THE IMPACT OF THE PROPOSED FEDERAL E-DISCOVERY RULES

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[1] Because of a conviction that e-discovery presents unique issues requiring uniform national rules, the Judicial Conference of the United States ("Judicial Conference") has recommended and the Supreme Court has approved a number of amendments to the Federal Rules of Civil Procedure ("Proposed Rules"), which are scheduled to go into effect at the end of 2006.[2] The Proposed Rules include provisions to address issues relating to the production of electronically stored information[3] and, for the

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[2] The Proposed Rules and Committee Notes can be found on the website of the Administrative Office of the United States Courts. U.S. COURTS, FEDERAL RULEMAKING, http://www.uscourts.gov/rules/newrules6.html#cv0804 (last visited May 14, 2006).; *see* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (2005), http://www.uscourts.gov/rules/Reports/ST09-2005.pdf [hereinafter STANDING COMMITTEE REPORT] (containing the final version of the Rules and the Committee Notes and the introductory explanations to the Judicial Conference not found on the Administrative Office site noted above).

[3] U.S. COURTS, FEDERAL RULEMAKING, http://www.uscourts.gov/rules/newrules6.html#cv0804 (last visited May 14, 2006). "[E]lectronically stored information" is the term adopted by the Proposed Rules to

first time, add limitations on rule-based sanctions regarding failure to produce that type of information. They also establish a new paradigm of mandatory early discussion of contentious issues, including preservation of potentially discoverable information.

[2] This article examines the Proposed Rules and their likely impact. Its premise is that the Proposed Rules represent a remarkable and balanced achievement which will have a positive influence. The article concludes with some modest suggestions for my former colleagues who will deal with the Proposed Rules from within corporate entities.

INTRODUCTION

[3] The Proposed Rules were developed by the Civil Rules Advisory Committee of the Standing Committee of the Judicial Conference ("Advisory Committee"). [4] The original package of rules and committee notes was released for public comment in August 2004.[5] It resulted from substantial interaction with the bench and bar over a period of several years,[6] and evolved out of a set of recommendations by a subcommittee of the Advisory Committee.[7] Those recommendations were the focus of

uniquely capture that information in electronic form which is subject to the Federal Rules of Civil Procedure ("Federal Rules"). The term is generally used throughout the discovery rules included in the package. *See* STANDING COMMITTEE REPORT, *supra* note 2, at Rules 16, 26, 33, 34, 37, 45, & Form 35.

[4] The official title of the Standing Committee is "The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States" and it includes advisory committees on appellate, bankruptcy, civil, criminal and evidence rules. James C. Duff, *The Rulemaking Process: A Summary for the Bench and Bar* (Oct. 2004), http://www.uscourts.gov/rules/proceduresum.htm.

[5] *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE (2004), http://www.uscourts.gov/rules/comment2005/CVAug04.pdf [hereinafter ADVISORY COMMITTEE REPORT, AUGUST 2004].

[6] Mini-conferences on e-discovery issues had been held at Hastings Law School and Brooklyn Law School in 2000. ADVISORY COMMITTEE REPORT, AUGUST 2004, *supra* note 5, at 5. "Since then, bar organizations, attorneys, computer specialists, and members of the public have devoted much time and energy in helping the rules committees understand and address the serious problems arising from discovery of electronically stored information." STANDING COMMITTEE REPORT, *supra* note 2, at 22.

[7] Richard J. Marcus, Consultant to the Discovery Subcommittee, issued a comprehensive (63 page) report to the Advisory Committee on Civil Rules in September 2003 on behalf

extensive discussions at a conference on e-discovery held at Fordham Law School prior to their finalization for public comment.[8] The discussion occurred against a backdrop of evolving case law in the federal courts, the adoption of state[9] and local district court rules,[10] and the issuance of "best practice" guidelines by the Sedona Conference[11] and the ABA Section on Litigation.[12] In part, the decision to proceed with the rule-making process

of the Discovery Subcommittee which presaged most of the eventual amendments, albeit in preliminary form for discussion only. *See* E-Discovery Rule Discussion Proposals (Sept 15, 2003), http://www.kenwithers.com/rulemaking/civilrules/marcus091503a.pdf.

[8] The Conference was held at Fordham University Law School in February 2004. Participants in the Conference came from a wide cross-section of participants in the e-discovery process. *See* ADVISORY COMMITTEE MEMORANDUM (Jan. 27, 2004), http://www.uscourts.gov/rules/E-Discovery_Conf_Agenda_Materials.pdf.

[9] *See* TEX. R. CIV. P. 196.4 (2006) (requiring production of all responsive electronic data which is "reasonably available to the responding party in its ordinary course of business" and allowing an objection if it cannot be retrieved by "reasonable efforts."); MISS. R. CIV. P. 26(b)(5) (2006) (imposing the same requirements as Texas). Texas and Mississippi differ on whether mandatory cost-shifting is appropriate. *Compare* TEX. R. CIV. P. 196.4 (2006) *with* MISS R. CIV. P. 26(b)(5) (2006). *Cf.* CAL. CODE CIV. P. § 2017(e)(2) (repealed 2005) (limiting orders to produce in electronic media which create an undue economic burden or hardship).

[10] A common thread in all district court rules was an emphasis on informed early discussion and participation in preparation for Rule 26(f) and Rule 16(b) scheduling orders. *See, e.g.*, E.D. & W.D. ARK. LOC. R. 26.1; D. DEL. R. 16.4(b); D.N.J. LOC. CIV. R. 26.1; D. WYO. LOC. R. 26.1 & Appendix D; United States District Court, District of Kansas, Electronic Discovery Guidelines, http://www.ksd.uscourts.gov/guidelines/electronicdiscoveryguidelines.pdf.

[11] The Sedona Principles, a set of fourteen "best practice" recommendations intended for the courts and parties, were developed by an ad hoc group of experienced representatives of producing parties, in-house counsel, technology companies, and service providers after an initial meeting in October 2002. *See generally* The Sedona Conference, The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production (2005), http://www.thesedonaconference.org [hereinafter *The Sedona Principles*]. For a comparison of *The Sedona Principles* and the initial rule proposals, *see* Thomas Y. Allman, *Proposed National E-Discovery Standards and the Sedona Principles*, 72 DEF. COUNS. J. 47 (2005) (arguing that they are basically consistent).

[12] *See* American Bar Association, Electronic Discovery Task Force, Report 103B, Amendments to the Civil Discovery Standards (2004), http://www.abanet.org/litigation/taskforces/electronic/ (follow "Final Revised Standards" hyperlink).

was motivated by a concern for the possible consequences of inaction at the national level.[13]

[4] The final form of the Proposed Rules differs from the original proposals in several major respects and came into being only after extensive public hearings held in San Francisco, Dallas and Washington, D.C. in January and February 2005 ("Public Hearings").[14] They were revised at an April 2005 meeting of the Advisory Committee[15] and subsequently reported to[16] and approved by the Standing Committee.[17] The Judicial Conference gave its approval to the full package in September 2005 and the Supreme Court added its endorsement in April 2006.[18] Assuming—as is expected—that Congress takes no action to prevent their enactment, the Proposed Rules will go into effect on December 1, 2006.

PRODUCTION FROM ACCESSIBLE SOURCES

[5] The first major innovation in the Proposed Rules relates to the scope of the obligation of a producing party to search for and produce relevant and non-privileged electronically stored information as part of an initial

[13] The Standing Committee is concerned that "[w]ithout national rules adequate to address the issues raised by electronic discovery, a patchwork of rules and requirements is likely to develop," resulting in "uncertainty, expense, delays, and burdens" being imposed on both small organizations and individual litigants as well as large public and private organizations. STANDING COMMITTEE REPORT, *supra* note 2, at 23.

[14] The Public Hearings were held by the Advisory Committee on January 12 in San Francisco, January 28 in Dallas and February 11 in Washington, D.C. Comments were accepted through February 15, 2005. United States Courts, Civil Rules Comments Chart (2004), http://www.uscourts.gov/rules/e-discovery.html (providing copies of the comments and transcripts of the remarks of testifying witnesses).

[15] *See generally* Civil Rules Advisory Committee, Minutes (April 14–15, 2005), http://www.uscourts.gov/rules/Minutes/CRAC0405.pdf [hereinafter *Advisory Committee Minutes, April 2005*].

[16] *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Advisory Committee Report to Standing Committee (May 27, 2005), http://www.uscourts.gov/rules/Reports/CV5-2005.pdf.

[17] *See generally* Committee on Rules of Practice and Procedure, Minutes (June 15–16, 2005), http://www.uscourts.gov/rules/Minutes/ST_June_2005.pdf.

[18] The Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2000). The statute authorizes the Supreme Court and "all courts established by Act of Congress" to "prescribe rules for the conduct of their business." *Id.* § 2071.

disclosure[19] or in response to a request for production.[20] Under amended Rule 26(b)(2)(B), absent a court order, a party need only search and produce from "reasonably accessible" sources of electronically stored information, provided that it also identifies those sources which it regards as "not reasonably accessible" to opposing counsel.[21] Whether a particular source is, in fact, "not reasonably accessible" turns on whether the act of acquiring the information from it involves "undue burden or cost."[22] The Rule provides for challenges by requesting parties for production from inaccessible sources, to be ordered upon a showing of "good cause."[23]

[6] This is an innovative and practical resolution to the concerns identified in the Public Hearings about e-discovery.[24] Despite criticism that it was not needed,[25] the Advisory Committee adopted the Rule to help

[19] STANDING COMMITTEE REPORT, *supra* note 2, at C-30.
[20] *Id.* at C-70.
[21] *Id.* at C-45 to C-46.
[22] *Id.*
[23] *Id.* at C-45 to C-46.

> On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

Id.
[24] At the Public Hearings, witnesses confirmed that a process of focusing on readily accessible electronic information effectively resolves most disputes and that a similar process is already firmly established in the hard copy world (albeit without the affirmative identification requirement).
[25] The proposed amendment was criticized by some as unnecessary, given the discretion under existing rules regarding the limitation of discovery. *See* Ronald J. Hedges, *A View from the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure*, 227 F.R.D. 123, 128 (2005) (stating that bifurcation of discovery is unnecessary because the dispute is all "about the difficulty and costs of retrieving data, accessible or not"); *accord* Henry S. Noyes, "*Is E-Discovery So Different That It Requires New Discovery Rules? An Analysis of Proposed Amendments to the Federal Rules of Civil Procedure*," 71 TENN. L. REV. 585, 615 (2004) (arguing that there is "no clear demand for reform" because most of the recorded complaints arise from the "defense bar's need to further limit the scope and amount of discovery").

curb excessive expense and streamline discovery in a majority of cases.[26] The Rule continues the tradition of the 1983 reforms, which were designed to achieve a similar purpose by introducing "proportionality, balance and common sense" into Rule 26(b).[27]

[7] As noted, the Rule provides a process for challenging the designation of a source as "not reasonably accessible" and a method for trumping inaccessibility, even if established, by proof of "good cause."[28] A producing party defending a decision not to produce by reason of inaccessibility has the burden of proof, and the issue can be raised by either party. The Committee Note suggests that targeted discovery, including the use of sampling,[29] may be necessary in some cases to resolve disputes if the parties are unable to agree.[30] The court can order

[26] *See generally The Sedona Principles*, *supra* note 11. Sedona Principle number eight states:

> The primary source of electronic data and documents for productions should be active data and information purposefully stored in a manner that anticipates future business use and permits efficient searching and retrieval. Resort to disaster recovery backup tapes and other sources of data and documents require the requesting party to demonstrate need and relevance that outweigh the cost, burden and disruption of retrieving and processing the data from such sources.

Id.

[27] Letter from Arthur Miller, Professor, Harvard Law School, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure (February 10, 2005), http://www.uscourts.gov/rules/e-discovery/04-CV-219.pdf; s*ee also* 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2008.1 (2d ed. 1994). The Advisory Committee anticipates that a requesting party will evaluate the information from accessible sources before insisting that the responding party search for, retrieve and produce whatever responsive information may be found in inaccessible sources. *See* STANDING COMMITTEE REPORT, *supra* note 2, at C-48 ("[I]n many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs").

[28] STANDING COMMITTEE REPORT, *supra* note 2, at C-46.

[29] *See* McPeek v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001) (ordering "test run" of backup tape restoration to determine whether the sample justifies further search).

[30] STANDING COMMITTEE REPORT, *supra* note 2, at C-48 (stating that "[s]uch discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems"). The issue of accessibility and good cause for production are normally so intertwined that a single hearing may suffice to resolve both types of challenges. *Id.* at C-49.

production of discoverable information from inaccessible sources, provided that the burdens and costs are justified by the circumstances of the case.[31] The court retains the discretion to shift some of the retrieval costs but is not required to do so, in contrast to the mandatory practice urged by some for inclusion in the Rule.[32]

[8] The approach in proposed Rule 26(b)(2)(B) is intended to be technologically neutral. Existing case law under Rule 26(c)[33] involving cost shifting in electronic discovery may provide some useful guidance on whether ordering access to a particular source involves "undue burden or cost."[34] Magnetic backup tapes used for disaster recovery purposes,[35] legacy data stored on obsolete and unused media, and information on databases not programmed to produce the information sought are typical examples of inaccessible sources in today's applications.[36] The test is not whether the source of information is routinely accessed in the ordinary course of business; the reference to "undue burden or cost" was added in

[31] *Id.* at C-46, C-47. The proposed Committee Note to Rule 26(b)(2) also articulates a fairly precise series of factors intended to help guide the process of identifying when "good cause" may exist. *Id.* at C-49.

[32] The Advisory Committee was not prepared to re-open old wounds and mandate cost-shifting as a deterrent to overbroad discovery requests. *Contra* TEX. R. CIV. P. 196.4 (requiring payment of the reasonable costs of any "extraordinary steps required" to produce electronic information). The proposed Committee Note to Rule 26(b)(2) suggests that a court may condition production from inaccessible sources on payment of "the reasonable costs of obtaining information" and that the "burdens in reviewing the information for relevance and privilege" can be used as a basis for denial of discovery. STANDING COMMITTEE REPORT, *supra* note 2, at C-50.

[33] FED. R. CIV. P. 26(c) (providing that a court may limit discovery which involves "undue burden or expense").

[34] Differentiation based on accessibility of electronically stored information was used in an early *Zubulake* decision to allocate the costs of access to various types of storage media. *See Zubulake v. UBS Warburg*, 217 F.R.D. 309, 342 (S.D.N.Y. 2003) [hereinafter *Zubulake I*]. Inherent in such an assessment is the concept of avoiding undue burdens. For example, in *Medtronic Sofamor Danek, Inc. v. Michelson*, No. 01-2373-M1V, 2003 U.S. Dist. LEXIS 8587 (W.D. Tenn. May 13, 2003), the court found that it would be an "undue" burden to require the restoration of the 996 network backup tapes at issue and ordered cost-sharing formula subject to a protocol. *Id.* at *9.

[35] *Medtronic Somafor Danek*, 2003 U.S. Dist. LEXIS 8587, at *25–26 (discussing the burdens involved in converting from backup tape format to a format that a computer can read followed by elimination of duplicates and conversion to a standard format so that a search program may seek information from the restored tapes).

[36] *See* STANDING COMMITTEE REPORT, *supra* note 2, at C-42.

part to emphasize that differentiation is intended to be made solely on that basis.[37]

A NOTE ON IDENTIFICATION

[9] Under Rule 26(b)(2)(B), the producing party must "identify" to the requesting party a description of any inaccessible sources of potentially responsive information that it does not intend to search or utilize for production.[38] The affirmative requirement that a party disclose what it has *not* undertaken to search is new to American discovery practice,[39] although firmly embedded in English Practice Directions regarding electronic disclosure,[40] and its impact remains to be seen. The

[37] An initial reference in the Committee Note suggested that a party may not rely upon the rule if a party actually accesses the requested information, even if the costs of doing so were substantial. ADVISORY COMMITTEE REPORT, AUGUST 2004, *supra* note 5, at 12. The final Committee Note effectively overrules this comment through its emphasis on burdens and costs of access regardless of use. *See* STANDING COMMITTEE REPORT, *supra* note 2, at C-45 to C-46; *see also* Sarah A. L. Phillips, Comment, *Discoverability of Electronic Data Under the Proposed Amendments to the Federal Rules of Civil Procedure: How Effective Are Proposed Protections for "Not Reasonably Accessible" Data?*, 83 N.C.L. REV. 984, 1005 (2005) (arguing the rationale for protecting data not accessed in the ordinary course of business disappears when changing technology makes it possible to retrieve information inexpensively).

[38] *Compare* FED. R. CIV. P. 26(b)(2)(B) (Proposed Official Draft 2006) (requiring parties to identify sources of information that were not searched when using electronic discovery methods) *with* FED. R. CIV. P. 26(b)(1) (allowing a party to concentrate on files from which one can anticipate finding discoverable documents when using hard copy discovery methods.)

[39] Typically, courts only asserted that power in response to a specific controversy and as part of a motion to compel. *See* Zhou v. Pittsburg State University, No. 01-2493-KHV, 2003 WL 1905988, *3 (D. Kan. Feb. 5, 2003) (ordering a producing party to describe efforts made to search for information).

[40] Since October 2005, parties in English High Court cases have operated under a Practice Direction which requires parties to identify efforts to search, or not search, categories of electronic documents by type and location. The requirement stems from the general "disclosure" practice regarding information subject to disclosure under CPR Rule 31.7(3). *See* Department for Constitutional Affairs, Practice Direction – Disclosure and Inspection, http:www.dca.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part31.htm#IDAUWVRD (last visited April 18, 2006). A suggested disclosure statement form can be found in the Annex to the Practice Direction. The form gives specific examples of the categories and types of disclosures that are contemplated but publicly available experience under the Program Direction is not yet available.

identification "should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources."[41] A party can satisfy the requirement by listing a generic "category or type."[42] The adequacy of generic disclosures may be questioned and discovery required if the parties cannot agree upon whether the sources should be searched.

[10] In the end, the identification requirement may well prove to be the single most creative and far-reaching change in the Proposed Rules.[43] As a minimum, it will place a premium on developing a pro-active and aggressive appreciation of the myriad alternative sources of potentially responsive information that may attend an individual case.

PRESERVATION AND THE AMENDMENTS

[11] Advocates for e-discovery rule changes, such as the author, typically sought greater certainty in the definition of the requirements for preservation of electronically stored information before discovery commenced.[44] However, the Amendments in their final form neither articulate such preservation requirements with precision nor set forth a standard of care to help in making preservation decisions.[45] While the Advisory Committee initially considered drafting explicit rules to describe preservation obligations, including the "trigger" or onset of such

[41] *See* STANDING COMMITTEE REPORT, *supra* note 2, at C-48.
[42] *Id.* at C-47.
[43] *See* Richard Acello, *E-mail to Lawyers: E-Discovery Rules on the Way*, A.B.A. J., October 7, 2005, http://www.abanet.org/journal/ereport/oc7rules.html (quoting Greg Joseph, an authority on federal procedure, to the effect that the identification requirement is the only real change in Rule 26(b)(2)).
[44] *See* Allman, *supra* note 1, at 209 (suggesting a rule which would have provided that "[n]othing in these rules shall require the responding party to suspend or alter the operation in good faith of disaster recovery or other electronic or computer systems absent [a] court order issued upon good cause shown").
[45] *See* Letter from Robert L. Byman, Chairman, American College of Trial Lawyers, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Jan. 25, 2005), http://www.uscourts.gov/rules/e-discovery.html (recommending that the Advisory Committee include a standard of reasonableness for both preservation and production).

obligations, at least after litigation commenced,[46] it ultimately elected not to tackle that thorny issue and instead focused on early discussion of preservation issues in hopes of forcing agreement or facilitating an early court ruling.[47]

[12] Thus, while the Committee Notes endorse an effective use of the "litigation hold" process[48] and emphasize the need to carefully assess the implications of the routine operations of information systems,[49] it is to the evolving case law to which counsel seeking to make tough preservation decisions must principally turn. The basics are fairly clear. The obligation to preserve discoverable evidence in electronic form pending discovery can arise before the filing of a complaint, since its focus is on maintaining information for use at trial.[50] Common law preservation obligations typically arise as a necessary implication of the obligation not

[46] The initial version of Rule 37(f), published before the Public Hearings, limited the scope of its sanction relief to post-litigation conduct because it was conditioned on meeting preservation obligations defined by the rule as in existence only after litigation commenced. STANDING COMMITTEE REPORT, *supra* note 2, at C-86. Proposed Rule 37(f), which is intended to relieve some of the harshness of these rules, does not differentiate based on temporal considerations since its nexus is the impact on the ability to produce information in discovery. *Id.* at C-87 (stating that "a party is not permitted to exploit the routine operation of an information system to thwart *discovery obligations* by allowing that operation to continue in order to destroy specific stored information that it is required to preserve") (emphasis added).

[47] *Id.* at C-87.

> Whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under Rule 26(b)(2) depends on the circumstances of each case. One factor is whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources.

Id.

[48] *Id.* (describing actions taken pursuant to a "litigation hold" process as one aspect of assessing and executing preservation obligations).

[49] *Id.* at C-87 (stating that "[a] preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case").

[50] *See* Wm. T. Thompson Co. v. Gen. Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984) (imposing a threshold duty to preserve all documents and information that may be relevant in litigation once the obligation arises); Broccoli v. Echostar Commc'ns Corp., 229 F.R.D. 506, 516–17 (D. Md. 2005) (holding that a preservation duty was triggered by conversations with supervisor prior to filing of EEOC complaint).

to spoliate evidence needed for trial.[51] Some statutory or regulatory retention requirements can also create preservation obligations cognizable in litigation.[52] Moreover, criminal penalties can be invoked against someone who destroys information in contemplation of a federal investigation or proceeding with the intent to obstruct that matter.[53]

[13] The onset of the preservation obligation, known as the "triggering" event, is usually marked by receipt of a pre-suit demand or the filing of a complaint but, in some cases, pre-litigation events are sufficiently predictive to invoke the obligation. The ability to self-designate sources of potentially discoverable information as inaccessible under Rule 26(b)(2)(B) does not change the responsibility to assess preservation imperatives.[54] There is a general consensus that the discharge of preservation obligations involves "reasonable and good faith efforts" to identify electronic information that may be relevant, but it is manifestly "unreasonable to expect parties to take every conceivable step to preserve all potentially relevant" electronically stored information.[55] A flexible and

[51] *See* Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001).

[52] *See* Byrnie v. Town of Cromwell Bd. of Educ., 243 F.3d 93, 109 (2d Cir. 2001). Under some circumstances, regulations can create the requisite obligation to retain records even if the litigation involving the records is not reasonably foreseeable. For such a duty to attach, however, the party seeking the inference must be a member of the general class of persons that the regulatory agency sought to protect in promulgating the rule. *Id.*

[53] Congress expanded the obstruction of justice statute to include actions undertaken "in relation to or contemplation of" any federal investigation or case. 18 U.S.C.A. § 1519 (West Supp. 2005). *See* Dana E. Hill, Note, *Anticipatory Obstruction of Justice: Pre-emptive Document Destruction under the Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. § 1519*, 89 Cornell L. Rev. 1519, 1565–69 (2004) (discussing the potential imposition of criminal liability for the destruction of information pursuant to a records retention policy).

[54] It was argued under the former proposal that the issue could be avoided by a producing party who improperly designated information as inaccessible, destroyed it before discovery began, and then pleaded that it did not know it was discoverable. *See Developments in the Law: Electronic Discovery, Electronic Discovery and Cost Shifting: Who Foots the Bill?*, 38 LOY. L.A. L. REV. 1639, 1678 (2005) (stating that "[i]n this regard, the proposed amendments would legalize spoliation of electronic data"). However, the Advisory Committee never intended such a result. Both Proposed Rule 26(b)(2) and Proposed Rule 37(f) make it quite clear that preservation decisions are separated from the production process.

[55] *The Sedona Principles*, *supra* note 11. Sedona Principle 5 provides that "[t]he obligation to preserve electronic data and documents requires reasonable and good faith

innovative approach is required, based on creative implementation of the "litigation hold" process and rooted in knowledge of the potential sources of discoverable information in use.[56]

EARLY PRESERVATION DISCUSSIONS

[14] Traditionally, initial decisions about preservation obligations have been made unilaterally by the producing party with any challenges coming later, if at all, in the context of motions seeking sanctions.[57] However, the paradigm of a producing party acting independently, and somewhat cavalierly, in determining its preservation obligations is modified by the Proposed Rules.[58] Rule 26(f) will now require that parties meet "as soon as practicable" in order to "discuss any issues relating to preserving discoverable information."[59] The Rule 16(b) scheduling order will reflect the results of these discussions based on the discovery plan developed by the parties. Revisions to Rule 16(b) and Revised Form 35 ("Report of Parties Planning Meeting"), Para. 3 ("Discovery Plan") will effectuate this approach.[60]

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efforts . . . [but] it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data." *Id.*

[56] For an articulation of a litigation hold process by a member of the Advisory Committee during the time of the Proposed Rules, *see* Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (S.D. N.Y. 2004) [hereinafter *Zubulake V*]. The suggestions of the Court are detailed with respect to the discussion of the respective roles of inside and outside counsel. The principles to be employed are the same whether the threat is of litigation or governmental regulatory action. *See* Cutler, Stegman & Helms, *Document Preservation and Production in Connection with Securities and Exchange Commission Investigations and Enforcement Actions*, 1517 PLI/Corp 579, 593 (2005).

[57] Motions for sanctions challenging the performance of preservation obligations are fairly routine when the loss of information is perceived to have impacted the ability to conduct a fair trial. *See, e.g.*, Coleman v. Morgan Stanley, No. CA 03-5045 AI, 2005 WL 674885, at *10 (Fla. Cir. Ct. 2005) (imposing a jury instruction to take allegations of complaint as proven due to failures to produce emails).

[58] *See The Sedona Principles*, *supra* note 11 (stating that "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronic data and documents"). This principle is undoubtedly still true under the Proposed Rules, but the approach must now include making persuasive use of the information about those "procedures, methodologies and technologies" in discussions with opposing parties and court submissions.

[59] STANDING COMMITTEE REPORT, *supra* note 2, at C-31.

[60] STANDING COMMITTEE REPORT, *supra* note 2, at C-36.

[15] The emphasis on early discussion of preservation issues is, in part, a response to the complaints about the unwelcome growth of an abusive sanctions practice aimed at the preservation context.[61] The Advisory Committee considered and rejected promoting increased reliance on the use of preservation orders because of concern about potentially overbroad orders.[62] Accordingly, the Committee Note discourages overuse of preservation orders by citing the cautionary language from the Manual for Complex Litigation, section 11.422, to the effect that "a blanket preservation order may be prohibitively expensive and unduly burdensome."[63] The Note also cautions that preservation orders issued "over objection should be narrowly tailored" and that "[e]x parte preservation orders should issue only in exceptional circumstances."[64]

[16] Adjusting to the new paradigm of early discussion will require cooperation from both sides of the aisle. Requesting parties must do a better job of articulating their focus – and do it early and often. Producing parties must come to the table prepared to candidly discuss the steps they have taken to preserve any sources of potentially discoverable evidence that they believe may be implicated.

OTHER TOPICS FOR EARLY DISCUSSION

[17] A pair of difficult issues for both producing and requesting parties has been the manner in which production is to be made and the way in which the inadvertent production of electronically stored information of privileged and trial preparation materials is to be handled. Proposed Rule

[61] The Advisory Committee heard substantial testimony to the effect that a preoccupation with sanction practice had replaced, in the judgment of some, a focus on the merits of the case. Spoliation sanctions are very much on the mind of the trial bar. *See* Robert L. Pottroff, *Sanctions: Don't Leave Home Without 'Em*, 1 Ann. 2003 ATLA-CLE 1017 (2003) (stating that "no case should be litigated without at least investigating the possibility that evidence has been destroyed, hidden or tampered with by the opposing party").

[62] *See* Treppel v. Biovail, No. 03 Civ. 3002, 2006 U.S. Dist. LEXIS 4407, at *16 (S.D.N.Y. Feb. 6, 2006) (explaining that full compliance with a preservation order can protect a producing party from sanctions if, absent such an order, otherwise discoverable information is lost because a party miscalculates its preservation obligations).

[63] STANDING COMMITTEE REPORT, *supra* note 2, at C-34 (quoting MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.422 (2004).

[64] *Id*. at C-35.

26(f) will also require discussion of both of these topics, and Rules 16(b) and Form 35 will be changed to encourage and accommodate any agreements reached on either topic.

[18] Thus: (a) **Form of Production**. One issue is whether and to what extent a party seeking production should be forced to specify a particular form or forms of production. Under some state e-discovery provisions, the party requesting information must make a request, which can be contested.[65] The Advisory Committee opted for a middle ground: a requesting party may, but need not, specify a preferred form or forms, but the responding party must either assent to the choice or indicate its intended form of production, which can be contested. Production need be made in only one form, however.[66]

[19] The Proposed Rule also provides that, if the parties are unable to reach agreement or a court order is not entered, the information must be produced "either in a form or forms in which it is ordinarily maintained, or in a form or forms that are reasonably usable."[67] If the information is maintained in a way that makes it "searchable by electronic means," then "the information should not be produced in a form that removes or significantly degrades this feature."[68]

[20] The "reasonably useable" alternative was substituted after the Public Hearings for a controversial option under which production could be in "an electronically searchable form."[69] Producing in a "reasonably useable" form may require that the producing party furnish technical assistance, information on application software, or other reasonable types of assistance.[70]

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[65] *See* TEX. R. CIV. PRO. 196.4 (1999).
[66] Proposed Rule 34(b) states: "[u]nless the parties otherwise agree, or the court otherwise orders: (iii) a party need not produce the same electronically stored information in more than one form." STANDING COMMITTEE REPORT, *supra* note 2, at C-73. Some courts have held that a party may be entitled to both a hard copy and electronic versions of the same information. *See id.;* McNally Tunneling Corp. v. City of Evanston, 2001 WL 1568879, at *4–5 (N.D. Ill. Dec. 10, 2001).
[67] STANDING COMMITTEE REPORT, *supra* note 2, at C-77.
[68] *Id*.
[69] *Id*. at C-78.
[70] *Id*. at C-77.

[21] Neither default form is intended to mandate production of metadata or embedded data.[71] The Advisory Committee discussed the competing concerns at some length but ultimately decided that the best course of action was to remain silent and leave the issue to individual case law development.[72] Metadata, for example, or information about information, varies in value or importance depending upon the matters at issue.[73] It is rarely at issue in the majority of cases. A requesting party may and should request a form of production that includes metadata if it believes it to be essential, and a producing party must either accede to the request or state an objection. Ultimately, the matter is for the court to decide if the parties are unable to agree.[74]

[21] (b) **Inadvertent Waiver by Production**. The parties must also discuss possible agreements to govern post-production claims of privilege or protection of trial preparation materials. The Committee Note to Rule 26(f) refers to "quick peek" agreements which allow a requesting party access to potentially privileged information without such access constituting a waiver.[75] The requesting party can then make a narrower request, thus reducing the review burden on the parties and the courts. The Committee Note also mentions a "clawback agreement," which allows parties to agree in advance that inadvertent production does not constitute a waiver of privilege or protection for trial preparation

[71] *But see* Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 657 (D. Kan. 2005) (interpreting an order requiring production of Excel spreadsheet in form maintained to require production of associated metadata). The presence of metadata – hidden information about the information portrayed – is one of the distinguishing features of electronic discovery.

[72] *See Advisory Committee Minutes, April 2005*, *supra* note 15, at 19. Some Advisory Committee members cautioned that to "technically adept lawyers and experts," the reference to production in a form in which it was "ordinarily maintained" included metadata and embedded data, while production in a "reasonably useable" form did not have that connotation. *Id.*

[73] *The Sedona Principles*, *supra* note 11 (suggesting that a party should not be required to preserve or produce metadata absent a clear requirement based on an agreement or court order to do so).

[74] *Williams*, 230 F.R.D. at 652. Magistrate Judge Waxse argues that emerging standards require a responding party faced with a request for production as an "active file" or for production in "native format" to affirmatively object to that request or be bound by it. *Id.* at 652 n.69.

[75] *See* STANDING COMMITTEE REPORT, *supra* note 2, at C-36.

materials.[76] Absent such an agreement or court order, amended Rule 26(b)(5)(B) will provide that the party making the claim of inadvertent production may notify the party receiving the information and trigger an obligation to "promptly return, sequester, or destroy the specified information."[77] The Rule also requires the receiving party to neither use nor disclose the information until the claim is resolved.[78]

[22] Any attempt to deal with evidentiary privilege issues in the Federal Rules is potentially controversial in light of the statutory mandate that substantive changes receive affirmative approval by Congress.[79] The Advisory Committee did not intend to deal with the substantive issue of privilege waiver through its proposals.[80] Some commentators, however, expressed concern about the original proposals, for fear of the consequences in related to third party litigation. One commentator opposing the rule stated that "[t]he language under consideration [in the initial proposal] does not account for these likely scenarios and might give unsuspecting attorneys a false sense of security."[81]

SANCTION LIMITATIONS ("SAFE HARBOR")

[23] Proposed Rule 37(f) will limit rule-based sanctions for the failure to provide information in discovery when the loss results from a "routine, good-faith" operation.[82] The Proposed Rule will not apply in "exceptional

[76] *Id.* The efficacy of this approach was the subject of much debate at the Public Hearings held in early 2005 and has been called into question by at least one court since then. *See* Hopson v. Mayor of Baltimore, 232 F.R.D. 228, 231 (D. Md. 2005).
[77] STANDING COMMITTEE REPORT, *supra* note 2, at C-57.
[78] *Id.*
[79] *See* 28 U.S.C. § 2074(b) (2000) (any rule "creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by an Act of Congress").
[80] Currently, the Advisory Committee on Evidence Rules is considering proposed Rule 502, which would set forth the scope of a waiver and extend the binding impact of a court approved selective waiver agreement to third parties in federal and state courts.
[81] *See* Noyes, *supra* note 25, at 648–649. The Committee subsequently amended proposed Rule 16(b) so as to eliminate language which "might seem to promise greater protection than can be assured." STANDING COMMITTEE REPORT, *supra* note 2, at C-28.
[82] STANDING COMMITTEE REPORT, *supra* note 2, at C-86 (stating that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system").

circumstances" and it only explicitly limits sanctions whose authority rests on the Federal Rules.[83] Limited and restricted though it may be,[84] it nonetheless is a significant step towards bringing a sense of proportion and rationality to the debate over corporate and individual responsibility.[85]

[24] Early proposals for a "safe harbor" sought to address the issue by requiring a prior preservation order and limiting sanctions to only those losses which resulted from willful violations of the order.[86] Selecting and preserving potentially discoverable electronically stored information for specific cases is very difficult in a business environment where disaster recovery tapes and active data are routinely overwritten or discarded for policy reasons unrelated to litigation.[87] The problem is exacerbated by the presence of multiple litigations. Information preserved for one case is theoretically available for other cases, compounding the volume and increasing the burden and complexity of searching for discoverable information. It is virtually impossible to achieve perfect compliance, a

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[83] *Id.*

[84] The elements of judicial discretion present in revised Rule 37(f) have prompted some to question whether it is still reasonable to refer to it as a "safe harbor." *See* Kenneth J. Withers, *We've Moved the Two Tiers and Filled in the Safe Harbor: Federal Rulemakers Respond to Public Comments on Electronic Discovery*, FED. LAW., Nov.-Dec. 2005, at 54 (noting that the phrase "safe harbor" is "no longer apt, if it ever was").

[85] The final form of Rule 37(f) emerged at the April 2005 meeting of the Advisory Committee. The compromise was adopted by a 9-2 vote and, with slight changes, is part of the Proposed Rules now before Congress. *Advisory Committee Minutes, April 2005*, *supra* note 15, at 43.

[86] Thomas Y. Allman, *The Case for a Preservation Safe Harbor in Requests for E-Discovery*, 70 DEF. COUN. J. 417, 423 (2003).

> No sanctions or other relief predicated upon a failure to preserve information shall be entered in the absence of an order that describes with particularity the specific information to be preserved and a finding that the party who failed to preserve such information acted willfully or willfully failed to act. Evidence that reasonable steps were undertaken to notify custodians of the relevant information of the obligation to preserve the information shall be prima facie evidence of compliance with obligations under such preservation order.

Id.

[87] *See generally* Eric Friedberg, *To Recycle or Not to Recycle, That Is the Hot Backup Tape Question*, 22 No. 12 COMPUTER & INTERNET LAW. 16 (2005) (commenting on how the *Zubulake V* court's suggested preservation obligations are not practical or realistic).

standard to which some cases point.[88] Thus, special treatment for inadvertently lost electronically stored information makes sense from a public policy standpoint. As Professor Martin Redish has noted, the loss of electronically stored information in a routine business context cannot fairly be said to support a presumption that the individual involved (or his or her employer) acted with an intent to spoliate.[89] Proof of a heightened degree of culpability should be required.[90]

[25] The need for any safe harbor was hotly debated. To some, the need seemed obvious in light of the mounting evidence that sanctions were being sought in instances where parties had attempted to take reasonable steps to meet their preservation obligations.[91] Others saw in the reported decisions no evidence of a reason to act. A study noted that most courts did not sanction for the "smallest infractions," although they sometimes "sanction[ed] negligent but prejudicial conduct."[92] In response,

[88] *See* Thomas Y. Allman, *Ruling Offers Lessons for Counsel on Electronic Discovery Abuse*, LEGAL BACKGROUNDER, Oct. 15, 2004, at 1, 2 (pointing out that *Zubulake V* appears to allow "no room for error, carelessness or preoccupation with other responsibilities" on the part of employees served with a litigation hold notice).

[89] Martin R. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L. J. 561, 621 (2001) (noting that "[e]lectronic evidence destruction, if done routinely in the ordinary course of business, does not automatically give rise to an inference of knowledge of specific documents' destruction, much less intent to destroy those documents for litigation-related reasons"); *accord* Convolve, Inc. v. Compaq Computer Corp., 223 F.R.D. 162, 177 (S.D.N.Y. 2004) (stating that only in cases of intentional failure to preserve is it fair to presume that evidence would be harmful to the spoliator).

[90] One can draw an analogy to the policy requirement in the Private Securities Act, in which a safe harbor from liability can only be defeated by proof of actual knowledge of the false or misleading nature of a forward-looking statement subject to the rule. *See* 15 U.S.C. § 77z-2(c) (2000).

[91] "Reasonable steps do not always preserve everything. Things slip through. That is the point of the safe harbor." *Advisory Committee Minutes, April 2005*, *supra* note 15, at 18; *see also* Memorandum from Myles V. Lynk, Chair, Discovery Subcomm. & Richard Marcus, Special Reporter, Advisory Comm. on Civ. Rules to the Participants in February 2004 Fordham E-Discovery Conference 34 (Jan. 27, 2004), http://www.uscourts.gov/rules/E-Discovery_Conf_Agenda_Materials.pdf.

[92] Shira A. Scheindlin and Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 MICH. TELECOMM. TECH. L. REV. 71, 73, 94 (2004), http://www.mttlr.org/voleleven/scheindlin.pdf (reporting on the results of a review of forty-five federal cases and twenty-one state sanction cases).

proponents of a safe harbor argued that it was the fear of sanctions that produced an unfair chilling effect.[93]

[26] In the end, the Advisory Committee adopted a compromise limitation that applies only to losses from "routine, good faith" operations. A "routine operation" is one that involves "the ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs."[94] A broad range of business systems are included within the potential scope of the Rule.[95] The distinguishing factor is whether the loss occurred in the context of a "good faith" operation of the system in question, taking into account any steps undertaken relating to the execution of preservation obligations. This necessarily implicates the scope and rationality of the litigation hold process which has been followed in that case.[96] The mere failure to prevent the loss of information does not bar protection from sanctions, since conduct is to be judged by a "good faith" standard intermediate between absolute perfection and willful misconduct.[97]

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[93] At the Public Hearings, proponents of the "safe harbor" strongly supported an alternative formulation for Rule 37(f) proposed by the Advisory Committee that would have required proof of willful or reckless conduct before sanctions could be imposed. The primary version of Rule 37(f) as then proposed would not have applied if the loss of the otherwise discoverable information had been due to negligence or failure to meet a court order. *See* ADVISORY COMMITTEE REPORT, AUGUST 2004, *supra* note 5, at 32–33. The Advisory Committee resolved the debate by the compromise formulation discussed in the text.

[94] STANDING COMMITTEE REPORT, *supra* note 2, at C-87.

[95] *Id.* at C-83.

> Examples . . . include programs that recycle storage media kept for brief periods against the possibility of a disaster that broadly affects computer operations; automatic overwriting of information that has been "deleted"; programs that change metadata (automatically created identifying information about the history or management of an electronic file) to reflect the latest access to particular electronically stored information; and programs that automatically discard information that has not been accessed within a defined period or that exists beyond a defined period without an affirmative effort to store it for a longer period.

Id.

[96] *See id.* at C-85 (noting that "[t]he steps taken to implement an effective litigation hold bear on good faith, as does compliance with any agreements the parties have reached regarding preservation and with any court orders directing preservation").

[97] *See id.* at C-84 (noting that "the Advisory Committee . . . revised Rule 37(f) to adopt a culpability standard intermediate between the two published versions. The proposed rule

[27] Rule 37(f), despite falling short of the full protection originally sought, nonetheless provides more certainty than may be available under existing case law.[98] It is consistent with better reasoned decisions challenging losses due to the application of record retention programs.[99] The use of a "good faith" standard – with its connotations of reasonability and deference to common sense – is not unusual in the business or litigation context.[100]

EXCEPTIONS

[28] Proposed Rule 37(f) contains a number of exceptions. First, Rule 37(f) on its face applies only to rule-based sanctions. It does not purport to address situations where no prior order of discovery has issued and parties have resorted to the inherent powers of the trial courts.[101] However, federal courts may resist the temptation to invoke their inherent powers to reach contrary results from those which would apply under Rule 37(f). They may consider Rule 37(f) and its underlying polices to provide persuasive guidance for the resolution of disputes involving electronically

provides protection from sanctions only for the 'good faith' routine operation of an electronic system").

[98] The effect of mere negligence in complying with preservation obligations is unsettled. *Compare* Se. Med. Supply v. Boyles, Moak & Brickell Ins., 822 So.2d 323, 329 (Miss. Ct. App. 2002) (ruling that destruction of computer files pursuant to a routine business procedure was not subject to sanctions where party had made duplicate copy), *with* DaimlerChrysler Motors v. Bill Davis Racing, No. Civ. A. 03-72265, 2005 WL 3502172, *2–3 (E.D. Mich. Dec. 22, 2005) (containing a jury instruction indicating the appropriateness of sanctions while telling the jury to "presume, based upon the spoliation, that the evidence destroyed would have been favorable to plaintiff," despite the fact that the "destruction of evidence in this case was negligent and not willful").

[99] Courts addressing sanctions for loss of information in that context require proof of breach of a known preservation obligation by a party acting with a "culpable" state of mind and a resulting prejudice to the party or the trial. *See, e.g.,* Stevenson v. Union Pac. R.R., 354 F.3d 739, 747 (8th Cir. 2004) (requiring "some indication of an intent to destroy the evidence for the purpose of obstructing or suppressing the truth").

[100] Compare the application of the business judgment rule to director conduct, whereby exculpation from personal liability for bad business decisions is available so long as the director acted in "good faith." Eric J. Friedman, *Changing Currents for Directors' Duties*, 1467 PLI/Corp 11, 17–21 (2005).

[101] *See* MOSAID Techs. Inc. v. Samsung Elec. Co., 348 F. Supp. 2d 332, 333 (D.N.J. 2004) (noting a failure to institute a litigation hold).

stored information in the absence of rule-based sanctions.[102] One court has already done so.[103]

[29] Second, the protection of Rule 37(f) is inapplicable if "exceptional circumstances" are present. This "safety valve" acknowledges that even a non-negligent loss of information can have highly prejudicial impact in some circumstances and render protection inappropriate.[104] However, that does not mean that sanctions are automatic in such a case and a court would be guided by the existing precedent in that judicial circuit on the issue.

[30] Finally, as the Committee Note stresses, the limitations in Rule 37(f) are applicable only to "sanctions," and not to "the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information."[105]

A NOTE ON CORPORATE RETENTION POLICIES

[31] The potential impact of the Proposed Rules on the evolution of corporate policy was a topic of much contention during the rule-making process. Opponents of party-designated initial production argued that producing parties might "game" the process by simply making all

[102] Such respect for Rule limitations in the face of inherent powers is not unknown. For example, in the case of *Brandt v. Vulcan, Inc.*, the Seventh Circuit refused to suggest that a court should have exercised its inherent powers to sanction discovery misconduct where the District Court had concluded that it lacked power to do so because of limitations under Rule 37(b)(2). 30 F.3d 752, 757 n.9 (7th Cir. 1994).

[103] *See Convolve, Inc. v. Compaq Computer Corp.*, where Magistrate Judge Francis relied upon an earlier version of proposed Rule 37(f) in absolving a party of the failure to undertake to preserve certain "ephemeral" information in the absence of a discovery order. 223 F.R.D. 162, 177 (S.D. N.Y. 2004),

[104] *See* STANDING COMMITTEE REPORT, *supra* note 2, at C-88 (stating that "this provision recognizes that in some circumstances a court should provide remedies to protect an entirely innocent party requesting discovery against serious prejudice arising from the loss of potentially important information").

[105] *Id*. The Advisory Committee was aware that "case management orders" are a necessary and frequent part of the administration of justice and clarified that point in the Committee Note to Rule 37(f), which states that "a court [can] order the responding party to produce an additional witness for deposition, respond to additional interrogatories, or make similar attempts to provide substitutes or alternatives for some or all of the lost information."

electronic information difficult to access.[106] A similar argument was levied against the "safe harbor" proposal on the ground that it would improperly encourage premature elimination of electronic information.

[32] Both arguments miss the mark widely. Retention policies are typically adopted and implemented for business reasons, and no rational executive will or can long countenance deliberate attempts to make business information inaccessible for ordinary use.[107] Underlying both arguments was the unstated assumption that some generalized public policy requires that all electronic information must be retained forever.[108] The Advisory Committee wisely rejected both arguments,[109] especially in light of the potential civil and criminal ramifications of taking deliberate obstructing action in the face of litigation demands.[110]

[33] In fact, the Proposed Rules will have a positive influence by increasing the awareness of the need for effective corporate policies

[106] A similar argument was made on policy grounds against cost shifting based on accessibility. The initial proposal provided only that "[a] party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible." *See* ADVISORY COMMITTEE REPORT, AUGUST 2004, *supra* note 5, at 26. Proposed Rule 26(b)(2)(B) now focuses on the sources of such information and adds "because of undue burden or cost" onto the end of the rule. *See* STANDING COMMITTEE REPORT, *supra* note 2, at C-50.

[107] Effective compliance with legal and ethical obligations is a primary goal of corporate compliance policies. The corporate guidelines in the Federal Sentencing Guidelines, U.S.S.G § 8B2.1, were enhanced at the direction of Congress in the Sarbanes-Oxley Act. Pub. L. No. 107-2004, 116 Stat. 745 (2002).

[108] *See The Sedona Principles*, *supra* note 11 (select "Publications" on the left side of the screen, then choose the appropriate link); *cf.* Arthur Andersen, L.L.P. v. United States, 544 U.S. 696, 704-05 (2005) (stating that retention policies which lead to the destruction of information are common and appropriate in the absence of specific requirements of law).

[109] The concern that a party will deliberately "bury" information to avoid litigation demands is something of a red herring. As the Standing Committee noted, "A party that makes information inaccessible [in a case] because it is likely to be discoverable in litigation is subject to sanctions now and would still be subject to sanctions under the proposed rule change." STANDING COMMITTEE REPORT, *supra* note 2, at C-45.

[110] Congress has stiffened existing law and added new criminal penalties for one who knowingly alters or destroys documents with the intent to impede a federal investigation or proceeding or "in relation to or contemplation of any such matter or case." 18 U.S.C. § 1519 (West Supp. 2005). *See* Hill, *supra* note 53 (discussing impact of statute on destruction of information pursuant to records retention policies).

governing the use and retention of electronic information, especially email. Policies have historically been fragmented and somewhat dysfunctional in this area. Those sponsored by the information technology functions have often focused on the size of mailboxes as the primary management tool for email.[111] On the other hand, records retention policies often rely on individual users to select email for retention based on content and office file plans.[112] The interplay between the two necessarily involves difficult choices. For example, a user might be required to apply retention categories with a set period of days or have it lost to automatic deletion.[113]

[34] The challenge is to integrate these competing and functional interests with litigation and compliance imperatives without impairing or degrading the efficient use of electronic systems. In some cases, this can be as simple as reviewing and revising existing policies to make them more realistic and to enhance training to meet identified expectations especially in regard to implementing litigation holds.[114] In other cases, however, it may involve consideration of technological solutions, such as some form of electronic archiving.[115] Any solution adopted will involve a

[111] *See* Randy Kahn, *Electronic Communication Policies and Procedures*, AIIM E-DOC MAGAZINE, June 24, 2005, http://www.aiim.org/article-docrep.asp?ID=30088.
[112] *See* U.S. Department of the Interior, *It's in the Mail: Common Questions about Electronic Mail and Official Records*, http://www.doiu.nbc.gov/orientation/email.html#long (last accessed April 25, 2006).
[113] Courts sometimes express surprise with imperfect compliance by users with records retention. *See* United States v. Philip Morris USA, Inc., 327 F. Supp. 2d 21, 25 (D.D.C. 2004) (noting that it was "astounding" that employees had failed to follow a "print and retain" requirement in a document retention policy). However, such an occurrence is perfectly understandable and does not in and of itself indicate a failure to meet obligations imposed by law. *See* Concord Boat Corp. v. Brunswick Corp., 1997 WL 33352759, at *6 (E.D. Ark. 1997) (allowing individual employees to use discretion whether to retain e-mail is not indicative of bad faith).
[114] An entity may, for example, wish to review email retention policies as a first step in a program to take a holistic look at electronic information management. This will necessarily involve a focus on competing policy imperatives from among admittedly a wide range of options. At a minimum, any solution should include an enhancement in compliance training of individual users to help them adhere to litigation hold policies.
[115] *See* Thomas Y. Allman, *Email Retention: Time for a New Approach*, AIIM E-Doc Magazine, Sept./Oct. 2005, http://www.edocmagazine.com/article_new.asp?ID=30580. Archiving can be implemented by configuration of existing software applications or by use of dedicated software and hardware designed for that purpose and either hosted or

compromise among identified "pain points" based on competing budget constraints, issues of responsibility for implementation ("ownership"), and concerns over the risk of over-retention, with its own unique problems.[116] The Sedona Conference is hard at work attempting to articulate a rational framework and justification within which individual entities may select their comfort level in this and three other key areas.[117]

CONCLUSION: SOME MODEST SUGGESTIONS

[35] The Proposed Rules clearly require considerably more attention by in-house lawyers to early preparation for electronic discovery and place a premium on the execution of predictable and well-thought out plans. Based on my own experience, I can suggest three areas for improvement.

FOCUS ON SOURCES AND THEIR CHARACTERISTICS

[36] An on-going effort should be made, at least in regard to predictable types of litigation, to identify potential sources of discoverable information and to document and assess the burdens and costs associated with access and retrieval of electronic information from those sources. This effort will help to better facilitate the assessment of steps needed to prevent losses of information from those operations (and to justify those actions in the event they are not fully effective). This approach can best be accomplished by investing the scarce time needed to develop good working relationships with appropriate IT personnel and to understand the actual operation of information applications. This would also help identify potential testifying witnesses who can assist in briefing outside

made available by third parties. The scope can be individual departments, classes of employees (such as executives) or entire portions of entities, with varying retention periods selected by policy. *Id.*

[116] Archival and other technology solutions are often sold on an "ROI" basis which takes into account avoided costs of expensive storage as offset by the licensing, hardware and ongoing maintenance costs of the solution. To the extent that additional volumes of information are retained, the calculations frequently overlook the added costs of access and review, especially for relevancy and privilege.

[117] The Sedona Conference WG1 Working Group on Electronic Document Production is currently in the process of developing Commentaries on four related topics: Email Management and Archiving, Legacy Data, Search and Retrieval and Litigation Holds. *See The Sedona Principles*, *supra* note 11.

counsel and appear, if needed, to explain the details to any reviewing court.

LITIGATION HOLDS

[37] The scope and effectiveness of the litigation hold process, by whatever name it goes and whether it is formal or informal, should be enhanced by developing innovative approaches to cover both litigation and investigative possibilities. At the heart of the process should be a sliding scale approach to assess and address whatever relevant sources of information may be understood to exist and to match them to the needs of the discovery process.

OUTSIDE COUNSEL

[38] The division of effort among counsel in collecting, culling and producing information in litigation should be reevaluated with an eye to the emerging emphasis on sources of information. Preparation for the "meet and confer" process should be enhanced so that outside counsel are better prepared to accurately discharge their ethical and legal obligations to both their clients and the court. Candid "after action" assessments of earlier preservation and production experience should be routine and meetings should be held with outside counsel and consultants to discuss mutual expectations in order to ensure that the interests of all parties are aligned.

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[39] The Proposed Rules constitute a remarkable achievement which should help establish uniform practices for those unfamiliar with the unique issues involved in e-discovery. When coupled with the suggestions outlined above – and others like them – parties will be better prepared to participate in the good faith and reasonable approach to e-discovery which will be essential to their success.