



REPORT
OF THE
SPECIAL COMMITTEE ON DISCOVERY AND CASE
MANAGEMENT IN FEDERAL LITIGATION
OF THE
NEW YORK STATE BAR ASSOCIATION

APRIL 2, 2012

Opinions expressed are those of the Committee preparing this report and do not represent those of the New York State Bar Association unless and until the report has been adopted by the Association's House of Delegates or Executive Committee.

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Executive Summary

The Special Committee on Discovery and Case Management in Federal Litigation (the “Committee”) was tasked with examining the perceived delays and expense of litigation in federal court and to make recommendations to reduce both. After looking at empirical data and perusing the ample literature, both scholarly and practical, on the causes of delays and expense and on remedies, including the significant and useful group of materials assembled for the May 2010 conference at Duke Law School (the “Duke Conference”) sponsored by the Civil Rules Advisory Committee of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (“Advisory Committee”), the Committee decided to focus on, and make recommendations regarding four stages of litigation. The report is divided into four parts that coincide with those recommendations.

Part I

The first part addresses the absence of rules about preservation and spoliation in the Federal Rules of Civil Procedure. After analyzing the current case law concerning when and what information is to be preserved, the scope of that duty, and finally the elements of a spoliation claim, the report proposes new Rules 26(h) and 37(g) to the Federal Rules of Civil Procedure¹. Proposed Rule 26(h)(1) would create a duty to preserve when (a) “a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action, or (b) a subpoena is received by a non-party.” Proposed Rule 26(h)(2) describes the scope of the duty to preserve and introduces the concept of proportionality, requiring that the person with the duty to preserve must take reasonable actions under the circumstances. The factors to be considered in determining the reasonable measure to be undertaken include the importance of the material to the resolution of the issues, the importance of the issues at stake, the amount in controversy, the expense and burden of preservation, and the parties’ resources.

Proposed Rule 26(h)(3) defines the termination of the duty of preservation, in circumstances when no action has been commenced, to be when facts and circumstances lead a reasonable person to expect not to be a party to an action, and, when an action has been commenced, at the termination of the party’s or non-party’s involvement.

¹ All references to “Rules” are to the Federal Rules of Civil Procedure unless otherwise noted.

Finally, proposed Rule 26(h)(4) requires that documents, whether electronically stored or otherwise, be kept in a form as close to the original without material loss of accessibility.

The Committee proposes a new Rule 37(g) to provide for sanctions for violation of preservation duties, suggesting in subsection (1) nine possible remedies ranging from dismissal of the action to allowing further discovery, but requiring the court to impose the “least severe remedy or sanction to redress the violation” The factors to be considered in determining the appropriate remedy or sanction calibrated to levels of culpability are set forth in subsection (2).

Part II

The Committee embraces the notion that early judicial intervention will foster cooperation among adverse counsel and efficiency in completing discovery and resolving issues in litigation, which ultimately leads to a less expensive and faster resolution of any dispute. The Committee believes that the current Rule 16 pretrial conference does not come early enough and that holding a conference within sixty days of the filing of the complaint can accomplish much in the way of eliminating frivolous claims or defenses, amending pleadings, providing for limited discovery in anticipation of Rule 12(b) motions, scheduling motions, and addressing preservation issues. The Committee recognizes that at this early stage of the litigation, counsel will not have complete command of the facts and legal theories underpinning her client’s claims or defenses and that a complete discovery plan, including issues surrounding the withholding of privileged and confidential documents, will not be possible. Accordingly, the Committee acknowledges that there is still need for a later scheduling order currently

contemplated by Rule 26(f) and Rule 16(b), although its timing might be affected by the Committee's proposal. Further, certain cases may not benefit from such an early conference, perhaps because they are relatively straightforward, and the litigants or the court could then opt out of the conference. Nonetheless, the Committee recommends an initial early pre-trial conference as outlined in proposed new Rule 16(b).

Under proposed Rule 16(b)(1), the new proposed Rule 16(b) pre-trial conference is to be held as soon as practicable, but, absent good cause, no later than sixty days after the filing of the initial pleading. Proposed Rule 16(b)(2) requires counsel (or a party appearing *pro se*) to meet and confer about simplifying issues and eliminating frivolous claims or defenses, preservation of evidence, dispositive motions, involvement of a magistrate judge or special master, application of mediation, initial disclosures, the expected scope of discovery of electronically stored information, and any other issue that will promote prompt and efficient resolution of the matter.

Proposed Rule 16(b)(3) requires that, at this initial pre-trial conference, the parties present the court with a concise overview of the essential issues and the importance of discovery in resolving those issues so that the court can make a proportionality assessment and limit or stage discovery. The proposed rule encourages the court to take action on those matters addressed in counsel's meet-and-confer, set a timetable for the Rule 26(f) conference, establish deadlines for amending pleadings, address the timing of any Rule 12(b) motions, assess whether from the face of the pleadings and counsel's presentation of the essential issues there is an opportunity for prompt disposition of the action, address any class action management issues or scheduling, determine whether mandatory initial disclosure should be required, and

decide whether any other conferences should be scheduled to address any issues, including those identified above.

Part III

The Committee believes that the current obligation under Rule 26(a)(1)(A)(ii) to produce all documents, ESI, or tangible items a party may use to support its claims or defenses is of limited value and often fails to produce efficiency in the discovery process, especially in complex litigation. Empirical evidence reveals that a only a minority of practitioners believe that the obligation reduces discovery and that more than half believe it adds to the cost of discovery. Accordingly, the Committee recommends that the requirement be eliminated and proposes deletion of subparagraph ii of Rule 26(a)(1)(A).

The Committee recognizes that in certain cases the initial mandatory disclosure of such documents, ESI, and tangible evidence may indeed be efficient and efficacious in speedier resolution of the dispute. The Committee therefore has included in the items the court should consider in its initial pre-trial conference to be held pursuant to proposed Rule 16(b) whether such mandatory disclosure should be imposed (*see* proposed Rule 16(b)(3)(vii)).

Part IV

Most litigating attorneys representing substantial businesses have experienced the excruciating burden of reviewing documents, especially e-mails and electronically stored information, for privilege or work-product protection and then having to create a privilege log, which often receives little attention from the adversary. Counsel agonize over the import of communications involving the client's counsel and

then the adequacy of the description of the withheld documents in the privilege log. The Committee believes that significant steps to reduce this burden should be undertaken at least by agreement among the parties, if not by court direction, and therefore propose eight guidelines to be followed by practitioners in the review of documents for privilege or protection and the preparation of a privilege log.

Because cooperation is critical to ensuring effective and cost efficient discovery, Guideline 1 counsels parties to meet and confer early and sets out topics that the parties should be prepared to discuss at an initial conference. Guideline 2 encourages counsel to take advantage of Federal Rule of Evidence 502 and agree to secure an order early in the case that the production of privileged or protected documents will not result in any waivers. As an alternative to logging every privileged or protected document, Guideline 3 suggests other approaches such as agreeing on categories of documents to be excluded, logging documents by category, and how to most efficiently treat e-mail chains. Guideline 4 advises that attachments to e-mails should be identified and logged separately from the e-mails containing them. As the assertion of privilege or protection may be challenged, Guideline 5 cautions counsel to keep track, in written form, of the efforts made to search for privileged or protected documents. Guideline 6 addresses the need to verify the accuracy and thoroughness of the search for privileged or protected documents. Where a portion of document is redacted, Guideline 7 notes that it should be treated in the same manner as a document that is privileged or protected in its entirety and the basis for the redaction must be sufficiently descriptive. Finally, Guideline 8 encourages the parties to agree to an *in camera* sampling by the court of sufficient size

and variety for large-scale challenges to the assertion of privilege or protection rather than a review of all contested documents.

Introduction

The Committee was formed at the request of then Bar Association president Stephen P. Younger in the summer of 2010 to study and make recommendations about the perceived burgeoning cost of litigation, largely attributed to expanding discovery, and in particular discovery of electronically stored information (“ESI”), and the lengthy delays in concluding actions and proceedings once initiated. The Committee has examined various topics relevant to those issues, including the impact of increasing use of electronic communications and ESI, delays in litigation, mandatory initial disclosure, proportionality, preservation and spoliation, active and early judicial case management, the role of magistrate judges, and the narrowing of issues for trial.

The Advisory Committee has also been addressing these same issues.² Based on the Advisory Committee’s recommendations, the Standing Committee develops proposed amendments to the Federal Rules of Civil Procedure which, upon favorable review by the Judicial Conference and the U.S. Supreme Court, may eventually be presented to Congress under the Rules Enabling Act of 1934, 28 U.S.C.A. § 2071, *et seq.*

² The Advisory Committee’s review of Rule 26 since the 1990s has resulted in several relevant amendments. Moreover, in recognition of the problems created by ESI in the discovery process, it convened the Duke Further Conference to address the cost and delays in federal court litigation. The Advisory Committee has held further meetings, including one in Houston, Texas in September 2011, and is expected to issue recommendations by the Spring of 2013.

For almost ten years, The Sedona Conference^{®3} has been addressing the burgeoning cost and length of complex litigation and the role of the retrieval and disclosure of ESI in that trend. In March 2003, a working group of The Sedona Conference^{®4} first published *The Sedona Principles*, which addressed electronic document retention and production. These principles were republished in a second edition in 2007.⁵ In 2010, the same working group published *Principles of Proportionality*,⁶ and, in August 2011, The Sedona Conference[®] published a compendium for judges to assist them with case management.⁷ The focus of The Sedona Conference[®] on impediments to fulfillment of the mandate of Rule 1 that the courts provide “just, speedy, and inexpensive determination of every action” is further evidence of the concern of the bench and bar with the delays and costs of litigation.

Late last year, the Judicial Improvements Committee of the United States District Court for the Southern District of New York announced a pilot project that will test techniques in complex civil cases to streamline the judicial process in several areas, including initial pretrial case management, discovery, motions, and final pretrial conferences.⁸ For instance, the Southern District pilot project requires the parties to file

³ The Sedona Conference[®], based in Phoenix and Sedona, Arizona, is a charitable, non-partisan research and educational institute dedicated to the improvement of law and policy in several areas of the law, including complex litigation. It brings together experts, judges, and experienced litigators to consider in a non-adversarial setting various problems and issues in selected areas of the law.

⁴ Working Group 1, the first of many Sedona working groups, developed and published for comment in 2003 principles and best practice recommendations for ESI retention and disclosure in civil litigation. These *Sedona Principles* were promptly cited favorably in the first *Zubulake* decision, *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 320 n.61, 327 n.67 (S.D.N.Y. 2003).

⁵ *The Sedona Principles, Second Edition: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (2007). The second edition reflected comments to the original principles and also the 2006 revisions to the Federal Rules of Civil Procedure.

⁶ The Sedona Conference[®] *Commentary on Proportionality* (2010).

⁷ The Sedona Conference[®] *Cooperation Proclamation: Resources for the Judiciary* (2011).

⁸ The Judicial Improvements Committee, which was chaired by U.S. District Judge Shira Scheindlin, was comprised of judges from the southern district and preeminent practitioners in the court. The Judicial

no later than seven days before an initial pre-trial conference a report covering a number of issues in an effort to identify, among other things, the scope of discovery required for the case, how discovery disputes will be handled, the potential for dispositive motion practice, and whether issues can be narrowed to make trial more efficient. The pilot project now also requires pre-motion conferences for all non-Rule 12(b) motions and seeks to resolve discovery disputes via letter submissions rather than motions. These, among other reforms, are meant to make the judicial process more efficient in the many complex litigations that are filed in the Southern District.

Some, if not all, of the issues the Committee has examined have also been addressed by other bar associations within the State and even within the Association, for example, by the Commercial and Federal Litigation Section.⁹ The New York City Bar Association filed an extensive comment letter with the Administrative Office of the United States Courts in February of 2005 on proposed amendments to the Federal Rules of Civil Procedure addressing discovery of electronic evidence.¹⁰ In April 2010, the Federal Courts Committee of the New York City Bar Association submitted a proposal to the Duke Conference for amendments to the Rules that would create a “new motion (a ‘Summary Adjudication Motion’) that will permit the court to control the scope of discovery and breadth of the claims, counterclaims, and defenses by deciding substantive issues after the filing of the complaint and before summary judgment.”¹¹

Improvements Committee issued its report in early October 2011, and the pilot project began in the Southern District of New York on October 31, 2011. *See* N.Y.L.J., Nov. 2, 2011, at 1.

⁹ The Commercial and Federal Litigation Section released a report in July 2011 entitled *Best Practices in E-Discovery in New York State and Federal Courts*. It was adopted by the Executive Committee of the Association on September 27, 2011.

¹⁰ Ltr. from Bettina B. Plevan, President, to Peter G. McCabe, Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, dated Feb. 15, 2005.

¹¹ Proposals for the 2010 Duke Conference Regarding the Federal Rules of Civil Procedure dated April 2010.

Two reformative themes have emerged from the review and analysis of the current litigation landscape by the Advisory Committee at its Duke Conference, by the Judicial Improvements Committee in fashioning its pilot project, and also by the Committee in the course of its work, namely the need for active and early judicial management by the courts of the cases on their calendars and the need for cooperation among the attorneys for the litigants. In addition to these two precepts, the Committee has embraced the concept of proportionality, *i.e.*, the notion that the burdens imposed by discovery, be they financial or simply temporal, should bear some reasonable relationship to the importance of the issue(s) and stakes in the case. The Committee believes that interaction between the court and the attorneys for the litigants early in the litigation process will focus the parties and the court on the important issues in the case, will result in a more efficient and less expensive discovery process, will minimize time-consuming and often unnecessary discovery and related motion practice, and ultimately will serve the fundamental aspirations of Rule 1 in providing “a just, speedy, and inexpensive determination of every action and proceeding.”

In view of the extensive review by these other groups of the impact of electronic data on disclosure and discovery in litigation, the Committee has chosen to limit its review and recommendations to four areas: preservation of documents and spoliation, initial mandatory disclosure, early judicial case management, and preparation of privilege logs and waiver. Accordingly, this report is divided into four parts. The first part addresses proposed rule changes related to preservation and spoliation.¹² The second

¹² Because the Advisory Committee advanced its review of the preservation and spoliation issues, held a “mini-conference” in September 2011, and addressed these issues at its November 2011 meeting, the Committee accelerated its work to prepare an interim report on that topic for submission to the Advisory Committee. The Interim Report was presented to the Association’s House of Delegates at its June 25, 2011

part proposes amendments to Rule 16 to provide for a preliminary court conference to be held even earlier than is required under current Rule 16(b). The third part proposes the elimination of Rule 26(a)(1)(A)(ii), which requires mandatory initial disclosure of electronic data, documents, and tangible evidence a party may use to support its claims or defenses. Finally, part four offers guidelines for the preparation of privilege logs to reduce the burden of their preparation without risking waiver of the privilege.

Part I – Preservation and Spoliation

This section of the report addresses issues relating to the preservation and spoliation of ESI, documents, and things, including whether changes in the Federal Rules of Civil Procedure are necessary. The text first provides an overview of current federal case law concerning when and what information is to be preserved, the scope of the duty to preserve, and the elements of a spoliation claim. It then summarizes the Committee's recommendations. Appendix A presents proposed Rules and Advisory Committee Notes to provide standards for preservation as well as remedies and sanctions for spoliation.

Technological developments in data processing and electronic storage have exponentially increased the amount of information available to parties in litigation. Practical realities of business and the expense of maintaining a cache of data militate against indefinite information storage. In the course of business or other activities, ESI is destroyed or compromised through normal and customary document retention/destruction practices. In the past, it was enough to keep paper documents for a set period of time, such as seven years, and off-site facilities could be used for storage. Today, the sheer

meeting for informational purposes and later approved by the Association's Executive Committee at a July 28, 2011 meeting. That interim report is now incorporated in this final report as Part I and Appendix A.

mass of e-mails and attachments and the capacity of personal computers and networks results in the propagation of enormous amounts of information. This information must be regularly purged or an enterprise may perhaps be overwhelmed.¹³

The possibility of the loss of such potentially relevant information has led some courts to grapple with preservation and spoliation in an electronic context. Some courts have formulated guidelines to advise parties as to their responsibilities regarding preservation. These guidelines include whether and when a “litigation hold” should be placed on document preservation, how long it should last, what it should encompass, and to whom it should be directed. These cases also address the remedies and sanctions when documents have been lost or destroyed.

The lack of a federal rule governing preservation complicates the analysis so that courts are often operating within their inherent authority. Consequently, a divergence has arisen in judicial viewpoints analyzing the concepts of preservation and spoliation, particularly in the area of ESI. Amendment of the Federal Rules of Civil Procedure is now necessary to ameliorate this lack of uniformity.

We recommend amending Rules 26 and 37 to provide that a duty to take reasonable and proportionate actions to preserve discoverable documents, ESI or things commences (a) for parties or anticipated parties, when they become aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action, and (b) for non-parties, when they receive a subpoena. We propose that the duty require actions that are reasonable under the circumstances to preserve documents, ESI or things

¹³ In addition, the cost of storage of large volumes of hard-copy documents compels companies to destroy them periodically.

discoverable under Rules 26(b) and 34(a) taking into consideration appropriate proportionality factors; that the material be preserved in a form as close to, if not identical to, its original condition, without material loss of accessibility; and that timely preparation, dissemination and maintenance of a reasonable litigation hold should be considered due care, absent exceptional circumstances. Remedies and sanctions should be commensurate with the culpability of the person failing to preserve evidence, the prejudice suffered, and the relevance of the unavailable information or things.

A. BACKGROUND

1. Historical Overview

“Spoliation” is derived from the Latin “to spoil.” The prohibition against negligent spoliation may be traced to Roman law and Justinian’s maxim *omnipraesumuntur contra spoliatores* (all presumption against the spoliator), Note, *The Spoliation Doctrine and Expert Evidence in Civil Trial*, 32 U.B.C. L. Rev. 293, 294-96 (1995); to English cases dating back to the seventeenth century; and to American cases including *The Pizarro*, 15 U.S. (2 Wheat.) 91 (1817), and *Pomeroy v. Benton*, 77 Mo. 64 (1882). See generally Lawrence Solum & Stephen Marzen, *Truth & Uncertainty: Legal Control of the Destruction of Evidence*, 36 Emory L.J. 1085, 1087 n.4 (1987). Early American cases generally required a showing of some level of intent, at times even evil animus or bad faith, before imposing sanctions. See *id.* at 1088-90. For example, erasing to make corrections or destroying handwritten notes after creating a typewritten document were not spoliation, because the evidence was essentially preserved. See *id.*

2. Source of the Duty to Preserve

There is as yet no explicit Federal Rule of Civil Procedure concerning preservation in general, although a court can fashion an order to preserve evidence in a particular case. See *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010) (“*Pension Comm.*”) (Scheindlin, J.) (“breach of the duty to preserve, and the resulting spoliation of evidence, may result in the imposition of sanctions by a court because the court has the obligation to ensure that the judicial process is not abused”).¹⁴

Federal courts have issued sanctions for pre-litigation spoliation under the “inherent power of the court.” See *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (“the power to sanction for spoliation derives from the inherent power of the court, not substantive law”) (pre-litigation destruction of car alleged to be defectively designed or manufactured); *Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009) (authority to impose sanctions for spoliated evidence derives from a court’s inherent power); Thomas Y. Allman, *Preservation and Spoliation Revisited: Is it Time for Additional Rulemaking?*, 2010 Conf. on Civil Litig., Duke Law School, May 10-11, 2010, at 7, available at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/02E441B3AD64B2D9852576DB005D976D/\\$File/Thomas%20Allman%2C%20Preservation%20and%20Spoliation%20Revisited.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/02E441B3AD64B2D9852576DB005D976D/$File/Thomas%20Allman%2C%20Preservation%20and%20Spoliation%20Revisited.pdf?OpenElement) (“Allman”); John M. Barkett,

¹⁴ There are numerous municipal and state regulations and laws that address duties to preserve documents in a surprising variety of particularized and technical fields, including alligator parts dealers (Ala. Code § 9-12-207(d) (2010)), transporters of inedible kitchen grease (Cal. Food & Agric. Code § 19313.1), utilities (N.Y. Energy Law § 17.103(2)(a)), and chemical manufacturers (15 U.S.C. § 2607). The proposed amendments to the federal rules would not affect these regulations, and this report does not otherwise address such statutes, codes or regulations.

Walking the Plank, Looking Over Your Shoulder, Fearing Sharks Are in the Water: E-Discovery in Federal Litigation?, 2010 Conf. on Civil Litig., Duke Law School, May 10-11, 2010, at 28 n.67, available at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/699991AD4965C1A78525771C0060372C/\\$File/John%20Barkett%2C%20Walking%20the%20Plank.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/699991AD4965C1A78525771C0060372C/$File/John%20Barkett%2C%20Walking%20the%20Plank.pdf?OpenElement) (“*Walking the Plank*”).

Some courts have reasoned that the obligation to preserve is owed to the court, rather than litigants. See *Krumwiede v. Brighton Assocs., L.L.C.*, No. 05 C 3003, 2006 WL 1308629 at *11 (N.D. Ill. May 8, 2006) (prejudice to judicial system); *Pension Comm.*, 685 F. Supp. 2d at 461; *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 517 (D. Md. 2010) (“*Victor Stanley*”) (Grimm, M.J.). See also John M. Barkett, *Zubulake Revisited: Pension Committee and the Duty to Preserve*, 2010 Conf. on Civil Litig., Duke Law School, May 10-11, 2010, at 20-24, available at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/C3A77C696C1B3540852576DB005D8764/\\$File/John%20Barkett%2C%20Zubulake%20Revisited.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/C3A77C696C1B3540852576DB005D8764/$File/John%20Barkett%2C%20Zubulake%20Revisited.pdf?OpenElement) (“*Zubulake Revisited*”). Typical of this view is a 1977 opinion from the United States District Court for the Northern District of Indiana:

Although a potential litigant is under no obligation to preserve every document in its possession, whatever its degree of relevance, prior to the commencement of a lawsuit, some duty must be imposed in circumstances such as these lest the fact-finding process in our courts be reduced to a mockery.

Bowmar Inst. Corp. v. Texas Inst. Inc., 25 Fed. R. Serv. 2d (Callaghan) 423, 426-27 (N.D. Ind. 1977) (case citation omitted).

Courts have also relied upon Rule 37 as a source of power to impose sanctions for spoliation arising post-litigation. “[I]f the spoliation violates a specific court order or disrupts the court’s discovery plan, sanctions also may be imposed under Fed. R. Civ. P. 37[(b)(2)].” *Victor Stanley*, 269 F.R.D. at 517. See also *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106-07 (2d Cir. 2002) (“*Residential Funding*”) (discussing broad discretion to fashion remedies under Rule 37 for violation of a discovery order).

“Whether exercising its inherent power, or acting pursuant to Rule 37, a district court has wide discretion in sanctioning a party for discovery abuses.” *Nycomed US Inc. v. Glenmark Generics Ltd.*, 08-CV-5023 (CBA) (RLM), 2010 U.S. Dist. LEXIS 82014, at *11-12 (E.D.N.Y. Aug. 11, 2010) (some case citations omitted).

3. **The Rules Enabling Act**

The federal rules, when originally adopted, arguably concerned themselves with conduct after the commencement of litigation on the purported ground that regulation of pre-litigation conduct was outside the Rules Enabling Act.¹⁵ See Allman, at 6; *Walking the Plank*, at 28 n.66. We have found no cases that specifically address whether a rule governing a pre-litigation duty to preserve evidence would run afoul of the Rules Enabling Act. Cf. *Jacobs v. Scribner*, Case No. 1:06-cv-01280-AWI-NEW (DLB) PC, 2007 U.S. Dist. LEXIS 51729 (E.D. Cal. July 5, 2007) (declining to

¹⁵ The Rules Enabling Act, 28 U.S.C. § 2072, provides limits on the rule-making authority delegated to the Supreme Court by Congress. It states: “(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals. (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.”

enter a preservation order prior to the appearance of the defendants on the ground the court lacked jurisdiction to enter such an order as to them).¹⁶ And, the Civil Rules Advisory Committee was careful in the 2006 amendments to Rule 37 not to make the Rules applicable to pre-litigation conduct. *See Allman*, at 8.

However, there are federal rules that apply to pre-litigation conduct. Rule 27(a) provides for depositions to perpetuate testimony “[b]efore an [a]ction [i]s [f]iled,” albeit on petition to the court with notice to expected adverse parties. Rule 11 imposes a pre-litigation duty to investigate before filing a complaint. Once a complaint is filed, under Rule 11, the court may impose sanctions on an offending party or his attorney, even in the absence of subject matter jurisdiction over the cause of action. *See Willy v. Coastal Corp.*, 503 U.S. 131, 139 (1992) (“[t]he interest in having rules of procedure obeyed, by contrast, does not disappear upon a subsequent determination that the court was without subject matter jurisdiction”). A court has significant discretion in determining what sanctions, if any, should be imposed for a violation of Rule 11 in filing a complaint. *See Perez v. Posse Comitatus*, 373 F.3d 321, 325-26 (2d Cir. 2004); 1993 Advisory Committee Notes to Rule 11 subdivisions (b) and (c).

Were a rule adopted that aimed at a pre-litigation duty to preserve evidence, it would appear to be consistent with the Rules Enabling Act. Indeed, as under Rule 11, the potential violation of such a duty would be tested only once litigation has

¹⁶ Commentator Thomas Y. Allman, who also favors a rule governing a pre-litigation duty to preserve rather than reliance on the inherent authority of the court, finds succor in a Supreme Court decision involving pre-commencement conduct relating to a fraudulent transfer of assets, *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). *See* Thomas Y. Allman, *Addressing Preservation & Spoliation After The Conference on Civil Litigation at Duke Law School*, Mar. 21, 2011, at 11, available at http://www.thesedonaconference.org/conferences/20110407/conference_papers/pdf/Chapter%207%20-%20Addressing%20Preservation%20and%20Spoliation.pdf. However, the *Chambers* decision relied on the inherent authority of the court.

commenced, and any sanctions or remedies would depend on the particular circumstances.

The regulation of discovery is now clearly considered to be within the scope of the Rules Enabling Act.¹⁷ Discovery requires not only the collection and production of ESI, documents and things, but also concomitantly their preservation in the first place. Accordingly, a rule concerning the preservation of ESI, documents, and things, even before litigation commences, must be within the scope of rules regulating the disclosure or discovery of those items during litigation. Persons would not be subject to a preservation rule absent some connection to a lawsuit – whether by commencing the action, receiving service of process, or receiving a subpoena in the case of third parties. A pre-litigation failure to preserve could be made sanctionable in a lawsuit only after a consideration of a variety of factors, including a culpable state of mind. Remedies or sanctions could then be narrowly tailored both to deter future conduct and to ameliorate the wrong, if any, committed.

B. CURRENT STATE OF THE LAW

1. Triggering the Duty

The duty to preserve arises when litigation is reasonably foreseeable or anticipated. *See Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001); *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 587-88 (6th Cir. 2009) (remanding to the district court to consider whether it was reasonably foreseeable that missing documents would be needed in future litigation); *Pension Comm.*, 685 F. Supp. 2d at 465,

¹⁷ *See Sibbach v. Wilson*, 312 U.S. 1, 13-16 (1941) (determining that Rules 35 (inspection rights) and 37 (sanctions for discovery violations) were constitutional exercises of rule-making power under the Rules Enabling Act and did not abridge or modify substantive rights).

496 (“pending or reasonably foreseeable litigation”); *Victor Stanley*, 269 F.R.D. at 521 (“reasonably anticipated” litigation); *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 641, 642 (S.D. Tex. 2010) (“*Rimkus*”) (Rosenthal, J.) (“reasonably anticipated” litigation); see also The Sedona Conference®, *The Sedona Principles: Second Edition, Best Practices, Recommendations & Principles For Addressing Electronic Document Production*, 70 cmt. 14.a (2007) (“*Sedona Principles*”) (“the common law duty of preservation arises when a party, either plaintiff or defendant, reasonably anticipates litigation”). It has been held that the litigation must be “more than a possibility.”¹⁸ *Knight v. Deere & Co.*, 2:08-cv-01903-GEB-EFB, 2010 WL 1948311 at *4 (E.D. Cal. May 11, 2010) (citing *Realnetworks, Inc., v. DVD Copy Control Ass’n, Inc.*, 264 F.R.D. 517, 524 (N.D. Cal. 2009)).¹⁹

The standard is not difficult to state; its application is more problematic. For example, Judge Scheindlin held that the duty to preserve arose four months before the filing of a discrimination claim, because e-mails were marked as privileged attorney-client communications, even though they were not sent to or from an attorney and were not legal in nature. See *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216-17 (S.D.N.Y. 2003) (“*Zubulake IV*”). In *Pension Committee*, Judge Scheindlin again

¹⁸ One court has rejected a temporal requirement between the destruction of evidence and the commencement of litigation, because to find otherwise would allow a party to destroy evidence so long as the action was not commenced within a certain period of time. See *Durham v. County of Maui*, CIV. NO. 08-00342 JMS/LEK, 2010 WL 3528991, at *4, n.6 (D. Haw. Sept. 10, 2010).

¹⁹ However, some courts have held that spoliation sanctions require notice that litigation was “imminent.” See *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681 (7th Cir. 2008); *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007).

imposed a duty to preserve on certain plaintiffs after two prospective plaintiff groups retained counsel, a bankruptcy had been filed, administrative remedies had been invoked, and some prospective plaintiffs communicated with other parties. *Id.*, 685 F. Supp. 2d at 476.²⁰

The court in *Aiello v. Kroger Co.*, 2:08-cv-01729-HDM-RJJ, 2010 WL 3522259 (D. Nev. Sept. 1, 2010), held that the filing of an accident report triggered the duty to preserve a surveillance video that may have recorded an accident. *Id.* at *3. However, another court has held that a demand letter does not trigger a duty to preserve, if the letter does not actually threaten litigation or demand preservation. *See Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 623 (D. Colo. 2007).

Gregory P. Joseph has criticized the reasonably-anticipates-litigation standard as “nebulous, creat[ing] uncertainty, [and] impos[ing] needless costs.” Gregory P. Joseph, *Electronic Discovery and Other Problems*, 2010 Conf. on Civil Litig., Duke Law School, May 2010, at 8, available at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/EE0CC8AFE81F5D90852576480045504B/\\$File/Gregory%20P.%20Joseph%2C%20Electronic%20Discovery%20and%20Other%20Problems.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/EE0CC8AFE81F5D90852576480045504B/$File/Gregory%20P.%20Joseph%2C%20Electronic%20Discovery%20and%20Other%20Problems.pdf?OpenElement) (“Joseph”). He proposes instead that a rule specify the following triggers for an obligation to preserve information:

(i) receiving a written notice to preserve; “[ii] preparing an incident report or other steps

²⁰ Consulting an attorney may provide guidance in determining whether a duty to preserve exists (if advice is sought regarding rights, then evidence should be preserved as a matter of caution). A letter threatening possible litigation and noting the retention of attorneys was sufficient to trigger a duty, even though litigation was not commenced until three years later. *See Goodman v. Praxair Services Inc.*, 632 F. Supp. 2d 494, 504, 511 (D. Md. 2009). It is less clear that a duty should be imposed on a party not planning to litigate, but who is similarly situated to others who are in litigation. *See Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1194 (D. Utah 2009) (company held to have violated its duty to preserve by not placing a hold on documents five years earlier when it learned that other companies in its industry were being sued).

taken in the ordinary course of business in anticipation of potential litigation; [iii] notifying an insurance company or indemnitor of a potential liability; [iv] hiring an investigator or photographer; [v] retaining or instructing counsel; [vi] engaging experts; [vii] breaching a contractual, regulatory or statutory duty to preserve or produce specific data; [viii] issuing an oral or written notice to preserve, or taking steps to draft one; [ix] filing a complaint with a regulator; [x] sending a pre[-]litigation notice that is prerequisite to filing suit or advising that litigation is contemplated; [or] [xi] conducting destructive testing.”²¹ *Id.* at 8.

Applying a general standard incorporated in a rule may be difficult and result in some inconsistencies, but the alternative of incorporating a laundry list of triggering events is too limited and inflexible and may create loopholes. *See Victor Stanley*, 269 F.R.D. at 522 (“the duty to preserve evidence should not be analyzed in absolute terms; it requires nuance, because the duty ‘cannot be defined with precision’”) (citations omitted). Thus, the better approach is to provide examples in Advisory Committee Notes to a general standard stated in a rule.

²¹ The Civil Rules Advisory Committee has suggested that the following list of events would lead a reasonable person to conclude that he or she could expect to be a party to an action: (1) service of a pleading or other document asserting a claim; (2) receipt of a notice of claim or other communication – whether formal or informal – indicating an intention to assert a claim; (3) service of a subpoena or similar demand for information; (4) retention of counsel, retention of an expert witness or consultant, testing of materials, discussion of a possible compromise of a claim, or taking any other action in anticipation of litigation; (5) receipt by a person of a notice or demand to preserve discoverable information; (6) the occurrence of an event that results in a duty to preserve information under a statute, regulation, or contract, or (7) knowledge of an event that calls for preservation under a person’s own retention program. Agenda of the Advisory Committee on Civil Rules, April 4-5, 2011, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-04.pdf> (“Agenda”), at 198-99.

2. **Relevance**

The information to be preserved is that which is “relevant to litigation or . . . future litigation,” *Fujitsu*, 247 F.3d at 436, and within a party’s possession, custody or control, *Residential Funding*, 306 F.3d at 107. Relevance for purposes of preservation may have a different meaning than relevance in the context of evidence admissible at trial or even in determining a remedy or sanction for spoliation.

At minimum, relevance in the preservation context includes information or things “relevant to any party’s claim or defense,” Rule 26(b)(1). See, *Victor Stanley*, 269 F.R.D. at 531 (quoting *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 219 F.R.D. 93, 101 (D. Md. 2003)) (“if ‘a reasonable trier of fact could conclude that the lost evidence would have supported the claims or defenses of the party that sought it’”). But, it also might include information or things “relevant to the subject matter involved in the action,” Rule 26(b)(1); *Zubulake IV*, 220 F.R.D. at 218; *Victor Stanley*, 269 F.R.D. at 522; or even information or things “reasonably calculated to lead to the discovery of admissible evidence,” Rule 26(b)(1).

Until a more precise definition [of relevance] is created by rule, a party is well-advised to “retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches.” *Zubulake IV*, 220 F.R.D. at 218. In this respect, “relevance” means relevance for purposes of discovery, which is “an extremely broad concept.” *Condit v. Dunne*, 225 F.R.D. 100, 105 (S.D.N.Y. 2004). . . . “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1).

Orbit One Commc’ns, Inc. v. Numerex Corp., 271 F.R.D. 429, 436-37 (S.D.N.Y. 2010) (some case citations omitted) (Francis, M.J.).

3. Scope of the Duty

A district court recently expressed the basic obligation of parties to preserve and produce documents relating to a claim, and the consequences that flow from a failure to observe that obligation: “Courts cannot and do not expect that any party can meet a standard of perfection. Nonetheless, the courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party. . . . [W]hen this does not happen, the integrity of the judicial process is harmed and the courts are required to fashion a remedy. . . . By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records – paper or electronic – and to search in the right places for those records, will inevitably result in the spoliation of evidence.”

Webb v. CBS Broad., Inc., No. 08 C 6241, 2010 WL 2104179, at *6 (N.D. Ill. May 25, 2010) (quoting *Pension Comm.*, 685 F. Supp. 2d. at 461-62) (some citations omitted).

The person with a duty to preserve must act reasonably in the circumstances. *Victor Stanley*, 269 F.R.D. at 522. “The duty to preserve evidence ‘includes an obligation to identify, locate, and maintain information that is relevant to specific, predictable, and identifiable litigation.’” *Id.* (quoting The Sedona Conference®, *The Sedona Conference Commentary on Legal Holds: The Trigger and the Process* 3 (public cmt. ed. Aug. 2007), available at http://www.thesedonaconference.org/content/miscFiles/Legal_holds.pdf (“*Sedona Conf. on Legal Holds*”)). See *Tango Transp., LLC v. Transp. Int’l Pool, Inc.*, Civ. A. No. 5:08-CV-0559, 2009 WL 3254882, at *3 (W.D. La. Oct. 8, 2009) (the scope of a party’s duty to preserve potentially relevant evidence includes evidence in possession of “employees likely to have relevant information, *i.e.*, ‘the key players’”). “The action

must be ‘reasonably calculated to ensure that relevant materials will be preserved,’ such as giving out specific criteria on what should or should not be saved for litigation.” *Victor Stanley*, 269 F.R.D. at 525 (quoting *Jones v. Bremen High Sch. Dist.* 228, No. 08 C 3548, 2010 WL 2106640, at *6 (N.D. Ill. May 25, 2010) (quoting *Danis v. USN Commc’ns, Inc.*, No. 98 C 7482, 2000 WL 1694325, at *38 (N.D. Ill. 2000))).

According to Judge Scheindlin, acting reasonably requires (i) prohibiting the destruction of information, (ii) taking steps to collect and review it, and (iii) monitoring those steps. *Pension Comm.*, 685 F. Supp. 2d at 465. (S.D.N.Y. 2010); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (“*Zubulake V*”) (Scheindlin, J.). Prohibiting the destruction of information may include issuance of a written litigation hold notice to all persons who possess relevant information, *Pension Comm.*, 685 F. Supp. 2d at 465; *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 194 (S.D.N.Y. 2007); *Zubulake IV*, 220 F.R.D. at 217-18, and suspension of a routine document retention/destruction policy, *Zubulake IV*, 220 F.R.D. at 218; *In re Kessler*, No. 05 CV 6056 (SJF) (AKT), 2009 WL 2603104 (E.D.N.Y. Mar. 27, 2009). See *Victor Stanley*, 269 F.R.D. at 524. In other words, prohibiting destruction of information may require a party “to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of e-mail or to preserve the records of former employees that are in a party’s possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.” *Pension Comm.*, 685 F. Supp. 2d at 471.

A litigation hold should “direct employees to *preserve* all relevant records – both paper and electronic” – and “create a mechanism for *collecting* the preserved records so that they can be searched by someone other than the employee.” *Pension Comm.*, 685 F. Supp. 2d at 473 (emphasis in original). However, “a litigation hold might not be necessary under certain circumstances,” *Victor Stanley*, 269 F.R.D. at 524 (citing *Jones*, 2010 WL 2106640, at *7), such as, for example, when “all sources of likely relevant information are subject to permanent retention pursuant to the organization’s record retention policy” or “all sources of the information can be immediately secured without requiring preservation actions by employees,” *Sedona Conf. on Legal Holds*, at 15.

A litigation hold should generally take the form of a written notice to be distributed to the client, or, where the client is an organization, to any employees who may be in possession of relevant information. *See, e.g., Haynes v. Dart*, Civ. A. No. 08 C 4834, 2010 WL 140387, at *4 (N.D. Ill. Jan. 11, 2010) (failure to issue a written notice is at least “relevant” to consideration of sanctions for spoliation of evidence). It should inform the recipient, among other things, as to what information is potentially relevant to the lawsuit. *See, e.g., Chan v. Triple 8 Palace, Inc.*, No. 03 CIV 6048 (GEL) (JCF), 2005 WL 1925579, at *6 (S.D.N.Y. Aug. 11, 2005). The notice should “describe the litigation in a way that will be understood by everyone with responsibility for preserving documents,” and should “provide specific examples of the types of information” that should be preserved. *See Sedona Conf. on Legal Holds*, at 14-15. A written litigation hold should also “identify potential *sources* of information” (emphasis added) and give “detailed instructions” explaining what each recipient must do in order to ensure that no

sources of information are overlooked. *Id.*, at 15; *cf. Orbit One*, 271 F.R.D. at 442 (instructions to employees were not sufficiently “detailed” to communicate preservation duties). Moreover, a proper litigation hold should advise the client against “downgrading [potentially relevant] data to a less accessible form – which systematically hinders future discovery by making the recovery of the information more costly and burdensome.” *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 372 n.4 (S.D.N.Y. 2006).

“Although it is well established that there is no obligation to “‘preserve every shred of paper, every e-mail or electronic document, and every backup tape,’” *Consol. Edison Co. of N.Y., Inc. v. United States*, 90 Fed. Cl. 228, 256 (Fed. Cl. 2009) (quoting *Zubulake IV*, 220 F.R.D. at 217), in some circumstances, ‘[t]he general duty to preserve may also include deleted data, data in slack spaces, backup tapes, legacy systems, and metadata.’ [Paul W.] Grimm, [Michael D. Berman, Conor R. Crowley, Leslie Wharton, *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*,] 37 U. Balt. L. Rev. [381,] 410 [(2008)] (emphasis added).” *Victor Stanley*, 269 F.R.D. at 524. “[A] litigant could choose to retain all then-existing backup tapes for the relevant personnel (if such tapes store data by individual or the contents can be identified in good faith and through reasonable effort), and to catalog any later-created documents in a separate electronic file. That, along with a mirror-image of the computer system taken at the time the duty to preserve attaches (to preserve documents in the state they existed at that time), creates a complete set of relevant documents.” *Id.* (quoting *Zubulake IV*, 220 F.R.D. at 218).²²

²² The Civil Rules Advisory Committee has suggested excluding specific categories of electronic data from any preservation obligation, such as deleted, slack, fragmented or unallocated data on hard drives, RAM, and legacy media. Agenda, at 202-03. See *Columbia Pictures Indus. v. Fung*, Case No. CV 06-5578

Reasonableness and proportionality are surely good guiding principles for a court that is considering imposing a preservation order or evaluating the sufficiency of a party's efforts of preservation after the fact. Because those concepts are highly elastic, however, they cannot be assumed to create a safe harbor for a party that is obligated to preserve evidence but is not operating under a court-imposed preservation order. Proportionality is particularly tricky in the context of preservation. It seems unlikely, for example, that a court would excuse the destruction of evidence merely because the monetary value of anticipated litigation was low.

Orbit One, 271 F.R.D. at 43-47, n.10. The *Orbit One* court concluded, "Although some cases have suggested that the definition of what must be preserved should be guided by principles of 'reasonableness and proportionality,' *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010); see *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010), this standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle." *Orbit One*, 271 F.R.D. at 436 (some citations omitted).

A party subject to a duty to preserve must preserve the information in its possession, custody or control. See *Canton v. Kmart Corp.*, No. 1:05-cv-143, 2009 WL 2058908, at *2 (D.V.I. July 13, 2009) (quoting *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 334 (3d Cir. 1995)); *Velez v. Marriott PR Mgmt., Inc.*, 590 F. Supp.

SVW (JCx), 2007 U.S. Dist. LEXIS 97576, at *39 (C.D. Cal. June 8, 2007) (holding that, while data passing through RAM and written only to temporary files constitutes ESI under Rule 34, failure to preserve such evidence would not be sanctioned, although the service log data was to be preserved); cf. *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 432 (S.D.N.Y. 2009) (discussing case law on duty) (to preserve transient data absent specific request for same).

We reject the approach of excluding specific categories of ESI. Such a list may well become obsolete in the near future for technical or other reasons. Given the lead time necessary to change a federal rule, a more general standard of preservation seems better. For example, metadata has become an increasingly useful tool for searching or culling ESI, rather than merely an evidentiary requirement in relatively rare cases. See *Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep't of Homeland Sec.*, 255 F.R.D. 350, 356 (S.D.N.Y. 2008) (noting that the *Sedona Principles* rejected the Sedona Conference's statement only two years earlier that there should be a modest legal presumption against the production of metadata).

2d 235, 258 (D.P.R. 2008); *Nat'l Grange Mut. Ins. Co. v. Hearth & Home, Inc.*, Civ. A. No. 2:06CV54WCO, 2006 WL 5157694, at *5 (N.D. Ga. Dec. 19, 2006). “[D]ocuments are considered to be under a party’s control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action,” according to district courts in the Second and Fourth Circuits. *Victor Stanley*, 269 F.R.D. at 523 (quoting *Goodman*, 632 F. Supp. 2d at 515 (quoting *In re NTL Inc. Sec. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007))). Moreover, according to district courts in the First, Fourth and Sixth Circuits, there is “a [further] duty to notify the opposing party of evidence in the hands of third parties.” *Victor Stanley*, 269 F.R.D. at 523 (citing *Silvestri*, 271 F.3d at 590); *Velez*, 590 F. Supp. at 258; and *Jain v. Memphis Shelby Airport Auth.*, No. 08-2119-STA-dkv, 2010 WL 711328, at *2 (W.D. Tenn. Feb. 25, 2010)); *see also Jordan F. Miller Corp. v. Mid-Continent Aircraft Serv.*, 139 F.3d 912, 1998 WL 68879, at *5-6 (10th Cir. 1998) (if a party relinquishes ownership or custody of potentially relevant evidence, it must contact the new custodian to preserve the evidence). However, “district courts in the Third, Fifth, and Ninth Circuits have held that the preservation duty exists only when the party controls the evidence, without extending that duty to evidence controlled by third parties.” *Victor Stanley*, 269 F.R.D. at 523 (citing *Bensel v. Allied Pilots Ass’n*, 263 F.R.D. 150, 152 (D.N.J. 2009); *Rimkus*, 688 F. Supp. 2d at 615-16; *Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2010 WL 582189, at *4 (D. Ariz. Feb. 12, 2010)).²³

²³ *But see Columbia Pictures*, 2007 U.S. Dist. LEXIS 97576, at *38-39 (a litigant is under a duty to preserve what it knows or reasonably should know, is relevant in the action, is reasonably calculated to lead to discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the) (subject of a pending discovery request).

“The preservation obligation runs first to counsel, who has ‘a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing the destruction.’ Where the client is a business, its managers, in turn, are responsible for conveying to the employees the requirements for preserving evidence.” *In re NTL, Inc. Secs. Litig.*, 244 F.R.D. 179, 197-98 (S.D.N.Y. 2007) (quoting *Chan*, 2005 WL 1925579, at *6). “[I]t is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information.” *Zubulake V*, 229 F.R.D. at 432. Counsel’s duties, in designing a litigation hold, also include directly “communicating with the ‘key players’ in the litigation, in order to understand how they stored information,” thereby ensuring that such information is included in the documents being preserved. *Id.*; *see also Pension Comm.*, 685 F. Supp. 2d at 465 (“the failure to collect records – either paper or electronic – from key players constitutes gross negligence or willfulness”). “To the extent that it may not be feasible for counsel to speak with every key player, given the size of a company or the scope of the lawsuit,” it may be sufficient to perform “a system-wide keyword search” of the client’s ESI, and then to preserve “a copy of each ‘hit’” located by the search. *Zubulake V*, 229 F.R.D. at 432. In addition, counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.” *Id.* “To do this, counsel must become fully familiar with her client’s document retention policies, as well as the client’s data retention architecture.” *Id.*

One commentator has argued that, because ESI may be stored on non-party servers, discovery of these non-parties should proceed by way of subpoena under Rule 45, rather than by making a demand on a party under Rule 26 and then requiring the party to demand the information from the non-party, under the theory that such ESI is under the party’s custody and control. It is argued that courts could better consider the burdens of non-parties in the context of the motion to compel compliance with a subpoena. *See Comment: Jurisdictional, Procedural, and Economic Considerations for Non-Party Electronic Discovery*, 59 Emory L.J. 1339, 1361-1362 (2010).

Thus, when an allegation of a breach of the duty of preservation leading to spoliation arises, the protections of the attorney-client privilege and attorney work-product doctrine are implicated. For the purposes of determining any sanctions, a tension exists between the protections and the need to ascertain the actions taken in furtherance of the preservation duty. See *Pension Comm.*, 685 F. Supp. 2d at 477 (no protection for “[w]hich files were searched, how the search was conducted, who was asked to search, what they were told, and the extent of any supervision”).²⁴

Counsel should also ensure that the evidence is preserved in its original form, or as close as possible. “The reviewing court, as well as the parties, should be focused upon maintaining the integrity of the evidence in a form as close to, if not identical to, the original condition of the evidence.” *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 435 (W.D. Pa. 2004). For ESI, absent agreement, this may require preserving the evidence in native format and making it available to the requesting party with no loss in the level of accessibility of the document.

Case law has developed guidelines for what the preservation duty entails. Unfortunately, in terms of what a party must do to preserve potentially relevant evidence, case law is not consistent across the circuits, or even within individual districts. This is what causes such concern and anxiety, particularly to institutional clients such as corporations, businesses or governments, because their activities – and vulnerability to being sued –

²⁴ Guidelines from *Sedona Conf. on Legal Holds*, at 15, suggest that sufficient documentation of a litigation hold may avoid disclosing attorney work product and still be sufficient to demonstrate that adequate care was taken to preserve documents, so long as it includes:

- the date and by whom the hold was initiated and possibly the triggering event;
- the initial scope of information, custodians, sources and systems involved;
- subsequent scope changes as new custodians or data are identified or initial sources are eliminated;
- notices and reminders sent, confirmations of compliance received (if any), and handling of exceptions;
- a description as to the collection protocol, persons contacted, and the date information was collected; and
- a master list of custodians and systems involved in the preservation effort.

often extend to multiple jurisdictions, yet they cannot look to any single standard to measure the appropriateness of their preservation activities, or their exposure or potential liability for failure to fulfill their preservation duties. A national corporation cannot have a different preservation policy for each federal circuit and state in which it operates. How then do such corporations develop preservation policies? The only “safe” way to do so is to design one that complies with the most demanding requirements of the toughest court to have spoken on the issue, despite the fact that the highest standard may impose burdens and expenses that are far greater than what is required in most other jurisdictions in which they do business or conduct activities.

Victor Stanley, 269 F.R.D. at 523. A uniform federal rule regarding the preservation duty is required, especially in this age of electronically stored information.

C. ELEMENTS OF A SPOILIATION CLAIM

The elements of a claim for spoliation are:

(1) that the party having control over the evidence had an obligation to timely produce it; (2) that the party that failed to produce the evidence had a culpable state of mind; and (3) that the missing evidence is relevant to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Residential Funding, 306 F.3d at 107; *accord Victor Stanley*, 269 F.R.D. at 520-21 (quoting *Goodman*, 632 F. Supp. 2d at 509 (quoting *Thompson*, 219 F.R.D. at 101)); *Rimkus*, 688 F. Supp. 2d at 615-16; *Jones*, 2010 WL 2106640, at *5; *Melendres*, 2010 WL 582189, at *4; *In re Global Technovations, Inc.*, 431 B.R. 739, 778 (Bankr. E.D. Mich. 2010). In other words, the elements for a claim of spoliation are: (1) a duty to preserve, (2) breach of the duty to preserve, (3) a culpable state of mind, (4) the loss of relevant information, and (5) prejudice.

1. Relevant Information

To determine an appropriate remedy or sanction for spoliation (as opposed to relevance for purposes of preservation), “[e]vidence is relevant if it would have

clarified a fact at issue in the trial and otherwise would naturally have been introduced into evidence.” *Pension Comm.*, 685 F. Supp. 2d at 496. There must be a showing that “the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction.” *Residential Funding*, 306 F.3d at 109 (quoting *Kronisch v. United States*, 150 F.3d 112, 127 (2d Cir. 1998)). “[T]he concept of ‘relevance’ encompasses not only the ordinary meaning of the term, but also that the destroyed evidence would have been favorable to the movant.” *Zubulake V*, 229 F.R.D. at 431. It must be “more than sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence,” *Residential Funding*, 306 F.3d at 108-09; *Victor Stanley*, 269 F.R.D. at 531 (quoting *Pension Comm.*, 685 F. Supp. 2d at 467).

2. Prejudice

Prejudice “can range along a continuum from an inability to prove claims or defenses to little or no impact on the presentation of proof.” *Rimkus*, 688 F. Supp. 2d at 613.

Spoliation of evidence causes prejudice when, as a result of the spoliation, the party claiming spoliation cannot present “evidence essential to its underlying claim.” *Krumwiede v. Brighton Assocs., L.L.C.*, No. 05-C-3003, 2006 WL 1308629, at *10 (N.D. Ill. May 8, 2006) (noting that even if the files were only modified and not deleted, ‘the changes to the file metadata call the authenticity of the files and their content into question and make it impossible for [the defendant] to rely on them’). . . . Generally, courts find prejudice where a party’s ability to present its case or to defend is compromised. . . . [A]t least one court has found that the delayed production of evidence causes prejudice. See *Jones*, 2010 WL 2106640, at *8-9 . . . Th[is] court considers “prejudice to the judicial system.” *Krumweide*, 2006 WL 1308629, at *11.

Victor Stanley, 269 F.R.D. at 532. See *Rimkus*, 688 F. Supp. 2d at 613 (prejudice occurs when spoliation substantially denies a party the ability to support or defend its claim); *Henry v. Gill Indus.*, 983 F.2d 943, 948 (9th Cir. 1993) (same); *Pension Comm.*, 685 F. Supp. 2d at 479 (same); *Jain*, 2010 WL 711328, at *4 (same); *Goodman*, 632 F. Supp. 2d

at 519 (same); *Velez*, 590 F. Supp. 2d at 259 (same); *Jones*, 2010 WL 2106640, at *8-9 (prejudice occurs when spoliation substantially denies a party the ability to support or defend its claim or delays production of evidence); *see also Dillon v. Nissan Motor Co.*, 986 F.2d 263, 268 (8th Cir. 1993) (prejudice occurs when evidence is destroyed that may have been helpful); *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, Case No. 09-60351-CIV, 2010 WL 3368654, at *8 (S.D. Fla. Aug. 23, 2010) (prejudice occurs from spoliation of evidence crucial to a claim or defense); *Pinstripe, Inc. v. Manpower, Inc.*, No. 07-CV-620-GKF-PJC, 2009 WL 2252131, at *2 (N.D. Okla. July 29, 2009) (prejudice arises from spoliation that impairs a party's ability to support a claim or defense).

3. Rebuttable Presumptions

Since “[c]ourts must take care not to ‘hold[] the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed [or unavailable] evidence,’ because doing so ‘would . . . allow parties who have . . . destroyed evidence to profit from that destruction,’” *Pension Comm.*, 685 F. Supp. 2d at 468, 479 n.96 (quoting *Residential Funding*, 306 F.3d at 109 (quoting *Kronisch*, 150 F.3d at 128)), some courts employ presumptions for relevance and prejudice.

When a spoliator acts willfully, relevance of evidence or prejudice may be presumed. *See Victor Stanley*, 269 F.R.D. at 532 (relevance); *Sampson*, 251 F.R.D. at 179 (relevance); *Pension Comm.*, 685 F. Supp. 2d at 468 (prejudice). In some circumstances in the Second Circuit, if a spoliator acts in a grossly negligent manner, relevance and prejudice may be presumed. *See Pension Comm.*, 685 F. Supp. 2d at 467 & n.32 (quoting *Residential Funding*, 306 F.3d at 109). However, in the Fourth Circuit,

“[n]egligent or even grossly negligent conduct is not sufficient to give rise to the presumption.” *Victor Stanley*, 269 F.R.D. at 532; see also *In re Kmart Corp.*, 371 B.R. 823, 853-54 (Bankr. N.D. Ill. 2007) (in the Seventh Circuit, unintentional conduct is insufficient for a presumption of relevance); *Rimkus*, 688 F. Supp. 2d at 617 (no presumption of relevance and prejudice is available when the level of culpability is “mere” negligence).

In the Second Circuit, “bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party.” *Residential Funding*, 306 F.3d at 109. However, “[t]he Fifth Circuit has not explicitly addressed whether even bad-faith destruction of evidence allows a court to presume that the destroyed evidence was relevant or its loss prejudicial. *Rimkus*, 688 F. Supp. 2d at 617.

If a presumption is available, it is rebuttable by a showing “that the innocent party has not been prejudiced by the absence of the missing information,” *Victor Stanley*, 269 F.R.D. at 532 (quoting *Pension Comm.*, 685 F. Supp. 2d at 468), “for example, by demonstrating that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party’s claims or defenses,” *Pension Comm.*, 685 F. Supp. 2d at 469; *Rimkus*, 688 F. Supp. 2d at 617. “If the spoliating party demonstrates to a court’s satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required.” *Pension Comm.*, 685 F. Supp. 2d at 469.

4. **Culpable State of Mind**

Case law has identified four culpable states of mind: negligence, gross negligence, willfulness, and bad faith.

“Negligence, or ‘culpable carelessness,’ is ‘[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation[.]’” *Victor Stanley*, 269 F.R.D. at 529 (quoting *Black’s Law Dictionary* 846 (Bryan A. Garner ed., abridged 7th ed., West 2000)); see *Jones*, 2010 WL 2106640, at *6-7 (negligence is a failure to act reasonably under the circumstances). Negligence is “unreasonable conduct . . . that . . . creates a risk of harm to others,” *Pension Comm.*, 685 F. Supp. 2d at 464, or “conduct ‘which falls below the standard established by law for the protection of others against unreasonable risk of harm,’” *Id.* (quoting Prosser & Keeton on Torts § 31 at 169 (5th ed. 1984) (quoting Restatement (Second) of Torts § 282)) (citations omitted). “Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.” *Zubulake IV*, 220 F.R.D. at 220; accord *BancorpSouth Bank v. Herter*, 643 F. Supp. 2d 1041, 1061 (W.D. Tenn. 2009); *Sampson v. City of Cambridge*, No. WDQ-06-1819, 2008 WL 7514364, at *8 (D. Md. May 1, 2008); *Hous. Rights Ctr. v. Sterling*, No. CV 03-859 DSF, 2005 WL 3320739, at *3 (C.D. Cal. Mar. 2, 2005); but compare *Canton*, 2009 WL 2058908, at *3 (quoting *Mosaid Techs., Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 338 (D.N.J. 2004)) (conduct is culpable if “party [with] notice that evidence is relevant to an action . . . either proceeds to destroy that evidence or allows it to be destroyed by failing to take *reasonable* precautions” (emphasis added)).

Gross negligence is “a failure to exercise even that care which a careless person would use . . . and differs from ordinary negligence only in degree, and not in kind.” *Pension Comm.*, 685 F. Supp. 2d at 464 (quoting Prosser & Keeton on Torts § 34 at 211-12 (5th ed. 1984)) (citations omitted). For example, “[a]fter a discovery duty is well established, the failure to adhere to contemporary standards,” such as “to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party’s possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources,” is gross negligence. *Pension Comm.*, 685 F. Supp. 2d at 471; *accord Victor Stanley*, 269 F.R.D. at 529; *cf. Surowiec v. Capital Title Agency, Inc.*, 790 F. Supp. 2d 997, 1007 (D. Ariz. 2011) (Campbell, J.) (“[t]he Court disagrees with *Pension Committee*’s holding that a failure to issue a litigation hold constitutes gross negligence *per se*”); *Haynes*, 2010 WL 140387, at *4 (“[t]he failure to institute a document retention policy, in the form of a litigation hold, is relevant to the court’s consideration, but it is not *per se* evidence of sanctionable conduct”).

Willfulness is “intentional or reckless conduct that is so unreasonable that harm is highly likely to occur,” *Pension Comm.*, 685 F. Supp. 2d at 464, or “an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences,” *Id.* (quoting Prosser & Keeton on Torts § 34 at 213 (5th ed. 1984) (citing Restatement (Second) of Torts § 500 and collecting

cases)). See *Victor Stanley*, 269 F.R.D. at 530 (“[w]illfulness is equivalent to intentional, purposeful, or deliberate conduct”).

“[B]ad faith requires ‘destruction for the purpose of depriving the adversary of the evidence,’ *Powell v. Town of Sharpsburg*, 591 F. Supp. 2d 814, 820 (E.D.N.C. 2008), for willfulness, it is sufficient that the actor intended to destroy the evidence.” *Victor Stanley*, 269 F.R.D. at 530. “Conduct that is in bad faith must be willful, but conduct that is willful need not rise to bad faith actions.” *Id.*

The court in *Pension Committee* provided four examples of different levels of culpability: (i) failure to collect records from key players is either gross negligence or willfulness; (ii) destruction of e-mail or certain backup tapes is either gross negligence or willfulness; (iii) failure to obtain records from employees who had any involvement, but were not key players, could be negligence; and (iv) failure to take all appropriate measures to preserve ESI likely is negligence. *Id.*, 685 F. Supp. 2d at 465.

D. REMEDIES AND SANCTIONS FOR SPOILIATION

The range of potential remedies and sanctions for spoliation from least harsh to most harsh is:

(a) further discovery, *Pension Comm.*, 685 F. Supp. 2d at 469 (citing, *e.g.*, *Treppel v. Biovail Corp.*, 249 F.R.D. 111, 123-24 (S.D.N.Y. 2008)); *Victor Stanley*, 269 F.R.D. at 536;

(b) cost-shifting, *Pension Comm.*, 685 F. Supp. 2d at 469 (citing, *e.g.*, *Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284, 291-92 (S.D.N.Y. 2009)); *Rimkus*, 688 F. Supp. 2d at 647 (“reasonable costs and attorneys’ fees required to identify

and respond to the spoliation . . . [which] may arise from additional discovery needed after a finding that evidence was spoliated, the discovery necessary to identify alternative sources of information, or the investigation and litigation of the document destruction itself”); *Victor Stanley*, 269 F.R.D. at 533, 536 (attorneys’ fees and costs);

(c) fines “to punish the offending party . . . to deter the litigant’s conduct” *Pension Comm.*, 685 F. Supp. 2d at 469, 471 (citing, *e.g.*, *United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21, 25 (D.D.C. 2004), and quoting *Green*, 262 F.R.D. at 291 (quoting *In re WRT Energy Sec. Litig.*, 246 F.R.D. 185, 201 (S.D.N.Y. 2007)));²⁵

(d) special jury instructions (an adverse inference), *Pension Comm.*, 685 F. Supp. 2d at 469 (citing, *e.g.*, *Arista Records*, 608 F. Supp. 2d at 443-44), “to level the evidentiary playing field and sanction the improper conduct,” *Rimkus*, 688 F. Supp. 2d at 645;²⁶

²⁵ But see *Victor Stanley*, 269 F.R.D. at 536-37 (“[A] few courts have ordered the spoliating party to pay a fine to the clerk of court or a bar association for prolonging litigation and wasting the court’s time and resources. *E.g.*, *Pinstripe, Inc. v. Manpower, Inc.*, No. 07-CV-620-GKF-PJC, 2009 WL 2252131, at *4 (N.D. Okla. July 29, 2009); *Claredi v. Seebeyond Tech. Corp.*, No. 4:04CV1304 RWS, 2007 WL 735018, at *4 (E.D. Mo. Mar. 8, 2007); *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 111 (D.N.J. 2006); *Turnage*, 115 F.R.D. at 559. However, . . . it is unclear whether these unappealed trial court holdings would withstand appellate review, because in similar cases the Fourth and Tenth Circuits have vacated discovery sanctions ordering the payment of money to the Clerk of the Court, deeming them to be criminal contempt sanctions, which are unavailable without the enhanced due process procedure requirements criminal contempt proceedings require. *Bradley v. Am. Household, Inc.*, 378 F.3d 373, 377-79 (4th Cir. 2004); *Buffington v. Baltimore Cnty., Md.*, 913 F.2d 113, 133 (4th Cir. 1990); *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1438, 1442-44 (10th Cir. 1998).”).

²⁶ Judge Scheindlin describes three types of adverse inference jury instructions: (a) “a jury can be instructed that certain facts are deemed admitted and must be accepted as true;” (b) “a court may impose a mandatory presumption[, that] . . . is considered to be rebuttable;” or (c) a “spoliation charge” may “permit[] (but . . . not require) a jury to *presume* that the lost evidence is both relevant and favorable to the innocent party . . . [and the jury] must then decide whether to draw an adverse inference against the spoliating party” after considering the spoliating party’s rebuttal evidence. *Pension Comm.*, 685 F. Supp. 2d at 470 (original emphasis).

(e) preclusion of evidence, *Pension Comm.*, 685 F. Supp. 2d at 469 (citing, e.g., *Brown v. Coleman*, No. 07 Civ. 1345, 2009 WL 2877602, at *4 (S.D.N.Y. Sept. 8, 2009)); *Victor Stanley*, 269 F.R.D. at 533;

(f) termination (entry of a default judgment or dismissal), *Pension Comm.*, 685 F. Supp. 2d at 469 (citing, e.g., *Gutman v. Klein*, No. 03 Civ. 1570, 2008 WL 5084182, at *2 (E.D.N.Y. Dec. 2, 2008)); *Victor Stanley*, 269 F.R.D. at 533; and

(g) civil or criminal contempt, *Victor Stanley*, 269 F.R.D. at 536 (“Fed. R. Civ. P. 37(b)(2)(A)(vii) provides that the court may ‘treat[] as contempt of court the failure to obey’ a court order to provide or permit discovery of ESI evidence. Similarly, pursuant to its inherent authority, the court may impose fines or prison sentences for contempt and enforce ‘the observance of order.’ *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812).”).

“[T]he applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine.” *Silvestri*, 271 F.3d at 590 (quoting *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999)). Sanctions “should (1) deter the parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position [it] would have been in absent the wrongful destruction of evidence by the opposing party.” *Pension Comm.*, 685 F. Supp. 2d at 469 (quoting *West*, 167 F.3d at 779 (quoting *Kronisch*, 150 F.3d at 126)) (internal quotation marks omitted); accord *Victor Stanley*, 269 F.R.D. at 534. “[T]he range of available sanctions serve both normative – designed to punish culpable conduct and deter it in

others – and compensatory – designed to put the party adversely affected by the spoliation in a position that is as close to what it would have been in had the spoliation not occurred – functions. Because . . . the duty to preserve relevant evidence is owed to the court, it is also appropriate for a court to consider whether the sanctions it imposes will ‘prevent abuses of the judicial system’ and ‘promote the efficient administration of justice.’” *Victor Stanley*, 269 F.R.D. at 534 (quoting *Jones*, 2010 WL 2106640, at *5).

“[A] sanction . . . must be proportionate to the culpability involved and the prejudice that results. Such a sanction should be no harsher than necessary to respond to the need to punish or deter and to address the impact on discovery.” *Rimkus*, 688 F. Supp. 2d at 618. “In determining what sanctions are appropriate, the Court must consider the extent of prejudice, if any, along with the degree of culpability.” *Victor Stanley*, 269 F.R.D. at 533.

The harshest sanctions may apply not only when both severe prejudice and bad faith are present, but also when, for example, culpability is minimally present, if there is a considerable showing of prejudice, or, alternatively, the prejudice is minimal but the culpability is great. . . . For example, in some, but not all, circuits, conduct that does not rise above ordinary negligence may be sanctioned by dismissal if the resulting prejudice is great. *Silvestri*, 271 F.3d at 593 (stating that dismissal may be an appropriate sanction for negligent conduct “if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case” and dismissing case without concluding whether plaintiff’s conduct rose above negligence); see *Rimkus*, 688 F. Supp. 2d at 614-15 (“The First, Fourth, and Ninth Circuits hold that bad faith is not essential to imposing severe sanctions if there is severe prejudice, although the cases often emphasize the presence of bad faith. In the Third Circuit, the courts balance the degree of fault and prejudice.”) (footnotes omitted). Conversely, absence of either intentional conduct or significant prejudice may lessen the potential appropriate sanctions. In the Fifth and Eleventh Circuits, for example, courts may not impose severe sanctions absent

evidence of bad faith. See *Rimkus*, 688 F. Supp. 2d at 614; *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, No. 09-60351-CIV, 2010 WL 3368654, at *12-13 (S.D. Fla. Aug. 23, 2010).

Victor Stanley, 269 F.R.D. at 533.

Judge Scheindlin in *Pension Committee* stated, “For less severe sanctions – such as fines and cost-shifting – the inquiry focuses more on the conduct of the spoliating party [F]or more severe sanctions – such as dismissal, preclusion, or the imposition of an adverse inference – the court must consider, in addition to the conduct of the spoliating party, whether any missing evidence was relevant and whether the innocent party has suffered prejudice as a result of the loss of evidence.” *Id.*, 685 F. Supp. 2d at 467. Magistrate Judge James C. Francis, IV disagrees with the implication in this quote from *Pension Committee* that any sanctions, even less severe ones, would be warranted if any information was lost, if there were also no showing of relevance. See *Orbit One*, 271 F.R.D. at 440. On the other hand, Judge Lee H. Rosenthal in *Rimkus* stated, “[S]evere sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of ‘bad faith.’” *Id.*, 688 F. Supp. 2d at 614.²⁷

²⁷ See *Arista Records*, 608 F. Supp. 2d at 442-43, where Magistrate Judge Theodore H. Katz rejected entering case-dispositive sanctions in favor of adverse-inference instructions that would serve the remedial purpose of restoring plaintiffs to the position they would have been in had the evidence not been destroyed. See also *Mullaney v. Hilton Hotels Corp.*, CIVIL NO. 07-00313 ACK-LEK, 2009 WL 2006828, at *7 (D. Haw. June 30, 2009), where then Magistrate Judge Leslie E. Kobayashi held that the loss of digital photographs of an accident warranted telling the jury of the lost photographs and compelling the defendant to produce a live witness with knowledge of the lost photographs to be examined at trial.

In courts in the Second Circuit, “when the spoliating party was merely negligent, the innocent party must prove both relevance and prejudice in order to justify the imposition of a severe sanction,” *Pension Comm.*, 685 F. Supp. 2d at 467-68, “by adduc[ing] sufficient evidence from which a reasonable trier of fact could infer that the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction,” *Id.* at 468 (quoting *Residential Funding*, 306 F.3d at 109 (quoting *Kronisch*, 150 F.3d at 127)) (internal quotation marks omitted). In courts in the Fifth Circuit, “[m]ere negligence is not enough’ to warrant an instruction on spoliation.” *Rimkus*, 688 F. Supp. 2d at 614 (quoting *Russell v. Univ. of Tex. of Permian Basin*, 234 Fed. Appx. 195, 208 (5th Cir. 2007) (unpublished) (quoting *Vick v. Tex. Employment Comm’n*, 514 F.2d 734, 737 (5th Cir. 1975))). Case law in the Fifth Circuit indicates that an adverse inference instruction is not proper unless there is a showing that the spoliated evidence would have been relevant.” *Rimkus*, 688 F. Supp. 2d at 617.

“The Eleventh Circuit has held that bad faith is required for an adverse inference instruction.²⁸ The Seventh, Eighth, Tenth, and D.C. Circuits also appear to require bad faith.²⁹ The First, Fourth, and Ninth Circuits hold that bad faith is not essential to imposing severe sanctions if there is severe prejudice, although the cases

²⁸ See *Penalty Kick Mgmt. Ltd. v. Coca Cola Co.*, 318 F.3d 1284, 1294 (11th Cir. 2003) (“[A]n adverse inference is drawn from a party’s failure to preserve evidence only when the absence of that evidence is predicated on bad faith.” (quoting *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997))).

²⁹ See, e.g., *Turner v. Pub. Serv. Co. of Colo.*, 563 F.3d 1136, 1149 (10th Cir. 2009) (“Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.” (quoting *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997))); *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008) (“In order to draw an inference that the [destroyed documents] contained information adverse to Sears, we must find that Sears intentionally destroyed the documents in bad faith.”); *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007) (“A spoliation-of-evidence sanction requires ‘a finding of intentional destruction indicating a desire to suppress the truth.’” (quoting *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004))); *Wylar v. Korean Air Lines Co.*, 928 F.2d 1167, 1174 (D.C. Cir. 1991) (“Mere innuendo . . . does not justify drawing the adverse inference requested . . .”).

often emphasize the presence of bad faith.³⁰ In the Third Circuit, the courts balance the degree of fault and prejudice.³¹ *Rimkus*, 688 F. Supp. 2d at 614-15 (footnotes in original). In the Fifth Circuit, an adverse inference instruction may be given “[w]hen a party is prejudiced, but not irreparably, from the loss of evidence that was destroyed with a high degree of culpability.” *Id.* at 618. In the Second Circuit, “[t]he sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence.” *Residential Funding*, 306 F.3d at 108. *See also Pension Comm.*, 685 F. Supp. 2d at 470 (“[W]hen a spoliating party has acted willfully or in bad faith, a jury can be instructed that certain facts are deemed admitted and must be accepted as true.” However, “when a spoliating party has acted willfully or recklessly, a court may impose a mandatory presumption [that] . . . is considered to be rebuttable.”). The Sixth Circuit follows the Second Circuit.

³⁰ *See, e.g., Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004) (holding that an inference cannot be drawn merely from negligent loss or destruction of evidence but requires a showing that willful conduct resulted in the loss or destruction); *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001) (holding that dismissal is “usually justified only in circumstances of bad faith” but “even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case”); *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 447 (1st Cir. 1997) (“Certainly bad faith is a proper and important consideration in deciding whether and how to sanction conduct resulting in the destruction of evidence. But bad faith is not essential. If such evidence is mishandled through carelessness, and the other side is prejudiced, we think that the district court is entitled to consider imposing sanctions, including exclusion of the evidence.”); *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17, 23-24 (1st Cir. 1981) (“In any event, Allen Pen has not shown that the document destruction was in bad faith or flowed from the consciousness of a weak case. There is no evidence that Springfield believed the lists would have damaged it in a lawsuit. Without some such evidence, ordinarily no adverse inference is drawn from Springfield’s failure to preserve them.”); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (“Short of excluding the disputed evidence, a trial court also has the broad discretionary power to permit a jury to draw an adverse inference from the destruction or spoliation against the party or witness responsible for that behavior.”).

³¹ *See, e.g., Bense v. Allied Pilots Ass’n*, 263 F.R.D. 150 (D.N.J. 2009) (declining to apply a spoliation inference or other sanction for the loss of information resulting from the defendant’s failure to impose litigation holds in a timely manner); *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 335 (D.N.J. 2004) (noting that “[t]hree key considerations that dictate whether such sanctions are warranted are: ‘(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future,’” and holding that bad faith was not required for an adverse inference instruction as long as there was a showing of relevance and prejudice (quoting *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994))).

See *Rogers v. T.J. Samson Cmty. Hosp.*, 276 F.3d 228, 232 (6th Cir. 2002) (allowing severe sanctions for negligent destruction of evidence following Second Circuit in *Residential Funding*).

A sanction of termination may be imposed in the Second Circuit “where a party has engaged in perjury, tampering with evidence, or intentionally destroying evidence by burning, shredding, or wiping out computer hard drives.” *Pension Comm.*, 685 F. Supp. 2d at 470; *see also West*, 167 F.3d at 779 (“willfulness, bad faith, or fault on the part of the sanctioned party” may result in dispositive sanctions). In the Fifth Circuit, a dispositive sanction may be imposed “when ‘the spoliator’s conduct was so egregious as to amount to a forfeiture of his claim’ and ‘the effect of the spoliator’s conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.’” *Rimkus*, 688 F. Supp. 2d at 618 (quoting *Sampson*, 251 F.R.D. at 180 (quoting *Silvestri*, 271 F.3d at 593)). “In the Fourth Circuit, to order these harshest sanctions, the court must “‘be able to conclude either (1) that the spoliator’s conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator’s conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim[,]’” *Goodman*, 632 F. Supp. 2d at 519 (quoting *Sampson*, 251 F.R.D. at 180 (quoting *Silvestri*, 271 F.3d at 593)) (emphasis in *Goodman*)[.]” *Victor Stanley*, 269 F.R.D. at 534. According to Magistrate Judge Grimm, “Elsewhere [than in the Fourth Circuit], dispositive or potentially dispositive sanctions are impermissible without bad faith, even if there is considerable prejudice. *See Rimkus*, 688 F. Supp. 2d at 614 (In

the Seventh,³² Eighth,³³ Tenth,³⁴ Eleventh,³⁵ and D.C. Circuits,³⁶ ‘the severe sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of “bad faith.”)’” *Victor Stanley*, 269 F.R.D. at 535 (footnotes added). See also *Micron Tech., Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1327 (Fed. Cir. 2011) (“[a] determination of bad faith is normally a prerequisite to the imposition of dispositive sanctions for spoliation”); *Dae Kon Kwon v. Costco Wholesale Corp.*, Civ. No. 08-00360 JMS BMK, 2010 WL 571941, at *2 (D. Haw. Feb. 17, 2010) (requiring that party “engaged deliberately in deceptive practices”); *Global Technovations*, 431 B.R. at 779 (willfulness, bad faith, or fault ranging from intentional conduct to ordinary negligence may support dispositive sanctions); *Mosaid*, 348 F. Supp. 2d at 335 (dispositive sanctions “should only be imposed in the most extraordinary of circumstances”); *Driggin v. Am. Sec. Alarm Co.*, 141 F. Supp. 2d 113, 123 (D. Me. 2000) (“severe prejudice or egregious conduct” required for dispositive sanctions).

“Pursuant to their inherent authority, courts may impose fines or prison sentences for contempt and enforce ‘the observance of order.’” *Hudson*, 7 Cranch at 34, 3 L.Ed. 259. . . . [T]hey may ‘prevent undue delays . . . and . . . avoid congestion . . . , such as by dismissing a case. *Roadway Exp., Inc. v. Piper*, 447 U.S. [752,] 765 [(1980)] . . .

³² In contrast, in his appendix in *Victor Stanley*, Magistrate Judge Grimm states that the standard in the Seventh Circuit for imposing dispositive sanctions is “willfulness, bad faith, or fault” citing *Kmart*, 371 B.R. at 840.

³³ See *Menz v. New Holland N. Am., Inc.*, 440 F.3d 1002, 1006 (8th Cir. 2006); *Johnson v. Avco Corp.*, 702 F. Supp. 2d 1093, 1111 (E.D. Mo. 2010).

³⁴ In contrast, in his appendix in *Victor Stanley*, Magistrate Judge Grimm states that the standard in the Tenth Circuit for imposing dispositive sanctions is “willfulness, bad faith, or [some] fault” (brackets in original) citing *Procter & Gamble Co. v. Haugen*, 427 F.3d 727, 738 (10th Cir. 2005).

³⁵ See *Managed Care Solutions*, 2010 WL 3368654, at *12.

³⁶ See *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1477 (D.C. Cir. 1995); *D’Onofrio v. SFX Sports Group, Inc.*, Civ. A. No. 06-687 (JDB/JMF), 2010 WL 3324964, at *5 (D.D.C. Aug. 24, 2010).

However, the court’s inherent authority only may be exercised to sanction ‘bad-faith conduct,’ *Chambers v. NASCO, Inc.*, 501 U.S. [32,] 50 (1991), and ‘must be exercised with restraint and discretion,’ *Id.* at 44.” *Victor Stanley*, 269 F.R.D. at 518.

E. RECOMMENDATIONS

We recommend two new Rules – one regarding preservation (Rule 26(h)) and one regarding spoliation (Rule 37(g)). The language of the proposed Rules and Advisory Committee Notes is set forth in detail in Appendix A.

The proposed preservation Rule covers the triggering of the duty to preserve, the scope of the duty to preserve, and the termination of the duty to preserve. In accordance with the case law discussed above, proposed Rule 26(h)(1) triggers the duty to preserve for parties to a litigation when a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action. It does not set forth a list of events that would trigger the obligation to preserve, although the Advisory Committee Note describes some triggering events, because the obligation to preserve will depend on the varying circumstances of each case. For non-parties, the duty to preserve will not be triggered until the receipt of a subpoena – a bright-line rule.

Under proposed Rule 26(h)(2), the duty to preserve requires actions reasonable under the circumstances. As with the triggering of the duty, the scope of the duty to preserve is only described generally due to the myriad situations that may arise. Importantly, however, the proposed Rule also includes a proportionality limitation to provide some guidance to the parties in formulating preservation programs either unilaterally or by agreement and to prevent courts from completely second-guessing

preservation programs in hindsight. These proportionality provisions include: (A) the potential importance of the information, (B) the importance of the issues to the litigation, (C) the amount in controversy, (D) the burden of preservation, (E) the parties' resources, and (F) the likely needs of the case.

The proposed Rules also define relevance for purposes of preservation consistently with the case law as material "discoverable under Rules 26(b) and 34(a)." This is stated in proposed Rule 26(h)(1) and reaffirmed by the phrase "discoverable documents" in Rule 26(h)(2).

To further define the scope of the duty to preserve, proposed Rule 26(h)(4) adopts the formulation of *Capricorn Power Co.* that documents, ESI, or things should be preserved "in a form as close to, if not identical to, the original condition" without material loss of accessibility. *Id.*, 220 F.R.D. at 435. The proposed Rule thus does not require ESI to be retained in exactly its condition at the time the duty to preserve is triggered. Instead, there only need be no loss of accessibility, so that ESI may be transferred to a different storage medium or, if not preserved in native format, may be preserved in a static image with appropriate load files. *Cf. Jannx Med. Sys. v. Methodist Hosps. Ins.*, Case No. 2:08-CV-286-PRC, 2010 WL 4789275, at *4 (N.D. Ind. Nov. 17, 2010) (conversion of electronic documents to .pdf format did not comply with the Rule 34(b)(2)(E)(ii) requirement that documents be produced in reasonably usable form).

In recognition of the potential high cost of preservation, an innovation in the proposed preservation Rule is a temporal limitation. The termination of the duty to preserve in the absence of litigation is the obverse of the trigger for the duty to preserve:

“[W]hen a person becomes aware of facts or circumstances that would lead a reasonable person to expect not to be a party to an action.” Proposed Rule 26(h)(3). Similarly, in the event of litigation, the duty to preserve is coterminous with the person’s involvement in the litigation. *Id.* For subpoenaed non-parties that should ordinarily be when they have complied with the subpoena.

Consistent with the case law described above, the proposed spoliation Rule states the elements for a finding of spoliation as relevance, prejudice and culpability. See proposed Rule 37(g)(2)(A) through (C). However, it seeks to provide a single set of standards rather than the differing standards that have developed under the case law. To accomplish this, the proposed Rule lists the possible remedies and sanctions from least severe to most severe (Rule 37(g)(1)(A) through (I)), imposes a requirement that the court must select the least severe remedy or sanction (Rule 37(g)(2)), and then requires that a threshold of culpability be passed in order to impose remedies or sanctions at a level of severity or greater (Rule 37(g)(2)(C)(i) through (v)).

Thus, for any sanction, but not for the remedies of further discovery or cost-shifting, there must be at least negligence. See proposed Rule 37(g)(2)(C)(v). This changes current case law holding that, even if no one was at fault, the party losing the information may still be sanctioned. See *Residential Funding*, 306 F.3d at 109; *Pension Comm.*, 685 F. Supp. 2d at 478-79.

Under proposed Rule 37(g)(2)(C)(iv), a sanction of cost- or fee-shifting or a fine under proposed Rules 37(g)(1)(B) or (C) may be imposed only if the person having the duty to preserve was negligent, meaning that the spoliator failed “to exercise the

standard of care that a reasonably prudent person would have exercised in a similar situation.” *Victor Stanley*, 269 F.R.D. at 529 (quoting *Black’s Law Dictionary* 846 (Bryan A. Garner ed., abridged 7th ed., West 2000)). Further, only these least severe sanctions or the even less severe remedies could be imposed on non-parties responding to a subpoena. See proposed Rules 37(g) (1)(A) through (C).

Under proposed Rule 37(g)(2)(C)(iii), an adverse-inference jury instruction or direction establishing matters or facts may imposed under proposed Rules 37(g)(1)(D), (E) or (F) only if the person was grossly negligent, meaning that the spoliator failed “to exercise even that care which a careless person would use.” *Pension Comm.*, 685 F. Supp. 2d at 464 (quoting Prosser & Keeton on Torts § 34 at 211-12 (5th ed. 1984)). Mere negligence would be insufficient.

Further, the most severe sanctions of termination of an action or contempt may only be imposed upon a finding of willfulness for termination or bad faith for contempt. Under proposed Rule 37(g)(2)(C)(ii), termination of the litigation may be imposed under Rules 37(g)(1)(G) or (H), if the person acted willfully, meaning that the spoliator engaged in “intentional or reckless conduct that is so unreasonable that harm is highly likely to occur,” *Pension Comm.*, 685 F. Supp. 2d at 464. Negligence or gross negligence would not be enough. Under proposed Rule 37(g)(2)(C)(i), a contempt may be found under Rules 37(g)(1)(I), only if the person violated a previous order in bad faith, meaning that the spoliator destroyed the evidence “for the purpose of depriving the adversary of the evidence,” *Victor Stanley*, 269 F.R.D. at 530 (quoting *Powell*, 591 F. Supp. 2d at 820). Even willfulness, and certainly not negligence or gross negligence, would not result in a finding of contempt.

Proposed Rule 37(g)(2)(C)(vi) also provides a limited “safe harbor” for compliance with a litigation hold. Such compliance is to be considered “due care,” absent exceptional circumstances, thereby avoiding any sanctions for spoliation, although further discovery could still be ordered. However, if an employee intentionally destroyed potentially relevant documents, ESI or things despite his or her company’s timely preparation, dissemination and maintenance of a reasonable litigation hold, a court might be justified in finding such actions constituted exceptional circumstances that would eliminate the safe harbor.

Our hope is that the proposed preservation Rule will provide more certainty and guidance than under current case law and the proposed spoliation Rule will provide flexibility by which a court may calibrate the remedies or sanctions necessary to compel compliance and ensure that justice is done.

Part II – Early Case Management

The case management structures implemented by the amendments to Rule 16 in 1983 and thereafter have significantly improved the case management process; litigants have generally favored the courts’ increased involvement in early and continued case management, and broad support for early case management was evident among participants from bench and bar at the Duke Conference. At the same time, courts and litigants have expressed growing concern about the length, cost, and complexity of litigation in federal courts. The current rules may create inconsistent or unnecessary scheduling requirements in cases where potentially dispositive issues are identified at the outset of the case.

The legal community holds somewhat contradictory views about the value and efficacy of case management structures. On the one hand, as one commentator notes, the federal judiciary has over the last several decades “formally validated the concept of case management, enshrined it in the Civil Rules, and enabled it by giving district judges an ever-expanding set of case-management tools.”³⁷ In many respects, this approach has been welcomed by the bar and by clients; empirical studies presented at the Duke Conference suggest that attorneys are generally satisfied with the current federal case management structure, and (if anything) want more, not less, case management by the judiciary.³⁸ Other respected voices, however, take the view that current case management systems are “in serious need of repair,” that the “‘one size fits all’ approach of the current federal . . . rules” is too inflexible, that “the existing rules structure does not always lead to early identification of the contested issues,” and that “[j]udges should have a more active role at the beginning of a case.”³⁹ Still others question whether the current case management systems do – or can – actually contribute to more efficient civil litigation, or whether they simply get in the way of federal judges’ efforts to resolve cases on the substance of the dispute.⁴⁰

The current proposal seeks to ameliorate this tension by (a) recognizing that, in some cases, threshold questions exist that must be resolved before the court or the litigants can meaningfully assess whether the comprehensive case management structure

³⁷ Steven S. Gensler, *Judicial Case Management: Caught in the Cross-Fire*, (“Gensler”) available at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DukeWebsiteMsg.aspx>.

³⁸ Emery G. Lee III & Thomas W. Willging, *Federal Judicial Center, National Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules*, at 67-68 (Oct. 2009) (discussed in Gensler, at 10).

³⁹ The American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System, *Final Report* (Mar. 11, 2009) at 2, 4.

⁴⁰ Different views on this issue are outlined in Gensler, at 13-18.

contemplated under the current Rules 16 and 26(f) should be applied or would add to the efficient disposition of the dispute; and (b) providing a structural opportunity for an initial conference as early as practicable that would allow courts and litigants to identify any such threshold contingencies and focus their collective attention on the early resolution of those issues. A few caveats should be noted at the outset: (i) while the proponents believe this approach would add to the efficient resolution of certain types of cases, there will be many instances where the current rule structure is entirely adequate, and the proposed early conference can either be dispensed with or used simply to schedule a more comprehensive case management conference; (ii) while the resolution of certain threshold issues may be dispositive of some cases, the proposed amendment is not intended solely for cases that are ripe for early disposition; rather, the proponents believe that early conferencing can provide opportunities for the parties to identify and target their energies on important issues whose resolution, while not dispositive, can contribute to the efficient resolution of the case.

We also believe that the initial conference will aid in the development of the two reformative themes embraced by the Committee in the course of its work, *i.e.*, the need for active and early judicial management by the courts of the cases on their calendars and the need for cooperation among the attorneys for the litigants. The first theme is reflected in the nature of the proposal itself, *i.e.*, the creation of an additional opportunity for case management. The second theme is also advanced by the creation of the proposed Rule 16(b) conference. As noted above, we believe that fostering an ethos of cooperation among counsel (without compromising counsel's obligations to advance and protect their client's interests), as much as anything else, can have a significant

impact on the need to reduce the cost and length of litigation. While it does not guarantee a cooperative, professional attitude among counsel, compelling face-to-face engagement early in the litigation can set the right tone and help to create the kind of cooperation that will facilitate swift and just resolution of disputes. We also believe that the presence of the court at the early stages of interaction among counsel enhances the likelihood of a civil, cooperative attitude pervading the litigation process. Our recommendations are guided in part by these beliefs.

Accordingly, we recommend an amendment to Rule 16 to create a new Rule 16(b) directing courts to convene an initial pretrial conference among the parties represented by lead trial counsel at the earliest practicable date to conduct an initial assessment of the needs of the case. The court may discuss a wide range of issues but the overarching goal of this conference is to determine, generally, whether the dispute is ripe for comprehensive case scheduling or whether there are individual issues that may either obviate the need for extensive case management or require a threshold resolution of identified issues before the court and parties can meaningfully plan a comprehensive scheduling order. We also recognize that certain cases may not benefit from such an early conference either because they are relatively straightforward or because they are vexingly complex. As a result, the proposed rule provides both the court and the litigants the opportunity, upon a showing of good cause, to (a) delay, (b) opt-out, or (c) decide to merge the proposed Rule 16(b) conference with the current case management structure if there is no need for such an early conference. This opt-out feature allows courts and litigants to make an individualized determination of whether the matter would benefit from an early conference. Indeed, individualized attention to each case and not a one-

size-fits-all case management philosophy is one of the key drivers behind the Committee's recommendation.

Although the parties and the court may obviate the need for the proposed Rule 16(b) conference, the proposed Rule 16(b) conference (or the prospect of such a conference) does require parties at an early stage in the litigation to begin thinking about how the particular case is going to be managed in terms of dispositive motions and the scope of discovery. Indeed, even if the parties seek to opt out of such a conference, they will need to give thought as to why such a conference would not be beneficial, confer with opposing counsel on that issue, and justify their decision to the court. We believe that this requirement can be beneficial in and of itself.

If, however, the parties and the court decide to go forward with the initial proposed Rule 16(b) conference, the parties are expected to meet and confer prior to the initial assessment pre-trial conference. During this initial meet-and-confer, the parties are expected to discuss (1) how to best simplify the issues in the case; (2) the preservation of documents and ESI; (3) the potential for dispositive motions; (4) the general scope of discovery; (5) potential settlement; and (6) any other issues that will foster the efficient and prompt resolution of the matter. We believe that this initial discussion provides the parties with the opportunity to open a dialogue about how to best manage the litigation going forward. This comports with the Committee's belief that opportunities for the parties to interact on these types of case management issues will aid in fostering cooperation among the parties at this early stage.

After the meet-and-confer, the court will hold its proposed Rule 16(b) conference. The first matter on the agenda at such a conference should be for the parties to provide the court with a summary of what was discussed during their meet-and-confer and what ideas that they have to ensure that there is a prompt and efficient resolution to the case. The court and the parties can then, if necessary or helpful, embark on a discussion about, among others things, the issues discussed by the parties at their meet-and-confer, service of process, whether the amendment of pleadings is required, whether initial disclosures are necessary, issues of preservation of ESI, whether a Rule 12(b) motion is required, whether the parties would benefit from certain matters being referred to a magistrate judge, and the scope of discovery. Based upon the parties' summary of their meet-and-confer, the results of the proposed Rule 16(b) conference and the court's experience and independent review of the pleadings filed to date, the court will then be equipped with the tools it needs to determine whether this is a case subject to early disposition – either by encouraging settlement with an efficient economical solution or with an early dispositive motion – or whether the case requires a full blown complaint-to-disposition case management plan.

For example, at this initial conference, the court and the parties may determine that there is a clear issue of whether the plaintiff has adequately alleged that there is personal jurisdiction over the defendant or defendants. If addressed early, the court would have the option and ability to schedule a Rule 12(b) motion on that issue or, if necessary, direct the parties to engage in brief, targeted discovery concerning personal jurisdiction. Having the early conference and addressing this issue in a comprehensive way would avoid a potential delay of several months during which a defendant may make

a Rule 12(b) motion on its own volition, plaintiff would oppose it and request jurisdictional discovery, and the court after some time would determine that jurisdictional discovery is warranted. As a result, the disposition of the case would be delayed and the parties required to expend additional time and resources to re-brief the motion to dismiss based upon the information gained during the targeted jurisdictional discovery. Although the disposition of the case may have been the same even had the proposed Rule 16(b) conference been held, we hope that the conference will avoid such an inefficient scenario.

The proposed Rule 16(b) conference would also benefit parties in a situation where the scope of discovery would be affected based upon what claims survive a Rule 12(b) motion. For instance, assume a plaintiff has brought an action for both breach of contract as well as an antitrust or intellectual property violation. If required to examine the pleadings at such an early stage, the court could determine that it is unlikely that the breach of contract claim would be subject to a dispositive motion but that the antitrust or intellectual property allegations are vulnerable to a motion. The court, with the parties' cooperation, could then order that the parties brief a motion to dismiss on the antitrust claim while ordering discovery to proceed only with respect to the breach-of-contract claim. In this scenario, the parties will advance the litigation by bringing the breach-of-contract claim closer to resolution and potentially simplifying the overall litigation.

These are just two examples where a case could potentially benefit from early case assessment during the proposed Rule 16(b) conference. But, as described above, there are also many cases that would not benefit from such a conference. Our goal, however, is to build a structural mechanism into the Rules where these issues are

examined and addressed without the requirement that a full-blown scheduling order be entered where it may not be warranted.

This proposed conference, however, will be most effective with active participation and focused attention from the parties' lead trial counsel and the court. Lead trial counsel must be familiar with the potentially dispositive issues and also be prepared to provide the court with reasonable solutions and ideas in order to facilitate the prompt and efficient resolution of the case. Counsel must also be sufficiently prepared to decide whether any early contingencies exist and how best to deal with them. They also must be willing and able (with sufficient client authorization) to agree to potential solutions offered by opposing counsel or risk having some issues decided by the court.

The court must also give its focused attention to this proposed Rule 16(b) conference in order to make it effective. In advance of the conference, the court must perform a detailed review of the filed pleadings and leverage its experience in managing cases to raise issues that may efficiently and effectively resolve the litigation. The court must also be willing to scrutinize the parties' views of what will most effectively resolve the litigation. At the proposed Rule 16(b) conference, a plaintiff may express to the court that every claim is meritorious and needs to be resolved at a full-blown trial on the merits. For its part, a defendant may express to the court that every claim asserted against it is frivolous and should be dismissed on a dispositive motion at the earliest opportunity possible with no discovery. These positions, of course, may be posturing by litigants at the outset of the litigation. But, it is the court's duty, if the parties take such strident positions, to then cut through the noise of zealous advocacy to devise an individualized strategy to resolve the litigation which can include some of the measures

discussed here or setting the case on a full complaint-to-disposition scheduling path. The court may also take this opportunity to coordinate the case's schedule with other deadlines contemplated by the Rules such as, for example, the time to answer or move, the time for entering a scheduling order under current Rule 16(b), an exchange of initial disclosures under Rule 26(a), or submission of the Rule 26(f) report.

Ultimately, the goal of the addition of the proposed Rule 16(b) conference is to reduce the amount of case management by efficiently identifying cases that can be put on a fast track to resolution. It is the Committee's belief that early case management will prove the adage that "an ounce of prevention is worth a pound of cure" is correct.

The text of the proposed Rule and Advisory Committee Note is set out in Appendix B.

Part III – Mandatory Initial Disclosure

Rule 26(a)(1) requires a party, with certain exceptions, at or within 14 days of a Rule 26(f) conference⁴¹ to disclose: (a) the identity of individuals likely to have discoverable information a party may use to support its claims or defenses, (b) documents, ESI and tangible evidence a party may use to support its claims or defenses, (c) a computation of damages, and (d) a copy of the insurance agreement under which an insurer may be obligated to satisfy all or part of a judgment.⁴²

The obligation to make the initial disclosure of documents, ESI and tangible evidence has been the subject of some criticism, and academics and practitioners

⁴¹ The timing of the conference is set by the court, but as a practical matter is limited by the requirement in current Rule 16(b) that a scheduling order be issued within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

⁴² The complete language of Rule 26(a)(1) is contained in Appendix C.

have expressed dissatisfaction with it.⁴³ Part of the initial opposition to the Rule arose from the addition of a duty to volunteer information not requested by an adversary in contrast to the time-honored adversarial litigation model, in which counsel zealously protect every bit of relevant evidence unless compelled to disclose as a result of a properly drafted request. Critics argue that early, mandatory disclosure has the effect of revealing a party's analysis of the adverse party's case, as well as its own, to the obvious benefit of the adverse party, and, carried to its logical extreme, the obligation creates a disincentive for parties to reveal damaging information to their own counsel. Other critics find the device of minimal value in cases where the plaintiff has limited, relevant knowledge, and others still point out that the device does not eliminate the need for further discovery and in many cases does not reduce – and may actually increase – the expense of the discovery. To the extent initial disclosures have been found to be useful, the instances appear to be limited to less complex litigations.⁴⁴ Since initial document mandatory disclosure seems to be wasteful of time and of negligible value in many cases, making it mandatory seems inconsistent with efficient management of the discovery process. In those cases where it is sensible, the court can order it at the initial pre-trial conference.

We recommend that the obligation to make initial document and tangible evidence disclosures be eliminated from Rule 26(a)(1). We believe that the benefits of such disclosure can be achieved by early court involvement, which should result in

⁴³ See *ABA Section of Litigation Member Survey on Civil Practice: Detailed Report*, Dec. 11, 2009. Empirical data contained in the report showed, based on responses from 3,300 members, that only 33% of respondents believed that initial disclosure under Rule 26(a)(1) reduced discovery, and fewer respondents (26%) believed that initial disclosure saved the client money, while more than half (52%) believed that it added to the cost of litigation. Moreover, the survey showed that over 95% of cases required discovery beyond the initial disclosure stage.

⁴⁴ See *infra*. n.60, p. 64.

delivery of relevant documents in an appropriate time frame, reduction of dilatory activity by counsel, and speedier resolution of the dispute.

A review of the Rule's history, the reaction its various amendments have elicited, and a comparison with some state provisions will be helpful to understanding this recommendation.

A. INITIAL DISCLOSURE UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee began considering a system of mandatory disclosures in 1990 as part of a broader movement to overhaul the federal discovery rules. Mandatory disclosure was intended to reduce materially the cost of discovery before trial by compelling the disclosure of documents and the other information required by Rule 26(a)(1)(A) that would inevitably be disclosed in the course of discovery. Such mandatory disclosure was intended to eliminate, or at least reduce, the cost of making and responding to discovery requests and motions. Rule 26(a)(1) was a product of that review, but the amendments to the Rule proved quite controversial. It was strongly opposed by numerous interest groups within the legal profession, including the American Bar Association (the "ABA"), the products liability bar, the Justice Department, public interest lawyers, and civil rights lawyers.⁴⁵

The Supreme Court approved the Rule, over the strong dissent of Justice Scalia, and the Rule went to Congress for approval.⁴⁶ For a variety of procedural reasons, legislation that would have deleted the provision for mandatory disclosure never came to a vote in the Senate, and the Rule automatically took effect on December 1, 1993. Rule

⁴⁵ Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)* -- "Much Ado About Nothing?" 46 Hastings L.J. 679 (1995).

⁴⁶ Order Prescribing Amendments to the Federal Rules of Civil Procedure, 507 U.S. 1089 (1993).

26(a)(1) imposed upon the parties “a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement.”⁴⁷ With respect to documents, data compilations, and tangible things, the new Rule required each party to, “without awaiting a discovery request, provide to other parties . . . a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings.”⁴⁸ The new rule also required each party to “make its initial disclosures based on the information then reasonably available to it,” and stated that the party “is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party’s disclosures or because another party has not made its disclosures.”⁴⁹

However, the amendment permitted district courts to opt out of the new rules.⁵⁰ More than half of the federal district courts opted out of imposing the requirement, resulting in a “patchwork and fragmented system.”⁵¹ Critics observed that mandatory disclosure requirements could lead to the “overproduction of marginally relevant information,” thus increasing delay and expenses for both sides, particularly at

⁴⁷ Rule 26 Advisory Committee Note, subdivision (a) (1993).

⁴⁸ Rule 26(a)(1)(B) (1993).

⁴⁹ Rule 26(a)(1) (1993).

⁵⁰ For example, the judges of the Southern District of New York suspended operation of the mandatory initial disclosure rule, pending further study, on the very day the new rule took effect. See *In re Local Rules of Civil Procedure*, M10-468, Amended Order (Dec. 1, 1993) (Griesa, C.J.).

⁵¹ Peter J. Beshar & Kathryn E. Nealon, *Changing the Federal Rules of Civil Procedure*, N.Y.L.J., Dec. 1, 2000, at 1.

the very beginning of a case. Such “front-loading” of costs, it was argued, has the potential to “impede settlement.”⁵²

Rule 26(a)(1) was amended in 2000 to impose a universal rule mandating initial disclosures. The 2000 Amendments implemented two changes. First, they required all parties (except in specified types of cases) to make initial disclosures, unless the parties agreed or the court ordered otherwise.⁵³ Second, they limited the information that must be disclosed to that which the disclosing party may use to support its position. Therefore, in addition to making the provisions of Rule 26(a)(1) mandatory, the 2000 amendment to the Rule narrowed the initial disclosure obligation from the identification of documents, data compilations, and tangible things that “are relevant to disputed facts alleged with particularity in the pleadings” to those that “the disclosing party may use to support its claims or defenses.”⁵⁴

Rule 26(a)(1) was amended again in 2006, this time to address the growing importance and cost of electronic discovery. Rule 26(a)(1) in its current form imposes a narrowly focused duty to disclose witnesses and documents “that the disclosing party intends to use to support its claims or defenses,” as well as damage

⁵² Michael J. Wagner, *Too Much, Too Costly, Too Soon? The Automatic Disclosure Amendments to Federal Rule of Civil Procedure 26*, 29 Tort & Ins. L.J. 468, 477 (1994).

⁵³ Rule 26(a)(1) (2000) & Advisory Committee Note to 2000 amendment. Proceedings exempt from initial disclosure include: (i) an action for review on an administrative record; (ii) a forfeiture action in rem arising from a federal statute; (iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence; (iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision; (v) an action to enforce or quash an administrative summons or subpoena; (vi) an action by the United States to recover benefit payments; (vii) an action by the United States to collect on a student loan guaranteed by the United States; (viii) a proceeding ancillary to a proceeding in another court; and (ix) an action to enforce an arbitration award. These categories of proceedings were exempted on the belief that the burden of making disclosures in cases within them would outweigh the likely benefit.

⁵⁴ Rule 26 (2000).

computations and insurance agreements.⁵⁵ Because initial mandatory disclosure may not be suitable for all cases, the Rule continues to exempt certain categories of cases deemed unsuited to initial disclosure,⁵⁶ permits the parties to waive the requirement by stipulation, and authorizes the court to modify or eliminate disclosure obligations in a particular case. To facilitate discovery planning and management by counsel, initial disclosures must be made at, or within 14 days of, the Rule 26(f) conference at which the parties must discuss settlement and attempt to agree on a discovery plan. Rule 26(a)(1)(E) requires a party to make initial disclosures based on “information then reasonably available to it” and expressly declines to excuse a party from its disclosure duty based on the failure of another party to make its disclosures. The Rule also defers formal discovery until the parties have conferred as required by Rule 26(f), which can effectively bar parties from engaging in formal discovery for as long as three months from defendant’s appearance or four months after service of the complaint.

B. ACADEMIC TREATMENT OF RULE 26(a)(1)

The enactment of the initial disclosure rule in December 1993 was met with skepticism by both academia and the judiciary even before its inception. Both groups emphasized the adverse effects the Rule was likely to have on civil litigants by increasing the discovery obligations and on federal judges who would be faced with satellite motion practice over the scope of its application.⁵⁷ As empirical data started

⁵⁵ Rule 26(a)(1)(A)(i)–(iv) (2006).

⁵⁶ Rule 26(a)(1)(B). No substantive changes were made to the 2000 amendments, although minor language changes were made.

⁵⁷ David D. Siegel, *The Recent (Dec. 1, 1993) Changes in the Federal Rules of Civil Procedure: Background, the Question of Retroactivity, And a Word About Mandatory Disclosure*, 151 F.R.D. 147 (1993). See also Dissenting Statement of Justice Scalia, H.R. Doc. No. 103-74, at 107 (1993). In dissenting from the adoption of the amendments to the rules relating to discovery, Justice Scalia was joined by Justices Thomas and Souter.

flowing in, the initial concerns seemed to be validated.⁵⁸ Academic commentators focused their concerns on lack of uniformity in the Rule's application, since only a minority of the districts opted in and subscribed to the amendment.⁵⁹ Some scholars indicated that the new rule seemed to have worked best in simple and routine cases, whereas the greatest discovery and case management problems were being encountered in complex cases, such as civil rights class actions and products liability lawsuits, where litigants required more specific information.⁶⁰ The major source of contention was the "particularity" requirement of the amended Rule 26, which called for disclosure pertaining to "disputed facts alleged with particularity in the pleadings" and ran counter to the then existing notice pleading standard under *Conley*.⁶¹ This critique continued through the 1990's and included repeated calls for repeal of the amendment years after the Rule's enactment.⁶²

The drumbeat of academic criticism and practitioner dissatisfaction resulted in adoption of changes in 2000. As noted above, the 2000 amendment required uniform application of the Rule throughout all districts and included a list of proceedings exempt from Rule's application under Rule 26(a)(1)(B). Another prominent feature of the 2000 amendments was that a party must disclose "information that [it] may use to support its claims and defenses," rather than "relevant to the disputed facts alleged." This provision significantly narrowed the scope of initial disclosure by obligating a party to

⁵⁸ Carl Tobias, *A Progress Report on Automatic Disclosure in the Federal Districts*, 155 F.R.D. 229 (1994).

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ Ashley L. Belleau, *A Critique of the "New" Discovery Rules, Raising More Questions Than They Answer...Business As Usual In The Federal Courts*, 42-JUL Fed. Law. 36 (1995).

⁶² Lisa J. Trembly, *Mandatory Disclosure: A Historical Review of the Adoption of Rule 26 and an Examination of the Events That Have Transpired Since Its Adoption*, 21 Seton Hall Legis. J. 425 (1997).

disclose information which supported its position; a party was no longer required to disclose witnesses or documents that it did not intend to use.

Notwithstanding the changes adopted in 2000, which addressed many of the concerns of academics and commentators, practitioners have continued to express reservations about the efficaciousness of the mandatory document disclosure requirements of Rule 26(a)(1)(A)(ii).⁶³

C. **EMPIRICAL DATA AND PROPOSED AMENDMENTS TO- RULE 26(a)(1)**

Prompted by the Advisory Committee’s on-going deliberations and its scheduled Duke Conference, several organizations engaged in empirical studies and analyses of the operation of the judicial process, including the mandates of Rule 26(a)(1). The results of these efforts were presented at the Duke Conference and were examined by panelists and participants at the conference. The following are of particular interest.

1. **ACTL/IAALS**

The American College of Trial Lawyers (“ACTL”) Task Force on Discovery and the Institute for the Advancement of the American Legal System (“IAALS”) were proponents of comprehensive reforms to federal civil practice and stimulated the discussion by publishing a comprehensive report introducing twenty-nine so-called “Pilot Project Rules” calling for amendments to the federal rules.⁶⁴ Based on empirical data gathered from members of ACTL, Pilot Project Rules 5 through 5.5 attempted to address perceived flaws in the initial disclosure rule, particularly increased

⁶³ See *supra* n.43, p. 59.

⁶⁴ *Final Report on the Joint Project of the American College of Trial Lawyers (ACTL) Task Force on Discovery and the Institute for the Advancement of the American Legal System*, Mar. 11, 2009 [Revised Apr. 15, 2009].

cost of litigation, and called for disclosure by the pleading party within days of serving its pleading of “all reasonably available documents and things that may be used to support the party’s claims.”⁶⁵ Under the proposal, the timing of service of a responsive pleading would necessarily be premised upon the delivery of initial disclosure to defendant’s counsel. The comprehensive nature of ACTL/IAALS proposal was widely acclaimed by the defense bar.⁶⁶

2. Center For Constitutional Litigation

The Center For Constitutional Litigation (“Center”) broadly criticized the ACTL/IAALS proposed Pilot Project Rules.⁶⁷ According to the Center, nothing in the ACTL/IAALS Final Report explained why making the plaintiff disclose first would make litigation more efficient, and there was good reason to fear that making a plaintiff disclose first might make litigation less balanced and equitable, especially in asymmetrical cases where plaintiff had limited access to defendant’s information before the commencement of the lawsuit.

⁶⁵ The empirical data contained in the *Final Report* showed discontent by the defense bar with the current initial disclosure procedure. Approximately 1,500 members of ACTL responded to the survey, and, of those who responded, only 34% said that the current initial disclosure rules reduce discovery and only 28% said they save clients’ money.

⁶⁶ *Reducing the Cost and Duration Of Litigation – Comments On The Final Report Of The American College Of Trial Lawyers Task Force On Discovery And Of The Institute For The Advancement Of The American Legal System*, Thomas A. Gottschalk, The Metropolitan Corporate Counsel, June 1, 2009.

⁶⁷ *Nineteenth Century Rules for Twenty-First Century Courts? An Analysis and Critique of 21st Century Civil Justice System: A Roadmap for Reform Pilot Project Rules (Implementing The 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)*, Center for Constitutional Litigation, PC, Mar. 2010.

3. **ABA Litigation Section**

A proposal from the ABA Section of Litigation Special Committee, among other things, called for broader judicial involvement in civil proceedings.⁶⁸ The ABA's proposal for initial disclosure, which stemmed from its own survey of its members,⁶⁹ set the timing of the initial disclosures to the filing of the answer rather than the parties' initial conference and recommended that generally it should be completed no later than 30 days after a responsive pleading is filed. The proposal applied to all but complex cases, which it did not define.

The proposal eliminated the disclosure of the documents upon which the parties' claims or defenses were based, but maintained the need to disclose the names of the witnesses "likely to have significant discoverable information about facts alleged in the pleadings."⁷⁰

In complex cases, under the proposal, the parties would skip the initial disclosure and instead meet and confer to prepare a joint case management statement, followed by an early initial case management conference with the Court, to set the parameters and timing for disclosures and discovery. As part of their preparation for the initial pretrial conference, the parties would be required to discuss and attempt to agree on what documents, including electronically stored information, they would exchange.

⁶⁸ *Civil Procedure in the 21st Century Some Proposals*, Special Committee of the ABA Section of Litigation, Apr. 24, 2010.

⁶⁹ *See supra* n. 40, p. 52.

⁷⁰ This latter requirement to provide the names of witnesses with significant discoverable information runs in tandem with a proposal for amendment of Rule 8 and is designed to capture the concept of "notice plus" pleading – something less than *Iqbal* and *Twombly*, but more than the preceding *Conley* standard.

D. STATE MANDATED INITIAL DISCLOSURE RULES

Most states have adopted rules following the federal rules model, and a number have introduced a variety of discovery rule amendments that deviate from the federal model. A few states – Arizona, Texas, and Illinois – have completely departed from the federal rules in the pursuit of discovery reform. In 1992, Arizona, a so-called “replica” state that traditionally imitated the Federal Rules of Civil Procedure, adopted a package of discovery reforms more aggressive than anything implemented under the federal rules. Illinois and Texas have also made significant departures. In contrast, New York has never adopted any rules or procedures for early mandatory disclosure.

1. Arizona

Prior to the adoption of Rule 26(a)(1), in 1992 Arizona implemented a set of discovery reforms commonly referred to as the Zlaket Rules. The drafters of the Zlaket Rules (after chair of the committee Thomas Zlaket, later Chief Justice of the Arizona Supreme Court) sought to “reduce discovery abuse, minimize the cost and time involved in getting a case through the system, and persuade attorneys to treat each other with professional courtesy.”⁷¹ Arizona’s disclosure rules are broader in scope and applicability than the federal rules. Arizona imposes a broad duty to disclose core information in writing (through a disclosure statement) within 40 days after the filing of a responsive pleading. Parties must disclose the factual basis and legal theory underlying each claim or defense, the identity of all persons with relevant information (whether helpful or harmful to the disclosing party), the “nature of the knowledge or information each such individual is believed to possess,” and a list of documents that may be relevant to the subject matter

⁷¹ Hon. Robert D. Myers, *MAD Track: An Experiment in Terror*, 25 Ariz. St. L.J. 11, 13 (1993).

of the action, but not their production.⁷² The disclosure statement must also include information relating to both lay and expert trial witnesses.

Arizona also imposes a continuing duty to make amended or additional disclosures “whenever new or different information is discovered or revealed.”⁷³ The disclosure rules provide for the mandatory exclusion at trial of evidence or information that was not timely disclosed. Like the federal Rules, Arizona’s mandatory evidence exclusion sanction provides an exception for harmless failures to disclose. However, unlike the federal rules, Arizona’s disclosure rules apply to all cases without exemptions.

2. Illinois

Illinois adopted mandatory disclosure provisions that are almost identical to Arizona’s in scope but, unlike Arizona’s model, are limited in application to cases not exceeding \$50,000 in damages.⁷⁴ Like Arizona’s disclosure rules, Illinois imposes a continuing duty of disclosure “whenever new or different information or documents become known to the disclosing party” and an affirmative duty of “reasonable inquiry and investigation.” Illinois’ disclosure deadline – 120 days after the answer is filed – is later than Arizona’s deadline. See Ill. Sup. Ct. R. 222(c). Like Arizona, Illinois does not require initial mandatory production of documents.

3. Texas

Texas did not follow the federal mandatory disclosure rules but instead adopted “standardized requests for basic discoverable information that would be presumptively unobjectionable” and available in all cases. Rule 194.2, as promulgated in

⁷² Ariz. St. R.C.P.R. 26.1(a)(1), (2), (4).

⁷³ Ariz. St. R.C.P.R. 26.1(b)(2).

⁷⁴ Ill. Sup. Ct. R. 222 (a), (d).

1998, struck a compromise between plaintiffs’ and defendants’ attorneys and in its final version narrowed the scope of the request to require “the legal theories and, in general, the factual bases of the responding party’s claims or defenses” adding, in parentheses, “the responding party need not marshal all evidence that may be offered at trial.”⁷⁵ Rule 194.2 also broadened the scope of the request to include, among other things, the identity of “persons having knowledge of relevant facts, and a brief statement of each identified person’s connection with the case.” It neither required a list of relevant documents nor their production.

E. RECOMMENDATIONS

We agree with the ABA’s proposal to eliminate mandatory initial document disclosure and believe that the mandatory initial document disclosure provision of Rule 26(a)(1)(a)(ii) does not promote more efficient document production nor speed resolution of litigated disputes. Mandatory initial document disclosure risks complicating the attorney-client relationship, which in turn can impede the speedy judicial resolution of the dispute and, in some circumstances, can increase the cost and length of litigation. The mechanism often produces documentation of limited use, and it is abused by litigants in certain cases. We recognize that, in non-complex litigation, when engaged in by cooperating counsel, the device can speed and reduce the cost of discovery. But as discussed above, this mandatory disclosure can be ordered by the courts either as a result of agreement by the parties or after discussion in initial pre-trial conferences. Similarly, timing of the initial voluntary disclosures can be agreed upon by counsel or ordered by the courts.

⁷⁵ Tex. R. Civ. P. 194.2.

Compelling a party at the initial stage of litigation to “fully investigate” for the purpose of collecting and then producing documents, ESI, and tangible things it will use to support its claims or defenses can impose a substantial burden on an enterprise with multiple departments, branches, or affiliates dispersed around the country or the globe. We are mindful that where a defendant will make a dispositive motion, such disclosure by the defendant on all but issues related to that motion will have been wasteful if the motion is successful. For example, it would be inefficient and unnecessarily burdensome to require a defendant with a meritorious Rule 12(b)(2) motion for lack of personal jurisdiction to produce documents, ESI, and tangible things unrelated to the motion. Similarly, when a defendant has a good chance of having multiple causes of action dismissed under Rule 12(b)(6), requiring mandatory disclosure under Rule 26(a)(1)(A)(ii) is unnecessarily wasteful.

Obviously, when such a motion is unsuccessful, the disclosure contemplated by Rule 26(a)(1)(A)(ii) can be completed. This could be accomplished with a scheduling order emanating from the initial pretrial conference contemplated by the Committee’s proposed Rule 16(b), by agreement of the parties, or by the current Rule 16(b) scheduling order that follows the court’s receipt of the parties report under Rule 26(f). Such disclosure could be staged or made conditional depending on the outcome of the motion made against the pleadings or even pursuant to Rule 56.

We also see the potential for collateral litigation arising from challenges to the disclosing party’s good faith in fully investigating the case. A party may not know all of the theories supporting its claims or defenses at the early stages of a case. Certain facts may not be known or a claimant’s theories of recovery and the facts on which they

are based may not be fully apparent at the early stages of the case. Whether a producing party has adequately investigated a case at the early stage of a case and therefore made adequate disclosure could be the subject of litigation under Rule 37. By delaying the disclosure of the documents, ESI, and tangible things contemplated by Rule 26(a)(1)(A)(ii) until after a time when the parties have had the opportunity to confer and also to set forth their theories of the case before the court, as is contemplated by the Committee's proposed Rule 16(b) conference, the potential for such collateral motion practice will be minimized.⁷⁶

We believe that disclosure of the identity of, and contact information for, persons with information relevant to the dispute and the general nature of the relevant information related to the claims and defenses of the action or proceeding eliminates wasteful discovery by the party seeking to gather relevant information from the opposing party and imposes a minimal burden on the party being asked to disclose their identity and contact information. The net benefit seems substantial.

Similarly, being compelled to disclose an implicated insurance policy and a computation of damages, along with disclosure of underlying documentation, will, without imposing a burden on the disclosing party, provide the court and opposing counsel with relevant information to make decisions about the prosecution of the case, as well as facilitate issue narrowing and perhaps tiered discovery at an early stage of the case.

⁷⁶ Current Rule 26(a)(1)(C) contemplates production of the Rule 26(a)(1)(A)(ii) material within 14 days of the Rule 26(f) conference, which of course is after the parties have conferred. The current Rules do not require disclosure of the parties' theories supporting their claims or defenses at the pretrial conference, and, even if they were disclosed, 14 days might be insufficient for the investigation required by Rule 26(a)(1)(E).

Thus, we propose eliminating subparagraph (ii) of Rule 26(a)(1)(A) and renumbering subparagraphs (iii) and (iv) accordingly. A redlined version of the proposed amendment and Advisory Committee Note are found in Appendix C.

Part IV – Privilege Log

A. INTRODUCTION

Most commercial litigation practitioners have experienced the harrowing burden the privilege log imposes on a party in a document-intensive⁷⁷ case, especially one with many e-mails and e-mail strings. Guidance for preparation of the log is found in Rule 26(b)(5)(A), which provides that:

When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

- (i) expressly make the claims; and
- (ii) describe the nature of the documents, communications or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

Rule 26(b)(5) was added to the federal rules in two stages. What is now Rule 26(b)(5)(A) was added in 1993. Initially, it required that, if a party withheld materials otherwise discoverable because of a claim of privilege or work product, it had to notify the other party. The withholding party also had to provide sufficient information to permit the other party to evaluate whether the claimed privilege or protection was applicable. Although the Rule required a description of the nature of the withheld document, it did not define what information the party asserting the claim of privilege or work-product protection must provide. The Advisory Committee Note

⁷⁷ For the purpose of this part of the Report, “document” refers to information on paper and to ESI.

suggested that details, such as time, persons, and general subject matter, might be appropriate to disclose if only a few items were withheld, but that these details might be unduly burdensome to disclose if the withheld documents were voluminous. In the latter situation, it might be sufficient to describe documents by categories.

The Rule was amended in 2006 to add what is currently Rule 26(b)(5)(B). This Rule sought to provide a procedure for handling inadvertently produced documents that may be subject to a claim of privilege or protection. The Advisory Committee Note acknowledged that, where a claim of privilege or protection relates to ESI, the risk of waiver, and the time and effort required to avoid it, may increase substantially. The volume of ESI may make it difficult for a party to ensure that it has reviewed all information to be produced.

Accordingly, Rule 26(b)(5)(B) provides a procedure for a party to assert a claim of privilege or protection after production. In the event of inadvertent production, the party asserting privilege or protection must give notice to the receiving party of the claim and the basis for it. The notice must be sufficiently specific to permit the receiving party to evaluate the claim of privilege or protection. The receiving party, after notice, “must promptly return, sequester, or destroy the specified information and any copies.” If there is a dispute over the assertion of privilege or protection, the receiving party may not use or disclose the information until the claim of privilege or protection is resolved. The receiving party may present the issue of whether the information is privileged or otherwise protected to the court. If the information has been disclosed before the receiving party received notice of the claim of privilege or protection, the receiving party

must take reasonable steps to retrieve the information and preserve it until the claim is resolved.

Complying with Rule 26(b)(5)(A) traditionally has required a document-by-document list containing the following information at a minimum:

- (i) the type of document (*e.g.*, letter, e-mail, or memorandum);
- (ii) the general subject matter of the document;
- (iii) the date of the document;
- (iv) the author of the document;
- (v) the addressee of the document;
- (vi) any other recipients of the document; and
- (vii) where not apparent, the relationship of the author, addressees and recipients.

See Local Rules of the United States District Courts for the Southern and Eastern Districts of New York 26.2(a)(2)(A).

Courts generally have embraced the requirement of a detailed privilege log on a document-by-document basis. See, *e.g.*, *Graham v. Aspen Dental Mgmt., Inc.*, No. 3:09-cv-72-SEB-WGH, 2010 WL 1463013, at *2 (S.D. Ind. Apr. 12, 2010) (rejection of categorized privilege log); see also *Infinite Energy, Inc. v. Thai Heng Chang*, No. 1:07cv23-SPM/AK, 2008 WL 4098329, at *2 (N.D. Fla. Aug. 29, 2008); *Johnson v. Bryco Arms*, No. 03 cv 2582, 02 cv 3029, 2005 WL 469612, at *3 (E.D.N.Y. Mar. 1, 2005) (the privilege log should identify each document); *In re App. for an Order for Jud. Assistance in a Foreign Proceeding in the Labor Ct. of Brazil*, 244 F.R.D. 434, 438 (N.D. Ill. 2007) (“[f]or each document, the log should identify”); *SEC v. Microtune, Inc.*, 258 F.R.D. 310, 315 (N.D. Tex. 2009) (“[t]he burden is on the party asserting the privilege to

demonstrate how each document satisfies all of the elements of the privilege”); *Allen v. Woodford*, No. cv-F-05-1104 OWW LJO, 2007 WL 309485, at *12 (E.D. Cal. Jan. 30, 2007) *reh’g denied*, No. 1:05-cv-1104 OWW NEW, 2007 WL 841696 (E.D. Cal. Mar. 20, 2007) (privilege log must list specific documents). However, this approach is often extremely burdensome and difficult, if not impossible, to implement with the volume of documents entailed in the discovery of ESI. Moreover, a document-by-document privilege log is often useless to the court and the non-generating party. Efforts to streamline the log can produce a log with inadequate information, thereby risking a waiver of the privilege. See *C.T. v. Liberal Sch. Dist.*, Nos. 06-2093-JWL, 06-2360-JWL, 06-2359-JWL, 2008 WL 217203, at *9 (D. Kan. Jan. 25, 2008); *In re Rivastigmine Patent Litig.*, 237 F.R.D. 69, 87 (S.D.N.Y. 2006).

In practice, the 1993 suggestion in the Advisory Committee Note that there need not be a detailed privilege log for a voluminous collection of documents has rarely been taken up. *But see, e.g., In re Motor Fuel Temperature Sales Practices Litig.*, 2009 WL 959491 at *3 (D. Kan. Apr. 3, 2009) (“[t]he court is sympathetic to defendants’ argument that individually logging thousands of privileged attorney communications would be immensely burdensome and have little, if any, benefit to plaintiffs”); *SEC v. Thrasher*, No. 92 civ. 6987 (JFK), 1996 WL 125661, at *1 (S.D.N.Y. Mar. 20, 1996) (a categorical log allowed where “(a) a document-by-document listing would be unduly burdensome and (b) the additional information to be gleaned from a more detailed log would be of no material benefit to the discovering party in assessing whether the privilege claim is well-grounded”).

We have chosen to present a set of guidelines for best practices designed to alleviate the burden of privilege log preparation without sacrificing the protections afforded by the attorney-client privilege or work-product doctrine.⁷⁸ Our aspiration is that parties will agree to the practices outlined below or courts will apply them in cases before them.

These guidelines provide some guidance about methods to shorten the process relating to the segregation of privileged or protected material and the creation of the privilege log. Counsel should use these guidelines in conjunction with their overall discovery plan. These guidelines are merely suggestive and do not purport to encompass all the strategies counsel may employ to render discovery relating to privileged or protected material more cost-effective.

For these guidelines to work, the parties must cooperate. Legal gamesmanship and litigation by attrition must be paradigms of the past. Parties, courts, and the public at-large simply cannot afford it. Accordingly, counsel must suspend their adversarial attitudes for purposes of accelerating, and reducing the cost of, discovery. Although the parties should drive the discovery process, active judicial case management should be available to make clear that cooperation is expected, and compel it if necessary, so that the entire discovery plan, including privilege-related issues, proceeds in a speedy and efficient manner.

⁷⁸ The Committee presents these guidelines, rather than suggesting changes to Rule 26(b)(5), because the Rules in general are flexible enough in their current form to allow for implementation of the recommended guidelines.

B. GUIDELINES

Guideline 1

Parties should meet and confer early in the case, as part of their initial discussion about document production, before or at the Rule 26(f) conference, to discuss: (1) the volume of claims of privilege or protection the parties anticipate encountering, (2) how to segregate and exclude presumptively privileged or protected documents from production, and (3) how to handle the inadvertent production of privileged or protected material.

Cooperation is critical to ensuring effective and cost-efficient discovery.

To that end, counsel should meet and confer early in the case. Rule 26(f) requires counsel to confer “as soon as practicable.”

Prior to the Rule 26(f) conference or the initial conference with the court under current Rule 16(a) or proposed Rule 16(b), counsel should ascertain the manner in which their client maintains information, the volume of information potentially discoverable, and the nature and scope of potentially privileged or protected information. At a Rule 26(f), 16(a) or proposed 16(b) conference, counsel should be in a position to discuss the extent and nature of the privilege or protection claims they will assert, the volume of documents or information covered by such claims, the identification of relevant custodians, and what categories of documents can be excluded as presumptively privileged or protected. Counsel should also discuss how to treat the inadvertent disclosure of privileged material utilizing the procedures available under Rule 26(b)(5)(B) and Federal Rule of Evidence 502.

If the parties are in a position to discuss the search process or protocol, they should also discuss the manner in which the search will ensure that the designation of documents or information as privileged or protected is accurate, effective and

complete. Parties should agree ahead of time that the sharing of such information is confidential and cannot be deemed a waiver of privilege.

Guideline 2

Counsel should take advantage of Federal Rule of Evidence 502 by agreeing early in the case that the production of privileged or protected documents will not result in any waivers. The parties should ensure that this agreement is incorporated in a court order.

Because of the proliferation of ESI and the impracticality in many instances of a page-by-page review of all documents to identify those that are privileged or protected, it is important to have agreement on how to handle the disclosure of privileged or protected documents. Federal Rule of Evidence 502 “creates a new framework for managing disclosure issues in a cost effective manner in the age of large electronic document productions.” *Coburn Grp., LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032, 1037 (N.D. Ill. 2009). Federal Rule of Evidence 502(b) provides that disclosure of privileged or protected information will not operate as a waiver if: (a) the disclosure was inadvertent; (b) the party asserting the privilege or protection took reasonable steps to prevent the disclosure; and (c) reasonable steps were taken to rectify the error. Reasonable steps may include some method of verifying the accuracy, effectiveness and completeness of the searches for privileged or protected information. This may involve, at the very least, some level of searching for known privileged or protected communications among the documents to be produced prior to their production.⁷⁹ Where a third-party vendor is used to search for privileged or protected

⁷⁹ Rule 4.4(b) of the New York Rules of Professional Conduct requires the attorney for the receiving party who “knows or reasonably should know” that a privileged or protected document was inadvertently sent to notify the producing party promptly.

documents, the party using the vendor must perform a verification check to ensure that the production database the vendor prepares does not contain privileged or protected documents. See *Thorncreek Apts. III, LLC v. Vill. of Park Forest*, Nos. 08 C 1225, 08-C-0869, 08-C4303, 2011 WL 3489828, at *7 (N.D. Ill. Aug. 9, 2011). Depending on the case, it may also be a “reasonable step” to take samples of documents so long as there is variety in the sample and the sample is large enough to constitute a sufficient check. See *Victor Stanley v. Creative Pipe, Inc.*, 250 F.R.D. 251, 257 (D. Md, 2008) (“[t]he only prudent way to test the reliability of the keyword search is to perform some appropriate sampling of the documents determined to be privileged and those determined not to be in order to arrive at a comfort level that the categories are neither over-inclusive or under-inclusive”).

Federal Rule of Evidence 502(b) covers only inadvertent disclosures in a pending federal action. To protect against the disclosure of privileged or protected information in other federal actions or state proceedings, and in situations such as “quick peeks” and “clawbacks”, resort to Federal Rule of Evidence 502(d) is essential. Under Rule 502(d), a court order may provide that disclosure of otherwise privileged information does not waive the privilege or protection in connection with pending litigation. Such an order should provide for a procedure consistent with Rule 26(b)(5)(B) as described above. Rule 502(d), together with Federal Rule of Evidence 502(e), allows for the entry of an order preventing waiver in other federal or state proceedings and as to non-parties as well. It was the intention that Federal Rule of Evidence 502 would reduce the costs of privilege review, especially in cases involving ESI, by allowing parties to a

litigation to determine the consequences of a disclosure of privileged or protected information. See Advisory Committee Note to Federal Rule of Evidence 502 (2008).

Federal Rules of Evidence 502(d) and (e) allow parties to enter into “quick peek” agreements, whereby parties could produce all their documents without first reviewing them for privilege and protection and then pull back those that are privileged or protected as a review proceeds. See 2007 Advisory Comm. Note on Fed. R. of Evid. 502 (“the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of ‘claw-back’ and ‘quick peek’ arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product”). While certainly easier, as a practical matter, it is a risky proposition. Even with clawback, the receiving side is not going to forget what it saw. See *F.D.I.C. v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 483 (E.D. Va. 1991) (“[a]ny order issued now by the court would have only limited effect; it could not force NBNE to forget what has already been learned”).

To protect against waiver, the parties should agree upon and request the court to enter an order pursuant to Rule 502(d). An example of such an order can be found in an “Order Pursuant to Federal Rule of Evidence 502(d)” in *In re Terrorist Attacks on September 11, 2001 03 MDL 1570 (GBD) (FM)* (S.D.N.Y. Apr. 25, 2011) (Maas, M. J.) that states:

WHEREAS, Federal Rule of Evidence 502(d) authorizes a federal court to order that the attorney-client privilege and work product protection are not waived by a “disclosure connected with the litigation pending before that court – in which event the disclosure is also not waived in any other Federal or State proceeding;” and

WHEREAS, this Court finds good cause to issue such an order pursuant to Rule 502(d).

IT IS HEREBY ORDERED that, pursuant to Federal Rule of Evidence 502(d), the parties' production of any documents in this proceeding shall not, for purposes of this proceeding or any other proceeding in any other court, constitute a waiver of any attorney-client privilege or attorney work product protection applicable to those documents.

Finally, the order the court enters pursuant to Federal Rule of Evidence 502(d) should be separate from any "so-ordered" confidentiality agreement. This avoids the confusion that could ensue by burying the Rule 502(d) portion in the typically lengthy confidentiality agreement.

Guideline 3

Parties need to agree on the form and the level of detail the privilege log needs to contain. Where possible, counsel should agree to reject a document-by-document privilege log and instead adopt alternative approaches that shorten the process. These alternatives include, but are not limited to: (1) categories of exclusion, (2) logging by category, and (3) special treatment for e-mail chains. Counsel should also be aware of technological tools that can shorten the process of segregating privileged or protected documents and creating the privilege log.

There are ways to reduce the burden and expense relating to the creation of a privilege log. Counsel facing the creation of a burdensome privilege log would do well to consult John M. Facciola and Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 Fed. Cts. L. Rev. 19 (2009). This article provides a new framework for privilege review that relies on grouping documents that are likely privileged or protected into categories on a rolling basis. Ultimately, the parties will want to "create a set of natural differentiations among documents so the parties can say, once again with confidence, what is true of items within the category is true of the whole." *Id.* at 46. The Facciola-Redgrave Framework

suggests several methods counsel can employ to alleviate the burden of the process of privilege review.

1. Categories of Exclusion

Certain types of documents are so obviously privileged or protected that it may serve no purpose to log them at all. A good example would be communications exclusively between a party and its trial counsel. Another would be work product, such as legal memoranda, that an attorney prepares after the filing of the complaint. The Southern District of New York Judicial Improvements Committee pilot project identifies as well internal communications within a law firm, an in-house legal department, or a government law office, and “documents authored by trial counsel for an alleged infringer in a patent infringement action even if the infringer is relying on the opinion of trial counsel to defend a claim of willful infringement.” Counsel should also agree not to log exact duplicates, a circumstance that e-mail chains have made more common. Of course, parties can agree to exclude other, more specific categories. For instance, parties might agree to exclude communications between certain custodians, depending on the individual needs of the case.

At bottom, whether a categorical approach will work depends on the facts and circumstances of a particular case. *See In re Motor Fuel Temperature Sales Practices Litig.*, NO. 07-MD-1840-KHV, 2009, WL 959491, at *3 (D. Kan. Apr. 3, 2009) (court permitted categorical privilege log that contained information regarding the number of documents, the time period the documents covered, and a statement from counsel about the nature of the privilege).

The Facciola-Redgrave Framework also suggests that, upon request, parties supply evidentiary support for categories. This could take the form of “an affidavit attesting to the facts that support the privileged or protected status of documents and ESI within that category.” *Id.* at 47.

2. Logging by Category

Where a category cannot be excluded altogether, parties may wish to consider a log that lists groups of documents rather than each document. Documents can be logged as a category perhaps noting the range of control numbers, the beginning date of the earliest document, and the ending date on the latest document with a description. For example, if a litigation concerns a purchase price adjustment, it may be sufficient to describe draft contracts, to the extent privileged or protected, as “draft contracts created by counsel that includes legal advice regarding X’s rights with respect to the purchase price adjustment clause.” Or, it may be appropriate to log e-mails between specific persons, such as the CFO and in-house counsel, as a group. The challenging part of this exercise is to describe the category in a way that imparts sufficient information for the other side to assess the privilege or protection. Attorneys often fail in this endeavor. *See, e.g., Chevron Corp. v. Salazar*, No. 11 civ. 3718 (LAK) (JCP), 2011 WL 4388326 (S.D.N.Y. Sept. 20, 2011) (plaintiff’s short description of categories impeded the process, and the court therefore ordered an itemized privilege log).

3. E-mail Chains

An e-mail chain or string is two or more e-mails that effectively constitute a conversation among the persons involved in the chain. Both the Facciola-Redgrave

Framework and the Judicial Improvements Committee endorse truncated privilege logs for e-mail strings. We believe that both can be useful.

As a starting point, the Facciola-Redgrave Framework, which requires only one entry in the log to identify a single e-mail chain, is a sound and time-saving approach. It calls for the “last-in-time” e-mail in the string to be identified, provided that each e-mail in the string will at one point in time have been the “last-in-time.” See Facciola-Redgrave Framework at 49. The authors also recommend that, “[i]f an embedded e-mail communication is not otherwise available, then it must separately be identified.” *Id.*

Because an e-mail chain can involve a conversation among two or more persons that formerly would have taken place over the telephone or at a meeting, it may be appropriate for parties to agree to truncate even further the information about the e-mail chain by providing only: (1) the first-in-time e-mail, (2) the last-in-time e-mail, (3) a list of all persons involved in the chain, and (4) the reason for asserting the privilege. This is an approach embraced by the Judicial Improvements Committee (“only one entry on the log to identify withheld e-mails that constitute an uninterrupted dialogue between or among individuals”). The Judicial Improvements Committee requires that the party disclose that the e-mails are part of an uninterrupted dialogue, but does not define what “uninterrupted dialogue” means.⁸⁰ The Judicial Improvements Committee also mandates disclosure of the number of e-mails within the dialogue, the beginning and ending dates and times, and the names of all recipients of the communications, as well as other requisite privilege log disclosures, such as the reason for asserting the privilege.

⁸⁰ The Judicial Improvements Committee does not suggest whether it is temporally limited, or limited by subject matter, or both. Parties can, and should, agree among themselves as to the parameters for what constitutes an “uninterrupted dialogue.”

The courts are split about whether it is appropriate to log e-mails as one entry, and the case law is still emerging. *Compare Helm v. Alderwoods Grp., Inc.*, No. C08-01184 SI, 2010 WL 2951871 at *2 (N.D. Cal. July 27, 2010) (requiring itemization of each e-mail within the string); *Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.*, 254 F.R.D. 238, 240–41 (E.D. Pa. 2008) (each progressive e-mail is its own document and failure to log each e-mail in a chain resulted in waiver to those e-mails that were not logged), *with Cont'l. Cas. Co. v. St. Paul Surplus Lines Ins. Co.*, 265 F.R.D. 510, 517 n.9 (E.D. Cal. 2010) (Rule 26(b)(5)(A) does not require separate itemization of e-mails in a privilege log) (citing *Muro v. Target Corp.*, 250 F.R.D. 350 (N.D. Ill. 2007)); *cf. U.S. v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1074 n.6 (N.D. Cal. 2002) (For the purposes of assessing waiver due to having sent the e-mail to a third party, the court held that “[e]ach e-mail/communication consists of the text of the sender’s message as well as all of the prior e-mails that are attached to it. Therefore . . . [the] assertion that each separate e-mail stands as an independent communication is inaccurate. What is communicated with each e-mail is the text of the e-mail and all the e-mails forwarded along with it.”).

Courts are also split as to whether forwarding a non-privileged e-mail for the purpose of seeking or communicating legal advice extends the privilege to that non-privileged e-mail to the extent it was forwarded. *Compare Dawe v. Corr. USA*, 263 F.R.D. 613, 621 (E.D. Cal. 2009) (“the current weight of authority favors examination of the most recent communication as the means for characterizing the entire e-mail string”); *Barton v. Zimmer Inc.*, No. 1:06-cv-208, 2008 WL 80647, at *5 (N.D. Ind. Jan. 7, 2008) (“even though one e-mail is not privileged, a second e-mail forwarding the prior e-mail to

counsel might be privileged in its entirety. . . . In this respect, the forwarded material is similar to prior conversations or documents that are quoted verbatim in a letter to a party's attorney") (citations omitted), with *BenefitVision Inc. v. Gentiva Health Servs. Inc.*, No. cv 09-473 (DRH) (AKT), 2011 WL 3796324, at *2 (E.D.N.Y. May 23, 2011) ("[i]f there are e-mail chains in which defendants claim privilege over only parts of the e-mail chain, those allegedly privileged e-mails must be redacted and all non-privileged portions must be produced"); *SEC v. Wyly*, No. 10 Civ. 5760 (SAS), 2011 WL 3055396 at * 4 (S.D.N.Y. July 19, 2011) ("the unprivileged material will have to be produced in some form, as it is the transmission that is protected, not the underlying information").

The better approach is to disclose if there are e-mails in the string that are clearly not privileged. Although one might assume that the initial e-mail, being unprivileged, would wind up as part of the general document production, particularly with the use of de-duping software, there is a danger that the non-privileged e-mail in its original form will be deleted.

4. Use of Software

Technology can be a useful tool to make more efficient the identification of privileged or protected documents. Indeed, the Advisory Committee Note to Federal Rule of Evidence 502(b) contemplates the use of screening software ("[d]epending on the circumstances, a party that uses advanced analytical software application and linguistic tools in screening for privilege and work product may be found to have taken 'reasonable steps' to prevent inadvertent disclosure"). Thus, counsel should be knowledgeable about computer applications and programs that can be used to review ESI for privileged or

protected material. For instructive material, see Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and Efficient than Exhaustive Manual Review*, XVII Rich. J.L. & Tech. 11 (2011), available at http://jolt.richmond.edu/v17:3/article_11.pdf; Adam I. Cohen and David J. Lender, *Electronic Discovery: Law and Practice*, Chap. 7[C][3] (Wolters Kluwer – 2d ed. 2012). Additionally, in the Southern District of New York, Magistrate Judge Andrew J. Peck has recently accepted the use of “computer assisted-review.” *Moore v. Publicis Groupe*, No. 11 Civ. 1279 (ALC) (AJP), --F. Supp.--, 2012 WL 607412 at §11 (S.D.N.Y. Feb. 24, 2012).⁸¹

Alternatively, parties may want to use search terms with existing software to isolate privileged or protected documents. For example, parties can search and segregate those items in which one or more names of a party’s in-house counsel appears anywhere in the document, including associated metadata along with search terms.

In addition, depending on the software, parties may be able to utilize metadata fields to generate a report and then turn that report into a type of index or log. A simple log can, in many cases, evolve from the “to”, “from”, and subject line fields. See Facciola-Redgrave Framework at 47 (noting that parties may be able to generate a report where information is in a database). If the subject line reveals privileged or protected information, the parties can always substitute a different description of the item, but should identify the entries they modified.

⁸¹ Objections have been filed with the District Judge.

Guideline 4

Attachments to e-mails should be identified as attachments and logged separately from the e-mail containing it.

Although an e-mail may be designated privileged or protected, it does not necessarily follow that an attached document is also privileged or protected. Therefore, each attachment must be reviewed and logged separately if deemed privileged or protected. In *C.T.* 2008 WL 217203, at *9 (D. Kan. Jan 25, 2008), plaintiff listed a series of e-mails but did not separately list the attachments. The district court held that any claim of privilege plaintiff might have wished to raise as to those documents was waived. The attached documents, to the extent relevant, had to be produced. *See also Genon Mid-Atlantic, LLC v. Stone & Webster, Inc.*, No. 11 Civ. 1299 (HB)(FM), 2011 WL 5439046, at *14 (S.D.N.Y. Nov. 10, 2011) (Maas, M. J.) (“[s]ince the attachments are primarily business related, they cannot be withheld on the basis of attorney-client privilege”).

Guideline 5

Counsel should keep track, in written form, of the efforts he or she made to search for privileged or protected documents.

Where the assertion of privilege or protection is challenged, counsel may have to demonstrate to the court that reasonable steps were taken to identify privileged or protected communications. In the event of a challenge to privilege or protection, The Sedona Conference®, *Cooperation Proclamation: Resources for the Judiciary* (August 2011) (“Cooperation Proclamation”), suggests a court accept an affidavit or affidavits by the “designating” party to explain why a particular document or documents are privileged or protected. This is a common-sense approach to resolving disputes. Accordingly, it is important that counsel keep track, in written form, of the efforts made to search for

privileged or protected documents. At a minimum, counsel should be in a position to explain what automated tools and applications were used to search for, identify and withhold privileged or protected communications and what methodologies were used to verify the effectiveness, completeness, and accuracy of the search techniques.

Guideline 6

Counsel should verify the accuracy and thoroughness of the searches by checking for privileged or protected documents at the beginning of the search process and again at the end of the search process. This verification can be by way of sampling, but the sample, whether random or systematic, should be of a sufficient size and variety so that the results can be considered valid.

Checking the review for privilege or protection is important for two reasons. First, under Federal Rule of Evidence 502(b), if counsel discloses privileged or protected material by mistake, a court will not find a waiver if counsel has taken reasonable steps to protect the privileged or protected documents. Thus, it may become necessary for counsel to demonstrate that they took those reasonable steps. Checking to make sure that the search corralled the right documents is an integral part of these reasonable steps. *See, e.g., Thorncreek Apts. III, LLC v. Village of Park Forest*, 2011 WL 3489828, at * 7 (defendant failed to provide sufficient account of review procedure where all counsel said was that he “‘spent countless hours reviewing’ a relatively large amount of documents and marked each document either ‘responsive,’ ‘non-responsive,’ or ‘privileged’”); *cf. Datel Holdings Ltd.*, 2011 WL 866993, at * 4 (N.D. Cal. Mar. 11, 2011) (defendant demonstrated “fairly robust measures” to avoid inadvertent disclosure where it: (1) hired contract lawyers to review documents for privilege; (2) a team of attorneys initially screened responsive documents and identified potentially privileged documents; (3) a quality control team then reviewed any documents marked potentially

privileged; (4) a privilege review team then reviewed any documents that were still designated privileged after the second review; (5) privileged documents were entered into a privilege log; (6) reviewing attorneys had specific instructions on how to identify documents that contained attorney-client communications or work product; (7) defendant's litigation counsel conducted a tutorial for the reviewers; and (8) defense counsel conducted its own quality control check). Checking one's work has the additional benefit of assuring that the privilege review is not overinclusive. This will serve to bolster credibility with the court.

In cases involving large volumes of documents, it may be reasonable to check via sampling, rather than performing a more extensive document review (such as checking all documents by key custodians) so long as there is variety in the sample and the sample is large enough to be valid. A sufficient variety could involve, but is not limited to, different custodians, different parts of the company, and different computer systems, depending on how a client stores information, the size of the company, and the like.

Guideline 7

Redactions should be treated in the same manner as a document that is privileged or protected in its entirety.

Like a document that is privileged or protected in its entirety, documents containing redactions are amenable to logging by category. However, as only part of the document is privileged or protected, these documents are also more likely to cross the line into a non-privileged area like business advice. Thus, a log for documents containing redactions may require a more careful description than the truncated approach here would entail. The practice of redacting a document to the point it is indecipherable is to be

discouraged as this only wastes more time and money, not to mention reducing credibility with the court.

Guideline 8

Parties should agree that large-scale challenges to the assertion of privilege or protection should be resolved by the court conducting an *in camera* sampling, rather than a review of all contested documents. The sample, whether random or systematic, should be of a sufficient size and variety so that the results can be considered valid. Parties should then resolve disputes concerning remaining documents in accordance with the court ruling.

In the event there is a challenge to an assertion of privilege or protection, the party asserting privilege or protection should submit an affidavit that identifies all persons named on a log and perhaps describes in greater detail why a particular document or documents are privileged or protected. If disagreement remains after this point, the parties should promptly bring the dispute to the attention of the court. An *in camera* inspection may become necessary for a subset of documents. Individual court practices and the circumstances of the case will determine whether and how that *in camera* inspection will proceed. For example, some courts may only require a short letter explaining the basis for the privilege or protection. Other courts may require an affidavit or formal motion. Nevertheless, in instances where a large volume of documents are in contention, the parties are encouraged to group the contested documents by category so that a ruling on samples can apply to each category. *See Cooperation Proclamation*, at 26.

This approach requires court involvement if it is going to be effective. However, it is far simpler for the court than the traditional approach when the court would entertain a motion and then try to assess each document. If limited judicial

resources do not permit the *in camera* inspection to proceed fast enough for the needs of the case, the parties may want to consider proposing the use of a special master from the private sector and split the costs.

Conclusion

The first proposal in the report, which relates to preservation and spoliation and offers new Rules 26(h) and 37(g), is intended to address a gap in the current Federal Rules of Civil Procedure and to provide guidance in what in the era prior to electronically stored information would have been a relatively straightforward obligation, but which now has become complicated and burdensome. The Committee's hope is that its proposal will be useful in the debate in fashioning a Rule to address this problem.

The second, third, and fourth proposals are intended to make certain aspects of the discovery process more efficient and less burdensome and to tie discovery to the procedural developments in the case. The second proposes an amendment to Rule 16 to require a pre-trial conference earlier than is contemplated under current Rule 16(a) and (b), at which various case management topics including discovery should be discussed. The third proposal simply urges elimination of the Rule 26(a)(1)(A)(ii) requirement that there be mandatory production (or listing) of documents, ESI, and tangible items supporting a party's claims or defenses. Finally, the fourth proposal is a set of guidelines or best practices for reviewing documents for privilege and protection and for preparation of a log. Again, the Committee hopes that these three proposals will be carefully considered and be useful in the debate about methods to reduce costs and delays associated with litigation in federal courts.

Appendix A

PROPOSED RULES AND ADVISORY COMMITTEE NOTES FOR PRESERVATION AND SPOILIATION

We propose that the following Rules be adopted concerning preservation and spoliation:

Proposed Rule 26(h). Preservation of Relevant Documents, Electronically Stored Information or Things.

(1) A duty to preserve documents, electronically stored information, or things discoverable under Rules 26(b) and 34(a) arises when: (A) a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action, or (B) a subpoena is received by a non-party.

(2) A person whose duty to preserve has been triggered must take actions that are reasonable under the circumstances to preserve discoverable documents, electronically stored information, or things in regard to potential claims or defenses of which the person is or should be aware, taking into consideration:

- (A) the potential importance of the preserved information in resolving the issues,
- (B) the importance of the issues at stake in the action,
- (C) the amount likely to be in controversy,
- (D) the burden or expense of preservation,
- (E) the parties' resources, and
- (F) the likely needs of the case.

(3) This duty shall continue for existing and subsequently created documents, electronically stored information, or things: (A) when no action has been commenced, until a person becomes aware of facts or circumstances that would lead a reasonable person to expect not to be a party to an action, or (B) when an action has been commenced, until the termination of the party's or non-party's involvement.

(4) The documents, electronically stored information, or things shall be preserved, subject to Rule 26(h)(2), in a form as close to, if not identical to, their original condition without material loss of accessibility.

Advisory Committee Note to Rule 26(h)(1)

It is inadvisable to formally set forth every single possible event that may trigger the duty to preserve. The circumstances of each case will vary. Nevertheless, if a person is anticipating commencing litigation, it should certainly begin preserving its own documents, electronically stored information, or things, and, if a person reasonably anticipates being sued, then it should similarly ensure that information or things that may be discoverable under Rules 26(b) or 34(a) are preserved. For a non-party, receipt of a subpoena should trigger the duty to preserve.

We propose that the duty to preserve be triggered “when a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action.”⁸² This language appears to provide more guidance than the simpler “reasonably anticipates litigation” articulated in some cases and in the *The Sedona Principles: Second Edition, Best Practices, Recommendations & Principles For Addressing Electronic Document Production*, 70 cmt. 14.a (2007). Accordingly, the duty may be triggered, among others, by the filing of an incident report, *Aiello v. Kroger Co.*, 2:08-cv-01729-HDM-RJJ, 2010 WL 3522259, at *3 (D. Nev. Sept. 1, 2010); retaining attorneys and sending a letter threatening litigation, *Goodman v. Praxair Services Inc.*, 632 F. Supp. 2d 494, 511 (D. Md. 2009); sending communications bearing the legend “attorney-client privilege,” *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216-17 (S.D.N.Y. 2003); or learning that others in one’s industry who are similarly situated are

⁸² This proposal is similar to what the Advisory Committee has suggested. See Rule 26.1(b) at Agenda of the Advisory Committee on Civil Rules, April 4-5, 2011, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-04.pdf> (“Agenda”) page 212.

being sued, *Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1194 (D. Utah 2009). Similarly, if a person sends a written notice requesting or demanding that specified information be maintained, then that person should begin preserving its own material, and, when a person receives such a written notice indicating that it will be a party to an action, it should ensure that discoverable material is preserved. However, the receipt of a demand letter, which does not purport to present any legal claim, or otherwise to threaten litigation within a reasonable period of time, should, in and of itself, be insufficient to trigger preservation obligations of the recipient. Seeking advice on the possibility of litigation, whether through solicitation of in-house counsel or retention of outside counsel, should be insufficient, in and of itself, to trigger an obligation to preserve documents. Commentators have suggested other triggering events such as notifying an insurer, hiring an investigator or photographer, engaging experts, breaching a contractual, regulatory or statutory duty to preserve or produce specific data, filing a complaint with a regulator, or conducting destructive testing. See Gregory P. Joseph, *Electronic Discovery and Other Problems*, 2010 Conf. on Civil Litig., Duke Law School, May 2010, at 8, available at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/EE0CC8AFE81F5D90852576480045504B/\\$File/Gregory%20P.%20Joseph%2C%20Electronic%20Discovery%20and%20Other%20Problems.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/EE0CC8AFE81F5D90852576480045504B/$File/Gregory%20P.%20Joseph%2C%20Electronic%20Discovery%20and%20Other%20Problems.pdf?OpenElement).

Courts have been more sympathetic to non-parties opposing discovery demands, recognizing that they are strangers to the litigation. See, e.g., *Lawson v. Chrysler LLC*, Case 4:08-cv-19-DDS-JCS, 2008 U.S. Dist. LEXIS 118677, at *4-5 (S.D. Miss. Dec. 18, 2008) (non-party is entitled to special consideration as to time and

expense in compliance, citing cases). Accordingly, the proposed Rule provides that non-parties will not have a duty of preservation until receipt of a subpoena.

Consistent with current case law, the description of material to be preserved – discoverable under Rules 26(b) and 34(a) – is broader than relevant material for purposes of determining a remedy or sanction for spoliation. It is logical that material produced in litigation will be a subset of material that is preserved. It also follows that not all material that is or should have been produced will be probative at trial. Therefore, relevance varies according to the stage of the litigation and the purpose for which material is being examined.

Advisory Committee Note to Rule 26(h)(2)

Proposed Rule 26(h)(2) describes the scope of the duty to preserve.⁸³ The scope of the duty can only be generally described in order to cover the myriad situations that arise. The standard is that a person subject to the duty must act reasonably under the circumstances. It is our expectation that courts will continue development of this standard on a case-by-case basis. See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 524 (D. Md. 2010) (Grimm, M.J.) (quoting The Sedona Conference®, *The Sedona Conference Commentary on Legal Holds: The Trigger and the Process* 3 (public cmt. ed. Aug. 2007), available at http://www.thesedonaconference.org/content/miscFiles/Legal_holds.pdf (“conduct that ‘demonstrates reasonableness and good faith in meeting preservation obligations’ includes ‘adoption and consistent implementation of a policy defining a document retention decision-making process’ and the ‘use of established

⁸³ This proposal is based on the Advisory Committee’s proposed Rule 26.1(c) at Agenda pages 200 and 213.

procedures for the reporting of information relating to a potential threat of litigation to a responsible decision maker’’’).

The duty to preserve applies to “discoverable documents.” This is meant to be a reference to proposed Rule 26(h)(1), which describes the subject matter of the duty as documents, electronically stored information, or things “discoverable under Rules 26(b) and 34(a).”

The proposed Rule seeks to limit the potentially broad scope of the materials required to be preserved in two ways. The first is by requiring preservation only of materials regarding “potential claims or defenses of which the person is or should be aware.” The second is by explicitly describing factors that define a proportionality test applicable to preservation.

The duty to preserve evidence may impose significant burdens. The “presumption is that the party possessing [evidence] must bear the expense of preserving it for litigation,” *Treppel v. Biovail Corp.*, 233 F.R.D. 363,373 (S.D.N.Y. 2006), although “[t]his presumption may be overcome if the demanding party seeks preservation of evidence that is likely to be of marginal relevance and is costly to retain and preserve, or where a non-party is in possession of the requested evidence,” *Mahar v. U.S. Xpress Enters. Inc.*, 688 F. Supp. 2d 95, 113 (N.D.N.Y. 2010); *see also Victor Stanley*, 269 F.R.D. at 522 (“[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 . . . the scope of preservation should somehow be proportional to . . . the costs and burdens of preservation.’”) (emphasis in original; citations omitted).

The proportionality limitation is particularly important as a guide to courts trying to determine in hindsight whether a particular preservation program was appropriate and as a counter to blunderbuss written notices to preserve. Notices to preserve may trigger the duty to preserve, but should not define the scope of that duty.

Advisory Committee Note to Rule 26(h)(3)

Because the cost of a pre-litigation duty to preserve may be quite high and it may currently be argued that it extends for years (or decades under some state statutes of repose or discovery rules for limitations purposes), the proposed Rule provides a limit on the pre-litigation duty to preserve. While this limit is merely the obverse of when the duty to preserve is triggered, it allows for the cessation of the duty to preserve when a change in circumstances makes it no longer reasonable to expect to be a party to an action.

In the event of litigation, the duty to preserve continues until the person’s involvement ends. The obligation for non-parties should ordinarily end once they have complied with a subpoena. If there is doubt about when the duty ends and no agreement can be reached, then the court, upon an appropriate application, may determine when the duty terminates as to all or a portion of the material being preserved.

Advisory Committee Note to Rule 26(h)(4)

“The reviewing court, as well as the parties, should be focused upon maintaining the integrity of the evidence in a form as close to, if not identical to, the original condition of the evidence.” *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 435 (W.D. Pa. 2004). While even copying an electronic file may change it to some degree, such slight change to the original form of the document is better than its destruction. See *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 435 n.39 (S.D.N.Y. 2009) (“[e]ven if preserving the data meant altering the Digital Music Files in some manner, to do so would have been for more appropriate than completely deleting data”).

There should also be no material loss in accessibility of the information once the duty to preserve arises.⁸⁴ Issues pertaining to back-up tapes will continue to evolve as back-up tapes either become an obsolete form of storage or are reconfigured so that they become more easily searchable. See The Sedona Conference[®], *Interview of Judge Scheindlin* (Mar. 24, 2004), available at <http://www.thesedonaconference.org/content/miscFiles/ScheindlinInterview.pdf>.

The proposed Rule recognizes that ESI need not be retained in exactly the condition it exists when the duty to preserve is triggered. The obligation is specifically stated to be subject to the proportionality principles of proposed Rule 26(h)(2), and “immaterial” losses of accessibility are acceptable, such as transfer to storage media.

The “native format” of ESI refers to the associated file structure that is defined by the original creating application. Viewing or searching documents in native

⁸⁴ In the absence of an event that would otherwise trigger a duty to preserve, data may be deleted, purged, or otherwise subjected to a reduced level of accessibility due to normal document data retention policies. See *Peterson v. Seagate LLC*, Civil No. 07-2502 MJD/AJB, 2011 WL 861488, at *3 (D. Minn. Jan. 27, 2011) (where no duty to preserve, ESI may be deleted or stored on backup tapes as the result of normal retention policies).

format often requires the availability of the original application. Preserving ESI in native format would comply with the proposed Rule.

It is also possible to store ESI in a “static” or imaged format, such as .tiff or pdf format, where the static image is designed to retain an image of the document as it would look in the original creating application. Static images, however, generally do not allow metadata to be viewed or the document information to be manipulated. Therefore, the preservation duty under proposed Rule 26(h)(4) under current technology may require any load files to be preserved with the static images. *Cf. Jannx Med. Sys. v. Methodist Hosps. Ins.*, Case No. 2:08-CV-286-PRC, 2010 WL 4789275, at *4 (N.D. Ind. Nov. 17, 2010) (conversion of electronic documents to PDF format did not comply with Rule 34(b)(2)(E)(ii) requirement that the documents be produced in reasonably usable form).

Not all ESI may be conducive to production in either native or imaged format, and some other form of production may be necessary (e.g., databases, legacy data). The Sedona Conference®, *The Sedona Conference Glossary: E-Discovery & Digital Information management* (3d ed. Sept. 2010), available at <http://www.thesedonaconference.org/dltForm?did=glossary2010.pdf>. Preservation should enable as a wide variety of production as feasible.

Proposed Rule 37(g). Failure to Comply with the Duty to Preserve.

(1) If a party or non-party is shown to have failed to preserve documents, electronically stored information, or things in accordance with Rule 26(h), the court where the action is pending may enter an appropriate order:

(A) providing for further discovery, including the shifting of reasonable expenses of the further discovery to the party or non-party that failed to preserve documents, electronically stored information, or things;

(B) requiring the party or non-party, or the attorney representing that party or non-party, or both to pay the movant's reasonable expenses, including attorneys' fees, caused by the failure, including expenses incurred in providing proof of spoliation and in making the motion;

(C) imposing a fine upon the party or non-party, or the attorney representing that party or non-party, or both;

(D) directing that matters or designated facts be taken as established against a party for purposes of the action, with or without the opportunity for rebuttal;

(E) providing for an adverse-inference jury instruction against a party, with or without the opportunity for rebuttal;

(F) prohibiting a party from supporting or opposing designated claims or defenses or from introducing designated matters in evidence;

(G) dismissing the action or proceeding in whole or in part;

(H) rendering a default judgment against the party; or

(I) treating the failure as a contempt of court, if there has been a violation of a previous order.

(2) The court must select the least severe remedy or sanction necessary to redress a violation of Rule 26(h), taking into account all relevant factors, including:

(A) the relevance of the documents, electronically stored information, or things,

(B) the prejudice suffered, and

(C) the level of culpability of the party or non-party failing in its duty.

- (i) A contempt of court may be imposed only if the level of culpability includes bad faith.
- (ii) A dismissal or entry of default judgment may be imposed only if the level of culpability includes at least willfulness.
- (iii) An adverse-inference jury instruction, direction as to the establishment of matters or facts, or preclusion of evidence may be imposed only if the level of culpability includes at least gross negligence.
- (iv) A sanction may be imposed only if the level of culpability includes at least negligence.
- (v) The remedy of further discovery, including shifting of expenses, may be ordered regardless of any culpability.
- (vi) Absent exceptional circumstances, it is evidence of due care, if a person whose duty to preserve under Rule 26(h) has been triggered, timely prepares, disseminates, and maintains a reasonable litigation hold.

Advisory Committee Note to Rule 37(g)

Case law on the standards for an appropriate remedy or sanction for spoliation is confused, particularly regarding the culpable state of mind is required to impose any particular sanction. *Compare Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 109 (2d Cir. 2002) (negligence sufficient to impose sanctions terminating the litigation), *with Vick v. Tex. Employment Comm’n*, 514 F.2d 734, 737 (5th Cir. 1975) (negligence not enough to impose severe sanctions). Proposed Rule 37(g) seeks to correct this situation.

The proposed Rule sets out the different remedies and sanctions and then calibrates the severity of the remedy or sanction to minimum levels of culpability. Thus, the most severe sanctions of termination of an action or contempt may only be imposed upon a finding of willfulness for termination or bad faith for contempt. Further, for any

sanction (not the remedies of further discovery or cost-shifting), there must be at least negligence. See proposed Rule 37(g)(2)(C)(v). This changes current case law holding that, even if no one was at fault, the party losing the information may still be sanctioned. See *Residential Funding*, 306 F.3d at 109; *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 478-79 (S.D.N.Y. 2010) (“*Pension Comm.*”) (Scheidlin, J.).

Under proposed Rule 37(g)(2)(C)(iv), a sanction under proposed Rules 37(g)(1)(B) or (C) may be imposed only if the person having a duty to preserve was negligent, meaning that the spoliator failed “to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.” *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 529 (D. Md. 2010) (“*Victor Stanley*”) (Grimm, M.J.) (quoting *Black’s Law Dictionary* 846 (Bryan A. Garner ed., abridged 7th ed., West 2000)).

Under proposed Rule 37(g)(2)(C)(iii), an adverse-inference jury instruction or direction establishing matters or facts may imposed under proposed Rules 37(g)(1)(D), (E) or (F) only if the person was grossly negligent, meaning that the spoliator failed “to exercise even that care which a careless person would use.” *Pension Comm.*, 685 F. Supp. 2d at 464 (quoting Prosser & Keeton on Torts § 34 at 211-12 (5th ed. 1984)). Mere negligence would be insufficient.

Under proposed Rule 37(g)(2)(C)(ii), termination of the litigation may be imposed under Rules 37(g)(1)(G) or (H), if the person acted willfully, meaning that the spoliator engaged in “intentional or reckless conduct that is so unreasonable that harm is

highly likely to occur,” *Pension Comm.*, 685 F. Supp. 2d at 464. Negligence or gross negligence would not be enough.

Finally, under proposed Rule 37(g)(2)(C)(i), a contempt may be found under Rules 37(g)(1)(I), only if the person violated a previous order in bad faith, meaning that the spoliator destroyed the evidence “for the purpose of depriving the adversary of the evidence,” *Victor Stanley*, 269 F.R.D. at 530 (quoting *Powell v. Town of Sharpsburg*, 591 F. Supp. 2d 814, 820 (E.D.N.C. 2008)). Even willfulness, and certainly not negligence or gross negligence, would not result in a finding of contempt.

The severity of the remedy or sanction should still depend on the extent of the prejudice and the relevance of the lost information. For example, on one end of the continuum, a remedy of the cost of filing the motion may be imposed when the level of culpability is lowest, *Columbia Pictures Indus. v. Fung*, Case No. CV 06-5578 SVW (JCx), 2007 U.S. Dist. LEXIS 97576, at *40 (C.D. Cal. June 8, 2007);⁸⁵ near the other end of the continuum, an adverse-inference instruction may be given to a jury “[w]hen a party is prejudiced, but not irreparably, from the loss of evidence that was destroyed with a high degree of culpability,” *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 618 (S.D. Tex. 2010) (Rosenthal, J.); see also *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 443 (S.D.N.Y. 2009) (same).

“Preservation of evidence may be particularly burdensome for non-parties, considering their interest in the litigation is minuscule, while the restrictions that can be imposed in a motion for preservation may be expensive and voluminous.” *Capricorn*

⁸⁵ For example, in *Sanders v. Kohler Co.*, 4:08CV00222 SWW/JTR, 2009 WL 4067265 (D. Ak. Nov. 20, 2009), the court declined to assess costs, but promised to revisit the issue if compliance was not forthcoming.

Power Co. v. Siemens Westinghouse Power Corp., 220 F.R.D. 429, 436 (W.D. Pa. 2004). Therefore, only the less severe remedies or sanctions under proposed Rule 37(g) would apply to non-parties.

Relevance for purposes of determining an appropriate remedy or sanction is different than relevance of purposes of complying with the duty to preserve. In this context, relevant material is that which “would have clarified a fact at issue in the trial and otherwise would naturally have been introduced into evidence.” *Pension Comm.*, 685 F. Supp. 2d at 496.

The proposed Rule also provides a limited “safe harbor” for compliance with a litigation hold. Such compliance is to be considered “due care,” absent exceptional circumstances, thereby avoiding any sanctions for spoliation, although further discovery could still be ordered. However, if an employee intentionally destroyed potentially relevant documents, electronically stored information or things despite his or her company’s timely preparation, dissemination and maintenance of a reasonable litigation hold, a court might be justified in finding such actions constituted exceptional circumstances that would eliminate the safe harbor. Best practices dictate that a “litigation hold” be issued and monitored for the duration of the litigation. This litigation hold should preferably be in writing, although it need not be so; should specify the nature and subject matter of the information to be retained and the time period covered; should state the necessity to preserve metadata or equivalent; and should be directed to the “key players” – those individuals most likely to have knowledge of the subject matter of the lawsuit or have institutional responsibility for managing and storing documents. See Sedona Conference[®], *The Sedona Conference Commentary on Legal Holds: The Trigger*

and the Process 3 (public cmt. ed. Aug. 2007), available at http://www.thesedonaconference.org/content/miscFiles/Legal_holds.. However, the litigation hold should be tailored to the facts and circumstances of the specific situation and the actual or anticipated case, without being in a certain form or covering a maximum number of custodians.

Thus, the proposed Rule provides flexibility by which a court may calibrate the remedies or sanctions necessary to compel compliance and ensure justice. Further, the Rule provides for courts to consider “all relevant factors,” which might additionally include: (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 scope of the preservation efforts; (C) the clarity and reasonableness of any request for preservation; (D) whether there were any good-faith consultations regarding the scope of preservation; (E) the party’s resources and sophistication in matters of litigation; (F) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and (G) whether the party sought timely guidance from the court regarding any unresolved disputes concerning preservation.⁸⁶

⁸⁶ See Agenda of the Advisory Committee on Civil Rules, April 4-5, 2011, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-04.pdf>, at 217-219, 229.

Appendix B

PROPOSED RULES AND ADVISORY COMMITTEE NOTE FOR EARLY CASE MANAGEMENT

Rule 16. Pretrial Conferences; Scheduling; Management

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

- (1) expediting disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation; and
- (5) facilitating settlement.

▲ (b) Initial Pre-Trial Conference.

(1) Timing. The court shall hold an initial pre-trial conference as soon as practicable. Absent good cause, such conference shall be scheduled no later than 60 days after the initial pleading has been filed with the Court.

(2) Initial Meet and Confer. Prior to the initial pre-trial conference, counsel or a party appearing pro se shall meet and confer to discuss, at least, the following topics:

- (A) formulating and simplifying the issues, and eliminating unsupportable claims or defenses;
- (B) the preservation of potentially discoverable documents and electronically stored information;
- (C) whether the initial pleading is subject to dismissal because of a dispositive affirmative defense or whether the parties contemplate making a motion pursuant to Federal Rule of Civil Procedure 12(b);
- (D) referring matters to a magistrate judge or a special master;

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- (E) settling the case or using special procedures to assist in resolving the dispute when authorized by statute or local rule;
- (F) whether and when initial disclosures under Rule 26(a)(1) should be made;
- (G) the expected scope of discovery of any electronically stored information; and
- (H) any additional issues that will foster the prompt and efficient resolution of the matter and/or the efficient administration of the case. The parties may also consider any additional applicable issues contemplated by Rule 16(d)(2).

(3) **Matters for Consideration.** At the initial pre-trial conference, the parties shall provide the court with a concise overview of the essential issues in the case and the importance of discovery in resolving those issues so that the court can make a proportionality assessment and limit the scope or timing of discovery as it deems appropriate. The court may consider and take appropriate action on the following matters:

- (A) all matters discussed by lead trial counsel during the Rule 16(b)(1) meet and confer;
- (B) addressing whether all defendants have been served with the initial pleading;
- (C) setting a timetable for the conference required by Rule 26(f);
- (D) setting a timetable for any amendments to the pleadings and joinder of additional parties;
- (E) whether, from the face of the initial pleading and the parties' overview of the essential issues in the case, there are any issues which may facilitate the prompt disposition of the action or may otherwise affect the scope, timing, or need for discovery;
- (F) whether any defendant intends to assert a defense by motion pursuant to Rule 12(b);
- (G) whether the court should direct production of a copy – or a description by category and location – of all or a reasonably accessible subset of documents, electronically stored information, and tangible things that the disclosing party has in its possession,

custody, or control any may use to support its claims or defenses, unless the use would be solely for impeachment;

- (H) scheduling any motions related to the management of class actions and associated discovery;
- (I) the date when an additional pre-trial conference should be held to address the above issues as well as those identified in Rule 16(d)(2); or
- (J) such other matters that the court deems appropriate.

(b) **Scheduling.**

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(1) *Scheduling Order.* Except in categories of actions exempted by local rule, 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 or by telephone, mail, or other means.

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but **(absent court order pursuant to Rule 16(b)(3)(I))** in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

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(3) *Contents of the Order.*

- (A) *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.
- (B) *Permitted Contents.* The scheduling order may:
 - (i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);
 - (ii) modify the extent of discovery;
 - (iii) provide for disclosure or discovery of electronically stored information;

- (iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;
- (v) set dates for pretrial conferences and for trial; and
- (vi) include other appropriate matters.

(4) *Modifying a Schedule.* A schedule may be modified only for good cause and with the judge's consent.

(ed) Attendance and Matters for Consideration at a Pretrial Conference.

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(1) *Attendance.* A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) *Matters for Consideration.* At any pretrial conference, the court may consider and take appropriate action on the following matters:

- (A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;
- (B) amending the pleadings if necessary or desirable;
- (C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;
- (D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;
- (E) determining the appropriateness and timing of summary adjudication under Rule 56;
- (F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;
- (G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;
- (H) referring matters to a magistrate judge or a master;
- (I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(ed) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

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(ef) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

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(fg) Sanctions.

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(1) *In General.* On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)–(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate—or does not participate in good faith—in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) *Imposing Fees and Costs.* Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable

expenses—including attorney’s fees—incur because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

Advisory Committee Note to Rule 16

The purpose of this amendment is to direct courts to convene parties and lead trial counsel at the earliest practicable date to conduct an initial assessment of the needs of the case, to determine, generally, whether the dispute is ripe for comprehensive case scheduling or whether there are individual issues that may either obviate the need for extensive case management or require a threshold resolution of identified issues before the court and parties can meaningfully plan a comprehensive scheduling order. Such issues may include (but are not limited to): (a) whether, on the face of the pleadings, any questions exist about subject matter jurisdiction; (b) whether all parties are properly before the court (including, for example, whether there are delays in effecting service of process or whether there are questions as to personal jurisdiction), (c) whether any party intends to bring a motion under Rule 12(b), and, if so, whether that constitutes good cause to extend the time for issuance of a comprehensive scheduling order or for the commencement of discovery, (c) whether threshold issues exist as to which targeted discovery is necessary or likely to expedite an early resolution of the action or otherwise assist in the orderly management of the case, (d) scheduling any early motion practice necessary to the management of cases filed as class actions, and (e) whether the parties are in a position to conduct meaningful settlement discussions prior to engaging in discovery or motion practice.

In cases where any of the above issues are present, the court should set a reasonable schedule for addressing such threshold issues. Depending on the posture of

the case, it may or may not be practicable at that time for the court to set timetables for the conference and submission of the report required by Rule 26(f), and for a further conference with the court leading to the issuance of a comprehensive scheduling order. The amendment also anticipates that the initial conference will address whether and to what extent the progress of the case will be meaningfully served by requiring initial disclosure of documents that a party may use to support its claims or defenses. The Advisory Committee strongly believes that the presence of lead trial counsel at this initial conference will enhance the likelihood of meeting the aspirations of Rule 1. The Advisory Committee encourages judges to require attendance of lead trial counsel at the initial pre-trial conference required by Rule 16(b)(1), whether by local rule, a judge's individual practices, or otherwise.

The amendment directs the court to schedule an initial conference as soon as practicable. The amendment anticipates that such a conference would optimally take place within 60 days after filing, but gives the court discretion to schedule a later date where good cause exists to do so. Such an "initial assessment" conference may not be necessary or helpful in all cases, and parties are encouraged to inform the court where it is obvious that there is no reason to defer issuance of a comprehensive scheduling order, in which case the court and parties may reasonably agree to schedule the Rule 26(f) conference and a comprehensive case scheduling conference at the earliest feasible date. Alternatively, in some instances (particularly in cases where delays in service of process are unavoidable, as may occur in cases requiring service outside the United States), it may be impossible to conduct a meaningful initial conference until considerably later than the time frames anticipated under Rule 16(b)(1) or 16(c)(2).

The amendment requires counsel (or the party, if *pro se*) to meet and confer prior to the initial conference to ascertain, among other things, (a) whether the claims and defenses can be simplified or streamlined at the outset, (b) whether any initial disputes exist as to the need and extent for preservation of documents and electronically stored information, (c) whether any party intends to bring a potentially dispositive motion before all pleadings are served, (d) whether the case is ripe for meaningful settlement discussions, (e) whether any threshold issues require early, targeted discovery, and (f) whether there is any reason to defer issuance of a comprehensive scheduling order. The parties should be prepared to present a concise summary of the case at the initial conference.

Appendix C

Rule 26 – Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) *Initial Disclosure.*

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

~~(ii) a copy or description by category and location of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;~~

(ii) ~~(iii)~~ a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iii) ~~(iv)~~ for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

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- (i) an action for review on an administrative record;
 - (ii) a forfeiture action in rem arising from a federal statute;
 - (iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;
 - (iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;
 - (v) an action to enforce or quash an administrative summons or subpoena;
 - (vi) an action by the United States to recover benefit payments;
 - (vii) an action by the United States to collect on a student loan guaranteed by the United States;
 - (viii) a proceeding ancillary to a proceeding in another court; and
 - (ix) an action to enforce an arbitration award.
- (C) *Time for Initial Disclosures—In General.* A party must make the initial disclosures at or within 14 days after the parties’ Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

Advisory Committee Note to Rule 26(a)(1)(A)

Mandatory initial disclosure has proven in many cases not to reduce the time and expense of providing adverse parties with the discovery they need to prepare their cases for trial or summary judgment motions. Moreover, with the advent of electronically stored information, collection of documentation called for by former Rule 26(a)(1)(A)(ii) can involve substantial expense and effort, which may turn out to be neither useful nor necessary when cases, especially complex litigations, are actively managed to narrow issues in the early stages of the case and to provide for staggered

discovery to match the management of the case. Accordingly, this component of the initial disclosures provided for in former Rule 26(a)(1)(A)(ii) has been deleted.

Its deletion does not express a view that such mandatory disclosure is not appropriate or useful in every case. To the contrary, such mandatory disclosure of documentation, electronically stored information, or tangible evidence a party may use to disclose its claims or defenses may well be appropriate in some cases, especially less complex ones. Parties and their counsel are encouraged to agree on such discovery, effectively implementing the deleted provision by agreement. Alternatively, parties and their counsel may agree upon limited initial discovery related to certain claims and defenses and provide for additional discovery conditioned upon certain events such as disposition of a portion of the claims or the impleading of additional parties.

Moreover, the courts retain the power to order such disclosure at the initial pre-trial conferences provided for under Rule 16. A party seeking such mandatory initial discovery but unable to secure its adversary's agreement will be able to seek an order from the court. At the court's discretion, it may order the complete scope of discovery envisioned by the now deleted portion of Rule 26(a)(1)(A)(ii), or it may choose a more limited or staged approach. Courts should be guided in crafting such orders by the principle that core documentation, electronically stored information, and tangible items necessary to pursue or defend against claims should be disclosed to the adverse party as soon possible so as to enable all parties to effectively and efficiently prepare for the upcoming stages of the litigation or to enable them to fashion strategies for pursuing or defending against the claims. At the same time, courts should be mindful of the substantial expense of preparing for production of electronically stored information, as

well as extensive hard copy documentation, and not require production related to claims and defenses in an action that may later turn to be dismissed or superfluous. In such circumstances, staged or conditional discovery may be more appropriate and efficient for the parties and the court itself.

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