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Preservation Rulemaking after the 2010 Litigation Conference

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PRESERVATION RULEMAKING AFTER THE 2010 LITIGATION CONFERENCE

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At the 2010 Civil Litigation Conference held at the Duke Law School in May 2010 (the "Litigation Conference"), a panel of jurists and practitioners representing a cross-section of e-discovery involvement (the "E-Discovery Panel")[2] reported its consensus recommendation that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules. The Panel consisted of two federal judges (a district judge and a magistrate judge), a plaintiff's employment counsel, two defense counsel, a former general counsel and was moderated by the president-elect of the American College of Trial Lawyers.

The Panel also outlined considerations which might be involved in drafting such a rule, should the effort be undertaken.

The Advisory Committee Report, issued shortly after the Litigation Conference ("Conference Committee Report"), noted that preservation "rulemaking was considered [in the 2006 Civil Rules Amendment process] but put aside, apart from the protection against sanctions included in Rule 37(e)."[3] For the reasons stated below, it is submitted that this is an appropriate time for such rulemaking despite the proximity in time to the 2006 Amendments.

I. THE 2010 LITIGATION CONFERENCE

The announced purpose of the 2010 Litigation Conference was to "explore the current costs of civil litigation, particularly discovery and e-discovery, and to discuss possible solutions."[4] The Conference included a series of panel discussions designed to reflect a broad spectrum of views, with participants invited from academia, the judiciary and the practicing bar. The discussions expanded upon the written submissions made by participants, all of which remain available on a website established for that purpose.[5]

The organizers of the Litigation Conference asked a number of entities to submit "suggested amendments to the Federal Rules of Civil Procedure." Thus, submissions were made by the ACTL/IAALS Task Force,[6] Lawyers for Civil Justice[7] and a Special Committee

1 ©2010 Thomas Y. Allman. The author, a former General Counsel, was a member of the E-Discovery Panel at the Litigation Conference held by the Civil Rules Advisory Committee on May 10-11, 2010 at the Duke Law School.
2 The formal title of the Panel segment was: "E-Discovery: Discussion of the Cost Benefit Analysis of E-Discovery and the Degree to Which the New Rules are Working or Not."
3 REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, May 17, 2010, at 12, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2010.pdf (conceding the potential advantages of such rules "for planning [an entity's] affairs and for achieving some uniformity").
4 Memorandum, Hon. John G. Koeltl to Participants in the 2010 Conference (Aug. 4, 2009 (copy on file with author).
5 Submissions referred to in this Paper ("CONFERENCE PAPERS") are *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h_Toc/B896CCD29A7DE0C88525764100492D17/?OpenDocument.
6 The ACTL/IAALS Task Force presented model Rules which evolved from the principles expressed its Final Report. *See* ACTL/IAALS Pilot Project Rules, CONFERENCE PAPERS.
7 Lawyers for Civil Justice (on behalf of DRI, the Federation of Defense & Corporate Counsel and the International Association of Defense Counsel), *White Paper: Reshaping the Rules of Civil Procedure for the 21st Century*, CONFERENCE PAPERS.

of the ABA ("ABA Special Committee"),[8] with opposing views expressed by members of the class action bar[9] and the Center for Constitutional Litigation.[10] A comprehensive summary of those submissions was circulated prior to the Conference.[11] In addition, the Seventh Circuit Electronic Discovery Pilot Principles now being implemented by Standing Orders as a pilot project were described[12] by the Chief Judge of the Northern District of Illinois. Additional rulemaking concepts were discussed by many of the participants and audience members.

The Conference was also presented with the results of a survey[13] administered to members of the American Bar Association Section on Litigation ("ABA Survey"),[14] the American College of Trial Lawyers[15] and the National Employment Lawyers Association ("NELA Survey").[16] A survey of opinions held by chief legal officers and general counsel by the Association of Corporate Counsel ("ACC Survey") was also made available[17] as was a study of the costs of litigation undertaken by the Searle Institute (the "Searle Survey").[18]

Finally, the Federal Judicial Center presented results from a survey of trial counsel involved in recently closed cases (the "FJC Survey").[19]

Some of the key results:

1. Cooperation. There was widespread agreement among Conference participants with the observation of the ABA Special Committee that "[w]hen lawyers are collaborative and cooperative the case costs less for clients."[20] The Sedona Conference® efforts promoting its *Cooperation Proclamation* were duly noted and supported.[21] One participant, expressing mild skepticism, referred to the approach as the "Kumbaya Campaign."[22] The Conference Committee Report also referred to "rather wistful suggestions" for revising Rule 1.[23]

Greater cooperation and collaboration on preservation was the intended focus of the 2006 amendment to Rule 26(f) mandating discussion of preservation at the meet and confer prior to the Rule 16(b) scheduling conference. Clearly, early agreement on

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8 ABA Special Committee, *Civil Procedure in the 21st Century* (Apr. 24, 2010), CONFERENCE PAPERS.
9 One Paper asserted that it is "far too early, and the current data too flawed" to begin efforts to revise the [2006 Amendments] relating to e-discovery. *See* Milberg LLP and Hausfeld LLP, *E-Discovery Today: The Fault Lines Not in Our Rules*, at 2-3, CONFERENCE PAPERS ("Milberg and Hausfeld").
10 Center for Constitutional Litigation, PC, *Nineteenth Century Rules for Twenty-First Century Courts: An Analysis and Critique* (Mar. 2010), CONFERENCE PAPERS ("CCL Analysis").
11 Rules Administrative Office, *Summary Comparison of Bar Association Submissions to the Duke Conference Regarding the Federal Rules of Civil Procedure* (Apr. 26, 2010), CONFERENCE PAPERS.
12 7TH CIRCUIT PILOT PROGRAM REPORT ON PHASE ONE (2010) ("PHASE ONE REPORT") (summarizing results from October 2009 through March 2010), CONFERENCE PAPERS.
13 The original survey instrument was administered in 2008 to members of the American College of Trial Lawyers and subsequently adapted for use by the ABA Section of Litigation and the National Employment Lawyers Association by the Federal Judicial Center.
14 American Bar Association Section of Litigation, *Member Survey on Civil Practice* (Dec. 11, 2009), CONFERENCE PAPERS.
15 The results of the survey was described in the 2009 joint "ACTL/IAALS Final Report" advocating sweeping changes in the civil litigation practices because the civil justice system "is in serious need of repair." American College of Trial Lawyers and the Institute for the Advancement of the American Legal System Final Report, at 2, CONFERENCE PAPERS.
16 National Employment Lawyers Association, *Summary of Results of [a] Survey of NELA Members, Fall 2009*, CONFERENCE PAPERS.
17 Association of Corporate Counsel, *Civil Litigation Survey of Chief Legal Officers and General Counsel*, CONFERENCE PAPERS.
18 The survey was conducted on behalf of Lawyers for Civil Justice, the Civil Justice Reform Group and the U.S. Chamber Institute for Legal Reform. *See* Searle Survey, *Litigation Cost Survey of Major Corporations,* CONFERENCE PAPERS.
19 Emery G. Lee III & Thomas J. Willging, Federal Judicial Center, *National Case-Based Civil Rules Survey, Preliminary Report* (2009), CONFERENCE PAPERS.
20 ABA Special Committee, *supra*, at 5, CONFERENCE PAPERS.
21 Hon. Paul Grimm, *The State of Discovery Practice in Civil Cases, Must The Rules Be Changed to Reduce Costs and Burdens, or Can Significant Improvements Be Achieved Within The Existing Rules,* at 19-21, CONFERENCE PAPERS (describing ongoing projects to facilitate cooperation in discovery).
22 Elizabeth J. Cabraser, *Uncovering Discovery*, at 35, CONFERENCE PAPERS ("[e]veryone would wish this leap to succeed, no one who deserves to be a lawyer or judge would wish to be seen subverting it, and everyone would volunteer to be the second to jump").
23 Conference Committee Report, *supra,* at 11.

preservation issues by counsel is ideal. However, many preservation issues must be resolved *prior* to the meeting at a time when opposing counsel are not available to commit to the ultimate scope of discovery. [24]

According to the FJC Survey, the topic of "retention" was discussed in only about 17% of the cases surveyed.[25] One unfortunate result of the increasing tendency to hold counsel responsible for client mishaps[26] has been, in absence of agreement, that outside counsel are reluctant to advise clients to do anything other than err on the side of over-preservation.[27]

A clear desire for greater guidance on preservation obligations was expressed by potential producing parties and reflected in the proposals identified by the E-Discovery Panel in its "Elements of a Preservation Rule."[28] This includes guidance for actions which must be undertaken prior to the commencement of litigation.

2. Judicial Management. Participants at the 2010 Litigation Conference generally echoed the call in the ACC Survey for "greater court involvement in 'crafting an e-discovery plan prior to a dispute.'"[29] The ABA Special Committee opined that "[j]udges should play an active role in supervising the discovery process and should work to assure that discovery costs are proportional to the dispute."[30] The Conference Committee Report speaks of the "virtual, perhaps absolute, unanimity" with which "[p]leas for universalized case management" were greeted.[31]

Many participants emphasized the adequacy of existing tools such as Rule 16 and Rule 26(c),[32] noting the ability to utilize creative methods of case management such as staggered discovery and judicially mandated "tracks" based on the need for increased judicial involvement in e-discovery.[33] Cases assigned to a more intensive track could be subject to a standing order with preservation management provisions such as those in the ongoing Seventh Circuit Electronic Discovery Pilot program.[34]

However, while case management could undoubtedly be improved, Rule 26(c) does not currently empower courts to deal with unduly burdensome preservation demands,[35] with the possible exception of those relating to inaccessible sources identified under Rule 26(b)(2)(B).[36] Rule 26(f) is also silent on the need to report on open

24 Kenneth J. Withers, *"Ephemeral Data" and the Duty To Preserve Discoverable Electronically Stored Information*, 37 U. BALT. L. REV. 349, 377 (Spring 2008) ("By the time the parties sit down at the Rule 26(f) conference, the preservation issues surrounding ephemeral data may be moot and the fate of the responding party may already be sealed, if sanctions are later found to be warranted").

25 Retention was listed as discussed in only 35% of the cases where ESI was discussed, which constituted about 50% of the cases surveyed. *See FJC Civil Rules Survey*, CONFERENCE PAPERS, at 15- 24. The FJC did not survey the extent to which preservation agreements were reached as a result of such discussions.

26 *See, e.g., In re A&M Florida Properties II, LLC*, 2010 WL 1418861 (Bankr. S.D.N.Y. Apr. 7, 2010) (sanctioning counsel and client for conduct which resulted in delayed production).

27 Thomas Y. Allman, *Preservation and Spoliation Revisited: Is it Time for Additional Rulemaking?* at 3, CONFERENCE PAPERS.

28 *See generally*, E-Discovery Panel, *Elements of a Preservation Rule,* CONFERENCE PAPERS.

29 ACC Survey, *supra*, at 3, CONFERENCE PAPERS.

30 ABA Special Committee, *supra,* at 4, CONFERENCE PAPERS.

31 Conference Committee Report, *supra,* at 8 (discussing need for "one-case-one judge," firm deadlines, regular and prompt access and "substantially successful" use of techniques stemming from the 2006 Amendments).

32 Hon. Paul Grimm, *supra,* at 21- 33, CONFERENCE PAPERS (suggesting use of discovery budgets, local rules and "common sense" systems such as innovative use of Rule 502).

33 Conference Committee Report, *supra*, at 14 ("Some version of tracking could be added" by "building into the present sequence or by adding a separate set of 'simplified' or 'tracking' rules" which could be mandatory as "long as jury trial is preserved").

34 *See* 7TH CIRCUIT PILOT PROGRAM REPORT ON PHASE ONE (2010) ("PHASE ONE REPORT"), *supra,* CONFERENCE PAPERS.

35 *Kemper Mortgage v. Russell*, 2006 WL 4968120 (S.D. Ohio May 4, 2006) (refusing to opine on whether the producing party was being "overly cautious" in plans for a litigation hold).

36 FINAL REPORT OF THE ADVISORY COMMITTEE (May 2005) "FINAL REPORT (2005)," at 51 [Changes Made after Publication and Comment](" [Rule 26(b)(2)(B)] has been changed to recognize that the responding party may wish to determine its search and potential preservation obligations by moving for a protective order"), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf.

preservation issues after "meet and confers"[37] and many trial courts do not use Rule 16 conferences for any form of discovery planning purposes. In rare cases, courts treat the issue of preservation planning by local initiatives.[38]

3. Pre-Litigation Access to Court. The risks associated with spoliation sanctions for those who "guess wrong" can force over-preservation and case-dispositive decisions prior to an action being commenced.[39] In *Texas v. City of Frisco*,[40] the State of Texas was denied an opportunity to seek pre-commencement relief from a broad preservation demand relating to a recently announced highway project. The magistrate judge held that a justiciable controversy did not exist even though the municipality making the demand clearly intended to bring a suit.

The Conference Committee Report endorsed the possibility of enacting "more explicit provisions" for dealing with preservation issues in Rule 26(c), "possibly including preservation before an action is filed."[41] Rule 27 "Depositions to Perpetuate Testimony," which authorizes limited pre-litigation proceedings "before an action is filed" to "prevent a failure or delay of justice" could serve as the vehicle. It could be amended to permit issuance of preservation or protective orders on the initiative of a person who "expects" to be a party to an action but "cannot presently bring it or cause it to be brought."[42] Rule 27 actions do not require an independent basis for federal jurisdiction as long as the contemplated action is itself authorized by statute.[43]

4. E-Discovery Costs. The Searle Survey documented a significant increase in the costs of discovery, including e-discovery. A substantial majority of defense and mixed practice lawyers surveyed by the ABA agreed that "the costs of litigation have risen disproportionately due to e-discovery."[44] Similar percentages believed that "e-discovery is overly burdensome."[45]

In some cases, the remedies proposed involved better case management and increased use of technology. Counsel representing plaintiffs in employment disputes agreed that costs are higher but asserted that "properly managed e-discovery can reduce the overall costs."[46] Milburg and Hausfeld argued that upwards of 80% of privilege and review costs—a primary cause of increased costs—will be reduced by use of "search technology."[47]

Those entities responding to the Searle Study, however, supported the recommendations initially made by Lawyers for Civil Justice that "each party [should] pay the costs of the discovery it seeks" which would "encourage each party to manage its own discovery expenses by shifting the cost-benefit decision onto the requesting party – the best cost avoider."[48]

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37 *See also* Form 52, *Report of the Parties' Planning Meeting* (2007) (no mention of preservation issues) *and compare to* ACT/IAALS Pilot Rule 8.1(b) (suggesting that courts discuss "production, continued preservation, and restoration of [ESI]"), *supra,* CONFERENCE PAPERS.

38 *See* Standing Order, ¶ 6 (N.D. Cal.) (requiring report on arrangements for evidence preservation to court before the scheduling conference).

39 *TIG Insur. Co. v. Giffin Winning,* 444 F.3d 587, 392 (7th Cir. 2006) (settlement occurred only after expending $1.2M in defending spoliation motion).

40 2008 WL 828055 (E.D. Tex. Mar. 27, 2008).

41 Conference Committee Report, *supra*, at 13 (noting the need to amend rules to allow for emergency application on filing the complaint).

42 Subsection (a)(1) of Rule 27 could be amended to authorize a movant to seek relief to "respond to preservation demands concerning discovery before an action is filed."

43 Jay E. Grenig, *Taking and Using Depositions Before Action or Pending Appeal in Federal Court,* 27 AM. J. TRIAL ADVOC. 451, 454-55 (Spring 2004).

44 ABA Survey, *supra*, at 5, CONFERENCE PAPERS.

45 *Id.* at 11.

46 NELA Survey, *supra*, at 6, CONFERENCE PAPERS.

47 Milberg and Hausfeld, at 46, CONFERENCE PAPERS ("the use of FRE 502 could reduce the cost of privilege review by as much as 80% in some cases").

48 Searle Study, *supra,* at 7 & 16, CONFERENCE PAPERS ("out of over 743 e-discovery disputes reported between 2004 and 2009, there was only *one* case where cost shifting was utilized to resolve a dispute") (emphasis in original).

The participants did not separately identify the need to shift e-discovery preservation costs, since, as the RAND representative explained, they are hard to identify but are nonetheless very real. Some courts already endorse cost-shifting as a viable option for incremental preservation costs,[49] as do the ACTL/IAALS Pilot Project Rules[50] and some local rules.[51]

5. Spoliation Sanctions. The emergence of e-discovery has coincided with a substantial growth in allegations that spoliation has occurred. A survey presented at the Conference (the "Sanctions Survey")[52] confirmed the author's findings that reported decisions have increased from an average of 10 or less per year prior to 2005 to at least 71 in 2009.[53] As the survey put it, "[allegations of] [f]ailure to preserve is the most prevalent" source of the disputes.[54] This is occurring despite the fact that a majority of entities surveyed by the ACC report that they have implemented some form of a litigation hold "mechanism" and records retention/destruction policies as well as other steps to enhance e-discovery compliance.[55]

In one sense, the increase in motion practice is understandable, given the inconsistencies among the circuits and the rigid requirements imposed by some courts[56] As noted in the Sanctions Survey, "[l]itigants and their lawyers [facing demands for e-discovery] must immediately identify, promptly preserve, comprehensively collect, fairly filter, properly process, rigorously review, and produce ESI in appropriate format[s] without sluggishness, purposeful or otherwise." It is not surprising that challenges have generally increased.[57]

Unfortunately, despite the addition of Rule 37(e) to address the inconsistent treatment of culpability among the circuits, many courts simply ignore the plain meaning of the rule.[58] Some courts—but not all[59]—have concluded that Rule 37(e) is inapplicable if a preservation duty existed at the time of the loss at issue, regardless of the culpability involved.[60]

Thus, the ABA Special Committee suggested that the "federal courts should adopt a uniform standard to address when sanction may be imposed for the deletion of ESI after a duty to preserve ESI has attached."[61] The author, Lawyers for Civil Justice, the

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49 *Treppel v. Biovail,* 233 F.R.D. 363, 372-373 (S.D.N.Y. Feb. 6, 2006).
50 *ACTI/IAALS Pilot Rules*, Comment, Rule 8.1 (referring to potential of court for shifting "any or all costs associated with the preservation, collection and production of [ESI] if the interests of justice and proportionality so require."), *supra,* CONFERENCE PAPERS,
51 Local Rule 26.1, District of New Jersey (2007) (requiring parties to meet and confer to attempt to agree on "[w]ho will bear the costs of preservation, production, and restoration (if any) of any digital discovery").
52 Willoughby and Jones, *Sanctions for E-discovery Violations: By the Numbers*, CONFERENCE PAPERS.
53 The number of reported cases found by the author was 32 in 2006, 68 in 2007 and 62 in 2008 (copies on file with author). There undoubtedly are many more that have escaped the author's unscientific tracking methods. *See also Symposium on Ethics and Professionalism in the Digital Age*, 60 MERCER L. REV. 863, 899 (2009) (high volumes of spoliation motions were almost unheard of before e-discovery).
54 Sanctions Survey, *supra*, CONFERENCE PAPERS.
55 ACC Survey, *supra*, at 8, CONFERENCE PAPERS.
56 Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, *supra,* 116 YALE L. J. 167, 190 (2006 Pocket Part) ("judge seeking effective control over electronic discovery may impose unrealistically stringent demands on litigants and lawyers, which will predictably lead to an increase in sanctions motions if parties cannot meet the demands").
57 A less attractive explanation is that there may be an element of strategic gamesmanship involved, since experience has shown that once allegations of spoliation are made, they tend to become the primary focus of the litigation, not the merits.
58 Some decisions show a remarkable reluctance to apply the plain meaning of the rule. *Wilson v. Thorn Energy LLC,* 2010 WL 1712236 (S.D.N.Y. Mar. 15, 2010) (finding that it was not "good faith" within Rule 37(e) to fail to make a copy of a flash drive before it inadvertently failed).
59 *Olson v. Sax,* 2010 WL 2639853, at 3 (E.D. Wisc. June 25, 2010) (no sanctions imposed because of overwriting after duty to preserve attached since "no evidence that [defendant] engaged in the 'bad faith' destruction of evidence for the purpose of hiding adverse evidence").
60 *Doe v. Norwalk Community College,* 248 F.R.D. 372 (D. Conn. 2007).
61 ABA Special Committee*, supra,* at 12,CONFERENCE PAPERS.

ACTL/IAALS Pilot Rules and, to a lesser extent, the Conference Committee Report[62] have also suggested addressing this issue.

6. Standard of Care. The Federal Rules do not currently articulate a standard of care for the implementation of preservation obligations under Rule 34. As one court presciently put it, "[a]bsent from Rule 34 is a procedure to preserve documents, things or land from damage or destruction that could compromise the integrity of the very existence of the evidence requested."[63]

As noted earlier, the E-Discovery Panel has recommended decoupling the duty to preserve from its evidentiary roots and incorporating it, taking into consideration a number of appropriate elements, presumably as part of Rule 34.[64] This would implement a similar proposal, made by the American College of Trial Lawyers at the time of the 2006 Amendments, that "[i]t would enhance . . . the entire body of the Federal Rules" if the Rules were amended "to state a standard of care for production and preservation—which we think should be reasonableness."[65]

The linkage between reasonable conduct and proportionality suggests that both characteristics should be referenced in any rule. Indeed, if "one word came to express the quest for speedier and less expensive procedures" at the Conference it was increased use of "proportionality."[66] Principle Five of the *Sedona Principles*[67] and the Seventh Circuit Pilot Program on E-discovery[68] both support this approach, as do thoughtful decisions such as *Rimkus Consulting v. Cammarata,*[69] where the district court held that "[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable,* and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards." (emphasis in original).[70]

II. PRE-LITIGATION CONDUCT

The principal argument against preservation rulemaking is that the Supreme Court is barred from enacting rules relating to pre-litigation matters.[71] The Committee Conference Report, in its discussion of preservation rulemaking, stated that the "first issue" is whether "a rule addressing discovery obligations and sanctions can attach to conduct before an action is filed in federal court."[72]

A preservation rule that fails to deal with pre-litigation conduct risks being irrelevant. Much of the "preservation action" of concern occurs before suit is filed. In *Phillip*

62 Conference Committee Report, *supra,* at 13 ("Rule 37(e) might be amended so as to bar sanctions against an attorney in the circumstances that now bar sanctions against a party").
63 *Capricorn Power Company v. Siemens Westinghouse,* 220 F.R.D. 429, 433 (W.D. Pa. 2004).
64 Statutory or regulatory requirements may also trigger preservation actions depending upon the intent of Congress or the regulators, a subject beyond the scope of these remarks. *See, e.g.,* Committee Note, Rule 26(f) (2006) (the obligation "may arise from many sources, including common law, statutes, regulations, or a court order in the case").
65 Letter, Robert L. Byman, Chairman to Peter G. McCabe, Secretary, *Proposed Amendments To the Federal Rules of Civil Procedure* (Jan. 25, 2005) (on file with author).
66 Conference Committee Report, *supra,* at 7 ("[h]ow to achieve it is the question").
67 Principle 5, THE SEDONA PRINCIPLES (2d ed. 2007) ("The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information.").
68 7TH CIRCUIT PILOT PROGRAM ("Every party to litigation and their counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control.").
69 2010 WL 645353 (S.D. Tex. Feb. 19, 2010).
70 *Id.* at *6.
71 Memorandum (Jan. 27, 2004), Advisory Committee on Civil Rules, at 35-36, *available at* http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/AgendaBooks.aspx ("the Civil Rules only address pending actions").
72 Conference Committee Report, *supra*, at 12.

M. Adams & Associates v. Dell, Inc., for example, the court held that the duty to preserve was triggered many years before suit was filed because other "computer and component manufacturers [in the industry] were sensitive" to the issue.[73] As one participant has observed, "[p]rospective litigants are at serious risk of committing spoliation—passively, actively, unintentionally—before litigation commences (if it ever does) because they have no codified benchmarks' to which to conform their behavior."[74]

Upon closer examination, the Enabling Act concern seems overblown. While Rule 1 states that the civil rules govern procedure "*in* the United States district courts," reliance on that language conveniently ignores the existence of Rule 27 (involving pre-commencement depositions used to perpetuate testimony)[75] which was approved by the Supreme Court and Congress - and the fact that courts routinely assess pre-litigation conduct wearing their inherent power hat. In *Silvestri v. General Motors*[76] and in *Goodman v. Praxair Services*,[77] for example, courts issued sanctions despite the fact that the discoverable evidence at issue was disposed of before the lawsuits were filed.

The test of Enabling Act jurisdiction,[78] or, for that matter, the use of inherent judicial power, is the relationship of the conduct to be regulated to the functioning of the courts. The mere fact that an action has not yet been commenced is not decisive. In *Chambers v. NASCO,*[79] the majority approved, over a dissent by Justice Kennedy, sanctions relating to pre-commencement conduct which was intimately related to the appropriate resolution of the case. *See* 501 U.S. at 55, n. 17 ("[a]lthough the fraudulent transfer of assets took place before the suit was filed, it occurred after Chambers was given notice, pursuant to court rule, of the pending suit. Consequently, the sanctions imposed on Chambers were aimed at punishing not only the harm done to NASCO, but also the harm done to the court itself.").

Rules seeking to limit the adverse impact of conduct on the functioning of discovery are well within the rulemaking power. As the Supreme Court noted in *Business Guides, Inc. v. Chromatic Comm. Enterprises, Inc.*,[80] Rule 11 is authorized since its "main objective" is to promote the judicial process by curbing abuses.[81] In *Shady Grove v. Allstate*,[82] the Court more recently noted that a rule which "regulate[s] only the process for enforcing [parties] rights" and not "the available remedies, or the rules of decision by which the court adjudicated" is clearly permissible.

Finally, Congress has, under the Enabling Act, reserved the power to review, revise and adopt changes to any rules that are proposed, including those that touch on pre-litigation conduct. Rules which survive that review have the same force of law as if directly enacted by Congress.[83] In *Chambers*, *supra,* the Supreme Court noted that "the exercise of the inherent power of lower federal courts can be limited by statute and rule, for '[t]hese

73 621 F. Supp. 2d 1173, 1191 (D. Utah 2009).
74 Gregory Joseph, *Electronic Discovery and Other Problem,* at 2-3, CONFERENCE PAPERS.
75 Rule 27 provides for limited discovery "before an action is filed" to "prevent a failure or delay of justice."
76 271 F. 3d 583, 590 (4th Cir. 2001).
77 632 F. Supp. 2d 494, 505 (D. Md. July 7, 2009).
78 28 U.S.C. § 2072 (a-b) (The Supreme Court shall have the power to prescribe "general rules of practice and procedure" provided they do not modify "substantive" rights).
79 501 U.S. 32 (1991). Justice Kennedy refused to accept this approach. *See* Kennedy, J., dissenting, at 74 ("By exercising inherent power to sanction pre-litigation conduct, the District Court exercised authority where Congress gave it none.").
80 498 U.S. 533 (1991).
81 *Id.* at 553.
82 130 S. Ct. 1431 (2010).
83 As Judge Posner has noted, "when a domain of judicial action is covered by an express rule, such as Rules 26 and 37 of the civil rules, the judge will rarely have need or justification for invoking his inherent power." *Fidelity National Title Insurance Co. v. Intercounty National Title,* 412 F.3d 745, 752 (7th Cir. 2005).

courts were created by act of Congress.'"[84] The Court has also indicated a strong preference for resolving fundamental civil discovery obligations by rulemaking, given the benefits of the practical and transparent process involved.[85]

III. POSSIBLE RULES

Reliance on ad hoc inherent power to articulate the duty to preserve has resulted in contradictory rulings and different formulaic approaches in different Circuits. In *Pension Comm. v. Bank of Am. Sec., LLC,*[86] for example, the court exempted moving parties from having to demonstrate that relevant and discoverable evidence was missing in order to seek sanctions merely because of the lack of written litigation holds. Other courts have reached diametrically opposed conclusions on similar facts.[87]

In addition, by relying on inherent power, not the specific and targeted provisions of Rule 37, the "wrong reason[s]" may be advanced[88] for the imposition of sanctions in the absence of a showing of egregious conduct. [89]

It is time for the Civil Rules to include duties relating to preservation.[90] This would not be the first time that rulemaking has superseded court-developed common law applied by inherent powers. In 1983, the Supreme Court acted to provide rule-based guidance in order "to obviate dependence upon" the "court's inherent power to regulate litigation."[91] However, as in the case of all rulemaking, the "devil is in the details," and great care must be taken not to exacerbate the very trends which have made preservation such a problem in the world of modern discovery.

A. Trigger of the Obligation

To help address the confusion inherent in assessing the "forseeability" of litigation, which helps illuminate when a party should have been aware of the need to preserve, the E-Discovery Panel recommended articulation of specific actions which would unequivocally trigger knowledge.[92] These examples could be included in a Committee Note. Some typical examples could include the service or delivery of a document such as a request or demand to preserve, a subpoena, CID or similar inquiry. When the shoe is on the other foot—i.e., when a party intends to initiate litigation or submit a counterclaim—the Rule or Committee Note could identify as triggering conduct the steps taken in anticipation of asserting or defending claims, such as preparation of reports, hiring of experts, presenting claims to regulators, hiring counsel and the like.[93]

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84 501 U.S. 32 at 48.
85 *Mohawk Industries, Inc. v. Carpenter,* 130 S. Ct. 599, 609 (2009) (rulemaking "draws on the collective experience of bench and bar" for "measured, practical solutions").
86 685 F. Supp. 2d 456 (S.D.N.Y. Jan. 15, 2010) (holding that it was gross negligence to fail to issue written litigation holds). The opinion was subtitled "*Zubulake* Revisited: Six Years Later," and was amended on May 28, 2010.
87 *Kinnally v. Rogers Corporation,* 2008 WL 4850116, at *6 (D. Ariz. Nov. 7, 2008) ("the absence of a written litigation hold . . . does not in itself establish [a violation]" (emphasis in original). A strict liability approach was also rejected in the context of Rule 26(b)(2)(B) by *Major Tours v. Colorel* ("Major Tours III"), 2010 WL 2557250, at *28 (D.N.J. June 22, 2010) ("The Rules compel [a] discretionary balancing . . . not a bright line requirement of production if a party "fails to adequate preserve every byte of previously accessible data.").
88 John M. Barkett, *Walking the Plank, Looking Over Your Shoulder, Fearing Sharks Are in the Water: E-Discovery in Federal Litigation?,* CONFERENCE PAPERS, at 35.
89 *Rimkus Consulting v. Cammarta,* 2010 WL 645353, at *5 and *7 (S.D. Tex. Feb. 19, 2010) (the Supreme Court's decision in *Chambers* may require a degree of culpability greater than negligence since, in that case "the inherent power was linked to the bad-faith conduct that affected the litigation."); *cf. United Medical Supply v. United States,* 77 Fed. Cl. 257, 268 (Fed. Cl. 2007) (it is a "huge logical leap" to suggest that Chambers "limit[s] sanctions to cases in which there is a showing of bad faith").
90 Conference Committee Report, supra, at 12 ("it may be possible to focus on provisions that address" this narrow source of preservation duties).
91 Rule 16, Committee Note, Subdivision (f) (1983) (dealing with failure to comply with Rule 16).
92 *See generally* E-Discovery Panel, "Elements of a Preservation Rule" ("Preservation Elements"), ¶ 1(Trigger), CONFERENCE PAPERS.
93 *Id.* at ¶ 1(b)(v).

Some have argued that a neutral cut-off point would be preferable to one based on forseeability. Thus, Professor Martin Redish has suggested establishing the trigger at a fixed point, such as the service of a discovery request or, if opposed, issuance of a discovery order.[94] The New York City Bar[95] has also suggested an objective retroactive limitation on preservation obligations. Under that proposal, "no sanctions [would be possible] for loss of data occurring more than one year prior to receipt of (i) a preservation demand letter; or (ii) the filing of a complaint, which ever comes first."

However, regardless of the method utilized, courts should concentrate on assessing the culpability of parties *at the time of loss* since "[t]he ultimate focus for imposing sanctions for spoliations of evidence is the intentional destruction of evidence indicating a desire to suppress the truth, not the [mere] prospect of litigation." [96]

B. Components of the Duty to Preserve

A preservation rule should require reasonable efforts, not extraordinary, excessive, disproportionate or unduly burdensome actions.[97] A "cost-benefit" balance should be applied so that the efforts are not "disproportionate to the potential value" of the information at issue. There are, admittedly, difficulties in applying the cost-benefit approach to preservation issues, given that costs are not always the sole factors at issue in litigation.[98] Nonetheless, it makes sense to embody the principle in the rule in addition to the requirement of a reasonable effort.

Thus, a standalone provision (e.g., Rule 34.1)[99] could provide:

> "Parties with actual or constructive notice of the likelihood that relevant and discoverable evidence is or will be sought in discovery shall undertake reasonable and proportionate efforts to preserve any such evidence within its possession, custody or control subject to the considerations of Rule 26(b)(2)(C) and Rule 37(e)."

However, experience also indicates the need for more explicit guidance to provide a substantial measure of certainty for preservation planning purposes and to form a "checklist" for disclosures and Rule 26(f) and 16(b) discussions.

One approach would be to specify types of ESI which need not be preserved absent agreement or a court order. Such a provision has been successfully implemented as a key part of the Seventh Circuit E-discovery Pilot Program. It would be analogous to Rule 26(b)(2)(B), added in 2006, which exempts *production* of ESI from inaccessible sources in the absence of a showing of good cause and has served as a model for preservation obligations.[100]

94 *See* Martin R. Redish, *Electronic Discovery and the Litigation Matrix,* 51 DUKE L.J. 561, 624-25 (2001) (advocating trigger of the duty to preserve upon receipt of discovery requests unless destruction took place before time when otherwise normally scheduled for destruction).

95 New York City Bar, *Proposals for the 2010 Duke Conference Regarding the Federal Rules of Civil Procedure*, at 5 (unnumbered), CONFERENCE PAPERS.

96 *Greyhound Lines v. Wade,* 485 F.3d 1032 (8th Cir. 2007).

97 The Sedona Conference® *Commentary on Preservation, Management and Identification of sources of Information That Are Not Reasonably Accessible*, 10 SEDONA CONF. J. 281, 282, 292 - 293 (2009) ["Step Five Analysis - The Proportionality Principle"] (the nature of the storage media and the characteristics of the information play a role in determining if burdens and costs of preservation outweigh the potential benefits).

98 *See* CCL Critique, at 4, CONFERENCE PAPERS ("[c]ost is a legitimate concern in adjudicating disputes, but mandating cost-benefit analysis 'at all times' [citing to ACTL/IAALS proposed Pilot Rule 1.2] is neither desirable nor practical.").

99 A proposed Rule 34.1 ("Duty to preserve") was also distributed for discussion purposes to attendees at the E-Discovery Conference in February, 2004 prior to the 2006 Amendments. *See* FORDHAM E-DISCOVERY CONFERENCE PARTICIPANT MEMO (2004), at 35, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/E-Discovery_Conf_Agenda_Materials.pdf.

100 *Cache La Poudre Feeds, LLC v. Land O Lakes, Inc.,* 2007 WL 684001 at *15 (D. Colo. Mar. 2, 2007) (the duty to preserve "would not automatically include information maintained on inaccessible computer backup tapes.").

Thus, a second provision could provide (in the Rule or in a Committee Note) that in the absence of a court order or prior agreement, the necessity of preservation of the following categories would not be required:

(1) Deleted, slack, fragmented or unallocated data on hard drives
(2) Random access memory (RAM) or other ephemeral data
(3) On-line access data such as temporary internet files
(4) Data in metadata fields that are frequently updated; such as last opened dates
(5) Backup data that is substantially duplicative of more accessible data available elsewhere, and
(6) Other forms of ESI which require extraordinary affirmative measures not utilized in the ordinary course of business."[101]

This provision would help reduce the obvious unfairness of "sandbagging" a producing party with unanticipated preservation burdens.[102] Courts would be urged to deal promptly with any disputes at the Rule 16 conference or in response to a motion for a preservation or protective order.[103] The right to seek sanctions would be waived by parties failing to take advantage of the opportunity to discuss and resolve contested issues.[104] Something like this approach was successfully applied in the landmark decision in *Columbia Pictures v. Bunnell*,[105] where a duty to preserve information temporarily stored in RAM was held to arise only after motion and a showing of the necessity for the retention.

A related approach would be to provide presumptive limitations on the total number of "key custodians" and information systems whose relevant information must be preserved and produced.[106] For example, up to 10 custodians (depending upon the value of the case as determined by the demand or by the court) and an equal number of information systems could be a presumptive maximum that a potential producing party would be responsible to address.[107] This would provide a strong incentive for parties and counsel to take advantage of the Rule 26(f) meeting process. The numbers, of course, would be subject to modification in individual cases.

C. Sanctions

Spoliation sanctions are but one form of discovery sanctions,[108] yet under the current regime they are routinely imposed without guidance from Rule 37. Once the preservation obligation is decoupled from the common law spoliation doctrine and

101 For a similar approach, *see Lawyers for Civil Justice White Paper,* CONFERENCE PAPERS, at 36-37 (Rule 26(h) Specific Limitations on Electronically Stored Information).
102 *Frey v. Gainey Trans. Services,* 2006 WL 2443787, at *9 (N.D. Ga. Aug. 22, 2006) (refusing spoliation sanctions where demand letter arguably was intended to "sandbag" party if ignored).
103 *See* 7TH CIR. PILOT PROGRAM, PRINCIPLE 2.04 (Scope of Preservation) ("if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable").
104 *Healthcare Advocates v. Hardin, Earley, Follmer & Frailey,* 497 F. Supp. 2d 627 (E.D. Pa. 2007) (finding no duty to preserve contents of cache files where preservation letter did not alert them to the need to do so).
105 245 F.R.D. 443 (C.D. Cal. 2007), denying motion to reverse order regarding preservation of server log data, 2007 WL 2080419 (C.D. Cal. May 29, 2007) (emphasizing "its relevance and the lack of other available means to obtain it").
106 This approach has worked well in the production context. *See, e.g.,* Rule 30(a)(2)(A)(no more than 10 depositions); Rule 33(a)(no more than 25 written interrogatories); *see also* Rule 30(d)(1) (deposition limited to 1 day of 7 hours unless otherwise stipulated or ordered by the court). *See generally*, Gregory S. Weber, *Potential Innovations in Civil Discovery: Lessons for California From the State and Federal Courts*, 32 MCGEORGE L. REV. 1051 (Summer 2001).
107 *Cf. Lawyers for Civil Justice White Paper*, *supra,* at 32 CONFERENCE PAPERS (suggesting a presumptive limitation of "a reasonable number of custodial or other information sources for production, not to exceed 10"). CPR (the International Institute for Conflict Prevention & Resolution) has incorporated a similar approach in its model Economical Litigation Agreement (2010)(copy on file with author).
108 *Casale v. Kelly,* 2010 WL 1685582, at *10 (S.D.N.Y. Apr. 26, 2010) (describing remedies for "failing to preserve" as a form of "discovery sanctions").

incorporated in the Civil Rules, it would be comparatively easy to adapt Rule 37 to treat preservation infractions under that Rule. Rule 37 already incorporates most of the traditional discretionary remedies needed to address such challenges.[109]

Thus, Rule 37(b)(2)(A) could provide that "[if a party] fails to obey an order to *preserve evidence or* provide or permit discovery," it would apply. Rule 37(c)(1) could be amended so that it would apply "[if a party] fails to *preserve or* provide information as required by these rules or identify a witness as required by rule 26(a) or (e)."

Rule 37 would then provide the basis for promoting the uniform treatment of the sanction issues among the Circuits. Rule 37 instructs courts to assess whether sanctions are "substantially justified"[110]or were not "unjust."[111] Examples could be given in the Committee Notes of whether or how to identify the relevance of the information alleged to have been lost and the prejudice suffered by the loss.[112]

The Committee Note could also address the issue of whether there is conduct that presumptively satisfies the requisite state of mind to justify sanctions under Rule 37 standards. In *Scalera v. Electrograph Systems,*[113] for example, internal counsel orally instructed key players to retain email, collected relevant files and was satisfied that backup media was secure and could be accessed. The court denied sanctions.

D. Rule 37(e)

In most circuits, proof of bad faith—evidencing a subjective intent to interfere with access to discoverable evidence—is required to justify imposition of serious sanctions.[114] However, the contrary is true in other circuits, where mere "negligence" is sufficient. Rule 37(e) was enacted as part of the 2006 Amendments to clarify that in the case of "routine" losses—which can occur before or after a duty to preserve attaches—rule-based sanctions are inapplicable provided the party acted in good faith, an "intermediate" standard which provides for the absence of bad faith. Thus, conduct falling within that scope is not to be treated differently even if the governing law of the circuit in which the action is pending would do so, absent Rule 37(e).

Unfortunately, some courts have interpreted an ambiguous Committee Note to Rule 37(e)[115] as a mandatory duty to take specific action, regardless of the need to so to effectuate preservation, thereby barring application of Rule when a duty to preserve is identified and the action is not taken. The author of the *Zubulake* opinions is quoted as arguing that "it can't be routine and good-faith not to suspend your process once you know

109 Rule 37(b)(2)(A), for example, authorizes the issuance of orders establishing or opposing "designated facts," the striking of "pleadings" or the entry of a "default judgment" or "dismissal." Rule 37(c) bars use of information or a witness to supply evidence on a motion, at a hearing, or at a trial and mandates payment of reasonable expenses, including attorney's fees, under many circumstances.

110 *Devaney v. Continental American Insurance,* 989 F.2d 1154, 1163 (11th Cir. 1993) (determination turns on whether "reasonable people could differ as to the appropriateness of the contested action.").

111 *Lewis v. Ryan,* 2009 WL 3486702 at *6 (S.D. Cal. Oct. 23, 2009) (not "unjust" to sanction where defendants knew documents were relevant but allowed them to be destroyed); *Webb v. The District of Columbia,* 146 F.3d 964, 971 (D.C. Cir. 1998) (the same "considerations" apply to Rule-based sanctions as have traditionally been applied to sanctions issued under authority of inherent powers).

112 Preservation Elements, *supra,* ¶ 7(d), CONFERENCE PAPERS.

113 262 F.R.D. 162, 178-179 (E.D.N.Y. 2009).

114 *Bakhtiari v. Lutz,* 507 F. 3d 1132 (8th Cir. 2007) (refusing to sanction pre-suit destruction of email through automatic deletion since the "ultimate focus" should be on proof of intentional destruction).

115 The Committee Note to Rule 37(e) provides that "[w]hen a party is under a duty to preserve information because of pending or reasonably anticipate litigation, intervention in the routine operation of an information system is one aspect of what is often called a 'litigation hold.'"

there is litigation."[116] However, "if the party cannot avail itself of the safe harbor because it had a duty to preserve data in the first instance, then Rule 37 does little to change the state of the pre-existing common law." [117]

Thus, Rule 37(e) should be clarified to provide that:

> "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information or tangible things lost as a 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." [118]

This would be consistent with the Private Securities Litigation Act (the "PSLRA")[119] and recommendations by Lawyers for Civil Justice and the ACTL/IAALS Pilot Project Rules.[120] It shuld also be broadened to include all forms of discoverable evidence, not just electronically stored information.[121]

IV. CONCLUSION

The preservation doctrine belongs in the Federal Rules, where it can be linked to and supportive of discovery obligations and whose compliance can be assessed by the provisions of an expanded Rule 37. Additional rulemaking involving practical standards which are "up to the task"[122] is feasible and should be discussed at the upcoming Advisory Committee meetings. Despite the hesitancy of the Advisory Committee to act in 2006, the time has come for action.

116 Panel Discussion, *Sanctions in Electronic Discovery Cases: Views from the Judges,* 78 FORDHAM L. REV. 1, 30-31 (Oct. 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 a litigation hold when you should there's going to be no excuse if you lose information.").

117 Emily Burns, Michelle Greer Galloway & Jeffrey Gross, *E-Discovery: One Year of the Amended Federal Rules of Civil Procedure,* 64 NYU ANN. SURV. AM. L. 201, 217 (2008).

118 *See also Lawyers for Civil Justice White Paper*, CONFERENCE PAPERS, at 38.

119 *Danis v. USN Communications,* 2000 WL 1694325, at *32, n. 20 (N.D. Ill. Oct. 23, 2000) (noting that under the PSLRA [15 U.S.C. §78u-4(b)(3)(C)(i)] sanctions may be imposed under the PSLRA only for willful document destruction.").

120 ACTL/IAALS Pilot Project Rules, *supra*, at 7 CONFERENCE PAPERS ("only upon a showing of intent to destroy evidence or recklessness"); *cf.* CCL Critique, *supra,* at 24, CONFERENCE PAPERS.

121 Letter, American College of Trial Lawyers to Advisory Committee (Jan. 25, 2005), at 4 ("[i]f a safe harbor is introduced into the Rules [which the ACTL then supported in principle], it should extend to all types of information").

122 *Chambers v. NASCO,* 501 U.S. 32, 50 (1991).