial practices and adapted to respond more quickly to research requests from the Advisory Committee on Civil Rules. Such studies may be less costly and more efficient, since a sample that is relevant to many issues in civil litigation will be identified and much of the initial data collection will be completed.

The proposed study will examine action taken on the full range of dispositive motions, including all Rule 12 motions and summary judgment. Such information will allow a better understanding of the manner in which cases are resolved prior to trial, and nature of the interaction among such motions. For example, we will be able to understand if Rule 12(e) motions for a more definite statement and Rule 12(c) motions for judgment on the pleadings have been supplanted by increased attention to Rule 12(b)(6) motions to dismiss for failure to state a claim following the 2009 Supreme Court decision in *Ashcroft v. Iqbal*. We will also be able to understand the relationship between action taken on dispositive motions and any subsequent effort to settle issues that remain unresolved.

The data archive will be designed to link with previous studies of pretrial practice to allow an assessment of how motion practice has changed over time. For example, it will be possible to determine if dispositive motions have increased over time, offsetting the decline in trials. It will also be possible to determine if cases disposed of for failure to state a claim would have, in the past, been resolved by summary judgment after extensive discovery, as suggested by the Supreme Court in *Twombly* and *Iqbal.*

While the initial study will focus on dispositive motions, the data archive can be structured to ease studies of other aspects of civil litigation. For example, part of the proposed archive will include the full docket sheet of the case (or at least hyperlinks to PACER access to the docket sheet) to facilitate electronic text searches for particular litigation practices. The archive may also include hyperlinks to the case management orders and other substantive orders filed in a case, to allow an assessment of formal discovery plans and the extent to which such orders encourage informal exchange of information.

The data sample will be large enough to permit complete studies based on common litigation events, such as dispositive motions. The sample will also provide an opportunity for pilot studies of some rare litigation events and guide such studies in the best way to identify such practices.

Collaborative Nature of the Study: The research project will be developed and executed with the guidance and assistance of the academic community, and the research data will be made available to the academic community to encourage further collaborative study of issues of concern to the federal judiciary. The guidance of legal scholars in developing the details of the research design will allow the project to anticipate the concerns of the academic community and respond to emerging lines of scholarship.

The planned access to the resulting data archive will benefit both the legal scholars and the federal judiciary. Presently many empirical studies by legal scholars must rely on samples drawn from the computerized legal record systems, such as Westlaw and Lexis, which are limited in their coverage of federal cases and appear to underreport cases in which motions are denied. The Center has developed applications that allow more representative samples to be drawn from the Court Management/Electronic Case Filing (CM/ECF) system and Public Access to Court Electronic Records system (PACER). While questions of outside researcher access to materials obtained from PACER must be resolved, the opportunity for outside scholars to

conduct their research that fairly represents a proper sample of federal cases will prove to be a direct benefit to the federal judiciary. Perhaps the collaborative nature of this study will encourage a greater consensus of views concerning the current state and trends in federal litigation.

Collaboration with legal scholars can extend to the coding of case data as well. In the past we typically have recruited local law students to code cases under the direct supervision of Research Division staff. Instead, perhaps we can enlist collaborating legal scholars to supervise students at their law schools in the coding of dispositive motions and other elements that are the focus of the research. The Center can provide modest reimbursement to law students for time spent coding records, perhaps with a modest honorarium for those scholars who agree to supervise the work of the students. The Center will benefit since more students can become involved in the coding effort, and that part of the research effort will be completed more quickly. The students will benefit tfrom their exposure to docket sheets, motions and court orders through PACER access (under terms to be determined). The coding activity itself will develop greater awareness of the pretrial stages of civil litigation and an understanding of the variation in litigation practices.

The Center, participating legal scholars, law schools and law students will agree to a set of mutually agreed upon terms that will guide the collaborative effort. This agreement will be framed around the issues listed in Appendix A.

Design of Study. While the final design of the research study will be the result of collaboration with legal scholars, several factors to be considered can be set forth in the form of a preliminary proposal.

Sample. The study will be guided by past research and the opportunity to compare the finding of this study with earlier studies to identify changes in practices over time. For that reason, the cases will be sampled from those districts that have been represented in earlier studies and that maintain a record system that allows accurate identification of cases and litigation events. Among the districts considered for inclusion the study are the following:

Eastern District of Arkansas
Central District of California
Eastern District of California
Northern District of California
District of Colorado
District of the District of Columbia
Middle District of Florida
Southern District of Florida
Northern District of Georgia
Northern District of Illinois
Southern District of Indiana
District of Kansas
Eastern District of Louisiana
District of Maryland
District of Massachusetts
Eastern District of Michigan
District of Minnesota
District of New Mexico
District of New Jersey
Eastern District of New York
Southern District of New York
Southern District of Ohio
Eastern District of Pennsylvania
District of Rhode Island
District of South Carolina
Northern District of Texas
Southern District of Texas
Eastern District of Wisconsin

Among the technical issues to be resolved is whether the sample of cases from these districts should be based on when cases are filed, when cases terminate, or other factors. We may wish to exclude certain categories of cases, such as prisoner cases, MDL cases, class action cases, pro se cases, social security cases, etc. We also may wish to stratify the sample based on area of litigation, circuit, district or procedural progress.

Case Events to be Recorded. The dataset will be composed to two types of information. The primary product will be a dataset available in multiple formats suitable for quantitative analysis. This dataset will include the following:

- Case ID and common case characteristics (e.g., docket number, case type, etc.);
- Judicial action taken on the following dispositive motions:
  - Rule 12(b)(1): Lack of subject matter jurisdiction
  - Rule 12(b)(2): Lack of Personal Jurisdiction
  - Rule 12(b)(3): Improper Venue
  - Rules 12(b)(4) and 12(b)(5): Insufficient Process or Service of Process
  - Rule 12(b)(6): Failure to State a Claim
  - Rule 12(b)(7): Failure to Join a Party under Rule 19
  - Rule 12(c): Judgment on the Pleadings
  - Rule 12(f): Motion to Strike
  - Rule 41(a): Voluntary Dismissal
  - Rule 41(b): Involuntary Dismissal
  - Rule 55(b)(2): Application for Default Judgment
  - Rule 56: Summary Judgment
- Characteristics of Movant and Respondent
- Final case disposition

A secondary product will be an index to general case events that will be noted in the dataset through hyperlinks to the PACER docket sheet but will not coded, such as:

- Dates of the complaint, answer, and case management orders;
- Evidence of Court-Annexed ADR; and,
- Final pretrial order.

We will also explore the possibility of web-based surveys of attorneys upon termination a case to assess issues such as informal exchange of information, cost, and factors that influenced settlement discussion.

Tentative Time Frame. This is an ambitious research project that will require considerable pilot work in order to ensure that the coding by law students in remote locations is an efficient and accurate process. The final time frame will be specified after the research proposal is developed in collaboration with legal scholars. The following dates represent my best current estimate of the development of the project:

April 2012	Consultation regarding research design, sample frame, districts and variables;
May – June 2012	Download and format case materials in coding database;
June-August 2012	Pilot work developing coding protocols;
July-September 2012	Development of training materials, including video with coding instruction;
October 2012 – January 2013	Coding of case materials;
October 2012 – January 2013	Monitoring of data collection;
November 2012 – January 2013	Resolution of coding conflicts;
November 2012 – January 2013	Data cleaning and preparation for analysis;
February 2013	Analysis of data;
March 2013	Report to the Advisory Committee on Civil Rules;
March 2013	Distribution of dataset to participating scholars; and,
September 2013	Placement of dataset in a public archive.

Access to CM/ECF. The Center will use recently developed techniques to search the text of docket sheets, orders, and CM/ECF codes to identify case events to be included as part of this study. The Center will then download relevant documents in the selected cases and place this information in a database suitable for remote coding. In many instances it will be necessary for the coder to access additional case information through PACER. Since the law students will be employed by the judiciary to conduct this study, such access appears to be within the PACER guidelines. It is worth noting that this effort will result in a savings to the federal judiciary arising from the collaborative coding effort, and will likely generate PACER access fees from future research efforts that rely on the resulting research archive. PACER use by participating coders will be monitored by the research staff.

Privacy and Confidentiality. This project will comply with Judicial Conference Guidelines regarding privacy and confidentiality of judicial branch data. Individual parties, attorneys and judges will not be identified in the dataset, but the identities of individual participants may be deduced by comparing information in the archived research records identifying individual cases with similar records that are easily accessible to the public.

cc: Hon. Mark Kravitz
Hon. Lee Rosenthal
Prof. Edward Cooper
Prof. Richard Marcus
Andrea Kuperman, Esq.
Benjamin Robinson, Esq.
Jonathan Rose, Esq.

Appendix A: Draft Terms of Collaboration

Below is a draft statement of the role that the Center, participating legal scholars, and law students will play in the development of the research project. Such terms will be implements through a series of letters of agreement among those involve in the study.

The Center will:

- Identify cases and motions to be included in the study;
- Download the docket sheet, orders resolving all dispositive motions, and place this information in a database that allows remote computer access to these materials;
- Develop a consistent coding system for recording case events;
- Provide classroom and/or video instruction to participating law students regarding the proper system for reviewing case materials, downloading of additional materials through PACER, and use of coding protocols for recording of case events;
- Reimburse students for time spent coding cases according the schedule of reimbursement governing the federal judiciary (approximately $15/hour);
- Monitor the data collection, resolve coding conflicts, and prepare one or more datasets suitable for analysis using commonly available statistical software programs;
- Prepare an initial report for the Advisory Committee on Civil Rules;
- Provide access to the dataset to collaborating law professors at the time of the report to the Advisory Committee on Civil Rules; and,
- Prepare a permanent data archive that will allow public access six to ten months after the report to the Advisory Committee on Civil Rules.

Collaborating legal scholars will:

- Consult with Center staff on the design of the research, as well as the collection and coding of new data;
- Supervise 10 - 25 students who have completed the initial course on civil procedure who agree to code at least 100 cases each;
- Serve as an initial contact point for questions from students regarding coding issues; and,
- Participate in an online forum of collaborating professors to resolve conflicts in coding practices, and disseminate to their students consistent coding practices.
- Comply with Judicial Conference policies regarding privacy and confidentiality of research data.

Participating law students will:

- Agree to code at least 100 cases (and more if interested);
- Review codebook and other materials provided by the Center;
- Code information in the selected cases in a manner consistent with the codebook and within the time frame set by the project;
- Report problems in coding to the supervising legal scholar, with a copy of the report to the Center staff member supervising the project;
- Submit completed coded material and all information necessary for reimbursement, including account information necessary for direct electronic deposit to the student's account; and,
- Comply with Judicial Conference policies regarding privacy and confidentiality of research data.

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