WHITE PAPER:

Reshaping the Rules of Civil Procedure for the 21st Century

The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure

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On behalf of

Lawyers for Civil Justice
DRI – The Voice of the Defense Bar
Federation of Defense & Corporate Counsel
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I. Introduction and Executive Summary

The United States Judicial Conference Rules Committee has undertaken an ambitious program to study the Federal Rules of Civil Procedure. It does so as part of its continuing responsibility under the Rules Enabling Act to study the Rules of Procedure and recommend amendments to promote simplicity, fairness, and just determination of litigation in the federal courts. That study begins in earnest with The 2010 Civil Litigation Conference at Duke University Law School on May 10-11, 2010.

Lawyers for Civil Justice (LCJ), DRI - The Voice of the Defense Bar (DRI), Federation of Defense and Corporate Counsel (FDCC), and International Association of Defense Counsel (IADC) are very pleased to have been invited to participate in the Conference. We submit this White Paper to summarize our collective view on major problems facing the federal courts now and in the future and to suggest meaningful amendments to the Rules that will help solve these problems. The many defense trial lawyers and corporate counsel who contributed to the preparation of this paper are identified below.

Prior Attempts to Solve Systemic Federal Litigation Problems (Section II)

The history of federal civil litigation is replete with efforts to improve the Rules of Civil Procedure, tracing back to Roscoe Pound's call for reform in 1906. Though initially met with skepticism, Pound's call for change was eventually joined by others urging a fundamental reform of the system that led to the adoption of the Rules Enabling Act of 1934 and adoption of the Federal Rules of Civil Procedure in 1938. The drafters accomplished enormous improvements in civil justice by merging law and equity, abolishing the old and hyper-technical system of writs, and offering a relatively straightforward litigation system.

The first several decades of litigation under the 1938 Rules has been called the "golden age" because discovery had not yet burgeoned; class actions, complex, multidistrict, and mass tort litigation had not yet emerged; and the system was widely viewed as working well. The Rules were amended in 1946 to broaden available discovery and by the 1950's The Prettyman Report, adopted by the Judicial Conference, noted a "serious problem" that included "unnecessary delay, volume of record, and expense." Perhaps because of the 1966 and 1970 amendments, by the 1970s, many expressed increased dissatisfaction with the civil justice system. Skyrocketing costs; rapidly increasing discovery; the explosion of large, complex, and difficult-to-manage cases; and other problems led to calls for reform. But the Advisory Committee embraced the findings of the Columbia Field Study to conclude that "there is no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules."

In 1976, Chief Justice Burger called together a National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. Follow-up studies by the Federal Judicial Center, among others, led to amendments in 1980 providing more judicial management of the discovery process. The Advisory Committee, however, rejected calls for fundamental changes in the discovery rules. Further efforts at reform led to additional, non-fundamental, changes. But the problems with

discovery abuse, excessive expense, and delay continued. While dissatisfaction undoubtedly exists with every legal system, we conclude that more than tinkering at the edges of the Rules of Civil Procedure is required. Fundamental and meaningful reforms are essential to achieve effective justice in the federal system.

A Call for Complete Reevaluation of Key Federal Civil Procedure Rules (Section III)

Diverse stakeholders in the federal civil litigation process want systemic reform of the Federal Rules. Substantial reforms needed cannot be left to sporadic and potentially inconsistent *ad hoc* holdings by various courts deciding cases before them. Courts acting individually face practical and institutional limitations that prevent them from making the needed systemic changes to inter-related rules. Broad-based policy and rule reform is necessary.

In *Twombly*, a decision that heralds the Committee's examination, the United States Supreme Court discussed the institutional limitations of the federal courts to manage discovery and other procedural issues, through case-by-case litigation. More to the point, the Supreme Court made a frank assessment of the federal courts' inability to control discovery costs, even in meritless claims, through case management in individual cases. In short, the Supreme Court concluded that under the present system of "notice" pleading and broad discovery, the federal courts were failing, in key ways, to ensure the just, speedy and cost-effective determination of every action.

In fact, the Supreme Court forecasted the findings of the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System, which in their recent Report concluded that "[a]lthough the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's civil justice system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them."

The Supreme Court and the ACTL/IAALS Report did not criticize the ability or dedication of the members of the federal judiciary. Rather, the statements were an acknowledgement of the institutional limitations facing courts. Major and systemic reform is required to attain the goals stated in Rule 1, and the Rules as a whole, and cannot be achieved through litigation alone in the face of these institutional limitations. The need to overhaul the civil litigation system is real and immediate. Every prior effort to amend the Rules to deal with the problems presented by modern litigation in the digital age stimulated vigorous debate. While these precise fixes may do the same, there is much evidence that the current system is not working as it should, costs too much, and produces too little.

Solving Systemic Problems (Section IV)

Many issues call for a comprehensive reevaluation of the existing Rules governing litigation in the 21st century including attempting to redefine and balance the interrelationship of pleading and discovery, reevaluating the premises and focus of discovery, further refining the treatment of e-discovery, developing clear preservation standards, and deterring runaway litigation costs by reasonable cost allocation rules. These issues impact more than just the particular litigants in a particular case. Indeed, they affect the courts applying the rules; the attorneys interpreting those

rules and counseling their clients; and the members of society who need a system of civil justice that provides meaningful, accessible, and affordable dispute resolution.

Require a Short, Plain Statement of the Material Facts (Section IV A)

Original Rule 8 was drafted as a pragmatic reaction to abuses of common law and code pleading that detracted from merits-based decision-making. Instead of adopting Rule 8 as a doctrinal choice in favor of notice pleading, which leaves issue identification and resolution to discovery and trial, Rule 8 was simply the most practical tool available at the time to resolve cases. In complex litigation, however, the consensus has been to require more particular pleading standards *for the same reason*: so that discovery would not become the same sort of irrelevant, expensive time waster that common law and code pleading had become.

We propose amendments primarily to Rule 8 – but also to Rules 9, 12 and 65. These amendments implement the pleading standards currently in successful and non-controversial use in many categories of cases and apply them to all civil actions. Our proposal also includes a stay of discovery, a procedure that has proved successful under the Private Securities Litigation Reform Act, pending resolution of a challenge to the sufficiency of a pleading via motion to dismiss, for more definite statement, or for judgment on the pleadings. The essence of our proposed amendment would codify the *Twombly-Iqbal* standard as follows: ". . . a short and plain statement**, made with particularity,** of **all material facts known to the pleading party that support** the claim**,** ~~showing~~ **creating a reasonable inference** that the pleader is **plausibly** entitled to relief . . . ." and would define "material fact" as **". . . one that is necessary to the claim and without which it could not be supported."**

There is nothing new or radical about tightening pleading standards to address complaints of non-merits-based, expensive, irrelevant procedures that dominate litigation. It is the natural response; if litigation has become more complicated, tighter pleading standards are a natural and legitimate reaction. If discovery has become as much of a problem as common law and code pleading were, particularized identification of issues at the initial pleading stage is the proper response. As stated above, Rule 8 is a pragmatic reaction against the abuses that detracted from merits-based decision-making. Because Rule 8 was only designed to correct flaws in common law and code pleading perceived to dictate outcomes on the basis of procedure rather than merits, it is consistent with the vision of the original drafters to adjust those rules whenever form supersedes substance.

The Rules have a long history that makes clear the intention that they prevent procedure and cost from driving judicial outcomes and ensure that adjudication is based on the merits of underlying claims, not on the fear of endless, costly, and disruptive litigation. Since the adoption of the Rules in 1938, numerous attempts have been made to address instances in which procedure has threatened to dominate merits-based adjudication. The repeated reaction to perceived threats of abusive litigation or to types of litigation viewed as "special cases" has been to require more detailed and factually-supported statements of claims and contentions. Examples include: Rule 9(b), the Ninth Circuit Judicial Conference's 1955 proposal, Admiralty Rule E(2)(a), *Leatherman and Swierkiewicz,* the Private Securities Litigation Reform Act, the "Y2K" Act, and Local Patent Rules. In each of these instances, the perception that litigation became too costly, complicated, burdensome, and underutilized, was met with proposals to require greater specificity in pleading as a cure.

As these examples demonstrate, heightened pleading standards are neither new nor strange. They

are used every day in numerous types of litigation throughout all federal courts and are imposed to guard against exactly the same deficiencies that led to the adoption of the Federal Rules of Civil Procedure. Since these pleading standards are working in those categories of cases, there is no reason why they should not be the rule for all cases. **The intended purpose of the judicial system is the evaluation and adjudication of known claims, not the unfettered search for unknown claims. Yet, the current procedural framework has devolved to where legal action is permitted without knowledge of a cognizable claim. Even when claims are known, no incentive exists to identify the claims with any specificity.** The discovery process is often without a tether to constrain its consumption of time and resources. Therefore, many factors counsel in favor of amending the pleading rules as one piece of a comprehensive rule overhaul, rather than awaiting case-by-case application of the *Twombly/Iqbal* standard in the lower courts.

Adopt Clear, Concise and Limited Discovery Rules (Section IV B)

The scope of discovery is defined largely by Rule 26, with the help of several rules that describe the specific discovery tools available. Debate has persisted over the scope of discovery, as has concern that discovery abuse, misuse, and excessive expense and burden pose significant danger to the administration of justice. Nearly three quarters of a century later, despite *numerous* attempts to address these concerns, the problem remains. Self-enforcing rules are the best path to efficient discovery.

As evidenced by the extensive history of amendments to Rule 26, establishing and enforcing a reasonable scope of discovery has proved a challenge. While the repeated attempts to address the catastrophic costs, burdens, and abuses of discovery through judicial intervention were commendable, the practical result of such intervention is that the problems have remained unsolved. In fact, the problems have persisted and festered. It is time to change course. Judicial intervention is a method that arguably encourages excessive motions practice by requiring parties to seek out the assistance of the courts. Instead, practitioners should be bound by the rules to narrow the scope of discovery without judicial oversight. Against this background we propose a new Rule 26(b)(1):

Scope in General. The scope of discovery is limited to any nonprivileged matter that would support proof of a claim or defense and must comport with the proportionality assessment required by Rule 26(b)(2)(C).

The proposed rule focuses discovery where it should be focused – on the claims and defenses in the action. The rule also requires that the parties comply with the proportionality requirements as an integral part of the scope of discovery consideration. The proposed Rule also simplifies the current first tier of discovery and eliminates the second tier of discovery under the current rule by removing the language that allows the expansion of discovery for "good cause." The requirement for a showing of good cause has essentially been ignored. The second tier language failed to prevent the explosion of unnecessary discovery as intended. Largely ignored, the scope of discovery in practice has been the broader "subject matter involved in the action". The proposed rule narrows the scope of discovery to the claims and defenses asserted in the pleadings

We also propose a modification to Rule 26(b)(2)(B) that identifies specific categories of electronically stored information that should not be discoverable in most cases: "A party need not provide discovery ***of the following categories*** **of** electronically stored information [~~from sources~~], ***absent a showing by the receiving party of substantial need and good cause, subject to the***

proportionality assessment pursuant to Rule 26(b)(2)(C) . . . ."."

The categories, based in large part on the Seventh Circuit's Electronic Discovery Pilot Program, include: RAM, on-line access data, data in metadata fields that are frequently updated automatically, backup data, physically damaged media, legacy data, and any other data (i) that are not available to the producing party in the ordinary course of business and (ii) that the party identifies as not reasonably accessible because of undue burden or cost.

Adding "substantial need" to the standard for ordering production of one of the undiscoverable categories clarifies the burden on the requesting party and is a better defined standard. A third proposed change is to separate the proportionality assessment from the "good cause" standard and clarify that it is an additional determination by the court. Next, Rule 26(b)(2)(C)(iii) should be amended to explicitly invoke the principle of proportionality and to track the new language of Rule 26(b)(1) regarding the scope of discovery. Of course, proportionality does not mean that big cases justify big discovery. Proportionality requires that discovery not be unreasonably cumulative or duplicative, not be otherwise available, and that its burdens are outweighed by its likely benefits.

Under our proposal, Rule 26(b)(2) would also be modified to add Rule 34 to the list of discovery methods that may be limited in frequency and extent. Similar to the Interrogatory limitation in Rule 33, we propose the addition of Rule 34 (b)(1)(B), limiting document requests to 25, including sub-parts. In the vast majority of cases, 25 document requests should be more than sufficient. If not, the parties may stipulate, or the court may for good cause order a greater or fewer number of requests, after also considering the proportionality assessment under Rule 26(b)(2).

The modification limits the temporal scope of a document request by tying it to an unambiguous event: the filing of the complaint. Issues arising in unusual circumstances, such as tolling agreements, could be addressed by stipulation or court order. The final proposed limitation would also limit the number of sources from whom information may be discovered.

The Advisory Committee Notes to the 1993 amendment point out that one objective of the deposition and interrogatory limits was "to emphasize that counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case." In regard to Rule 33, the Committee noted that the limits on interrogatories were not intended "to prevent needed discovery, but to provide judicial scrutiny before the parties make potentially excessive use of this discovery device."

Seventeen years after the introduction of these limits, they have not caused a substantial hardship to litigants. On the contrary, parties have adapted to the presumptive limits and courts have grown adept at adjudicating requests to exceed the stated limit. More importantly, the limits have contributed to at least some streamlining of federal litigation by forcing parties to carefully assess the discovery needs of their case and to be more efficient.

The Rules Must Address Preservation of Information (Section IV C)

Preservation of electronically stored information (ESI) is an unfortunate consequence of the information explosion and unfettered discovery that the 2006 E-Discovery Amendments have not addressed. Ancillary litigation involving preservation has risen at an alarming rate. Court-by-court, district courts have created *ad hoc* "litigation hold" procedures that have destroyed national uniformity. Preservation issues are decided on a case-by-case basis, with little guidance for parties in

federal court.

As a result, parties are forced to incur extraordinary expenses in an attempt to meet the most stringent requirements established by the "litigation hold" cases. A party's alternative is to face costly sanctions for failing to preserve ESI. Often the ESI that is the subject of preservation motions has little to no direct relevance to the claims or defenses asserted in a lawsuit. Further, there is little analysis of the sufficiency of the ESI produced in most litigation hold cases. Equally disturbing is the imposition of severe sanctions, such as an adverse inference jury instruction, where a party unintentionally fails to meet the *ad hoc* requirements established by various courts. More courts are interpreting the mere failure to implement a formal written litigation hold as demonstrating sufficient bad faith to warrant sanctions.

Amendments to the Rules should be enacted that directly address preservation. Rule 37(e) should be amended to permit spoliation sanctions only where willful conduct for the purpose of depriving another party of the use of the destroyed evidence results in actual prejudice to the other party. A clear rule is needed to counteract the inconsistency of requirements established by various courts, some of which even have imposed sanctions for negligent preservation.

Preservation should also be directly addressed in Rule 26. Ultimately the ancillary litigation related to "litigation holds" is a product of an alleged failure to preserve ESI that would have been subject to disclosure in the litigation. Proposed Rule 26(h) and related amendments, will restore uniform national procedures that are designed to introduce certainty into preservation decisions by parties and consistency in analyses and decisions by courts.

The procedural rules we propose clearly address conduct taking place after litigation is initiated. There is strong federal case law support for using the proposed procedural rules to analyze pre-litigation conduct in the context of post-litigation motion practice. Spoliation sanctions are currently imposed for the effects of pre-litigation conduct on a subsequent lawsuit pursuant to the court's inherent powers to control litigation. Providing rules directly addressing preservation will permit courts to approach the effects of any willful failure to preserve in a more structured and uniform procedural environment. This approach should lead to judicial reliance on inherent powers only on rare occasions when preservation conduct is not directly addressed by the federal rules.

Runaway Discovery Costs Require Specific Cost Allocation Provisions (Section IV D)

Despite several amendments to Rule 26 aimed at controlling the increasing costs of discovery, discovery costs in many cases (particularly asymmetrical cases) are not being effectively controlled. In today's litigation environment, discovery is used as a weapon in the requesting party's arsenal to impact the outcome of a case irrespective of the merits, rather than as a tool to collect information to aid the fact finder. Parties request substantial volumes of information (including information that can be very expensive to collect and to review) in an effort to force opposing parties to consider settlement. Rather than deciding to settle after a fair and practical examination of the merits of a particular case, parties instead opt to settle to avoid expensive and protracted discovery. Early settlement demands often reference the high cost of discovery as a basis to encourage settlement and to avoid the expenditure of hundreds of thousands or millions of dollars in discovery costs.

In addition to the high out-of-pocket costs associated with discovery, protracted discovery can cause business and procedural diseconomies. Discovery events (including the institution of litigation

holds, document preservation efforts, data gathering, depositions, and related efforts) are extremely disruptive and result in substantial inefficiencies in daily business activities. Typically companies engaged in litigation have to devote substantial resources to these efforts. Employees with discoverable information and information technology support staff often have to modify the routine handling of information. Procedures and systems geared for business efficiency often must be modified to meet the demands of discovery.

Rule 26 in its current form does not provide a reliable method of curbing the negative impact of discovery costs on the parties' ability to carry on their businesses or on the ability of courts to determine cases on the merits. Judges are asked to manage the scope of discovery, but are unable to do so effectively because of institutional limitations on the courts. It is extremely difficult for judges, at the beginning of a case, to determine the proper scope of discovery, because they know less than the parties about the underlying facts of each side's position. The purpose of discovery is to permit parties to access information that will enable fact finders to determine the outcome of civil litigation. Having rules that encourage the parties to police themselves and to focus on the most efficient means of obtaining the truly critical evidence is the best way to achieve that purpose.

The proposed cost allocation amendment to Rule 26, to require that each party pay the costs of the discovery it seeks, will encourage each party to manage its own discovery expenses by shifting the cost-benefit decision onto the requesting party. A requester-pays rule will encourage parties to focus the scope of their discovery requests on evidence that is reasonably calculated to produce relevant information from the most cost-effective source. In addition to focusing discovery requests, proposed Rule 26 discourages a party from using discovery as a weapon to force settlements without regard to the merits of a case; a party that pays for discovery will have no incentive to make overly broad requests. Furthermore, proposed Rule 26 encourages cooperation between parties to control discovery costs.

The Federal Rules should incentivize parties to pursue discovery at the lowest cost and in the least burdensome manner possible to obtain the evidence necessary for the fact finder to determine the case on the merits. Discovery rules should not provide weapons for parties to force settlements not justified by the merits. The proposed rule would help achieve those results by deterring excessive and unnecessary discovery. A party making a claim or raising a defense is in the best position to decide if information is worth the cost of obtaining it. A requester-pays rule will encourage more purposeful and focused requests designed specifically to obtain only that information necessary for the just and full adjudication of the issues.

DISCUSSION

II. Prior Attempts to Solve Systemic Federal Litigation Problems

The history of federal civil litigation is replete with efforts to improve the Rules of Civil Procedure. Roscoe Pound's clarion call for reform at the American Bar Association convention in 1906 was initially met with skepticism. According to Pound, "Dissatisfaction with the administration of justice is as old as law."[1] Pound saw "more than the normal amount of dissatisfaction with the present-day administration of justice in America" in 1906, and he sought to diagnose the problems, and then to offer some solutions. Pound's speech was not initially cheered by everyone in attendance; Wigmore later recalled that some lawyers present at the time were "hotly impatient to suppress the whole matter," with one suggesting that Pound sought to "destroy that which the wisdom of centuries has built up."[2]

Yet Pound's call for change was eventually joined by others urging a fundamental reform of the system. These early reforms led to the adoption of the Rules Enabling Act of 1934, Pub, L. No 73-415, 48 Stat. 1064. Other reforms followed, including the adoption of the Federal Rules of Civil Procedure, which became effective in 1938. The overarching goal of the Rules, which is set forth in Federal Rule of Civil Procedure Rule 1 is to "secure the just, speedy, and inexpensive determination of every action and proceeding." The drafters accomplished enormous improvements in civil justice by merging law and equity, by abolishing the old and hypertechnical system of writs, and by offering a relatively straightforward litigation system with an emphasis on ease of access to the courts, provisions for discovery to avoid trial by surprise, procedures to dismiss weak cases early, and a culminating trial to decide the outcome of most cases. The proponent of the new discovery rules prophetically noted that "[u]nless litigation can be conducted under such reasonably favorable circumstances as to make it a legitimate business risk instead of a lottery, modern business men will decline to use it, and whenever possible will either arbitrate, settle by direct negotiation, or simply charge off the loss."[3]

The first several decades of litigation under these Rules has been called the "golden age" because discovery had not yet burgeoned with the growth of computers, copy machines, and e-mail, class actions and mass tort litigation had not yet emerged, and the system was widely viewed as working well.[4] The Rules were amended in 1946 to broaden available discovery by incorporating language that prohibited objection to discovery on the basis that the evidence would not be admissible at trial. Fed. R. Civ. P. 26, advisory committee notes (1946 amend). The advisory committee emphasized that discovery was intended "to allow for a broad search for facts, the names of witnesses, or any other matters that may aid a party in the preparation or presentation of his case."[5]

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[1] Roscoe Pound, *The Causes of Dissatisfaction with the Administration of Justice* (1906), *reprinted in Proceedings in Commemoration of the Address*, 35 F.R.D. 241, 273 (1964)..

[2] John Henry Wigmore, *Roscoe Pound's St. Paul Address of 1906: The Spark that Kindled the White Flame of Progress,* 20 J. Am. Jud. Soc'y 176, 177 (1937).

[3] Edson R. Sunderland, *Scope and Method of Discovery before Trial,* 42 Yale L.J. 863, n.42 (1933).

[4] Robert G. Bone, *The Process of Making Progress: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy,* 87 Geo. L.J. 887, 897-98 (1999).

[5] *See Report of the Advisory Committee on Civil Rules* 34 (June 1946), *available at* http://www.uscourts.gov/rules/Reports/CV06-1946.pdf.

But as early as 1951, it had become apparent that some big and protracted cases were not being handled in accord with the desire for a speedy, just, and inexpensive determination on the merits. The Prettyman Report, adopted by the Judicial Conference, observed problems including "unnecessary delay, volume of record, and expense" that constituted "a serious problem."[6] Despite these concerns, further revision to the Rules in 1966 consisted of the most significant amendments modifying only the procedure for joinder and class actions.[7]

Despite the 1966 amendments, by the 1970s, dissatisfaction with the civil justice system increased. Skyrocketing costs; rapidly expanding discovery; the explosion of large, complex, and difficult to-manage cases; and other problems led to calls for reform. But the Advisory Committee embraced the findings of the Columbia Field Study to conclude that "there is no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules."[8] Despite calls for change on the basis that the "costs of discovery do not appear to be oppressive," the Rules continued to reflect a broad party-controlled approach to discovery. But problems with heavy case loads, delay, and expensive discovery continued to plague the civil justice system, as we point out in greater detail in sectionIV.B. of this paper.

In 1976, Chief Justice Burger called together a National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice to commemorate Pound's original address and to study the administration of justice at the time.[9] The Pound Conference identified discovery abuse as a serious problem.[10] The Pound Conference also focused on alternative dispute resolution as a solution for delay and overcrowding in the federal courts. *Id.* Follow-up studies by the Federal Judicial Center and others led to amendments in 1980 to provide for more judicial management of the discovery process. The Advisory Committee, however, rejected these calls for fundamental changes in the rules governing discovery.[11]

Further efforts at reform led to additional changes, but the problems with discovery abuse, excessive expense, and delay continued. Today, more and more litigants have fled the federal civil justice system for other forms of dispute resolution or, if unable to flee the system, are forced to settle cases early and without regard to the merits in an effort to avoid the expense and unpredictability of litigation. Serious discussion about the vanishing jury trial and what it means for civil justice continues.[12]

In the tradition of Roscoe Pound, LCJ recognizes that dissatisfaction undoubtedly exists in every legal system. But today, our members have concluded that there is a need for more than tinkering at

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[6] E. Barrett Prettyman, *Procedure in Anti-Trust and Other Protracted Cases, attached to* Hon. Leon R. Yankwich, *"Short Cuts" in Long Cases,* 13 F.R.D. 41, 62 (1951).

[7] *See Report of the Advisory Committee on Civil Rules* 5 (Sept. 1965), *available at* http://www.uscourts.gov/rules/Reports/ST09-1965-1.pdf.

[8] *See Report of the Advisory Committee on Civil Rules* (Oct. 1969), *in Report of the Advisory Committee on Civil Rules* app. 2 (Oct. 1969), *available at* http://www.uscourts.gov/rules/Reports/ST10-1969.pdf.

[9] *The Pound Conference: Perspectives on Justice in the Future* (A. Leo Levin & Russell R. Wheeler, eds., 1979).

[10] *The Pound Conference Recommendations: A Blueprint*, 77 F.R.D. 277, 288-90 (1978).

[11] Fed. R. Civ. P. 26(f) advisory committee's note (1980).

[12] One implication of the vanishing jury trial is an inexperienced trial bar that is unable to anticipate what evidence will be necessary and persuasive at trial and which therefore seeks the broadest-ranging discovery possible not because the information is needed to develop the case, but because the lawyer is uncertain what information is needed and because the lawyer has no incentive to limit the requested discovery.

the edges of the Rules of Civil Procedure. Fundamental and meaningful reforms are needed to the Rules of Practice and Procedure.

III. A Call for Reevaluation of Key Federal Civil Procedure Rules

A diverse spectrum of stakeholders in the federal civil litigation process feel the need for systemic reform of the Federal Rules of Civil Procedure. The substantial reforms cannot be left to sporadic and potentially inconsistent *ad hoc* holdings by various courts deciding the cases before them. Further, courts acting individually face practical and institutional limitations that prevent them from making the needed systemic changes to inter-related rules.

Just recently the United States Supreme Court discussed the institutional limitations of the federal courts to manage discovery and other procedural issues through litigation on a case-by-case basis. In *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), the Court reviewed the current state of pleading in the federal courts. Notice pleading is theoretically designed to provide liberal access to the federal courts, and thereafter to have discovery, summary judgment and trial test the legitimacy of the proffered claims. The Court grappled with the increasingly apparent problem that notice pleading coupled with broad discovery is becoming more and more unworkable in the face of modern litigation realities. The Court commented that discovery in complex cases *(Twombly* involved an antitrust claim) can be "expensive" and "potentially massive."[13]

More to the point here, the Supreme Court made a frank assessment of the federal courts' ability to control discovery costs, even in meritless claims, through case management in individual cases. The Court remarked that it is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management . . . given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side."[14]

In short, the Supreme Court concluded that under the present system of notice pleading and broad discovery, the federal courts were failing, in key ways, to ensure the just, speedy and cost-effective determination of every action.[15] In so doing, the Supreme Court forecasted the findings of the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System, which in their recent report concluded that "[a]lthough the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's civil justice system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them."[16]

The Supreme Court did not make these comments in *Twombly* as a criticism of the ability or dedication of the members of the federal judiciary. Rather, the Court's statement was an acknowledgement of the institutional limitations facing courts. Before the close of discovery, judges

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[13] *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 558 (2007).
[14] *Id.* at 559.
[15] *See* Fed. R. Civ. P. 1.
[16] Institute for the Advancement of the American Legal System, *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 ("ACTL/IAALS Report")* 2 (2009), *available at*
http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008.

do not, and cannot, know enough about a particular case to effectively determine the proper scope of discovery. The Court quoted at length from a law review article assessing this same issue, after noting that "given the system that we have, the hope of effective judicial supervision is slim":

> The timing is all wrong. The plaintiff files a sketchy complaint (the Rules of Civil Procedure discourage fulsome documents), and discovery is launched. A judicial officer does not know the details of the case the parties will present and in theory *cannot* know the details. Discovery is used to find the details. The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find. . . . Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define "abusive" discovery except in theory, because in practice we lack essential information.

Frank H. Easterbrook, *Discovery as Abuse, 69 B.U. L. Rev. 635, 638-39* (1989). Judge Easterbrook concluded his article by noting that discovery abuse "cannot be fixed by tinkering with Rule 26, Rule 37, or any of their companions." *Id.* at 647. Major and systemic reform is required to attain the goals stated in Rule 1. While the Court in Twombly and Iqbal moved the interpretation in the right direction,[17] systemic reform cannot be had through litigation alone.[18]

One can reach this same conclusion by examining the litigation and recent Rules amendments involving electronic discovery ("e-discovery"). Lawyers for Civil Justice ("LCJ") submitted Comments to this Committee addressing these revisions.[19] When presented with the question of whether the ballooning crisis of e-discovery could be dealt with by individual courts examining discovery issues in the particular cases before them, the answer in that context was no. LCJ deemed the development of case law through *ad hoc* litigation insufficient to fix systemic e-discovery problems, although *Iqbal* and *Twombly* are efforts to align the pleading rules with the realities of modern litigation. [20]

In the e-discovery context, such *ad hoc* treatment through litigation led to the development of a variety of fact-specific approaches, leaving litigants in most jurisdictions without guidance, or clear

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[17] *Id.*

[18] Even though *Twombly* involved the interpretation of one rule against a backdrop of case law that predicted its holding, some commentators have argued that the *Twombly* holding was perhaps more appropriate for rule making than court decision. *See* Gregory G. Garre, Statement before Senate Judiciary Committee (December 2, 2009), *available at* http://judiciary.senate.gov/pdf/12-02-09%20Garre%20Testimony.pdf ("There is ample case law within the federal circuits supporting the basic propositions on which *Twombly* and *Iqbal* were decided.")

[19] *See, e.g.,* Lawyers for Civil Justice, *LCJ Comments to the Civil Rules Advisory Committee, "The Search for Standards. How Amendments to the Federal Rules of Civil Procedure Can Help Solve the E-Discovery Crisis ("2004 LCJ Comments")* (2004).

[20] Ronald J. Allen & Alan E. Guy, *Conley as a Special Case of Twombly and Iqbal: Exploring the Intersection of Evidence and Procedure and the Nature of Rules*, Penn. St. L. Rev., (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1589732.

standards regarding their discovery obligations.[21] The result is a "patchwork of varying discovery 'rules'" that are "unlikely to enhance the efficiency of electronic discovery practice – or to provide the desired guidance or certainty."[22]

The Report of the Civil Rules Advisory Committee that proposed the 2006 e-discovery amendments agrees that these issues are best resolved by rules amendments and not *ad hoc* litigation. Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Comm. on the Fed. Rules of Civil Procedure, to the Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure (May 27, 2005) (Hereinafter referred to as the "Committee Report"). The Report states that the rule making process allows participation from a broad spectrum of participants — judges, attorneys, bar groups, academics, and litigants. *Id.* at 18, 21. The collection and review of such broad perspectives is not possible or proper by a court deciding a single contested case.

Proceeding via amendment also allows the Committee to consider broad, "architectural" issues and options in a way that a single judge deciding individual cases cannot. The Report's discussion of earlier amendments applies with equal force here:

> [T]he Committee's efforts leading to the 2000 amendments focused on the "architecture of the discovery rules" to determine whether changes can be effected to reduce the costs of discovery, to increase its efficiency, to increase uniformity of practice, and to encourage the judiciary to participate more actively in case management. The proposed amendments to make the rules apply better to electronic discovery problems have the same focus.

Id. at 20-21.

The need to overhaul the civil litigation system is real and immediate. While the precise fixes may provoke vigorous debate, as have every prior effort to amend the Rules to deal with the problems presented by modern litigation in the information age, there is general and widespread agreement that the current system is not working as it should.[23]

IV. Solving Systemic Problems

Many current litigation issues need to be addressed. These issues include (i) balancing the interrelationship of pleading and discovery, (ii) reevaluating the premises and focus of discovery, especially e-discovery, (iii) developing clear preservation standards, and (iv) deterring runaway litigation costs by reasonable cost allocation rules. Such issues must not be left to the vagaries of individual cases by case determinations driven by the narrow interests of the specific parties litigating those cases. These issues impact not only the litigants in a specific case but also the courts applying the rules, the attorneys interpreting those rules and counseling their clients, and the members of society wanting and needing a system of civil justice that provides meaningful, accessible and

[21] LCJ Comments, *supra* note 19, at 6-7.
[22] Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up To The Task?,* 41 B.C.L. Rev. 327, 378 (2000).
[23] *See, e.g.*, Institute for the Advancement of the American Legal System, *Final Report On The Joint Project Of The American College Of Trial Lawyers Task Force On Discovery And The Institute For The Advancement Of The American Legal System* (2009), *available at* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008.

affordable dispute resolution and certainty with which to govern their conduct in advance of and in avoidance of litigation and ancillary disputes. The law and litigation affect primary behavior. Inefficient and unpredictable litigation is a tax on productive behavior.[24] More importantly, the litigation system affects primary behavior in the world at large, and a dysfunctional litigation system is likely to have perverse effects in the world at large by sanctioning appropriate behavior and providing incentives for inappropriate behavior.[25] These perverse effects weaken our economy and social structure, our global competitiveness, and could ultimately undermine our democracy. Adjusting the Rules to the demands of millennial litigation has hugely important ramifications today and for our future.

A. Require a Short, Plain Statement of the Material Facts

1. The Rules Must Require More than Mere Notice Pleading

Original Rule 8 was drafted as a pragmatic reaction to abuses of common law and code pleading that detracted from merits-based decision-making. Instead of adopting Rule 8 as a doctrinal choice in favor of notice pleading, which leaves issue identification and resolution to discovery and trial, the drafters thought that Rule 8 was simply the most practical tool available at the time to resolve cases simply. In complex litigation, however, the reaction has been to require more particular pleading standards *for the same reason*: so that discovery would not become the same sort of irrelevant, expensive time waster that common law and code pleading became.[26].

Judge Clark, according to one group of commentators, "did not believe in a total abandonment of the requirement of allegations of specific fact in pleadings."[27] To the contrary, in the words of another commentator, "Clark insisted that there were limits to the generality of pleading allowed under the Federal Rules. A bare allegation that the defendant had injured the plaintiff through negligence, he said, would not suffice."[28] It is therefore incorrect "to characterize the adoption of notice pleading as the signal that wholly unsupported, conclusory factual allegations would render a pleading sufficient to withstand a motion to dismiss."[29]

Recent scholarship has begun identifying more precisely the variables that a pleading system needs to accommodate. The critical questions are the knowledge each party possesses prior to litigation, how symmetrically distributed that knowledge is and the cost of obtaining more information and again how the cost will be distributed over the parties; and the value of the litigation for promoting the primary aims of the law. If the parties possess substantial knowledge about the allegations and

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[24] See Allen, *supra* note 20.

[25] *Id.*

[26] Granted that Rule 8(a) was originally adopted to avoid the formalism and abuse that had become associated with code pleading and to organically connect the pleadings to the newly created system of elaborate discovery devices. It would be a serious mistake, however, to believe that the drafters of the new rules intended to impose no burden whatsoever on a plaintiff seeking the benefit of the litigation system. Any rule that allowed a plaintiff to reach the discovery process—with all of its inevitable burdens and expense—merely by the unilateral allegation of a conclusory assertion of defendant's liability would make a mockery of the values of fairness and efficiency inherent in our procedural system. A plaintiff must do more than simply allege liability. "[F]ashioning procedures without any serious concern for the avoidance of economic waste and the attainment of economic efficiency inexcusably drains society's resources and violates the dignity of the litigants whose personal resources are unduly affected." Redish, *supra* note 33, at 596-97.

[27] Richard L. Marcus, Martin H. Redish & Edward F. Sherman, *Civil Procedure: A Modern Approach* 133 (4th ed. 2005).

[28] Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 Yale L.J. 914, 917-18 (1976).

[29] Marcus, *supra* note 27, at 134.

the costs of obtaining further knowledge through discovery are symmetrical, little is to be gained by wasting resources on pleading. However, when those variables begin to shift, as they have in modern litigation, then the justification for investing greater resources in pleading rises commensurably. In addition, an intelligently designed system will take into account the probability of correct outcomes and the costs of erroneous outcomes, and here it must be kept in mind that forcing a blameless defendant to trial is an erroneous outcome. [30]

Thus, while the system adopted in the original Federal Rules for the most part eschewed the requirements of factual detail associated with code pleading, it would be both unwise and incorrect to assume that the newly adopted rules would be satisfied by anything less than allegation of facts sufficient to justify the reasonable conclusion that the case had merit. Original Form 9 (now Form 11) was not to the contrary. There, the very allegation of the facts known to plaintiff demonstrated the plausibility of unlawful behavior on the part of one of the parties: pedestrians are not run over absent the failure of at least one of the parties to fail to live up to the standard of due care.This is all that the Supreme Court in *Twombly* and *Iqbal* held Rule 8(a) to mean—that a claim be "plausible" on its face. An allegation of a legal conclusion that is nothing more than a mere factual possibility does not justify the costs and burdens triggered by invocation of the judicial process. These decisions, then, did not represent an alteration of or departure from the standard of original Rule 8(a). To the contrary, they restored some notion of common sense and order to what had become, over the years, interpretive chaos.[31]

While we maintain that the Federal Rules of Civil Procedure should be reconsidered and amended in light of contemporary litigation practice, it is important to see that the Court's decisions in *Iqbal* and *Twombly* were both justifiable and moved the pleading dynamic in the proper direction. The primary criticism of the cases is that they "changed" the meaning of Rule 8. It is strange, though, to criticize one interpretation of a rule by reference to another. More importantly, the criticisms neglect that the *Conley* interpretation was driven by the conceptual understandings of the problems facing litigation at the time; as those understandings change, so too is it reasonable to ask the meaning of the rule in light of those changed understandings. That may be all that the recent cases have done. [32]

Because the vague text of the current version of Rule 8(a) has given rise to both mistake and manipulation, we firmly believe that a revision of that text is required to guarantee that no court may misconstrue its intent in the future. Rule 8(a) requires more than mere notice of a claim.

There is nothing new or radical about clarifying pleading standards to address complaints of non-merits-based, expensive, irrelevant procedures that dominate litigation. "[F]ashioning procedures without any serious concern for the avoidance of economic waste and the attainment of economic efficiency inexcusably drains society's resources and violates the dignity of the litigants whose personal resources are unduly affected."[33] Litigation has become more complicated and clear

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[30] *See* Allen, *supra* note 20.

[31] Martin H. Redish & Lee Epstein, *Bell Atlantic v. Twombly and the Future of Pleading in the Federal Courts: A Normative and Empirical Analysis*, 12-13 (2008), http://ssrn.com/abstract=1581481. "[A]n unduly lax pleading standard, when combined with the availability of invasive, expensive and burdensome discovery can easily risk over-enforcement of the substantive law because even defendants who have caused no harm will be induced to settle, if only to avoid the burdens of the litigation process . . . ."

[32] *See* Allen, *supra* note 20 for a thorough examination of this and related issues.

[33] Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561, 596-97 (2001).

pleading standards are a natural and legitimate reaction. Discovery has become as much of a problem as common law and code pleading were, thus particularized identification of material facts and issues at the initial pleading stage is the proper response.

To this end, we propose changes to apply to all civil actions the pleading standards currently used in numerous types of cases. These changes are primarily to Rule 8 but the changes also apply to Rules 9, 12 and 65. They include a stay of discovery, just as currently exists under the Private Securities Litigation Reform Act, pending resolution of a challenge to the sufficiency of a pleading via motion to dismiss, for more definite statement, or for judgment on the pleadings. Our proposal is as follows: (deletions are ~~struck~~ and additions are **bold underscore**)

Rule 8. General Rules of Pleading

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement**, made with particularity,**[34] of **all material facts known to the pleading party that support** the claim**,**[35] ~~showing~~ **creating a reasonable inference**[36] that the pleader is **plausibly**[37] entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

For the purposes of this section, a material fact is one that is necessary to the claim and without which it could not be supported. As to facts pleaded on information and belief, the pleading party must set forth with particularity the factual information supporting the pleading party's belief.[38]

* * *

(d) ~~Pleading to Be Concise and Direct;~~ Alternative Statements; Inconsistency.

~~**(1)** ***In General.*** Each allegation must be simple, concise, and direct. No technical form is required.~~

(~~2~~1) ***Alternative Statements of a Claim or Defense.*** A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

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[34] Fed. R. Civ. P. 9(b).
[35] American College of Trial Lawyers, *Proposed Pilot Project Rules 2.1* (2009), http://www.actl.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=4509.
[36] Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(2) (2008).
[37] From *Twombly* and *Iqbal.*
[38] ACTL Prop. Pilot Rules 2.1 (with slight modification).

(~~3~~2) ***Inconsistent Claims or Defenses.*** A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

* * *

Rule 9. Pleading Special Matters

* * *

(b) Fraud or Mistake; Conditions of Mind. **In accordance with Rule 8(a)(2),** in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.

(c) Conditions Precedent. In pleading conditions precedent, **so long as the pleading otherwise satisfies the requirements of rule 8(a)(2),** it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

* * *

(a) (4) ***Effect of a Motion.***

(A) ***Alteration of time periods.*** Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

> **~~(A)~~(i)** if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or
>
> **~~(B)~~(ii)** if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(B) ***Stay of Discovery.*** **Upon the filing of a motion to dismiss under Rule 12(b)(6), a motion for judgment on the pleadings under Rule 12(c), or a motion for more definite statement under Rule 12(e), all discovery and other proceedings shall be stayed during the pendency of the motion unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.**[39]

* * *

Rule 65. Injunctions and Restraining Orders

[39] 15 U.S.C. § 78u-4(b)(3)(B).

* * *

(b) Temporary Restraining Order.

(1) ***Issuing Without Notice.*** The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint **that comports with Rule 8(a)(2)** clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

a. History of Pleading Before Rule 8

The need to change pleading requirements to promote better merits-based decisions is best understood in an historical perspective.[40] Through this lens, Rule 8 is not a doctrinal choice of notice pleading but is rather a pragmatic reaction against abuses of common law and code pleading that detracted from merits-based decision-making.

i. Common Law (Issue Pleading)

The common law pleading practice that developed in England between the thirteenth and sixteenth centuries required plaintiffs to choose a single writ under which to bring their claims.[41] Each writ triggered a different form of action with distinct procedural, evidentiary, and jurisdictional requirements.[42] Although less sophisticated, early American pleading practice followed the English common law model and continued to increase in technicalities through the early nineteenth century.[43] English common law rules restricting joinder, insisting on a single form of action, and requiring great precision and detail were often taken seriously.[44]

Common law pleading developed into a complex and formalistic system under which plaintiff and defendant exchanged hyper-technical pleadings in an attempt to reduce the case to a single legal or factual issue.[45] As a result, Plaintiffs often lost their cases on technical pleading grounds without a court ever reaching the merits of their claims.[46]

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[40] This pleading practice history is a compilation that draws from a number of sources and commenters including Koan Mercer, Robert Bone, Stephen Subrin, Charles Clark, Emily Sherwin and Wright & Miller.
[41] Koan Mercer, *"Even in These Days of Notice Pleadings": Factual Pleading Requirements in the Fourth Circuit*, 82 N.C. L. Rev. 1167, 1168 (2004).
[42] *Id.*
[43] *Id.* at 1169.
[44] Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 927 (1986).
[45] *See* Mercer, *supra* note 41, at 1168.
[46] *See* Mercer, *supra* note 41, at 1168.

Moreover, common law forms of action restricted litigation by requiring claimants to procure a writ from the king, through the clerk in chancery.[47] Over time, available writs became limited to cases where precedent existed, because new writs were rarely created.[48]

The common law proved unable to handle new disputes easily or to provide adequate relief in complicated cases.[49] Many disputes did not fit an existing writ and common law remedies were too limited to furnish relief in complicated disputes. The stilted procedure dominated substance, preventing adequate relief.[50] For example, the common law's restrictive joinder rules affecting parties and claims prevented adjudication of all pieces of a complex dispute in one proceeding.[51]

In response, and in particular for complicated disputes, equity developed as an auxiliary forum that provided relief when the common law furnished an "inadequate" remedy or no remedy at all.[52] Free of the arbitrary procedures of the common law, the chancellor in equity could resolve any type of dispute, including types not yet encountered, and could employ the discretion many jurists believed was necessary to a properly functioning legal system.[53]

When law and equity were merged and the forms of action were abolished, general procedural principles modeled on those that had been developed in equity were applied throughout the merged system.[54] The Field Code of Procedure effected these important changes.[55]

ii. Code (Fact Pleading)

The "Field Code" was the first of many state pleading codes.[56] It merged law and equity and extended equitable procedural principles to the merged system as a whole.[57] The general procedural principles of equity served as a model for code provisions precisely because those principles approximated an ideal procedural system reflecting the correct relationship between procedure and substantive law.[58]

To initiate a civil action under the Field Code, plaintiffs were required to submit a "plain and concise statement of the facts constituting a cause of action without unnecessary repetition."[59] The Field Code was intended to work a radical change in pleading practices.[60] Disputes soon arose over what causes of action were entailed in particular suits, what facts were necessary to make out the relevant

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[47] Charles E. Clark, *History, Systems and Functions of Pleading*, 5 Am. L. Sch. Rev. 716, 721 (1922).
[48] *Id.*
[49] Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 Colum. L. Rev. 1, 21-22 (1989).
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at 22-23.
[54] *Id.*
[55] *Id.*
[56] *See* Mercer, *supra* note 41, at 1169.
[57] Bone, *supra* note 49.
[58] *Id.*
[59] Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules and Conley v. Gibson*, 52 How. L.J. 73, 76 (2008); *see also*, N.Y. Field Code Law ch. 379 § 142 (1848) (*amended by* ch. 4348 (1949)).
[60] *See* Sherwin, *supra* note 59, at 77.

causes of action, and how much factual detail must be included in a complaint.[61] For example, in *City of Logansport v. Kihm,* the court held a pleading insufficient because plaintiff alleged that she struck the defective street, but not necessarily the defect in the street.[62] And, in *Reicher v. Trade Bank of New York* the court held that in order to plead the cause fully it was incumbent upon the depositor, in addition to other necessary facts, to allege the fact which constitutes the cause of action and courts will not sustain a pleading that only states evidentiary facts from which a trier of fact can infer liability[63]

iii. FRCP Drafting Committee

As *Kihm* and *Reicher* demonstrate, Code pleading produced illogical results where cases were often decided on technicalities rather than the merits. It was during this time that Charles Clark and others began to advocate reform of the Field Code's factual pleading requirements.[64] This reform came by way of the Federal Rules of Civil Procedure, specifically Rule 8.

The vision of the drafters of Rule 8 was to simplify pleading so that cases were decided on facts rather than technicalities. Some argue that the shift from notice to case screening marks a sharp break from the vision of the original Federal Rule drafters. However, it has been pointed out that the 1938 drafters were pragmatists whose work was influenced by the legal realism of the period.[65] Liberal pleading and evidence-based merits decisions were a pragmatic, not a natural law, ideal. A procedural system with these elements would work much better than the common law and code systems they inherited.[66]

The drafters' choice of pleading rules fit their pragmatic vision. Simplified pleading accomplished the notice-giving function at minimum cost and allowed cases to proceed through discovery and on to trial where they could be decided based on what actually happened rather than on legal technicalities.[67] Allowing cases to go to trial made sense because most cases were relatively small; the huge, complex case of today was relatively unknown. In that context, it made sense to assume relatively manageable discovery and trial costs for most cases.[68]

Federal Rule of Civil Procedure 8(a)(2) refers to "a short and plain statement of the claim showing that the pleader is entitled to relief' only in order to avoid the code's "facts constituting a cause of action" formulation.[69] Importantly Rule 8(a)(2) does not refer to notice pleading explicitly. The term "notice pleading" was in common use at the time to refer to the most liberal pleading standard, so if bare notice pleading were intended, the text of the Rule or the Committee Note would have said so.[70] "[Rule 8(a)], when properly construed, does not serve as an "Open, Sesame" to plaintiffs

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[61] *Id.*
[62] *City of Logansport v. Kihm*, 64 N.E. 595, 596 (Ind. 1902).
[63] *Reicher v. Trade Bank of New York,* 124 Misc. 166, 167 (N.Y. App. Term 1924).
[64] *See* Mercer, *supra* note 41, at 1169.
[65] Robert G. Bone, *Twombly, Pleading Rules ,and the Regulation of Court Access*, 94 Iowa L. Rev. 873, 892 n.100 (2009).
[66] *Id.* at 895.
[67] *Id.*
[68] *Id.* at 896.
[69] *See* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1202 (3d ed. 2004).
[70] Bone, *supra* note 65, at 892 n.100.

seeking to engage in legalized blackmail or to conduct fishing expeditions through the wasteful and inefficient use of the discovery process."[71]

Rule 8 came to stand for notice pleading through judicial interpretations. After Charles Clark was appointed to the Second Circuit Court of Appeals in 1939, he worked to establish Rule 8(2)(a) as a notice pleading rule and resisted efforts to construe it more strictly.[72] With the decision of *Conley v. Gibson,* and its infamous "no set of facts" dictum, the Court ushered in 50 years of "puzzling" disputes regarding what constituted a sufficient pleading vis-à-vis a claim for relief[73] until *Twombly* and *Iqbal*, where the Court clarified that Rule 8 called for more than mere "notice pleading."[74] However, the legal system has changed, and the Supreme Court, the body that inadvertently established notice pleading, revised its position in response to the realities of modern litigation.

Rule 8 was never meant to sanction mere "notice," but was designed to correct flaws in common law and code pleading perceived as dictating outcomes on the basis of procedure rather than merits. Thus, it is consistent with the vision of the original drafters of the Rules of Civil Procedure to adjust those rules whenever form threatens to supersede substance.[75] Indeed, since the adoption of the Rules in 1938, adjusting to avoid placing form over substance has been a consistent theme.

b. Specific Examples of Heightened Pleading Requirements Since 1938:

> *"On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires."*
>
> *Twombly,* 550 U.S. at 569 n.14.

Examining Fed. R. Civ. P. 9(b), the Supreme Court in *Twombly* illustrated the common theme. Since the adoption of the Federal Rules of Civil Procedure in 1938, the reaction to perceived threats of abusive[76] litigation or to types of litigation viewed as "special cases" has been to require more

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[71] Redish, *supra* note 31, at 7 and 12-13.

[72] *Id.*

[73] *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562-63 (2007) ("We could go on, but there is no need to pile up further citations to show that Conley's 'no set of facts' language has been questioned, criticized, and explained away long enough. To be fair to the Conley Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.").

[74] *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (holding that the plaintiffs' complaint was sufficient to survive a Rule 12(b)(6) motion, the Court stated that the "accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

[75] *See* Allen, *supra* note 20(for a philosophical defense of this point).

[76] "Abusive" may be in the eye of the beholder, but for the purposes of this paper – and in keeping with the motivations behind the original adoption of the Rules of Civil Procedure (*see* Section I, above) – "abusive" litigation is intended to refer to a deviation from merits-based outcomes; i.e., to litigation in which process – usually discovery – drives outcomes not correlated with the merits of underlying claims, primarily by creating the threat of enormous litigation expense not commensurate with potential liability.

detailed and factually-supported statements of claims and contentions beyond what was traditionally required by Rule 8.

i. Fed. R. Civ. P. 9(b)

The first such "special case," Fed. R. Civ. P. 9(b), requires "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Rule 9(b)'s heightened pleading standard prevents the "cart before the horse" approach of commencing a civil action as a pretext for abusive discovery and serves three purposes: "(1) informing defendants of the nature of the alleged wrong, so they may mount an adequate defense; (2) *eliminating conclusory complaints filed as a pretext for using discovery to uncover heretofore unknown wrongs;* and (3) protecting defendants from spurious fraud charges that might be particularly damaging to reputation."[77]

Those three purposes were accomplished by requiring factually-supported allegations beyond the requirements of Rule 8. The reference to 'circumstances' in the rule requires the plaintiff to state "the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff."[78]

ii. 1955 Proposed Pleading Change to Address Costly Antitrust Litigation

Professor Robert Bone noted recently, that in the 1950's, motivated by the perception that antitrust litigation had become disproportionately costly, the Ninth Circuit Judicial Conference proposed to the Civil Rules Advisory Committee an amendment to Fed. R. Civ. P. 8(a)(2) that would have added to the requirement of a "short and plain statement showing that the pleader is entitled to relief" the additional mandate that the pleader's statement "contain the facts constituting a cause of action."[79] Though the Advisory Committee ultimately rejected the proposal, it did so because it believed Rule 8 already required factual and not mere notice pleading.[80] In other words, the perception that litigation had become too costly was met with a proposal to require greater specificity in pleading as a cure.

iii. Admiralty Rule E(2)(a)

The current "Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions" (the "Admiralty Rules") were adopted in 1966 to harmonize pre-existing procedures in admiralty with the primary, stated goal of Federal Rule 1. *See* Advisory Committee Note to the 1966 adoption of the Admiralty Rules. Admiralty Rule E(2)(a) states that a complaint "shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for more definite statement, to commence an investigation of the facts and to frame a responsive pleading" for all actions brought under Admiralty Rules B, C and D [81] In other words,

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[77] *Levine v. Prudential Bache Properties, Inc.,* 855 F. Supp. 924, 929-30 (N.D. Ill. 1994) (citing *Viacom, Inc. v. Harbridge Merchant Servs., Inc.,* 20 F. 3d 771, 776-77 (7th Cir. 1994) (emphasis added)).

[78] *Viacom*, 20 F. 3d at 777.

[79] Bone, *supra* note 70, at 893-94 n.109 (2009).

[80] *Id.*

[81] Per Admiralty Rule E(1), application is to admiralty actions "in personam with maritime attachment and garnishment, actions *in rem*, and petitory, possessory, and partition actions," i.e., *in rem* and *quasi in rem*.

"just, speedy and inexpensive" is achieved by requiring heightened, factual pleading beyond what is required by Rule 8.

iv. Antitrust, Securities Fraud, Civil Rights, and Other "Serious Frivolous Suit Problems" Spurred Heightened Pleading Requirements

Professor Bone notes that in the 1980's, federal courts reacted to perceptions of increasing frivolity in antitrust, securities fraud, and civil rights litigation with judge-made requirements of greater particularity in pleading.[82] The Supreme Court rejected the ability of the federal courts to heighten pleading standards judicially (i.e., without formal amendment of the Rules).[83] Nonetheless, the concerted reaction of the judiciary to perceptions of abuse of notice pleading was, again, to tighten pleading standards.

v. Private Securities Litigation Reform Act

In 1995, Congress reacted to concerns of abusive and costly securities litigation – primarily claims of securities fraud – with the Private Securities Litigation Reform Act. A cornerstone of the reform was not only heightened pleading requirements but a stay of discovery automatically imposed during any challenge of the sufficiency of a plea for relief. Provisions of the Private Securities Litigation Reform Act are set out below, with emphasis added:

a. 15 U. S. C. § 78u-4(b)(1):

> In any private action arising under this chapter in which the plaintiff alleges that the defendant--
>
> (A) made an untrue statement of a material fact; or
>
> (B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;
>
> *the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.*

b. 15 U. S. C. § 78u-4(b)(2):

> In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, *the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.*

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[82] Bone, *supra* note 70, at 889-90 n. 82-87.

[83] *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163 (1993).

c. 15 U. S. C. § 78u-4(b)(3)(B):

> In any private action arising under this chapter, *all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss,* unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

vi. The "Y2K" Act[84]

Hindsight renders the Y2K Act superfluous, but its provisions reinforce the idea that when potentially-crippling litigation is feared, the consensus response is to require claimants to plead with more specificity. The Congressional findings justifying imposition of heightened pleading standards are particularly instructive.[85] In great detail, Congress emphasized that litigation has become costly

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[84] 15 U.S.C. §§ 6601-6617 (2008).

[85] The Congressional findings that supported the Y2K act are surprisingly applicable to litigation generally.

(a) Findings
The Congress finds the following:

> . . .
> (3)(A) Because year 2000 computer date-change problems may affect virtually all businesses and other users of technology products to some degree, there is a substantial likelihood that actual or potential year 2000 failure will prompt a significant volume of litigation, much of it insubstantial.
> (B) The litigation described in subparagraph (A) would have a range of undesirable effects, including the following:
> (i) It would threaten to waste technical and financial resources that are better devoted to curing year 2000 computer date-change problems and ensuring that systems remain or become operational.
> (ii) It could threaten the network of valued and trusted business and customer relationships that are important to the effective functioning of the national economy. iii) It would strain the Nation's legal system, causing particular problems for the small business and individuals who already find that system inaccessible because of its complexity and expense.
> . . .
> (iv) The delays, expense, uncertainties, loss of control, adverse publicity the problems sought to be addressed.
> (4) It is appropriate for Congress to enact legislation to assume that the year 2000 problems described in this section do not unnecessarily disrupt interstate commerce or create unnecessary caseloads in Federal courts and to provide initiatives to help businesses prepare and be in a position to withstand the potentially devastating economic impact of such problems.
>
> (5) Resorting to the legal system for resolution of year 2000 problems described in this section is not feasible for many businesses and individuals who already find the legal system inaccessible, particularly small businesses and individuals who already find the legal system inaccessible, because of its complexity and expense.
>
> (6) concern about the potential for liability-in particular, concern about the substantial litigation expense associated with defending against even the most insubstantial lawsuits-is prompting many persons and businesses with technical expertise to avoid projects aimed at curing year 2000 computer date-change problems.
>
> (7) A proliferation of frivolous lawsuits relating to year 2000 computer date-change problems by opportunistic parties may further limit access to courts by straining the resources of the legal system and depriving deserving parties of their legitimate rights to relief.

(8) Congress encourages businesses to approach their dispute relating to year 2000 computer date-change

and expensive, so much so, that an expected wave of commercial litigation regarding computer malfunctions would threaten the national economy by diverting businesses from their core functions of providing goods and services necessary to the well-being of the population. Congress found that the justice system was *already* inaccessible to many small businesses with legitimate claims because of the expense and burden of litigation. Fearing a flood of litigation arising from then-anticipated computer malfunctions when dates changed from 1999 to 2000, Congress acted preemptively to require stringent pleading standards.

The Act's key pleading requirements are found in 15 U.S.C. § 6607 and are, unsurprisingly, remarkably similar to those employed in each of the other examples in this section:

> * * * **(b) Nature and amount of damages**
>
> In all Y2K actions in which damages are requested, there shall be filed with the complaint a statement of *specific information as to the nature and amount of each element of damages and the factual basis for the damages calculation*.
>
> **(c) Material defects**
>
> In any Y2K action in which the plaintiff alleges that there is a material defect in a product or service, there shall be filed with the complaint a *statement of specific information regarding the manifestations of the material defects and the facts supporting a conclusion that the defects are material.*

problems responsibly, and to avoid unnecessary, time-consuming, and costly litigation about Y2K failures, particularly those that are not material. Congress supports good faith negotiations between parties when there is such a dispute, and, if necessary, urges the parties to enter into voluntary, nonbinding mediation rather than litigation.

(d) Required state of mind

> In any Y2K action in which a claim is asserted on which the plaintiff may prevail only on proof that the defendant acted with a particular state of mind, there shall be filed with the complaint, with respect to each element of that claim, a *statement of the facts giving rise to a strong inference that the defendant acted with the required state of mind. (Emphasis added.)*

vii. Local Patent Rules

A final example of the by-now familiar resort to mandating more-specific statements of contentions is found in local patent rules adopted by various district courts. The district courts have been unable to require heightened pleading standards in the fashion of the above examples because Fed. R. Civ. P. 84 "blesses" the use of Form 18 — a four-paragraph, barebones recitation of a patent infringement claim.[86] Instead, and because of this restriction, local patent rules typically require factually-supported statements of contentions in Rule 26 disclosures, but the purpose and effect are the same as if directed by the pleadings, i.e., before discovery commences, the claimant must make a factually-supported statement of specific contentions. [87]

As these numerous examples demonstrate, heightened pleading standards are neither new nor strange. They are used every day in numerous types of litigation throughout all federal courts. They are imposed to guard against exactly the same deficiencies that led to the adoption of the Federal Rules of Civil Procedure to begin with, that is, to prevent procedure and cost from driving judicial outcomes and to ensure that adjudication is based on the merits of underlying claims, not on the fear of endless, costly, and disruptive litigation. It is difficult to propose any justification for providing the protections of appropriately heightened pleading standards to some industries, but not others; to some classes of litigants, but not others; in some types of cases, but not others; and to some people, but not others.

2. Procedure is Again Outweighing Merits and Driving Up the Cost of Litigation

The widespread perception among litigants and their attorneys is that procedure, primarily discovery, is once again outweighing substance. The *in terrorem* effect of massive, unfettered discovery and the seemingly-inevitable (and increasingly technically-based) claims of spoliation that accompany it are (a) promoting settlements that go well beyond perceived liability or (b) driving up the cost of much litigation to levels entirely disproportionate to the underlying dispute. The continual efforts to rein in this problem show that formerly simple disputes are now "complex" precisely because of the out-of-balance procedures that accompany their adjudication. The evidence that procedure is

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[86] *See, e.g.*, N.D. Ill. Pat. R. pmbl., *available at* http://www.ilnd.uscourts.gov/home/assets/documents/Rules/localpatentrules-preamble.pdf.

[87] A comprehensive catalog of local patent rules can be found in this informative article: http://www.kirkland.com/siteFiles/Publications/OAEA370BB07989CF9286D12FFOC38469.pdf, and a specific example, the local rules of the United States District Court for the Eastern District of Texas, can be found here: http://www.txed.uscourts.gov/Rules/LocalRules/Documents/Appendix%20M.pdf.

outweighing the merits is discussed throughout this paper and will not be repeated here. Nonetheless, that evidence is compelling and pervasive and demands a constructive response. "[L]ittle doubt exists that in the years since [the Federal Rules were first promulgated], at least in a certain category of cases . . . discovery has become a major problem. It is the generally held view that inefficiencies, gaming, waste and burdens have become widespread . . . . [A]s the Supreme Court recently acknowledged, [changes in the Federal Rules designed to curb discovery abuse] have been frustratingly inconsistent in stemming the tide of discovery problems in larger and more complex cases."[88]

3. Restoring the Balance

The purpose of the judicial system is the evaluation and adjudication of known claims, not the unfettered search for unknown claims. Yet, the current procedural framework has devolved to where legal action is permitted without actual knowledge of facts to support a cognizable claim or to limit litigation to the known claim. And, even when claims are known, no incentive exists to identify the claims with any specificity. Thus, today, the discovery process is often without a tether to constrain its consumption of time and resources.

Twombly and *Iqbal* are the Court's recognition of systemic abuses and distortions, "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime . . . but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."[89] It is not an unreasonable burden to require a plaintiff to know and identify facts that state a plausible claim in order to initiate a legal action. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at ___, 129 S.Ct. at 1949. A fact-based pleading standard, separating the plausible from the merely possible, is a standard with which all litigants can live. Indeed, numerous classes of litigants already function smoothly under the proposed pleading standards. Ultimately, these amendments are essential to realize the goal of Rule 1.

It is also important to recognize that neither the litigation system generally, nor the pleading rules specifically, exist purely for their own purposes, but instead are instrumental to the rule of law. The rule of law, in turn, is critical for setting proper incentives to encourage productive primary behavior in society at large. If the litigation system raises costs too high or encourages too many wrongful verdicts or inappropriate expenditures of funds, the effects will be felt on productive behavior in the world at large. For example, the ability of one party to litigation to make another face ruinous costs acts as a tax on the behavior underlying the litigation. If the behavior is inappropriate or illegal, the substantive award of damages should act as that "tax,"; but if the behavior is neither inappropriate nor illegal, then procedural costs imposed by the litigation system can distort the substantive law, resulting in inappropriate disincentives to productive primary behavior. This point obviously was informing the Court's analysis in *Twombly*, with its focus on the adverse impact that predatory litigation practices can have on entire industries.

Realistic pleading standards based on *Twombly* and *Iqbal* will not deter legitimate claims. The best available data demonstrate that *Twombly* and *Iqbal* have had at most a negligible impact on dispositive motions. The lower courts have interpreted the two cases as largely consistent with prior law.

[88] Redish *supra* note 31 at 5.
[89] *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1950 (2009).

Pleading rules codifying similar standards will serve to protect government officials and other defendants from the burdens of vexatious litigation, without imposing any significant impediment on the ability of plaintiffs to pursue legitimate claims.[90]

4. A Realistic Pleading Standard Is Required.

The Supreme Court acknowledged in *Twombly* that the heightening of pleading standards is not an appropriate matter for judicial interpretation, but requires amendment of the Federal Rules of Civil Procedure.[91] The same factors that required comprehensive procedural rules counsel in favor of amending the pleading rules as one piece of a comprehensive rule overhaul, rather than awaiting case-by-case application of the *Twombly/Iqbal* standard in the lower courts.

B. Adopt Clear, Concise, and Limited Discovery Rules

1. Scope of Discovery

The scope of discovery is defined largely by Rule 26, with the help of several rules that describe the specific discovery tools available. Debates over the scope of discovery and concern regarding discovery abuse, misuse and excessive expense posing significant danger to the administration of justice have persisted since the adoption of the Federal Rules of Civil Procedure in 1938. Nearly three quarters of a century later, despite *numerous* attempts to address these concerns, the problem remains.[92] Indeed, "(a)lthough the civil justice system is not broken, it is in serious need of repair."[93] Much of the repair must come through meaningful changes, with real limitations, to the rules that define the scope of discovery. The proposed amendments below offer such meaningful standards and serve to eliminate much of the ambiguity in the rules that led to the explosion of discovery costs.

2. The Need for a Clear, Concise and Limited Scope of Discovery Rule: Fed. R. Civ. P. 26(b)(1)

In 1970 the rules addressing discovery were significantly amended. Specifically, Rule 26 was expanded to govern the scope of discovery generally.[94] Notwithstanding its expansion, the Advisory Committee Notes specifically recognized the "broad powers" of the court to regulate discovery.[95]

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[90] *See generally* Gregory G. Katsas, *Federal Pleading Standards Under Twombly and Iqbal*, Statement before House Judiciary Committee Hearing (December 16, 2009).

[91] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 n. 14 (2007).

[92] Civil Rules Committee Chair Judge Paul Niemeyer acknowledged the problem in his report to the Committee on Rules of Practice and Procedure (The Standing Committee) and prior to the 2000 amendments. He reported the revival of efforts to narrow the scope of discovery (a proposal "repeatedly considered…over the years" and continually rejected) and noted, "Twenty years of failure to reduce worrisome discovery problems to tolerable levels may justify resort to stronger medicine." *Report of the Advisory Committee on Civil Rules* 9 (May 18, 1998), *available at* http://www.uscourts.gov/rules/Reports/CV5-1998.pdf. Unfortunately despite continual acknowledgment of a need for "stronger medicine," numerous amendments to the rules have proven ineffective to solve the problems.

[93] Am. College of Trial Lawyers & Inst. For the Advancement of the Am. Legal Syst., *Final Report* 2 (2009).

[94] In its new form, Fed. R. Civ. P. 26(b)(1) stated that "[p]arties may obtain discovery regarding any matter, not privileged, *which is relevant to the subject matter involved in the pending action*, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other part . . . ." (emphasis added).

[95] Fed. R. Civ. P. 26 advisory committee's note (1970).

Despite this power, by 1976 discovery abuse emerged as a major concern.[96] Beginning in 1977, the Committee took up the question of how best to curb discovery abuse, including consideration of whether to narrow the scope of allowable discovery.[97] The Committee ultimately determined that abuse could "best be prevented by intervention of the court as soon as abuse is threatened,"[98] and therefore amended the rule to include subsection 26(f), which allowed the court or the parties to call for a discovery conference to resolve troublesome issues.

Problems persisted.[99] In 1983, the rules were again amended in hopes of curbing the abuse.[100] This time, once again reflecting the Committee's preference for judicial intervention, language was added to the rule which would allow the court to limit discovery that was duplicative, burdensome, or available from another source, among other things.

In 1993, Rule 26 was amended to require the parties to disclose specified materials "without awaiting a discovery request."[101] Minor amendments were also made with regard to the scope and limitations of discovery "to enable the court to keep tighter rein on the extent of discovery."[102] In the Advisory Committee notes, the Committee specifically recognized that "the information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay and oppression."[103]

Once again, despite major changes to the rules, major problems with discovery remained. In April of 1995, a mere two years after the then most recent amendments to Rule 26, the topic of discovery reform was again raised in the Advisory Committee's meetings.[104] In meetings that followed,

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[96] In 1976, at the fall American Bar Association meeting, 590 lawyers unanimously voted that discovery was being abused. Advisory Committee on Rules of Civil Procedure Meeting Minutes, May 23, 1977 at 19, *available at* http://www.uscourts.gov/rules/Minutes/CV05-1977-min.pdf.

[97] As reflected in Advisory Committee's minutes from December, 1977, the American Bar Association proposed language similar to the current proposal: "(1) **In General.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the ~~subject matter involved in the pending action, whether it relates to the~~ *issues raised by the* ~~claim or defense~~ *claims or defenses* of ~~the~~ *any* party. ~~seeking discovery or to the claim or defense of any other party, including~~ *The discovery may include* the existence, description, nature, custody, condition and location of any books, documents, or other tangible things; and the identity and location of persons having knowledge of any discoverable matter; *and the oral testimony of witnesses*. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." American Bar Association Section of Litigation, *Second Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137, 149 (1980).

[98] Fed. R. Civ. P. 26 advisory committee's note (1980).

[99] The 1983 Advisory Committee notes open with the statement: "Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems."

[100] Leading up to the 1983 amendment to R. 26(b), the American Bar Association once again advanced its proposal for narrowing the scope of discovery. The proposed language, while substantially similar to the original proposal, was amended further to narrow the proposed scope from any matter relevant to the "issues raised by the claims or defenses" of any party to any matter "relevant to the claim or defense of the party seeking discovery or to the claim of defense of any other party . . . ." American Bar Association Section of Litigation, *Second Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137, 140 (1980).

[101] Fed. R. Civ. P. 26(a)(1) (1993).

[102] Fed. R. Civ. P. 26 advisory committee's note (1993).

[103] *Id.*

[104] This discussion again broached "one of the perennial proposals for reform" i.e. narrowing the scope of discovery pursuant to R. 26(b)(1). Advisory Committee on Rules of Civil Procedure Meeting Minutes, April 20, 1995 at 5, *available at* http://www.uscourts.gov/rules/Minutes/CV04-1995-min.pdf.

discovery reform emerged as a major issue for consideration, [105] including the possibility of finally narrowing the scope of discovery under 26(b)(1). In the course of the Committee's consideration of the issue, expense of discovery in complex cases[106] arose as the primary impetus for continued reform.[107] In its consideration of how best to address the issue, the Committee remained focused on the value of judicial intervention.[108] Accordingly, a compromise emerged between the proposal of the American College of Trial Lawyers[109] and the Committee's support for judicial intervention. The compromise, which was eventually adopted into the rule, created two tiers of discovery: lawyer-managed and court-managed discovery.

Thus, as rule 26(b)(1) currently reads, lawyer-managed discovery is restricted to matters relevant to any party's claim or defense which may be expanded, through court-managed discovery, to include matter relevant to the subject matter, upon a showing of good cause.[110] The rule did not, however, serve to truly narrow the scope of discovery. Rather, the amendment merely "assigned" a portion of discovery to the courts to manage – an insufficient result, as illustrated by the failure of the amendment to sufficiently remedy the problems of civil discovery.[111] The 2006 amendments,

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[105] "When appointment of the Discovery Committee was announced, it was observed that most studies of the causes of popular dissatisfaction with the administration of civil procedure focus in large part on discovery. Discovery is expensive. Discovery is often conducted in a mean-spirited way. Discovery is used as a strategic tool, not to facilitate resolution of a controversy. Attorney self-regulation too often fails to work, as adversariness gets in the way of more professional behavior. Egos and tactics intrude. Over-use by discovery out of any reasonable proportion to the needs of the case may be more common than more direct abuse. The new disclosure practice is badly fractured as many districts have opted out of the national rule and adopted different local variations." Advisory Committee on Rules of Civil Procedure Meeting Minutes, Oct. 17-18, 1996, *available at* http://www.uscourts.gov/rules/Minutes/cv10-1796.htm.

[106] Advisory Committee on Rules of Civil Procedure Meeting Minutes, March 20-21, 1997, *available at* http://www.uscourts.gov/rules/Minutes/cv3-97.htm ("There is a strong sense that in most cases discovery is not a problem. The problems seem to be associated with 'complex' cases.").

[107] *Report of the Advisory Committee on Civil Rules* 3 (May 1999), *available at* http://www.uscourts.gov/rules/Reports/CV05-1999.pdf, states that "discovery abuse" was not a consideration in the Committee's efforts prior to the 2000 amendments and that expense was the driving force of reform. This sentiment is supported by comments in the Advisory Committee's meeting minutes, specifically, the statement from Judge Niemeyer reflected in the minutes from Oct. 1997 in which Niemeyer is credited with stating that the efforts in support of amending the rule would "more likely focus on the framework of discovery than on attempts to control 'abuses.'" Advisory Committee on Rules of Civil Procedure Meeting Minutes, Oct. 6-7, 1997, *available at* http://www.uscourts.gov/rules/Minutes/cv10-97.htm. Despite this disavowal of considerations of abuse, it is worth noting that in the initial discussions of renewed reform efforts, problems of "mean spirited", "strategic" and disproportionate discovery were acknowledged as a continuing source of dissatisfaction "with the administration of civil procedure." Advisory Committee on Rules of Civil Procedure Meeting Minutes, *supra* note 105.

[108] Advisory Committee on Rules of Civil Procedure Meeting Minutes, March 16-17, 1998 at 12-13, *available at* http://www.uscourts.gov/rules/Minutes/CV03-1998-min.pdf ("The single most important discovery change championed by lawyers is greater judicial involvement in the problem cases."; "This model, in short, is not the American College Proposal. It is instead a means of stimulating judicial involvement.").

[109] The proposal of the American College of Trial Lawyers was the recommendation that "the committee adopt the discovery scope limitation first advanced by the American Bar Association Litigation Section in 1977." *Id.* at 11.

[110] Fed. R. Civ. P. 26(b)(1).

[111] Standing Committee Meeting Minutes, June 1999 at 17, 22 *available at* http://www.uscourts.gov/rules/Minutes/ST06-1999-min.pdf ("Judge Niemeyer noted that the committee's proposed amendment to Rule 26(b)(1) would not narrow the scope of discovery . . . ."; "Judge Levi stated that the proposed amendment to Rules 26(b)(1) will not change the scope of discovery. He said that it will not keep litigants from obtaining appropriate discovery in any case. Parties will be entitled – on request and without court approval – to a very broad range of information . . . ."); Report of the Advisory Committee on Civil Rules 4 (May 1998), *supra* note 92 ("[W]e have not proposed reducing the breadth of discovery, nor have we intended to undermine the policy of full and fair disclosure in litigation. Where we have narrowed the scope of attorney managed discovery, we have preserved the original scope under court supervision.").

focusing on electronically stored information, did not eliminate the driving forces behind the decades-long effort to identify an appropriate and manageable scope of discovery, namely discovery abuse, misuse and unnecessary expense.[112] Rather, because of the explosion of technology leading to the creation and retention of more and more electronic data, discovery has only become more complex. As a one court recently opined, "[w]ith the rapid and sweeping advent of electronic discovery, the litigation landscape has been radically altered in terms of *scope*, mechanism, cost and perplexity."[113]

Self-enforcing rules are the best path to efficient discovery. As evidenced by the extensive history of amendments to Rule 26(b)(1), establishing and enforcing a reasonable scope of discovery has proved a challenge. While the repeated attempts to address the ongoing problem of discovery abuse through judicial intervention were commendable, the practical result of such intervention has not served to eradicate discovery abuse. Rather, the problem has persisted and grown. It is time to change course. Instead of relying on judicial intervention, a method that arguably encourages excessive motions practice by requiring parties to seek out the assistance of the courts, practitioners should be bound by the rules to narrow the scope of discovery without judicial oversight.

It is against this background that a new Rule 26(b)(1)[114] is proposed: ***Scope in General. The scope of discovery is limited to any nonprivileged matter that would support proof of a claim or defense and must comport with the proportionality assessment required by Rule 26(b)(2)(C).***

This proposed rule brings the focus of discovery to where it should be – to the claims and defenses in the action.[115] As noted most recently in the ACTL/IAALS Report:

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[112] *See In re Seroquel Prods. Liab. Litig.,* 244 F.R.D. 650 (M.D. Fla. 2007) ("As businesses increasingly rely on electronic record keeping, the number of potential discoverable documents has skyrocketed and so also has the potential for discovery abuse."); Am. College of Trial Lawyers & Inst. For the Advancement of the Am. Legal Syst., *Final Report* 7 (2009) ("The existing rules structure does not always lead to early identification of the contested issues to be litigated, which often leads to a lack of focus in discovery. As a result, discovery can cost far too much and can become an end in itself. As one respondent noted: 'The discovery rules in particular are impractical in that they promote full discovery as a value above almost everything else.' Electronic discovery, in particular, needs a serious overhaul. It was described by one respondent as a 'morass.' Another respondent stated: 'The new rules are a nightmare. The bigger the case the more the abuse and the bigger the nightmare.'")

[113] *PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.,* 2007 WL 2687670, at *1 (N.D.N.Y. Sept. 7, 2007) (Emphasis added.); *See also CBT Flint Partners, LLC v. Return Path, Inc.,* 2009 WL 5157961 (N.D. Ga. Dec. 30, 2009) ("The enormous burden and expense of electronic discovery are well known.")

[114] The full text of the current rule, with suggested amendments in **bold** and deleted text ~~struck-through~~ reads: **Rule 26(b)(1) Scope in General.** [Unless otherwise limited by court order,] The scope of discovery is ***limited to*** [~~as follows: Parties may obtain discovery regarding~~] any nonprivileged matter that ***would support proof of a*** [~~is relevant to any party's~~] claim or **defense *or impeachment of a witness***[~~, including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed~~] ***and must comport with the proportionality assessment required*** by Rule 26(b)(2)(C).

[115] "Discovery in general and document discovery in particular should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness." Am. College of Trial Lawyers & Inst. For the Advancement of the Am. Legal Syst., *Final Report* 8 (2009). The proposed rule is also in accordance with the scope limitations of the Am. College of Trial Lawyers & Inst. For the Advancement of the Am. Legal Syst., *21st Century Civil Justice System: A roadmap for Reform: Pilot Project Rules* 7 (2009):

10. Discovery

> The Purpose of Discovery: Discovery should enable a party to procure in admissible form through the most efficient, nonredundant, cost effective method reasonably available, evidence directly relevant to the claims and defenses asserted in the pleadings. Discovery should not be an end in itself; it should be merely a means of facilitating a just efficient and inexpensive resolution of disputes.[116]

The proposed rule also requires the parties to comply with the proportionality requirements as an integral part of the scope of discovery consideration. Judge Lee H. Rosenthal recognized the integral nature of proportionality and its tie to the proper scope of discovery in *Rimkus Consulting Group, Inc. v. Cammarata*, where she reasoned that "[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable,* and that in turn depends on whether what was done--or not done--was *proportional* to that case and consistent with clearly established applicable standards." [117]

The proposed Rule 26 also simplifies the current first tier of discovery and eliminates the second tier of discovery under the current rule by removing the language that allows the expansion of discovery for "good cause" because the requirement for a showing of good cause has been ignored:

> What has been my experience with the concept of bifurcated discovery under the 2000 amendment? (1) Attorneys do not as a general rule attempt to limit discovery to that which is relevant to a claim or defense; and (2) attorneys do not as a general rule address the existence of good cause, either to argue for broader discovery as Rule 26(b)(1) contemplates or to counter such arguments.[118]

The second tier language has not prevented the explosion of unnecessary discovery it was intended to prevent. Largely ignored, the scope of discovery in practice has been the broader "subject matter involved in the action". The proposed rule narrows the scope of discovery to the claims and defenses asserted in the pleadings.

The proposed rule also eliminates the redundant language addressing the admissibility of discoverable information. Elimination of the sentence addressing admissibility would simplify the rule without changing the relevant standard, namely that discoverable information need only be relevant and not admissible. The standard is implied within the proposed language. That is, prescribing discovery of "*any* non-privileged matter that would support proof of a claim or a defense" necessarily includes inadmissible evidence that otherwise meets the proposed standard. The Advisory Committee Notes are the more appropriate forum for clarification of questions

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> 10.1. Discovery must be limited in accordance with the initial pretrial order. No other discovery will be permitted absent further court order based on a showing of good cause and proportionality.
>
> 10.2. Discovery must be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality in PPR 1.2, including the importance of the proposed discovery in resolving the issues, total costs and burdens of discovery compared to the amount in controversy, and total costs and burdens of discovery compared to the resources of each party.

[116] Am. College of Trial Lawyers & Inst. For the Advancement of the Am. Legal Syst., *Final Report* 7 (2009).

[117] *Rimkus Consulting Group, Inc. v. Cammarata,* 2010 WL 645253, *6 (S.D. Tex. Feb. 19, 2010).

[118] Hon. 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, 126 (May 2005).

related to the newly proposed scope of discovery, including questions regarding admissibility.[119]

Finally, while we submit no specific proposal for the content of the relevant Note, we encourage the Committee to provide necessary instruction regarding the narrowing of the scope of discovery. For example, evidence supporting the impeachment of a witness would fall within the discoverable scope of "*any* nonprivileged matter that would support a proof of a claim or defense." That instruction provides valuable assistance to practitioners faced with questions about the propriety of their requests or disclosures and serves to reduce the need for judicial intervention, and parties' discovery expense.

3. E-Discovery Limitations: Fed. R. Civ. P. 26(b)(2)(B)

We also propose a modification of Rule 26(b)(2)(B) to identify specific categories of electronically stored information that should not be discoverable:

> **(B)** *Specific Limitations on Electronically Stored Information.*
>
> *(i)* A party need not provide discovery ***of the following categories*** of electronically stored information ~~from sources~~, ***absent a showing by the receiving party of substantial need and good cause, subject to the proportionality assessment pursuant to Rule 26(b)(2)(C):***
>
> ***(a) deleted, slack, fragmented, or other data only accessible by forensics;***
>
> ***(b) random access memory (RAM), temp files, or other ephemeral data that are difficult to preserve without disabling the operating system;***
>
> ***(c) on-line access data such as temporary internet files, history, cache, cookies, and the like;***
>
> ***(d) data in metadata fields that are frequently updated automatically, such as last-opened dates;***
>
> ***(e) information whose retrieval cannot be accomplished without substantial additional programming, or without transforming it into another form before search and retrieval can be achieved;***
>
> ***(f) backup data that are substantially duplicative of data that are more accessible elsewhere;***
>
> ***(g) physically damaged media;***
>
> ***(h) legacy data remaining from obsolete systems that is unintelligible on successor systems; or***
>
> ***(i) any other data that are not available to the producing party in the ordinary course of business and*** that the party identifies as not reasonably accessible because of undue burden or cost ***and that*** on motion to compel discovery or for a protective order, if any, the

[119] *Horenkamp v. Van Winkle and Co.,* 402 F.3d 1129 (11th Cir. 2005) (Although not binding, the interpretations in the Advisory Committee Notes "are nearly universally accorded great weight in interpreting federal rules").

> party from whom discovery of such information is sought shows is not reasonably accessible because of undue burden or cost.

Since adoption of the e-discovery amendments, experience dictates that the above modifications are necessary to reduce the expanding costs and burdens of e-discovery.

a. The Status Quo

In 2006, "[t]he amendment to Rule 26(b)(2) [was] designed to address issues raised by difficulties in locating, retrieving and providing discovery of some electronically stored information."[120] Unfortunately, Rule 26(b)(2)(B) does not serve its intended purpose:

> Although the Advisory Committee on Civil Rules attempted to deal with the issues in new Rule 26(b)(2), many of our respondents thought that the Rule was inadequate. The Rule, in conjunction with the potential for sanctions under rule 37(e), exposes litigants to a series of legal tests that are not self-explanatory and are difficult to execute in the world of modern information technology. The interplay among "undue cost and burden," "reasonably accessible," "routine good faith operation," and "good cause," all of which concepts are found in that rule, presents traps for even the most well intentioned litigant.[121]

Even commentators who claim the rule is serving a useful purpose recognize that it has not really affected court rulings.

> Fairly read, the results of the decisions applying Rule 26(b)(2)(B) are not much different from those which one would have expected under pre-Amendment case law. Although 'good cause' is often dutifully (and mechanically) referenced, the courts are, in fact, focused primarily on Rule 26(b)(2)(C)(iii), since it ultimately determines whether electronically stored information is discoverable, regardless of the accessibility of the source.[122]

The above quotes capture the essence of the problem. The language and the concepts of the rule, such as "reasonably accessible," are vague, and the "good cause" requirement, key to the court's decision making under the rule, is another application of the proportionality rule.

The problem lies in the rule's structure. The rule was drafted to recognize, and incrementally improve on, existing practice regarding inaccessible Electronically Stored Information ("ESI"):

> The proposed amendment is modest. The public comments and testimony confirmed that parties conducting discovery, particularly when it involves large volumes of information, first look in the places that are likely to produce responsive information. Parties sophisticated in electronic discovery first look in the reasonably accessible places that are likely to produce responsive information. On that level,

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[120] Fed. R. Civ. P. 26(b)(2) advisory committee's note (2006).
[121] Am. College of Trial Lawyers & Inst. For the Advancement of the Am. Legal Syst., *Final Report* 14 (2009).
[122] Thomas Y. Allman, *The "Two-Tiered" Approach to E-Discovery: Has Rule 26(b)(2)(B) Fulfilled Its Promise?,* 14 Rich. J. L. & Tech. 7, 63 (2008).

> stating in the rule that initial production of information that is not reasonably accessible is not required simply recognizes reality. Under proposed Rule 26(b)(2), this existing practice would continue; parties would search sources that are reasonably accessible and likely to contain responsive, relevant information, with no need for a court order. But in an improvement over the present practice, in which parties simply do not produce inaccessible electronically stored information, the amendment requires the responding party to identify the sources of information that were not searched, clarifying and focusing the issue for the requesting party. In many cases, discovery obtained from accessible sources will be sufficient to meet the needs of the case. If information from such sources does not satisfy the requesting party, the proposed rule allows that party to obtain additional discovery from sources identified as not reasonably accessible, subject to judicial supervision.[123]

Indeed, the problem may be that the amendment was too modest and too much of a compromise. It incorporated too much of the existing practice to really make a difference in reducing the costs and burdens of e-discovery. "[T]he development of electronic storage has introduced important new problems and substantially intensified many preexisting ones. As a result, though discovery's DNA may not have changed, the problems discovery creates have increased, and the stakes have risen substantially. To continue to employ pre-computer age discovery standards in the age of electronically stored data, then, would be the technological equivalent of driving a horse and buggy down Interstate 94."[124]

First, "[t]he amendment builds on the two-tier structure of scope of discovery defined in Rule 26(b)(1) and applies this structure to discovery of electronically stored information."[125] But that system for scope of discovery is largely ignored by parties and judges,[126] and the two tier system for inaccessible data suffers the same fate. It is unrealistic to expect parties and judges to be able to utilize a two tier system that is grafted onto another, unutilized, two tier system.[127]

Second, like the 26(b)(1) system, the rule relies on an undefined "good cause" standard.

> When reviewing the 2000 amendments to the discovery rules, Judge Scheindlin stated that "[t]he 'good cause' requirement will lead to ten or twenty years of satellite litigation, while its meaning is worked out; the good cause requirement was abandoned from Rule 34 in 1970, and should not now be resurrected." Judge Scheindlin's dire forecast was wrong. Instead of leading to years of litigation over its meaning, the resurrection of the good cause standard had no impact at all; it has simply been ignored. The unwise resurrection of the good cause standard in 2000

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[123] *Report of the Advisory Committee on Civil Rules* 44 (May 27, 2005), *available at* http://www.uscourts.gov/rules/Reports/CV5-2005.pdf.

[124] Redish, *supra* note 33, at 627.

[125] *Report of the Advisory Committee on Civil Rules* 43 (May 2005), *available at* http://www.uscourts.gov/rules/Reports/CV5-2005.pdf.

[126] Hedges, *supra* note 118; Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 Harv. J. L. &Tech. 49, 61 (2007) ("Today, with the benefit of a few years experience with the application of the two-tier system of Rule 26(b)(1), it is clear that . . . despite the 2000 amendments, the Rule has been ignored.").

[127] Hedges, *supra* note 118, at 128 ("And yet, the proposed amendment [26(b)(2)(B)] would engraft an accessible/inaccessible test on top of the existing discovery management tools of Rules 26(b)(1) and (b)(2), which are underutilized now.")

has been followed by the 2006 third coming of the good cause standard in the e-discovery amendments.[128]

In addition to being undefined, the good cause standard is explicitly linked to the pre-existing standard of proportionality in 26(b)(2)(C). This linkage makes the "good cause" requirement under the rule confusing, duplicative, difficult to apply consistently, and irrelevant. [129]

Our proposal seeks to correct several aspects of the rule that are causing it to be ignored, misunderstood or misapplied by the parties and the courts.

b. Specific Proposed Changes.

The first proposed change to Rule 26(b)(2)(B) specifically lists categories of ESI that a party need not provide in discovery absent a showing of substantial need and good cause. By identifying specific categories, the proposal seeks to clarify what is "not reasonably accessible," to reduce the amount of motions practice required to afford parties the protection of the rule, and to increase predictability for all parties regarding what is and is not discoverable.[130] Despite these changes, the proposal maintains the court's discretion to apply an exception to the presumed non-discoverability upon a showing of "good cause" or "substantial need."

When it approved the 2006 e-Discovery amendments, the Advisory Committee decided to omit specific examples of inaccessible data in the rule stating that "[i]t is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information."[131] But there is sufficient information to identify those types and sources of ESI that are burdensome and expensive to locate, retrieve and provide. One can also identify sources that are least likely to contain non-duplicative readable and relevant information. The list in the proposed rule is derived almost entirely from the principles identified in the Seventh Circuit's Electronic Discovery Pilot Program, which states "[t]he following categories of ESI generally are not discoverable in most cases."[132] The list is also consistent with examples of

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[128] Noyes, *supra* note 126, at 76-77.

[129] In its May 2005 report, the Advisory Committee stated, "[m]any comments suggested that the 'good cause' standard seemed to contemplate the limitations identified by [the proportionality test of Rule 26(b)(2)(C)]. The revised text clarifies the 'good cause' showing by expressly referring to consideration of these limitations." The amended rule now states that, once the producing party establishes that its ESI is not reasonably accessible, "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."
The Committee report might indicate that the 2006 amendments to Rule 26(b)(2) provide no new protection against the costs and burdens of e-discovery. Rule 26(b)(2)(C) already provides that all materials subject to discovery – traditional paper documents, ESI that is reasonably accessible, and ESI that is not reasonably accessible – shall be limited if the request does not satisfy the proportionality test. In fact, the 2000 amendment to Rule 26(b)(1), which defines the scope of permissible discovery, states that "[a]ll discovery is subject to the limitations imposed by [Rule 26(b)(2)(C)]." Finally, the Advisory Committee's Note emphasizes that "[t]he limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources." *Id.* at 7

[130] Noyes, *supra* note 126, at 79 ("Increased judicial discretion, coupled with the absence of meaningful boundaries on that discretion, leads to unpredictability. Parties will file more motions because they cannot anticipate the outcome of discovery disputes with any degree of confidence or certainty. Such uncertainty over discovery rules may discourage early settlement because plaintiffs will choose to test the limits of courts' tolerance for discovery.").

[131] Fed. R. Civ. P. 26 advisory committee's note (2006); *See* Standing Committee Meeting Minutes, June 2005 at 26, *available at* http://www.uscourts.gov/rules/Minutes/ST06-2005-min.pdf.

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

categories of ESI that are "not reasonably accessible" identified by the Sedona Conference.[133] Although the list relates to scope of preservation, it applies to production as well.

Additionally, the listing of sources that are less likely to contain non-duplicative, readable, relevant information is more consistent with one of the stated intentions of the Advisory Committee in formulating the rule than simply tying "accessibility" to "burden or cost:"

> A member stated that the real problem is not the cost of providing discovery. The current rules, he said, already address that matter. What the amendment adds is an explicit recognition that the additional costs of searching sources that are not readily accessible may be unnecessary because the information to be retrieved will not make much difference. Thus, the amendment allows the relevance of information to be determined as a case proceeds.[134]

A second proposed change is to add "substantial need" to the standard for ordering production of one of the presumptively undiscoverable categories proposed above. As discussed above, the "good cause" standard is vague and frequently ignored. The addition of "substantial need" would clarify the burden on the requesting party by adding a standard that is better defined elsewhere in the civil rules. Specifically, a showing of "substantial need" is necessary pursuant to Fed. R. Civ. P. 26(b)(3)(A)(ii) to compel the production of information otherwise protected by the work-product doctrine.

A third proposed change is the separation of the proportionality assessment from the "good cause" standard and clarification that it is an additional determination by the court, rather than a grafting of

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[133] *Sedona Conference Commentary on Preservation, Management, and Identification of Sources of Information that are Not Reasonably Accessible*, 10 Sedona Conf. J. 281, 288 (2009). (Stating, for example:

> The Federal Rules do not define "not reasonably accessible" other than to caution that it turns on the presence or absence of "undue burden or cost." Under the emerging case law at the time of the 2006 Amendments, there was a reasonable consensus, as outlined in the introductory remarks in the 2005 Advisory Committee Report, that the following data types were often deemed not to be reasonably accessible without undue burden or cost:
>
> - Information on databases whose retrieval cannot be quickly accomplished because the database software is not capable of extracting the information sought without substantial additional programming;
> - Information stored on media that must be transformed into another form before search and retrieval can be achieved;
> - Deleted information whose fragments remain only accessible by forensics; and
> - Legacy data remaining from obsolete systems that is unintelligible on successor systems.);

See also Am. College of Trial Lawyers & Inst. For the Advancement of the Am. Legal Syst., *Final Report* 15 (2009) ("Absent a showing of need and relevance, a party should not be required to restore deleted or residual electronically-stored information, including backup tapes."); Sarah Phillips, *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 (2005) (proposing specific categories of ESI be listed for different treatment under the rule, "the Committee could adopt a new definition of electronic data that is 'not reasonably accessible.' Instead of treating backup data, legacy data, and deleted data the same, the Rule could further distinguish among them. Under this formulation, there would be three categories of electronic data: accessible data, which would be discoverable subject only to the limitations of Rule 26(b)(2)(i), (ii), and (iii); backup and legacy data, which would be discoverable only upon a showing of good cause (with the good-cause analysis being stricter than that of Rule 26(b)(2)(i), (ii), and (iii)); and deleted data, which is never discoverable unless the requesting party can show that the responding party intentionally deleted files to avoid discovery.")

[134] Standing Committee Meeting Minutes *supra* note 131.

the proportionality assessment onto the "good cause" standard. As discussed above, the circular explanation of "good cause" through reference to the proportionality rule is confusing and redundant.

4. The Importance of Proportionality: Fed. R. Civ. P. 26(b)(2)(C).

Fed. R. Civ. P. 26(b)(2)(C) provides that a court *must* limit the frequency or extent of discovery otherwise allowed . . . if it determines that "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit . . . ."

This is the so-called "proportionality rule." Unfortunately, this rule has been honored more in the breach than in the observance. Many attorneys believe that zealous advocacy requires extensive discovery. The American College of Trial Lawyers Task Force on Discovery notes that this view is a symptom of the problems caused by the current discovery rules and that this view is crippling the justice system.

Not only is proportionality specifically codified in the Federal Rules of Civil Procedure, but the principle has garnered "industry support" as a method for controlling electronic discovery. Application of the principle of proportionality as stated in Rule 26(b)(2)(C) was also identified as one of the Sedona Conference's Principles for Electronic Document Production.[135]

The value of the application of the proportionality rule has been recognized by the courts. In *Mayflower v. Mancia*[136], Magistrate Judge Paul Grimm, a respected authority on electronic discovery, extolled the virtues of the proportionality rule. Judge Grimm noted the relationship between 26(g)(1) and proportionality, namely, that signing a discovery request or disclosure pursuant to 26(g)(1) indicates compliance with the "spirit and purposes" of the discovery rules.[137] Of course, proportionality does not mean that big cases justify big discovery. Proportionality requires that discovery not be unreasonably cumulative or duplicative, not be otherwise available, and that its burdens are outweighed by its likely benefits.

The changes we propose to Rule 26(b)(2)(C) align with the proposed changes to the scope of discovery:

> **(C)** *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
>
> **(i)** the discovery sought is [~~unreasonably~~] cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> **(ii)** the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

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[136] *Mayflower v. Mancia,* 253 F.R.D. 354 (D. Md. 2008).
[137] *Id.* at *4. (Emphasis added.).

(iii) the burden or expense of the proposed discovery outweighs its likely benefit ***or is not proportional to the claims and defenses at issue*** considering the needs of the case, the amount in controversy, the parties' resources, ***the complexity*** and importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

We propose first that Rule 26(b)(2)(C)(i) be amended to remove the word "unreasonably" as a modifier of "cumulative or duplicative"discovery. This change makes clear to both litigants and the court that there are limitations on discovery and that a court's discretion must be exercised within the boundaries of those limitations.

Next, for purposes of clarity and uniformity, Rule 26(b)(2)(C)(iii) should be amended to explicitly invoke the principle of proportionality and to track the new language of Rule 26(b)(1) regarding the scope of discovery. Subsection (iii) was added in 1983 to "address the problem of discovery that is disproportionate to the individual lawsuit"[138] and is widely known as the "rule of proportionality." Proportionality gained favor amongst practitioners following the 2006 amendments, and is recognized as a necessary foundation of discovery reform. Despite the widespread support for the principle, the current rules addressing discovery fail to explicitly mention it. So we propose an amendment of 26(b)(2)(C)(iii) that explicitly invokes the principle of proportionality. For purposes of uniformity and to reiterate the new and narrowed scope of discovery, we propose an amendment of 26(b)(2)(iii) that incorporates the new scope of discovery language.

5. Placing Limits on the Frequency and Extent of Discovery: Fed. R. Civ. P. 34

The Federal Rules, Local Rules and Court Orders have long placed limits on several of the discovery tools available to parties: Rule 30 (depositions), 33 (interrogatories) and 36 (requests for admissions). Even though Rule 34, governing requests for the production of documents, often leads to unwieldy discovery, it is conspicuously missing from that list. Therefore, we propose revisions to Rule 26(b)(2) and Rule 34 to place specific limitations on the parties' ability to obtain discovery:

Rule 26(b)(2). ***Limitations on Frequency and Extent.***

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

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

* * *

(b) Procedure.

[138] Fed. R. Civ. P. 26 advisory committee's note (1983).

(1) Contents of the Request.

The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must be limited, unless otherwise stipulated or ordered by the court in a manner consistent with 26(b)(2), to:

(i) a reasonable number of requests, not to exceed 25, including all discrete subparts;

(ii) a reasonable time period of not more than two years prior to the filing date of the complaint;

(iii) a reasonable number of custodial or other information sources for production, not to exceed 10;

(C) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(D) may specify the form or forms in which electronically stored information is to be produced.

Since the inception of the Federal Rules, ongoing discussions of ways to "secure the just, speedy, and inexpensive determination of every action and proceeding" have often centered on discovery and the exchange of "documents and things."

The 2006 amendments to the rules were in large part motivated by the recognition that current use of computers and other technology were rendering ever-increasing volumes of material subject to routine discovery and creating significant new burdens on parties conducting discovery.[139] Yet, Rule 34 was largely untouched by the 2006 amendments, at least in regard to the scope of permissible discovery.[140]

The history of the rule itself provides an interesting perspective on the current debate. Prior to 1970, the production of documents was conditioned on a showing of "good cause" and required a court order.[141] As the notes to the 1970 amendments explain, the good cause provision was deemed unnecessary with the addition of a provision protecting attorney work product materials absent good cause. It appears from the Advisory Committee notes to the 1970 amendment that the issuance of orders had become more or less *pro forma* except in the instance of work product questions, so the

[139] Volume is the single most influential driver of e-discovery expense. *See* David R. Cohen & Lynn Reilly, *E-Discovery: A Survival Guide for Lawyers Part 2,* http://www.abanet.org/yld/tyl/july08/cohen2.html.

[140] The 2006 amendments to FRCP 34 were limited to the inclusion of "electronically stored information" to the definition of a document and the addition of provisions dealing with the format of production of ESI.

[141] Fed. R. Civ. P. 34 advisory committee's note (1970).

elimination of the requirement of a court order functioned primarily as a freeing of judicial resources from what had become a routine and mostly meaningless task.

Since 1970, the demand for ever-broadening and comprehensive categories of documents has become routine, seemingly made without regard for the burden or expense on the producing party, to include every type of document and topic conceivably related to the subject matter of the case. The proposed amendments would limit the number of requests that may be served to match the number of interrogatories allowed in Rule 33, limit the scope to no more than two years prior to the date on which the complaint was filed, and limit the number of custodial or other information sources to ten.[142]

Specifically, the first modification would be to Rule 26(b)(2) to add Rule 34 to the list of Rules that may be limited in frequency and extent. Second, in Rule 34, we propose the addition of section (b)(1)(B), stating new limitations to the rule. The first limitation restricts a party to 25 document requests, including sub-parts, similar to the limitation in Rule 33.

In the second proposed limitation, the scope of requests is limited to two years from the filing of the Complaint. Issues may arise in unusual circumstances, such as tolling agreements, but could be addressed by stipulation or court order. The inclusion of the time limit in the rules may create different incentives for parties to file suit rather than attempt to resolve disputes extra-judicially in order to get as long a time period as possible for discovery. Strategy decisions are always part of the litigation process, and this new incentive should not outweigh the benefits of achieving a reasonable limitation on the temporal scope of discovery.

From the standpoint of the preservation obligation, the addition of a presumptive temporal scope would be of tremendous benefit to parties, although the specific standard for preservation we propose in section IV. C. of this paper would still be required. At present, there are virtually no rules to follow in deciding what exactly must be preserved and the litigation hold process almost always takes place with a lack of information concerning the actual claims and defenses that will be involved in the potential litigation. This lack of guidance in the rules and the resulting confusion regarding the proper temporal scope of preservation leads directly to needless motions practice as parties seek judicial intervention to settle a common question more easily addressed by a simple amendment to the rules. These guidelines would allow a party to be in full compliance with its obligations by instituting a legal hold which extends back two years from the date of the hold notice.

The proposed limitation would also greatly increase the likelihood that all discoverable information is maintained on the active systems of the producing party, which in turn would help decrease any reliance on second tier discovery sources. Presumptive reliance on data that is more likely to be

[142] While the burden and expense to the producing party is the usual focus of discussions of the burdens of increasing discovery, it should also be noted that overbroad document requests also burden the requesting party, who must in turn sift through the vast production to locate the – usually small number of – truly relevant documents. Thus, efforts to bring more rationality and proportionality to the process in fact benefits all parties to litigation by focusing efforts on the real issues in the case and reducing time and expense, widely noted as the most important factors in the perception that the court system is not functioning efficiently. *See,* Am. College of Trial Lawyers & Inst. For the Advancement of the Am. Legal Syst., *Final Report* 2 (2009) "Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other case of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them.")

maintained on an active system would also reduce the costs of preservation, particularly where the obligation often results in disruption to normal business operations and increased expense. A presumptive limit on discoverability may also reduce the cost of production and review by reducing the volume of ESI produced in the course of discovery.

A presumptive temporal limit to the scope of discovery has been previously considered, but was tabled by the Civil Rules Advisory Committee in October 1999. At that time, a seven year temporal limit was proposed.[143] Underlying the proposal was a desire to enforce proportionality in discovery. As reflected in the minutes, the proposal was tabled for reasons including allowing time for the then current proposal to 26(b)(1), namely the bifurcation of discovery management between lawyers and the court, to take effect.[144]

The final proposed limitation would place a limit on the number of sources from which information may be discovered. It is fairly standard to approach document discovery by identifying the individuals most likely to have in their possession the documents potentially relevant to the claims and defenses of the case. While this generally pertains to persons, it also includes structured databases and shared network drives. The proposed language includes both human (custodial) and non-human (informational) sources. Non-human sources such as shared network drives may require a more granular definition of a single source. As with the definition of the term "electronically stored information," any definition of "Source" must be readily adaptable into the future as technology continues to evolve.

The proposed limitation of ten sources is probably fewer than are typical in most complex cases, but also probably greater than the number involved in the (larger number of) commonly filed federal court causes of action. Ten corresponds to the current Rule 26 limitation on depositions, which is now well-accepted by litigants.

Collections of ESI often contain enormous duplication of information.[145] The ease of copying and distributing information through electronic means and the decentralized storage employed by most individuals and organizations result in multiple copies of the same documents being stored in dispersed locations. In response, many software developers designed software that allows parties to remove duplicates of the material under review for production.[146] Software is available that also removes lesser included email threads from collections of ESI. These efforts are largely designed to

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[143] Advisory Committee on Rules of Civil Procedure Meeting Minutes, October 14-15, 1999, at 22, *available at* http://www.uscourts.gov/rules/Minutes/1099mnCV.pdf.

[144] *Id.* at 23.

[145] Oliver Fuchsberger, *IT Tips for eDiscovery Best Practices*, Wyo. Lawyer, Aug. 2007 ("Collecting 'ESI' can result in extraordinary volumes of duplicates and non-relevant files, especially if the scope of discovery includes backup or archival systems."). *see also* Nick Ackerman & Angeline Chen, *What is Electronic Evidence?, in* eDiscovery for Corporate Counsel § 1:1 (Carole Basri & Mary Mack ed., updated Sept. 2008) ("ESI differs from regular paper documents…electronic documents, particularly email, can be massive and duplicative."); *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 Sedona Conf. J. 189, 200 (2007) (discussing de-duplication and noting that "ESI often consists of a massively redundant universe.").

[146] E-Discovery software with de-duplication capabilities include (but are not limited to): ImageMAKER Discovery Assistant, *available at* http://www.discoveryassistant.com/; EnCase Enterprise eDiscovery Suite, *available at* http://www.encaseenterprise.com/products/ediscovery_index.asp; Equivo>NearDuplicates, *available at* http://www.equivio.com/product.asp?ID=5; Extractiva Hard Copy Pro Plus 6.0 *available at* http://extractiva.com/hcpp.html; Trident Pro, *available at* http://www.discoverthewave.com/products; and Attenex Patterns, *available at* http://www.ftitechnology.com/products/attenex_patterns.aspx.

reduce the costs of performing the review and production, which are highly influenced by the volume of material under review.

The same results in production could be achieved through the review and production of fewer sources of ESI. Consider, for example, that employees of a corporation all working in the same functional unit within the company are most often engaged in internal discussions of particular topics, all of which, when conducted through email, are entirely duplicated in each participants' email archive. Instead of including as custodians every employee who worked with a particular subject matter, it is quite reasonable and defensible to choose a single person through whom key communications were filtered as the single custodian for the subject matter and thereby obtain the most highly relevant materials. Even among a group of peers, it is reasonable to assume that discussions will be duplicated within the group so that the inclusion of a single manager or supervisor as custodian achieves the objective of locating and producing relevant documents.

The limits proposed are modeled on those enacted in 1993 related to the number of permissible depositions and interrogatories under Rules 30 and 33 respectively. The Advisory Committee Notes to the 1993 amendment point out that one objective of the deposition and interrogatory limits was "to emphasize that counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case."[147] Seventeen years after the introduction of these limits, they have not caused a substantial hardship to litigants. On the contrary, parties have adapted to the presumptive limits and courts have grown adept at adjudicating requests to exceed or reduce the stated limit. More importantly, they have contributed to at least some streamlining of federal litigation by forcing parties to more carefully assess the discovery needs of their case.

C. The Rules Must Address Preservation of Information

The burden of preserving electronically stored information (ESI) arises from the confluence of the information explosion and unfettered discovery. This burden, unfortunately, has not been ameliorated by any of the many, prior Discovery Amendments. Ancillary litigation involving preservation has risen at an alarming rate. *Ad hoc* judicially created "litigation hold" procedures created District Court by District Court, lack national uniformity. Preservation issues are decided on a case-by-case basis, with little guidance for parties in federal court court who must continually adapt their preservation procedures to the most recent, most far reaching court ruling.

As a result, parties incur extraordinary expenses attempting to comply with the most burdensome demands of each unique case in the current patchwork of "litigation hold" cases. Otherwise, they face costly sanctions for failing to preserve ESI despite extraordinary efforts to do so. Often ESI at issue in preservation motions has little or no direct relevance to the claims or defenses asserted. In most litigation hold cases, analysis of the sufficiency of ESI that was produced is sparse. Yet, the cases provide for severe sanctions, such as adverse inference jury instructions, for unintentional failure to meet the *ad hoc* requirements established by various courts. And, more courts are interpreting the mere failure to implement a formal written litigation hold as demonstrating sufficient bad faith to warrant sanctions.

Amendments to the Federal Rules should be enacted which directly address preservation. Rule 37(e) should be amended to permit spoliation sanctions only where willful conduct occurred for the

[147] Fed. R. Civ. P. 34 advisory committee's note (1993).

purpose of depriving another party of the use of destroyed evidence and the destruction results in actual prejudice to the other party. A clear rule is needed to counteract those cases imposing sanctions for unintentional (negligent) preservation errors.

Rules 26 also should directly address preservation. Ultimately the ancillary litigation related to "litigation holds" is a product of alleged failure to preserve ESI that would have been subject to disclosure in the litigation. By proposing Rule 26(h) and related amendments, preservation procedures will be brought back into uniform national rules designed to give certainty to preservation issues faced by parties and consistency to analyses and decisions by courts.

The procedural rules we propose clearly address conduct taking place after litigation is initiated. We also find strong support in federal case law for using the proposed rules to analyze pre-litigation conduct in the context of post-litigation motion practice. Spoliation sanctions are currently imposed for the effects of pre-litigation conduct on a subsequent lawsuit pursuant to the court's inherent powers to control litigation. Rules directly addressing preservation will permit courts to approach the effects of any willful failure to preserve with more structure and uniformity. Courts will need to rely on their inherent powers only on rare occasions when preservation conduct is not directly addressed by the Federal Rules

1. Proposed Rules Addressing Preservation

We propose the following amendments to the Civil Rules to directly address the "grave concerns"[148] raised by us and others. As the volume of ESI created and stored increases exponentially, faith must be restored in the federal court system's ability to fairly and adequately address preservation, spoliation and the growing ancillary preservation litigation.

a. Proposed Rule 26(h) – Preservation

Proposed new Rule 26(h) would provide:

> **Rule 26. . .**
>
> **(h) Preservation**
>
> **(1) Duty to Preserve**
>
> Preservation of documents, intangible things and electronically stored information, unless otherwise ordered by the court, is limited to matters that would enable a party to prove or disprove a claim or defense, and must comport with the proportionality assessment required by Rule 26(b)(2)(C). All preservation is subject to the limitations imposed by Rule 26(b)(2)(C). The court may specify conditions for preservation.
>
> **(2) Specific Limitations on Electronically Stored Information.**

[148] *Rimkus Consulting Group, Inc. v. Cammarata*, 2010 WL 645253 at *6 (S.D. Tex. Feb. 19, 2010).

Absent court order demonstrating that the requesting party has (1) a substantial need for discovery of the electronically stored information requested and (2) preservation is subject to the limitations of Rule 26(h)(1), a party need not preserve the following categories of electronically stored information:

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

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

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

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

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

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

(G) physically damaged media;

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

(I) any other data that are not available to the producing party in the ordinary course of business.

b. Proposed Amendment to Rule 37(e), Sanctions

We propose that existing Rule 37(e) be replaced with the following:

> **Rule 37. . .**
> **(e) Electronically Stored Information.** Absent willful destruction, a court may not impose sanctions on a party for failing to provide relevant electronically stored information for the purpose of preventing its use in litigation.

2. The Preservation Problem Threatens Our Civil Justice System

Preservation has developed into one of the most vexing issues affecting civil litigation in today's federal courts. Faced with an exponentially expanding digital universe of discoverable information, courts are attempting to address civil discovery of information from complex computer systems using principles developed in the paper age. Digital discovery problems in the computer age have led many to conclude that the American system of civil discovery is broken.[149]

Adherence to preservation principles designed to apply to tangible things has created uncertainty for parties and has led to the creation of *ad hoc*, unwritten, *de facto* litigation hold rules that appear as traps for the unwary. To avoid spoliation sanctions, parties feel compelled to engage in costly over-preservation of digital information that may have little or no use in litigation. To make matters worse, a few jurisdictions are awarding sanctions for the simple act of not properly following the ministerial litigation hold steps developed by courts.

Without clearly defined preservation rules, parties struggle with where to draw the line on the scope of preservation. Preserve too much, and the preserving party faces costly procedures, storage costs and the resulting e-discovery challenges of analysis and production of huge volumes of digital information. Preserve too little, and the preserving party faces costly spoliation sanctions, which too often include a judge telling the jury a party was a "bad actor" to be reckoned with accordingly. Tempered judicial solutions to the preservation problem have not emerged. Without clear rules addressing reasonableness in preservation, parties are left to guess whether the cost of preservation is outweighed by the merits of a claim or the amount in controversy. Even then, there are no guarantees that courts will agree with the timing of when the preservation duty attached nor agree with the actions taken by a party to discharge its preservation duty.

More troubling is the trend of using spoliation as a litigation tactic. In the absence of clearly defined limits on preservation, some parties have used spoliation allegations as a way to gain an advantage in litigation. It is always possible to argue that something "more" should have been done to preserve digital information. As a result, federal courts are seeing more spoliation motions than at any time in history. Blame, however, does not fall solely on the shoulders of lawyers. Unquestionably, willful destruction with intent to prevent the use of information in litigation should be punished, but is the

[149] "I believe the explosive growth of information is transforming the litigation system, and that the current paradigm is broken." Jason R. Baron, E-discovery and the Problem of Asymmetric Knowledge, Presentation at the Mercer Law School Symposium: Ethics and Professionalism in the Digital Age (Nov. 7, 2008), *in* 60 Mercer L. Rev. 863 (2009); Am. College of Trial Lawyers & Inst. For the Advancement of the Am. Legal Syst., *Interim Report* A-2 (2008) (23% of those surveyed "indicated that the civil justice system is broken").

problem so pervasive that innocent parties should adhere to the strictest and costliest of standards? Judges are working to administer justice, one case at a time, and may not be in the best position to set uniform policy. The Civil Rules Advisory Committee considered preservation issues as part of the 2006 amendments, but chose to let the parties police themselves. As a result, the Civil Rules lack an effective approach to deal with preservation and spoliation in the digital age.

Judge Lee H. Rosenthal recently articulated how systemic preservation problems have consumed countless financial and legal resources in the United States since the Rules were amended to address discovery of electronically stored information ("ESI") in 2006:

> Spoliation of evidence –particularly of electronically stored information– has assumed a level of importance in litigation that raises *grave concerns*. Spoliation allegations and sanctions motions distract from the merits of a case, add costs to discovery, and delay resolution. *The frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential future sanctions than on reasonable need for information.* Much of the recent case law on sanctions for spoliation has focused on failures by litigants and their lawyers to take adequate steps to preserve and collect information in discovery.[150]

Therefore, we submit that Rules must be enacted to directly address preservation and that the Rules Committee has the power to recommend them and the Supreme Court to promulgate them. Bad actors should not be allowed to benefit from their malfeasance. At the same time well intentioned parties should not be caught up in the attempts by some to cast an ever-expanding spoliation net. More importantly, federal courts should be guided by rules as they confront the new realities of the digital age. Defining the type of conduct subject to spoliation sanctions is the proper subject of rule making. Rules directly addressing preservation will restore national uniformity and provide much needed rules based guidance. Claims should be won or lost on the merits, not on an alleged lack of preservation of evidence with little or questionable relevance. The focus should be on the culpability of the actor, prejudice to an opponent and the usefulness of the evidence that was actually preserved. We believe strongly that severe sanctions, such as an adverse jury instruction, should be reserved for willful destruction of evidence purposely that was intended to, and does in fact, deprive an opposing party of its use in the claim before the court.

3. ***Ad Hoc Preservation Requirement Have Created A Quagmire***

The duty to preserve evidence relevant to litigation is not a new concept in our legal jurisprudence.[151] Participants in federal civil litigation readily agree that the willful destruction of evidence to prevent an opponent from obtaining it for use in litigation should be punished.[152] This is known as spoliation.[153] Many agree that sanctions currently available to punish "bad faith" spoliation appear adequate to address bad actors through the court's inherent powers or through applicable FRCP

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[150] *Rimkus*, 2010 WL 645253 at *1.

[151] *See e.g.*, *Goodman v. Praxair*, 2009 U.S. Dist. LEXIS 58263 at *17 (D. Md. July 7, 2009) (tracing the origins of spoliation to: *Armory v. Delamirie*, 93 Eng. Rep. 664 (K.B.1722)).

[152] *Rimkus*, 2010 WL 645253 at *20 ("Courts agree that a willful or intentional destruction of evidence to prevent its use in litigation can justify severe sanctions.")

[153] *See generally* The Sedona Conference, *The Sedona Conference© Glossary: E-Discovery & Digital Information Management* 48 (2d ed. 2007) ("Spoliation is the destruction of records or properties, such as metadata, that may be relevant to ongoing or anticipated litigation, government investigation or audit.")

rules.[154]

A question then is what "punishment", if any, is appropriate for unintentional (negligent) errors in preservation efforts? Some courts have been willing to "punish" negligent spoliation of ESI with severe sanctions, such as an adverse jury instruction.[155] These rulings move away from the traditional "bad faith" requirement for awarding sanctions for the destruction of evidence.[156]

Meanwhile, preservation of ESI grows as a problem in the digital age as organizations of all kinds (large, small, private and public[157]) create, use and store vast quantities of ESI each day in the normal course of business. Opportunities for inadvertent loss of data abound as a result. The absence of information about the content of lost data complicates the equation. [158] In this context, judicially created "litigation hold" requirements have become ground zero as courts struggle with balancing the need for relevant evidence against limiting costly electronic discovery.

In the absence of clear precedent or concrete preservation rules, overly litigious parties have given birth to a new field of ancillary litigation, "discovery about the discovery," which is growing rapidly.[159] Judicial and party resources are detoured into depositions, affidavits, motion practice and hearings – all looking for what is missing – rather than focusing on the types and volume of relevant evidence already preserved and produced. Couched as a search for the truth, some courts have embarked on spoliation investigations to determine whether "all" the document based facts in existence were preserved. Our adversarial system of justice is designed to apply to an imperfect world of information. Not all deponents remember the events exactly as they unfolded. Not every

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[154] *Rimkus*, 2010 WL 645253 at 10-11.

[155] Negligence is sufficient to trigger spoliation sanctions in some Circuits once litigation has commenced. *See, e.g.*, *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002); *Velez v. Marriott PR Mgmt., Inc.*, 2008 U.S. Dist. LEXIS 103484 (D.P.R. Dec. 22, 2008) ("Applicable case law in the First Circuit has clearly established that 'bad faith or comparable bad motive' is not required for the court to exclude evidence in situations involving spoliation") (quoting *Trull v. Volkswagen of Am., Inc.*, 187 F.3d 88, 95 (1st Cir. 1999)). Negligent destruction of ESI while on notice of *potential* relevance to a forthcoming litigation has been deemed to be willful. *Ripley v. District of Columbia*, 2009 U.S. Dist. LEXIS 56230 (D.D.C. July 2, 2009) ("Defendant had notice of the litigation, yet failed to properly protect material evidence from destruction.")

[156] *Rimkus* contains a detailed analysis of "bad faith" standards across the Circuit Courts: "As a general rule, [in the Fifth Circuit] 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." *Rimkus*, 2010 WL 645253 (citations omitted.) Judge Rosenthal also surveyed spoliation requirements in other jurisdictions: "Other circuits have also held negligence insufficient for an adverse inference instruction. The Eleventh Circuit has held that bad faith is required for an adverse inference instruction. The Seventh, Eighth, Tenth, and D.C. Circuits also appear to require bad faith. 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. *Id.* (citations omitted.)

[157] The Government is not exempt from these standards. *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 274 (2007) ("It is the duty of the United States, *no less than any other party before this court*, to ensure, through its agents, that documents relevant to a case are preserved.")

[158] *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006) ("[B]ecause the relevance of [spoliated] documents cannot be clearly ascertained . . . a party can hardly assert any presumption of irrelevance as to the destroyed documents.") (quotation marks omitted). That "smoking guns" may have been lost is "precisely the reason" that information "should have been preserved and produced" in the first place. *Nursing Home Pension Fund v. Oracle Corp.,* 254 F.R.D. 559, 565 (N.D. Cal. 2008).

[159] *Advanced Micro Devices, Inc. v. Intel Corp.*, 2008 WL 2310288 at *14 (D. Del. Jun. 4, 2008) (noting that "the parties and the Special Master have spent and will continue to spend a significant amount of time and resources focused on the question of spoilation and, if appropriate, sanctions"); *see also Rimkus*, 2010 WL 645253; *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am.. Sec.,* 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).

party maintains detailed records of all of its actions. Sometimes records that should have been generated were never created in the first place. Correspondence, notes and other paper records can be misplaced, discarded or lost without ill intent to defraud the court.

Information in the digital age is widely distributed and if one custodian no longer has an email or electronic file, chances are very good that the email is in the possession of someone else. In the *Pension Committee*[160] case, defendants were aware of 311 allegedly missing emails because they obtained them from other parties. By cross-referencing the document productions of thirteen plaintiffs, defendants were able to argue that certain plaintiffs failed to produce some of the emails. Although the information was in their possession, defendants argued that the failure of some parties to produce emails produced by others was evidence of larger preservation errors. This claim led to an extensive round of ancillary litigation.[161]

In another case, defendant failed to implement a litigation hold, but through the use of digital forensics was able to uncover practically all the evidence deleted. This conduct resulted in monetary sanctions, although avoiding an adverse inference jury instruction.[162]

Although information appears to be more available in the digital age, ancillary litigation has increased over the loss of small portions of digital information with little or no connection to the controversy. Judicial examination of pre-litigation preservation conduct also has significantly increased in recent years The result is a legal "gotcha" game focused on the steps used to preserve data, instead of the data actually available, and without regard to the significance of the data to the ultimate outcome of the case.[163] The game is simple: Severe sanctions, such as an adverse inference jury instruction, are easier to obtain than ever, by merely poking holes in an opponent's preservation efforts. Inevitably, Monday morning quarterbacking of how preservation efforts should have been undertaken often conclude that some part of the process could have been done better.

In effect, a federal common law duty to implement a "litigation hold" has been created as courts struggle with preservation of vast amounts of ESI.[164] A litigation hold is best characterized as legal short hand for the suspension of the destruction of documents and ESI relevant to litigation. It can be understood as the legal efforts an organization employs to discharge its common law duty to preserve. One court has held that the failure to properly implement a litigation hold *will* lead to spoliation of evidence.[165] In some courts a litigation hold must be implemented by the distribution of a "written" litigation hold notice to avoid sanctions.[166]

Courts are mandating "written litigation holds" despite no formal requirement in the Federal Rules

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[160] *Pension,* 2010 WL 184312.

[161] *Id.*

[162] *Pinstripe, Inc. d/b/a Acctknowledge v. Manpower, Inc.*, 2009 U.S. Dist. LEXIS 66422 (N.D. Okla. July 28, 2009) (sanctions granted, although extra effort by defendant to recover deleted ESI after failure to issue litigation hold avoided the harshest sanction – an adverse inference jury instruction – requested by movant).

[163] *Calipine Corp. v. AP&M Field Servs., Inc.*, 2008 U.S. Dist. LEXIS 99178 (S.D.N.Y. Dec. 9, 2008) ("The spoliation doctrine exists to prevent one side from denying such an opportunity to the other by destroying or altering material evidence. It does not, however, permit a party to avoid the contest by defaulting the other side through playing a game of "gotcha" instead of seeking to develop its own case in a timely and appropriate manner.")

[164] *Pension,* 2010 WL 184312.

[165] *Id.*

[166] *Id.*

of Civil Procedure.[167] A written litigation hold is a ministerial step of issuing a written notice to custodians of relevant documents and ESI advising them not to destroy potentially relevant evidence. One court actually ordered a party to implement a formal litigation hold.[168] Another court ordered defendant to pay for a third-party expert to analyze whether defendant fulfilled its litigation hold preservation obligations.[169]

The ministerial step of issuing a written litigation hold notice is designed to force a party to take steps, of the court's choosing, to discharge the duty to preserve. The duty to preserve evidence "arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."[170] The scope of the duty rests on two related questions: (1) "*when* does the duty to preserve attach," and (2) "*what* evidence must be preserved."[171] The duty to preserve extends to documents or tangible things[172] by or to individuals "likely to have discoverable information that the disclosing party may use to support its claims or defenses."[173] The duty to preserve extends not only to documents in a party's possession, but also documents in its "control", which can include third-parties not included in the litigation.[174]

Other judicially created requirements require a party to determine the scope of what to hold and to

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[167] *See e.g.*, *Id.*

[168] In *Synventive Molding Solutions v. Husky Injection Molding Sys.*, 2009 U.S. Dist. LEXIS 105306 (D. Vt. Mar. 13, 2009), defendant filed a motion to compel plaintiff to implement a litigation hold. In response to the motion plaintiff argued that it was free to preserve evidence in any manner, so long as evidence is preserved. It also argued that the Federal Rules of Civil Procedure do not contain a rule requiring implementation of a "litigation hold." Regarding freedom to preserve, the court held: "*Zubulake* states only that litigants are "free to choose" a *method to store* electronic information, not a general *method of evidence retention*." *Zubulake v. UBS Warburg LLC* (*Zubulake IV)*, 220 F.R.D. 212 (S.D.N.Y. 2003). Regarding formal litigation hold procedures the court held: "[Plaintiff's] argument that the Federal Rules do not require litigants to adopt a 'litigation hold,' though technically accurate, is ultimately not persuasive. The Second Circuit has observed that the 'obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.' *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001). Other district courts in this Circuit have found that this "means that, once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Jacob v. City of New York*, 2009 WL 383752 at *1 (E.D.N.Y. Feb. 6, 2009) (internal quotation marks omitted); *see also Treppel v. Biovail Corp.*, 249 F.R.D. 111, 118-119 (S.D.N.Y. 2008); *Heng Chan v. Triple 8 Palace, Inc.*, 2005 WL 1925579 at *7 (S.D.N.Y. Aug. 11, 2005) ('the utter failure to establish any form of litigation hold at the outset of litigation is grossly negligent.'")

[169] *Maggette v. BL Dev. Corp.*, 2009 U.S. Dist. LEXIS 116789 (N.D. Miss. Nov. 24, 2009).

[170] *Zubulake IV*, 220 F.R.D. at 216 (quotation marks omitted); *see also Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590-91 (4th Cir. 2001); *Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148, 1159 (1st Cir. 1996); *Tulip Computers Int'l B.V. v. Dell Computer Corps.*, 2002 WL 818061 (D. Del. 2002) (". . . once Dell had knowledge of the case, it had an affirmative obligation to preserve potentially responsive documents."); *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 287 (E.D. Va. 2001) (stating that a party has a duty to preserve documents once the party "has notice (by a discovery request, by the provisions of a rule requiring disclosure or otherwise), that evidence is necessary to the opposing party's claim"). "The touchstone is 'reasonable anticipation.'" The Sedona Conference, *The Sedona Conference Commentary on Legal Holds: The Trigger and the Process* 5 (2007).

[171] *Id.*

[172] *See* Fed. R. Civ. P. 34 (2008).

[173] *Zubulake IV*, 220 F.R.D. at 217-18 (footnotes omitted).

[174] *In re NTL Sec. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007) (party must preserve documents if it has "the right, authority, or practical ability to obtain [them] from a non-party); Fed. R. Civ. P. 34(a)(1) (party must preserve evidence within its "control"); *see also Bryant v. Gardner*, 587 F. Supp. 2d 951, 967-968 (N.D. Ill. 2008) ("A party has a duty to preserve evidence over which it has control and reasonably knows or could foresee would be material to a potential legal action.") (citing authorities); *Cyntegra, Inc. v. Idexx Labs., Inc.*, 2007 WL 5193736, at *5 (C.D. Cal. Sept. 21, 2007); *Calzaturficio v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 38-39 (D. Mass. 2001) (party "controls" evidence it has the "legal right to obtain . . . on demand.")

decide what documents and information it must preserve. Generally speaking, courts have held that the duty to preserve extends to what the company "knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation."[175] Simply instructing employees to "look for things to keep" or to not destroy relevant documents is insufficient.[176] Defining the scope of ESI and other information to be preserved can be difficult as more litigants test their opponents' litigation hold efforts. Patrick Oot, former Director of Electronic Discovery and Senior Counsel at Verizon, believes that there is a worrisome "creep toward over-protectiveness and unreasonableness" in the scope of litigation holds at many organizations that have attempted to put a "hold" policy in place.[177] Specifically, there is a tendency to identify too many employees as holders of relevant ESI. This leads to excessive retention of ESI that attorneys will eventually review at significant cost.[178]

A number of federal courts have examined the timing and scope of "litigation hold" procedures (or lack thereof) in response to a wide array of pre-litigation scenarios. Sanctions have been awarded for a myriad of conduct: failure to recognize a trigger event[179]; failure to distribute a written litigation hold notice[180]; failure to issue timely reminders[181]; failure to confirm and enforce a litigation hold by not interviewing key players[182]; failure to inform the IT department of the need to preserve ESI[183]; failure to disable the automatic deletion features of a computer system (such as e-mail deleted or overwritten based on a pre-determined factor such as expiration of a set period of time)[184]; failure to preserve backup tapes[185]; failure to preserve the hard drives of laptops or desktops of key players

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[175] *Mosaid Technologies Inc. v. Samsung Electronics Co.*, 348 F. Supp. 2d 332, 333 (D.N.J. 2004) (citing *Scott v. IBM Corp*, 196 F.R.D. 233, 247 (D.N.J. 2000)).

[176] *Samsung v. Rambus,* 439 F. Supp. 2d 524 (E.D. Va. 2006).

[177] Institute for the Advancement of the American Legal System, *E-Discovery: A View from the Front Lines* 9 (2008).

[178] *Id.* (As some of our advisors note, devising an appropriate litigation hold is an art, not a science. For a variety of reasons, discovery in a case can be delayed and many parties fail to understand what exactly needs to be preserved until discovery has begun in earnest. Accordingly, lawyers tend to err on the side of over-retention.)

[179] *Zubulake IV*, 220 F.R.D. 212.

[180] *Acorn v. Co. of Nassau*, 2009 WL 605859.

[181] *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179 (2007)("There was no evidence that employees at [NTL] were ever reminded to preserve relevant documents and e-mail." The court granted plaintiffs' motion for sanctions, including adverse inference instruction, costs and attorneys' fees incurred with the motion, and additional discovery costs); *Keithley v. The Home Store.com, Inc.*, 2008 U.S. Dist. LEXIS 61741 (N.D. Ca. Aug. 12, 2008) (citing the lack of "timely reminders" holding "that the failure to have an adequate litigation hold in place and the failure to issue reminders to employees regarding the duty to preserve evidence was at least grossly negligent." Plaintiff was awarded $1.4 million in present sanctions, along with an adverse inference jury instruction and future cost sanctions.)

[182] *Zubulake IV*, 220 F.R.D. 212; *Zubulake v. UBS Warburg, LLC (Zubulake V)*, 229 F.R.D. 422 (2004).

[183] *Scalera v. Electrograph Systems, Inc. et al*, 262 F.R.D. 162 (E.D.N.Y. 2009) (failure to inform IT department of need to preserve e-mail in accordance with verbal litigation hold was negligence); *Coleman Holdings v. Morgan Stanley & Co. Inc.*, 20 So. 3d 952 (Fla. Dist. Ct. App. 2009) (collection instructions issued by the legal department to IT staff and the surrounding process weren't adequately monitored to ensure timely and thorough completion).

[184] *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179 (2007) (citing *Zubulake IV*, 220 F.R.D. 212) (inadequate hold scope left out key computer servers managed by third parties, and lack of hold and reminder communications led to disposal of data in systems that were retired or removed from service over the five-year litigation span. The judge deemed these inadequacies "at least grossly negligent" and pointedly told the defendant, "you should, by now, be aware of *Zubulake*."); *see also Mosaid Technologies Inc. v. Samsung Electronics Co.*, 348 F. Supp. 2d 332 (D.N.J. 2004) (granting adverse inference jury instruction because "Samsung never placed a 'litigation hold' or 'off switch' on its document retention policy concerning e-mail . . . [which automatically] allowed e-mails to be deleted, or at least to become inaccessible, on a rolling basis." The court noted the fact that Samsung "knew how to institute a 'litigation hold' and stop the spoliation of e-mails, having done so in one of its divisions in another litigation." The court concluded by stating that "when the duty to preserve is triggered, it cannot be a defense to a spoliation claim that the party inadvertently failed to [institute] a 'litigation hold'").

[185] *Forest Lab., Inc. v. Caraco Pharm. Lab., Ltd.*, 2009 WL 998402 (E.D. Mich. Apr. 14, 2009 (failure to preserve backup tapes post trigger event causes court to hold a hearing to determine if sanctions should be issued; sanction decision

after the employees left the company[186]; failure to preserve ESI after a malfunction of a computer[187]; failure to preserve specialized ESI, such as ESI stored in random access memory[188] or cache files[189]; and failure to preserve information on Blackberries™[190], to name a few.

In essence, the duties associated with preservation via litigation holds have been left to case-by-case judicial rulemaking. The result is a quagmire of common law duties that vary from court to court. Although some litigation hold "themes" or duties are common to the majority of cases, the cases are very fact specific. In an effort to avoid sanctions, parties assemble a list of litigation hold cases and do their best to create a "best practices" litigation hold process that, depending on their belief as to what affords the greatest protection, either meets the requirements they believe to be defensible as reasonable or meets the most stringent requirements,[191] But even strict adherence to the most stringent extant requirements is no guarantee that another court won't conclude, in hindsight, that something more should have been done in the context of implementing a litigation hold in the case before the court.

4. Current Significant Preservation Problems

Ad hoc preservation rules developed judge-by-judge are causing a host of unintended problems for parties in federal court. These problems include a lack of understanding of preservation obligations, existence of technology hurdles, and expenditures of significant costs associated with preservation. The following are specific examples.

a. Pre-Litigation Trigger Events Are Unpredictable

The problem of pre-litigation preservation is exacerbated by the lack of clear guidance from case law, statute or the FRCP regarding when a duty to preserve is triggered. Current trigger event cases require pre-litigation preservation whenever a company is deemed to have reasonably anticipated litigation.[192] The mere possibility of litigation is generally not sufficient to trigger the duty to

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reserved pending results of hearing).

[186] *Southern New England Tel. Co. v. Global NAPS, Inc.*, 2008 U.S. Dist. LEXIS 47986 (D. Conn. June 23, 2008).

[187] *Goodman*, 2009 U.S. Dist. LEXIS 58263 (D. Md. July 7, 2009).

[188] *See Columbia Pictures v. Bunnell,* 2007 WL 2080419 at *14 (C.D. Cal. May 29, 2007), *aff'd*, 245 F.R.D. 443, 446 (C.D. Cal. Aug. 24, 2007) (denying sanctions for failure to preserve information temporarily stored in RAM where no "specific request" had been made and there was no precedence for such preservation, leading to potential preservation sanctions in future case involving RAM).

[189] *See Healthcare Advocates v. Hardin, Earley, Follmer & Frailey,* 497 F. Supp. 2d 627 (E.D. Pa. 2007) (finding no duty to preserve contents of cache files where preservation letter did not alert them to the need to do so; Query, what if the letter requested preservation of cache files?)

[190] *Se. Mech. Servs., Inc. v. Brody*, 2009 WL 2883057 (M.D. Fla. Aug. 31, 2009).

[191] The alternative is to maintain a compendium of individual court rules and opinions for every district court and circuit court detailing the specific local rules and case law that applies in every jurisdiction in the United States. In addition, this exhaustive list must be maintained as litigation hold cases are issued with more frequency than ever.

[192] *Zubulake IV*, 220 F.R.D. 212.

preserve.[193] As a result most parties feel compelled to implement unnecessarily broad litigation holds or face the specter of spoliation sanctions at times when litigation may seem remote.[194]

Because litigation hold cases are fact specific[195] two courts presented with identical facts can reach opposite conclusions.[196] Whether a company reasonably anticipated litigation is judged in hindsight by a "knew or should have known" standard.[197] The standards are developed on a case-by-case basis. A trigger event to one judge may not be a trigger event to another judge. Left without meaningful guidance, litigants can find themselves at great risk if they do not preserve ESI that has little or no connection with the initial trigger event to avoid a court second guessing every preservation step the party took. The practical reality is that every day across America, potential producing parties with large volumes of electronic data go to great expense to preserve large quantities of information that will never see a courtroom or advance the interests of any case. Even then, companies can never be sure they have been comprehensive enough because the effort has such a "crystal ball gazing" quality to it under present court practices.

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[193] *Treppel v. Biovail Corp.(Treppel I)*, 233 F.R.D. 363, 371 (S.D.N.Y. 2006) ("the mere existence of a dispute between Mr. Treppel and Biovail in early 2002 did not mean that the parties should reasonably have anticipated litigation at that time and taken steps to preserve evidence"); *Goodman v. Praxair Servs., Inc.*, 2009 U.S. Dist. LEXIS 58263 (D. Md. July 7, 2009) ("The mere existence of a dispute does not necessarily mean that parties should reasonably anticipate litigation or that the duty to preserve arises") (citing *Treppel I*, 233 F.R.D. 363).

[194] Federal Judicial Center, *The Federal Judicial Center Rules Survey* 21-22 (2009) indicates the parties are voluntarily taking steps to freeze the destruction of ESI. Id. (at least 50% of potential producing parties - and perhaps more – initiated a litigation freeze).

[195] For detailed analysis of trigger event cases *See Legal Holds for "Anticipated Litigation": New Case Developments to Determine Triggering Events & Scope of Production—A Study* (ARMA Int. Ed., 2007) ; *Legal Holds & Spoliation: Identifying a Checklist of Considerations that Trigger the Duty to Preserve* (ARMA Int. Ed., 2004).

[196] In two separate cases different federal courts analyzed the pre-litigation conduct of a corporation that conducted "shred days" in adherence with a recently developed document retention policy as it prepared for patent litigation to enforce its patents. The Virginia District Court held that a duty to preserve was triggered and the destruction constituted spoliation. *Samsung v. Rambus*, 439 F.Supp.2d 524 (E.D. Va. 2006); *Rambus, Inc. v. Infineon Technologies AG*, 222 F.R.D. 280, 286 (E.D. Va. 2004) (citing *Rambus, Inc. v. Infineon Technologies AG*, 155 F. Supp. 2d 668, 680-83 (E.D. Va. 2001), *rev'd on other grounds,* 318 F.3d 1081 (holding that Rambus' development of list of litigation targets and internal strategy memos was evidence that it reasonably anticipated litigation); *compare with Hynix Semiconductor Inc. v. Rambus, Inc.*, 2006 WL 565893, 16 (N.D. Cal. 2006) (the California District Court's analysis holding that the same conduct did not trigger the duty to preserve and thus no spoliation. Another case widely cited for the steps taken to analyze trigger events is *Cache La Poudre Feeds, LLC v. Land O'Lakes Inc.*, 244 F.R.D. 614 (D. Colo. 2007) (letter that (i) warned that the defendant's use of trademark "may become a very serious problem," (ii) explicitly "put [defendant] on notice of our client's trademark rights" and defendant's "exposure," and (iii) sought "to determine whether this situation can be resolved without litigation" — but did not explicitly demand that evidence be preserved — held insufficient to trigger a duty to preserve); *Goodman*, 2009 U.S. Dist. LEXIS 58263 (D. Md. July 7, 2009) (holding that a November 1999 email and December 2000 telephone conversation did not trigger the duty but a January 5, 2001 letter did so; distinguishing *Cache*).

[197] *Dong Ah Tire & Rubber Co., Ltd. v. Glasforms, Inc.*, 2009 U.S. Dist. LEXIS 62668 (N.D. Cal. July 2, 2009) ("As an initial matter, the operative date for when Taishan can be deemed to have reasonably anticipated litigation must be identified . . . . The Ninth Circuit has not expressly defined the term 'anticipated litigation,' . . . and trial courts have crafted various formulations of when a party 'should know' that the evidence may be relevant to future litigation. *See e.g.*, *Hynix Semiconductor Inc. v. Rambus, Inc.,* 591 F. Supp. 2d 1038, 1061 (N.D. Cal. 2006) (determining that future litigation is probable when it is 'more than a possibility'); *Ameripride Servs., Inc. v. Valley Indus. Serv., Inc.*, 2006 WL 2308442, at *4 (E.D. Cal. Aug. 9, 2006) (placing the anticipated litigation date to when a potential claim was identified); and *Hynix*, 591 F. Supp. 2d 1038 (finding that litigation became "probable" when counsel was selected).

b. Enormous Costs and Burdens of Pre-Litigation Preservation

The explosion of technology is sometimes touted as the solution; in fact, it makes matters worse.[198] By some estimates 89% of business documents are created electronically and most are never printed to paper. Business information systems are created to serve the business, not litigation.[199] Systems that are efficient for their intended business purpose may be inefficient for purposes of discovery. Due to the size of some computer systems, identification of material relevant to potential litigation can be difficult, time-consuming and cumbersome.[200] Case law has held that a party cannot use the complexities of the computer system it created as an excuse for failing to preserve relevant ESI.[201] One court recently envisioned a day when failure to install "e-discovery" software will be deemed unacceptable.[202]

A recent survey was conducted in conjunction with ARMA International.[203] The survey reports that legal holds continue to present a technology hurdle for over half of the organizations surveyed:

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[198] ESI is commonly the most nettlesome and expensive part of the -preservation problem. *See Report of the Advisory Committee on Civil Rules* 10 (May 27, 2005), *available at* http://www.usc ("electronically stored information is retained in exponentially greater volume than hard-copy documents; electronically stored information is dynamic, rather than static; and electronically stored information may be incomprehensible when separated from the system that created it").

[199] *See, e.g.*, Sharon Isaacson, *Computer Technology Review* (2003), *available at* www.findarticles.com/cf_dls/m0BRZ/3_23/99751346/p1/article.jhtml ("[w]ith 93 percent of all business documents created electronically and only 30 percent ever printed to paper . . . ."); *See also Trillions and Trillions of E-Documents*, Star Tribune, Oct. 12, 2003, www.startribune.com/stories/1757/4143057.html ("The statistics are mind-boggling: In 2002, there were an estimated 3.25 trillion e-mails. E-mails and other electronic documents stored on many different platforms, from computer hard drives, floppy disks and CD-ROMs to PDAs and even cell phones. More than 95 percent never get printed.")

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

[201] *Doe v. Norwalk Cmty. College,* 248 F.R.D. 372 (D. Conn. 2007) (held that the haphazard administration of the IT policy of defendant did not excuse the destruction of ESI and as a result no "system" was in place to allow defendant to avail itself of Fed. R. Civ. P. 37(e)); *Zurich American Ins. Co. v. Ace American Reins. Co.*, 2006 WL 3771090 (S.D.N.Y. Dec. 22, 2006) (held that a "sophisticated reinsurer that operates a multimillion dollar business is entitled to *little sympathy* for utilizing an opaque data storage system, particularly when, by the nature of its business, it can reasonably anticipate frequent litigation).

[202] *Capitol Records, Inc. v. MP3tunes, LLC*, 261 F.R.D. 44 (S.D.N.Y. 2009) ("The day undoubtedly will come when burden arguments based on a large organization's lack of internal ediscovery software will be received about as well as the contention that a party should be spared from retrieving paper documents because it had filed them sequentially, but in no apparent groupings, in an effort to avoid the added expense of file folders or indices.")

[203] Forrester conducted the survey for ARMA online with responses from 434 technology and strategy decision-makers with responsibility for records management during June and July 2009. Approximately 95% of respondents were located in North America. Approximately 32% of the survey participants were employed by enterprises with more than 5,000 employees. The survey reports on the increasing role of records management to help mitigate legal risks associated with the continued explosion of the volume and types of electronically stored information created and stored by organizations each day. Brian W. Hill et al., *Records Management: User Expectations, Market Trends, And Obstacles* 6 (2009), *available at* http://www.forrester.com/rb/Research/records_management_user_expectations%2C_market_trends%2C_and/q/id/55123/t/2.

> "Limited support for integrated legal hold capability poses significant legal risk. Integrating legal hold capabilities with records management plays an important role in mitigating legal risk. Nearly 48% of records management stakeholders report that their records management solution supports legal hold natively or via a packaged third-party integration.... More than half of records management decision-makers report that their application doesn't support legal hold, that they don't know if it does, or that it does but that these capabilities aren't currently being used."

A significant "litigation hold" industry has emerged to support preservation efforts in the United States. Software developers now offer products specific to helping companies implement litigation holds, distribute hold notices and track efforts to preserve.[204] Some well known companies also offer e-mail and ESI archiving software and computer storage systems touted as litigation hold solutions.[205] Various software providers offer white papers on proper litigation hold procedures.[206] The mere existence of these businesses in such numbers is yet another indication of the excessive cost and burden of modern litigation.

Further contributing to the problem is the fact that pre-litigation preservation conduct may not be examined by a court until years after the company's decisions were made about timing, scope and methodology. As a result, preservation efforts in the face of anticipated litigation can be costly and require educated guesses about what, when and how to implement a litigation hold. Further, following perceived "best practices" for litigation holds offers no guarantee that the actions of a party will sufficiently discharge a party's duty enough to avoid sanctions.[207] Conversely, spoliation sanctions for failing to preserve ESI and other materials can be outcome determinative.[208]

In response, prudent companies in the U.S. have developed detailed "litigation hold" policies and procedures in an attempt to defend their preservation efforts.[209] Policies and procedures range from simple to very detailed.[210] It is our understanding that the typical written procedures can consist of

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[204] Litigation Hold software is available from a number of vendors, including but not limited to PSS Systems, LegalholdPro, Exterro, Autonomy, and Miratech.

[205] IBM's Enterprise Content Suite, Sharepointe, Mimosa Nearpointe Archive, http://www.mimosasystems.com/html/sol_legal_discovery.htm.

[206] *See e.g.*, 12 Myths About Legal Holds, (2009), http://www.legalholdpro.com/resources.

[207] Courts vary in assessing their authority to respond to unduly burdensome preservation demands. *Cf.* Paul W. Grimm, *Ethical issues Associated With Preserving, Accessing, Discovering and Using Electronically Stored Information,* U.S. Attorney's Bulletin, at 17 (May 2008) ("if [negotiations] are unsuccessful, counsel should consider filing a Rule 26(c) motion for a protective order to ask the court to clarify the disputed [preservation] issues"). For example, one court refused to opine on whether the producing party was being "overly cautious" in plans for a litigation hold in the absence of a motion seeking a formal remedy. *See Kemper Mortgage v. Russell*, 2006 WL 4968120 (S.D. Ohio May 4, 2006).

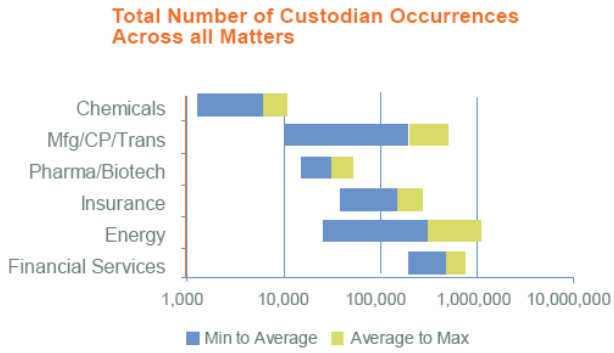
[208] Available sanctions for spoliation of evidence include "dismissal of the case, the exclusion of evidence, or a jury instruction on the 'spoliation inference.' *Vazquez-Corales v. Sea-Land Serv., Inc.,* 172 F.R.D. 10, 13 (D.P.R. 1997).

[209] As the introduction of The Sedona Conference® Commentary on Legal Holds states: "The duty to preserve information includes an obligation to identify, locate, and maintain, information that is relevant to specific, predictable, and identifiable litigation. When preservation of electronically stored information ("ESI") is required, the duty to preserve supersedes records management policies that would otherwise result in the destruction of ESI. A 'legal hold' program defines the processes by which information is identified, preserved, and maintained when it has been determined that a duty to preserve has arisen." The Sedona Conference, *The Sedona Conference Commentary on Legal Holds: The Trigger and the Process* 5 (2007).

[210] Sample litigation hold notices (short and long forms), a sample policy and sample procedures are available. *7 Steps for Legal Holds of ESI and Other Documents* app. C, F, G (2009).

pages of instructions and often include example forms for use.[211] Some organizations have issued model litigation hold procedures to be followed by their members.[212] Others have developed white papers to discuss what are believed to be "best practice" procedures for litigation holds.[213]

A survey of Global 1000 companies with revenue over $5 billion was conducted between October 2007 and March 2008.[214] The survey demonstrates with empirical data that the burden on American companies to implement litigation holds is very high. The survey highlights the changes in processes and technology within the surveyed companies, the impact of those changes on reducing risk and cost, and the methodologies used to issue litigation holds, manage preservation, and conduct e-discovery.[215]



While a few companies had only two dozen new matters per year, the majority of companies surveyed had far more new matters each year. The average was 980 new matters initiated each year, with an average of 5,100 open matters at any given time across all industries. 80% of the companies issued litigation holds for every matter, while 20% used early case assessments of various factors

[211] Blog post at www.lawdepartmentmangementblog.com (Reese Morrison): "Guidelines for hold procedures make sense. One I know about has 7-8 pages with attachments. The attachments describe a litigation support team, give a sample hold order with annotations, provide instructions to law firms of what to do and not to do with documents, guide document custodians, and explain in lay terms the function and importance of a litigation hold order." Nuts and bolts of how to handle litigation hold orders, http://www.lawdepartmentmanagementblog.com/law_department_management/2006/03/nuts_and_bolts_.html (Mar. 19, 2006, 17:36 EST).

[212] The American Health Information Management Association (AHIMA) has a model litigation hold policy posted on its website. The policy and procedures are based on the article *AHIMA Model E-Discovery Policies: Preservation and Legal Hold for Health Information and Records*, Journal of AHIMA, Feb. 2008, 79, no.2.

[213] *See e.g.*, International Legal Technology Association, *Litigation Support: Document Forensics and Legal Holds* (2009). The whitepaper contains a discussion of recent cases and attempts to answer some basic questions about the legal hold process such as: When is our legal obligation to preserve information triggered? Where is all of our data relating to this matter? How should we notify people of the need to preserve their information? Who needs to be notified? How much or how little information do we need to preserve? How can we best preserve and collect the data to meet our legal obligation? When should we rely upon custodian self-selection of data to preserve, and when is it more appropriate to follow a different procedure? When can we dispose of the information preserved subject to the legal hold? The paper goes on to discuss areas such as Planning, Timeliness and Prioritization, Use the Meet and Confer Wisely, Communication, Documentation and Audit Trail, Accountability, Consistency and Repeatability, Identification (of data sources), Transparency, Information Lifecycle Management as well as Supporting Technology and Automation.

[214] Compliance, Governance and Oversight Council, *Benchmark Survey on Prevailing Practices for Legal Holds in Global 1000 Companies* (2008), *available at* http://www.cgoc.com/events/benchmarkwebinar. The Survey was produced by the Compliance Governance and Oversight Counsel (www.cgoc.com), a community of corporate practitioners in retention, preservation and privacy. This community has been focusing on litigation hold issues since 2004. Benchmarking data was collected from corporations with revenue ranging from $5 billion to well over $150 billion in virtually all industry sectors, including: Biotechnology, Chemicals, Consumer Products, Energy, Financial Services, High Tech, Insurance, Manufacturing, Pharmaceutical and Transportation sectors, with Energy and Financial Services comprising 50% of the total. The companies manage a wide range of legal matters and legal holds. Matter types include commercial litigation, government investigations and inquiries, intellectual property disputes, government contract disputes, investigations, subpoenas, EEOC claims, employee "slip-and-falls" and mass tort litigation.

[215] *Id.*

to determine which matters required associated litigation holds.[216]

The survey discusses the tasks involved to implement a litigation hold pursuant to current case law requirements. Based on the data collected the survey includes a hypothetical look at the tasks involved to manage litigation holds across two hundred matters by one large organization over one year. The survey projected a staggering 60,000 tasks to simply send out a written litigation hold notice with quarterly reminders.

Included in the survey is one corporation's public hearing testimony before the Federal Rules Advisory Committee.

Level of documentation for 200 matters with 75 custodians each for one year.

Task	*Burden*
Initial notice and quarterly reminders	60,000 tasks
Affirmative responses from custodians	60,000 tasks
Manual and phone follow up — 25% of custodians	15,000 follow ups
Collection of 1,000 files (email, desktop) per custodian — 50% of custodians	7,500,000 files
Manual and phone follow up — 25% of collections	1,875 follow ups
In-house tracking per notice, custodian, follow up	2.5 people or 5,250 hours
Tracking with collections included	5 people or 9,963 hours

Included in the survey is one corporation's public hearing testimony before the Civil Rules Advisory Committee during the public comment phase for the 2006 Amendments:

> "I'm from a company that has 15,000 active litigations. In the year 2004, which was a slow year, we got new litigations at the rate of 225 a month. A few other numbers.
>
> We operate in 200 countries in the world. We have 306 offices around the world, 70 of them in the U.S. We generate 5.2 million e-mails a day, about half of that in the U.S. We have 65,000 desktop computers around the world and 30,000 laptop computers. These are for our employees, about half of those in the U.S. We have, in addition to the 65,000 desktops and 30,000 laptops, we have between 15,000 and 20,000 Blackberries and PDAs around the world. We have 7,000 servers worldwide, 4,000 of them in the U.S. We have 1,000 to 2,000 networks worldwide, about half of those in the U.S. We have 3,750 e-collaboration rooms. I assume that they're chat room type things, for people to be working on documents simultaneously. About 3,000 of those are in the U.S. We have 3,000 databases; 2,000 of those in the U.S. Our total storage of information that we now have is 800 terabytes; 500 terabytes in the U.S. One terabyte equals 500 million pages. 500 terabytes equals 250 billion pages. 800 terabytes equals 400 billion pages.
>
> I don't have worldwide figures on the disaster recovery system. The latest figures I have on the disaster recovery systems in the U.S. is that we generate 121,000 backup tapes for disaster recovery purposes. If we were ever to get an order, and we never have, that told us that we would have to stop all of our backup tapes, just the replacement of the backup tapes would cost 1.98 million dollars a month. That's over 20 — that's about 24 million dollars a year."[217]

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[216] *Id.*

[217] *Id.* (citing Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure (testimony of [Charles A.] Beach, [Exxon]) January 28, 2005. Mr. Beach explained in an interview conducted by John J. Jablonski on March 15, 2010, that his testimony regarding volume of printed pages was based on a bytes to plain text conversion. Conversion

c. The Preservation Playing Field is Typically Lopsided

Other noteworthy problems are created by asymmetrical litigation[218] and class actions.[219] In asymmetrical litigation an individual asserts a claim against a large company with a vast computer system. Claims often are made that encompass company wide electronic communications. A single claim may result in millions of e-mails, memoranda and other ESI being deemed relevant for preservation purposes. Costs of preservation can approach hundreds of thousands of dollars in some circumstances. While arguable, Rule 26(b)(2)(C) may be used to limit discovery (and preservation following the initiation of litigation), the pre-litigation requirement as to scope will remain untestable and subject to uncertainty until after litigation is initiated. However, courts will need to resist the simple conclusion that large cases require and justify wide ranging preservation and instead apply a more thoughtful analysis that truly takes into account the nature of the claims, the type of evidence needed to prove those claims, the sources of information readily available, the marginal benefit of preserving data beyond those sources and the cost involved in such additional preservation.

A similar problem exists in class action litigation where a class of litigants can assert the need for costly preservation in light of a significant total damages amount derived from an aggregation of millions of small claims. In both scenarios, significant economic pressure exists to resolve a case rather than incur preservation costs or risk preservation sanctions, regardless of the merits of the case.

d. *Ad hoc* Rules Expose Parties to Potential Disclosure of Privileged Analysis of Claims and Defenses

The general rule in the United States is that litigation hold notices are not discoverable. Litigation hold notices are usually internal letters, memoranda or e-mails directing members of an organization to preserve evidence in support of a litigation hold implemented by the organization related to an event that has triggered the duty to preserve evidence. Two reasons exist for protecting the production of litigation hold notices. One, most notices are issued by an attorney or at the direction of an attorney and contain attorney-client privileged communications or constitute attorney-work

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rates for other types of documents, such as spreadsheets, images and e-mails varies.).

[218] Employment related litigation comprises approximately 75 percent of all litigation in state and federal civil courts with the defendants having discovery obligations that are generally more burdensome and expansive. Gregory B. Reilly & Katy Shi-Klepper, *Employers Beware: Pitfalls and Promise of Electronic Information in Employment Litigation,* 252 N.J. Law. 14, 15 (2008).

[219] *See Melendres v. Arpaio*, 2010 U.S. Dist. LEXIS 20311, at *12-13 (D. Ariz. Feb. 12, 2010) (adverse inference jury instruction awarded for failure to preserve specific documents, rejecting defendants' argument that the class action complaint was too broad to put them on notice of specific documents to preserve); *In Re Yasmin and Yaz (Drospirenone) Mktg., Sales Practices and Prod. Liab. Litig.*, 2010 U.S. Dist. LEXIS 14092 (S.D. Ill. Mar. 22, 2010) (preservation order required defendants to take steps reasonably necessary, including issuing litigation hold notices, "to ensure the preservation of documents, data, and tangible things that are reasonably likely to be the subject of discovery in the Litigation" while requiring a narrower scope of preservation of plaintiffs "[b]ased on the disparity in resources and burden, the preservation activities set forth in this section shall fully satisfy the preservation obligations of the individual personal injury Plaintiffs in the Litigation and the individual plaintiffs serving as putative class representatives in the consumer-based class actions.").

product. Two, at least one court has held that disclosure of litigation hold notices "could dissuade other businesses from such instructions in the event of litigation."[220]

In certain circumstances, however, litigation hold notices are discoverable.[221] One party was required to produce detailed attorney notes of custodial interviews conducted as part of its litigation hold process.[222] Production of litigation hold notices exposes parties to disclosure of privileged communications and can provide an unfair roadmap into the legal strategy of an adversary.

5. New Rules Will Restore Integrity, Certainty and National Uniformity

We urge a change in the Rules to address the emerging problems associated with pre-litigation preservation, if federal civil litigation is finally to achieve the just, speedy and inexpensive resolution of controversies.[223] Rule 37 should be expanded to address preservation, as we propose in section IV. C., rather than rely upon the Committee Note to Rule 37(e) and the hope that courts will uniformly apply "reasonableness" and proportionality when analyzing complex preservation issues attendant to the increasing number of spoliation claims related to the alleged failure to preserve ESI. Specific rules should be created to directly limit sanctions for pre-litigation conduct.

In *Shady Grove Ortho. Assoc. v. Allstate Ins. Co.*[224], the Supreme Court recently addressed the authority granted to it by Congress to promulgate procedural rules for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them:

> In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, *28 U.S.C. § 2072(a)*, but with the limitation that those rules "shall not abridge, enlarge or modify any substantive right," *§ 2072(b)*.
>
> We have long held that this limitation means that the Rule must "really regulat[e] procedure, -- the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them," . . . The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. . . . What matters is what the rule itself *regulates:* If it governs only "the manner and the means" by which the litigants' rights are "enforced," it is valid; if it alters "the rules of decision by which [the] court will adjudicate [those] rights," it is not.[225]

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[220] *Gibson v. Ford Motor Co.*, 510 F. Supp. 2d 1116, 1123 (N.D. Ga. 2007).
[221] *Major Tours v. Colorel*, 2009 U.S. Dist. LEXIS 68128 (D.N.J. Aug. 4, 2009).
[222] *In re Intel Corp. Microprocessor Antitrust Litig.,* 2008 WL 2310288 (D. Del. Jun. 4, 2008) (holding that defendant Intel waived privilege protection due primarily to defendant's willingness to make records related to custodian interviews available to avoid worldwide depositions of custodians in response to class-action litigation. When Intel attempted to prevent disclosure of the privileged interviews the court held Intel to its attorney's promise to produce the interview notes.)
[223] *See* Fed. R. Civ. P. 1.
[224] *Shady Grove Ortho. Assoc. v. Allstate Ins. Co.,* 2010 U.S. LEXIS 2929 (U.S. Mar. 31, 2010).
[225] *Id.* at *26-27 (citations omitted).

So long as a rule governs "the manner and means' by which the litigants rights are 'enforced,' it is valid."[226] Here, because Rule 26(h) is built on the notion that certain categories of information are not generally discoverable in federal court litigation, and therefore, parties should not incur the cost of preserving those categories of information absent a court order or specific request, it passes constitutional muster under *Shady Grove*. The Court there went on to detail many instances of rules, similar to proposed Rule 26(h) that were in compliance with § 2072(b).[227]

Judge Rosenthal has noted that while Rule 37(e) "does not set preservation obligations," it does tell judges that a spoliation claim involving ESI "cannot be analyzed in the same way as similar claims involving static information."[228] The Rule provides guidance even when a duty to preserve arises prior to the commencement of litigation because of the likelihood of litigation.[229] The Committee Note to Rule 37(e) notes that good faith in the routine operation of an information system "may" involve a party's intervention to prevent the loss of information.

Despite Judge Rosenthal's approach, other courts have used the statement in the Committee Note to Rule 37(e) (that '[g]ood faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation") to ignore the guidance provided by the Rule and to establish a strict litigation hold duty when it comes to ESI. For example, the failure to place a meaningful litigation hold" on relevant evidence was held to have placed defendant's conduct "beyond the scope of 'routine, good faith operation of an electronic information system [of Rule 37(e)]."' [230] As the author of *Zubulake* recently opined, "it can't be routine and good-faith not to suspend your process once you know there is litigation."[231]

Despite the authority to create appropriate procedural rules governing the enforcement of preservation duties, other courts view sanctions for pre-litigation spoliation as an exercise of the court's inherent power[232] not the provisions of the Federal rules.[233] The Supreme Court has

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[226] *Id.*

[227] *Id.* at *27 ("Applying that test, we have rejected every statutory challenge to a Federal Rule that has come before us. We have found to be in compliance with *§ 2072(b)* rules prescribing methods for serving process, see . . . (Fed. Rule Civ. Proc. 4(f))[sic]; . . . (Fed. Rule Civ. Proc. 4(d)(1))[sic], and requiring litigants whose mental or physical condition is in dispute to submit to examinations[;] . . . *Schlagenhauf v. Holder, 379 U.S. 104, 113-114, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* [sic] (same). Likewise, we have upheld rules authorizing imposition of sanctions upon those who file frivolous appeals, . . . , or who sign court papers without a reasonable inquiry into the facts asserted, see *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533, 551-554, 111 S. Ct. 922, 112 L. Ed. 2d 1140 (1991)* [sic] (*Fed. Rule Civ. Proc. 11*). Each of these rules had some practical effect on the parties' rights, but each undeniably regulated only the process for enforcing those rights; none altered the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either.") (citations omitted).

[228] Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery after December 1, 2006*, 116 Yale L. J. 167, 174 (supp. 2006).

[229] Thomas Y. Allman, *Inadvertent Spoliation of ESI after the 2006 Amendments: The Impact of Rule 37(e),* 3 Fed. Cts. Law Rev. 25, 31 (2009) (collecting cases).

[230] *KCH Services v. Vanaire,* 2009 WL 2216601 (W.D. Ky. July 22, 2009).

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

[232] Gregory P. Joseph, *Sanctions: The Federal Law Of Litigation Abuse* § 26(E)(3) (4th ed. 2008). "[I]nherent powers of federal courts are those which 'are necessary to the exercise of all others."' *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (quoting *United States v. Hudson*, 11 U.S. 32, 34 (1812)); *see also Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 562-63 (3d Cir. 1985); *In re Stone*, 986 F.2d 898, 901-02 (5th Cir. 1993).

[233] *Goodman,* 632 F. Supp. 2d at 505-06 (D. Md. 2009)(in absence of court order, the "Court's ability to impose any sanction must derive from its inherent authority to regulate the litigation process, rather than from any sanction

affirmed lower court use of sanctions despite the fact that some activity may have occurred before suit was commenced.[234] In *Chambers v. NASCO*,[235] the Supreme Court held that lower courts have the power to "fashion an appropriate sanction for conduct which abuses the judicial process,"[236] but "the exercise of the inherent power of lower federal courts can be limited by statute and rule, for '[t]hese courts were created by act of Congress.'"[237] In *Chambers* the Court held that procedural rulemaking to control litigation is appropriate. This implies that rulemaking involving pre-commencement activity is appropriate so long as it is linked to the discovery in the litigation following an event triggering the duty to preserve.[238] While explicit preservation rules may appear like regulation of pre-litigation conduct, they in fact govern the effect of the conduct on the litigation before the court.

This point is well made by the First Circuit in *United States v. One*.[239] The court explained that the federal rules act as a limitation on a court's inherent powers whenever the rules directly address the conduct: "there are limits to a court's inherent powers, particularly in instances where the Civil Rules are on all fours. When, as in this case, the Civil Rules limit the nature of the sanction that can be imposed, a court may not use its inherent powers to circumvent the Rules' specific provisions."

The court in *Fidelity Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co.*, [240] addressed the need to refer to the rules before invoking the inherent powers of the court. The court held that "when a domain of judicial action is covered by an express rule, such as Rules 26 and 37 of the civil rules, the judge will rarely have need or justification for invoking his inherent power." In *Sentis Group, Inc. v. Shell Oil Co.*,[241] the court held that the rules should govern when they address the conduct. Specifically the court held that "[i]n general, then, courts first should turn to specific rules tailored for the situation at hand, such as Rule 37, to justify sanctions. Then, as an alternative basis for support or in circumstances where specific rules are insufficient, *i.e.*, when 'there [is] a need,' it may be appropriate to invoke their inherent authority."

The Seventh Circuit directly addressed this issue in *Kovilic Constr. Co. v. Missbrenner*.[242] The court held that:

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prescribed by the Federal Rules of Civil Procedure.")

[234] *Chambers v. Nasco*, 501 U.S. 32 (1991). The majority in *Chambers* approved the use of inherent sanctioning power in that case, while denying that it addressed pre-litigation conduct, arguably by focusing on the impact in the litigation itself. *See id.* at 55, n.17 ("[a]lthough the fraudulent transfer of assets took place before the suit was filed, it occurred after Chambers was given notice, pursuant to court rule, of the pending suit. Consequently, the sanctions imposed on Chambers were aimed at punishing not only the harm done to NASCO, but also the harm done to the court itself"). Justice Kennedy refused to accept this approach. *But see id.* at 74 (Kennedy, J., dissenting) ("By exercising inherent power to sanction pre-litigation conduct, the District Court exercised authority where Congress gave it none.")

[235] *Id.*

[236] *Id.* at 44.

[237] *Id.* at 48.

[238] For example, # Fed. R. Civ. P. Rule 27 ("Depositions to Perpetuate Testimony") does not, in subsection (a) ("Before an Action is Filed") "require an independent basis for federal jurisdiction" as long as the contemplated action for which the information is being perpetuated is itself authorized by statute. Jay E. Grenig, *Taking and Using Depostions Before Action or Pending Appeal in Federal Court,* 27 Am. J. Trial Advoc. 451, 454-55 (2004).

[239] *United States v. One*, 985 F.2d 655, 661 (1st Cir. 1993).

[240] *Fidelity Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 752 (7th Cir. 2005).

[241] *Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 900 (8th Cir. 2009) (citing *Societe Int'le Pour Participations Industrielles Et Commerciales, S.A. v. Rogers,* 357 U.S. 197, 207 (1958); *Chambers v. NASCO*, 501 U.S. 32, 49 (1991)).

[242] *Kovilic Constr. Co. v. Missbrenner*, 106 F.3d 768, 772-73 (7th Cir. 1997).

> The 'supersession' clause of the Rules Enabling Act, 28 U.S.C. § 2072(b) ... suggests that exercises of inherent powers may also not directly conflict with the national procedural rules [citing Rule 83(b)]. This Court has recognized the need to be cautious when resorting to inherent powers to justify an action, particularly when the matter is governed by other procedural rules, lest (even in the absence of a direct conflict) the restrictions in those rules become meaningless.... Sanctions authorized only by the inherent power of the court are therefore available only when no direct conflict with laws or national rules of procedure would arise. Even then, they must be used only with great caution.

This proposition was later echoed by the Third Circuit by *In re Prudential Ins. Co. Am. Sales Practice Litig. Actions.*[243] The court held that "[a]lthough a court retains the inherent right to sanction when rules of court or statutes also provide a vehicle for sanctioning misconduct, resort to these inherent powers is not preferred when other remedies are available. Moreover, the analysis in Chambers 'leads to the conclusion that if statutory or rules-based sanctions are entirely adequate, they should be invoked, rather than the inherent power.'"[244]

Allegations of spoliation, including the destruction of evidence in pending or reasonably foreseeable litigation, are addressed in federal courts through the inherent power to regulate the litigation process even if the conduct occurs before a case is filed or if, for another reason, there is no statute or rule that adequately addresses the conduct.[245] If a rule applies a federal court should apply it – rather than rely upon its inherent power.[246] In the absence of a specific rule addressing preservation duties and how to punish the failure to preserve ESI relevant to litigation, courts are clearly applying their inherent power.

Courts exercising their inherent authority regarding spoliation routinely ignore the fact that preservation failures occur prior to commencement of litigation, focusing, instead, on the impact of preservation failures on discovery.[247] To the extent any distinctions exist between sanctions depending upon the source of authority, they stem from the fact that courts applying Rule 37 must determine if the sanctions are "substantially justified[248] or were not "unjust" while courts applying inherent powers "exercise intrinsic self-restraint in using so powerful a weapon."[249] By virtue of the "supersession" clause of the Rules Enabling Act, which gives primacy to "national rules of

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[243] *In re Prudential Ins. Co. Am. Sales Practice Litig. Actions*, 278 F.3d 175, 189 (3d Cir. 2002).
[244] *Id.* at 189 (citations omitted).
[245] *Rimkus*, 2010 WL 645253, *citing Chambers*, 501 U.S. at 43-46; *Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1408 (5th Cir. 1993) (summary calendar).
[246] *Rimkus,* 2010 WL 645253 (If an applicable statute or rule can adequately sanction the conduct, that statute or rule should ordinarily be applied, with its attendant limits, rather than a more flexible or expansive "inherent power") [citing] *Chambers*, 501 U.S. at 50); *see Klein v. Stahl GMBH & Co. Maschinefabrik*, 185 F.3d 98, 109 (3d Cir. 1999) ("[A] trial court should consider invoking its inherent sanctioning powers only where no sanction established by the Federal Rules or a pertinent statute is 'up to the task' of remedying the damage done by a litigant's malfeasance . . . ."); *Natural Gas Pipeline Co. of Am.*, 2 F.3d at 1410 ("When parties or their attorneys engage in bad faith conduct, a court should ordinarily rely on the Federal Rules as the basis for sanctions.")
[246] *Id.*
[247] *Silvestri v. General Motors*, 271 F. 3d 583, 590 (4th Cir. 2001) (a damaged automobile was disposed of before a lawsuit was filed) and *Goodman*, 632 F. Supp. 2d, 505 (D. Md. 2009) (ESI was deleted prior to suit being commenced).
[248] *Devaney v. Continental American Insurance*, 989 F.2d 1154, 1163 (11th Cir. 1993) (determination turns on whether "reasonable people could differ as to the appropriateness of the contested action").
[249] *Webb v. The District of Columbia,* 146 F.3d 964, 971 (D.C. Cir. 1998).

procedure," courts are obligated to exercise their inherent powers in "'harmony'" with the Federal Rules when assessing conduct.[250] Regardless of the authority invoked, however, courts agree that the same "considerations are appropriate"[251] in determining sanctions whether under the court's inherent power or under the rules. Because sanctions issued under inherent power rest on a "relatively unstructured analysis" and are "broad and powerful tool[s]," courts are admonished to "first turn to specific rules tailored for the situation at hand."[252]

As the Supreme Court explained in *Chambers,*[253] there would rarely be a need to rely on inherent powers, since the Rules would be "up to the task."[254] One federal circuit held that there was no need to resort to inherent powers to impose sanctions in light of the remedies available under Rule 37. [255] By directly addressing preservation conduct, much needed guidance would be provided and certainty would be restored to pre-litigation conduct. Preservation rules will also bolster litigants' faith in the ability to of the courts to rely upon Rule 1 and other precedent to ensure proportionality and fairness in the context of litigation holds and preservation obligations.

D. The Rules Must Confront Runaway Discovery Costs

Several series of amendments to Rule 26 aimed at reining in the ever increasing costs of discovery have not effectively controlled these costs. Today, discovery is used as a weapon in the litigator's arsenal to impact the outcome of a case irrespective of the merits, rather than as a tool to collect information to aid the fact finder. Parties request substantial volumes of information that can be very expensive to collect and to review in an effort to force opposing parties to consider settlement based primarily on the threat of excessive litigation costs.[256] The strategy has worked --many parties decide to settle to avoid expensive and protracted discovery rather than undertaking a fair and practical examination of the merits. Early settlement demands often reference discovery costs as a basis for settlement, citing projected discovery expenditures of tens of thousands of dollars, if not hundreds of thousands or millions of dollars.

In addition, protracted discovery causes diseconomies. Discovery events (such as litigation holds, document preservation efforts, data gathering, depositions and related work) interfere with and detract from daily business activities and harm productivity. Typically, companies engaged in litigation devote substantial resources to these efforts. Custodians are impacted directly and often. Information technology support is usually required to preserve and protect data.

As discussed, the current Rule 26 provides no reliable remedy to curb discovery costs.

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[250] *Kovilic Construction Co. v. Missbrenner*, 106 F.3d 768, 773 (7th Cir. 1997) (reversing sanctions imposed based on use of court's inherent powers as abuse of discretion).

[251] *Id.* at 971 n.15.

[252] *Sentis Group, Inc. v. Shell Oil Company*, 559 F.3d 888, 900 (8th Cir. 2009) (reversing dismissal where reliance on inherent authority obscured the analysis of the sanction issues).

[253] *Chambers*, 501 U.S. at 32; *Degen v. United States*, 517 U.S. 820, 823 (1996)(reversing sanctions based on use of inherent power in light of ample authority under Federal Rules to manage discovery in civil suits).

[254] *Chambers*, 501 U.S. at 50.

[255] *Clearvalue, Inc. v. Pearl River Polymers, Inc.*, 560 F.3d 1291 (Fed. Cir. 2009).

[256] The ACTL/IAALS Report notes that in one survey 71% of respondents thought that "discovery is used as a tool to force settlement." Institute for the Advancement of the American Legal System, *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 ("ACTL/IAALS Report")* 9 (2009), *available at* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008.

Judges are asked to manage the scope of discovery, but are unable to effectively do so because of institutional limitations on the courts.[257] Judges, at the beginning of a case, struggle to determine the proper scope of discovery needed for both the court and the parties to flesh out each side's position because they know less than the parties about the underlying facts. Without effective guidance and necessary cooperation, discovery costs soar. Accordingly, parties need a a cost-effective, workable solution for access to relevant information. The purpose of discovery is to permit parties to access information that will enable fact finders to determine the outcome of civil litigation. Having rules that encourage the parties to police themselves and to focus on the most efficient means of obtaining truly critical evidence is the best way to achieve that purpose.

Some have contended that allocating costs to the requesting party would incentivize producing parties to run up their costs in responding to discovery requests. To the contrary, it would be dangerous folly for a target litigant, particularly in asymmetrical litigation, purposely to increase the costs of discovery or production in the false expectation that those costs would ever be allocated to the requesting party. And, in more symmetrical litigation there are built in cost controls on the basis of the classic economic theory: "What's good for the goose is good for the gander".

1. Proposed Rule Amendment

We propose that Rule 26 be amended to allocate the costs of discovery to the party who seeks the discovery:

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

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

2. Goals of Proposed Rule 26 Regarding Cost Allocation

The proposed Rule 26 will encourage each party to more properly tailor its discovery requests to its discovery needs by shifting the cost-benefit decision. A requester-pays rule will encourage parties to focus the scope of their discovery requests on evidence that is reasonably calculated to produce relevant information from the most cost-effective source. In addition to focusing discovery requests, proposed Rule 26 discourages a party from using discovery as a weapon to force settlements without regard to the merits of a case; a party that pays for discovery will have no incentive to make overly broad requests. Furthermore, proposed Rule 26 encourages cooperation between parties to control discovery costs and provides courts with a workable standard to guide parties through litigation.

3. Current Rules Governing Cost Allocation

In 2006, Rule 26(b)(2)(B)[258] was amended specifically to reference limitations on discovery in Rule 26(b)(2)(C) that could include cost allocation, if discovery of ESI from sources that are not reasonably accessible were permitted. To date, district courts have seldom applied this rule to shift costs for the purpose of permitting the discovery of inaccessible ESI for parties. Courts have applied the amended Federal Rules to shift costs for non-parties under Fed. R. Civ. P. 45(c).[259]

The Committee Notes to the Rule 26 e-discovery amendments outline seven factors to review when determining whether cost allocation is appropriate:

1. the specificity of the discovery request;

2. the quantity of information available from other and more easily accessed sources;

3. the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources;

4. the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;

5. predictions as to the importance and usefulness of the further information;

6. the importance of the issues at stake in the litigation; and

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[258] The Rule Provides as follows:

> (B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. 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.

[259] *Dow Chemical v. Reinhard,* 2008 WL 1968302 (S.D.N.Y April 29, 2008).

7. the parties' resources.[260]

As David Lender's analysis of Rule 26 notes, the Rule left many issues unresolved:

> "The new rule presents a number of important questions that will need to be resolved as courts wrestle with its meaning. For example, what does 'not reasonably accessible' mean? Are backup tapes always 'not reasonably accessible,' and will they become more reasonably accessible as technology changes? Can active, accessible data ever be considered 'not reasonably accessible' because of the costs to review such data for responsiveness and privilege? Will the new rules result in more cost-shifting or less cost-shifting to the requesting party?"[261]

The underutilization of Rule 26 in the nearly four years following the e-discovery amendment's effective date suggests that the Rule has not been an effective tool for courts to impose reasonable limits on discovery. The empirical data confirms that discovery costs continue to rise and that those costs continue to influence disposition of cases independent of the merits of the claims.

5. Appropriately Allocating the Costs of Discovery

The costs of discovery, and in particular electronic discovery, may often far exceed the value of the information sought and even the amount in controversy, thereby forcing litigants to settle even clearly non-meritorious claims. In other circumstances,, the allocation of costs still has a significant impact upon discovery. As Professor Martin Redish observed, "the fact that a party's opponent will have to bear the financial burden of preparing the discovery response actually gives litigants an incentive to make discovery requests, and the bigger expense to be borne by the opponent, the bigger the incentive to make the request."[262] Accordingly, "it is all but inevitable that . . . the current cost allocation system will result in excessive and therefore inefficient discovery even where the discovering party does not consciously intend the discovery to be abusive."[263]

Requiring requesting parties to bear the costs of discovery deters the natural tendency of litigants to draft discovery requests as broadly as possible, in the knowledge that such requests are not only "virtually free" to the requesting party, but will result in significant costs to the responding party. For example, the "predictable allocation of costs" resulting from the Texas discovery rule "has helped reduce the overbroad nature of many requests" in the state.[264] At earlier Rules Committee discovery conferences such as at Fordham Law School, counsel and judges familiar with the experience in Texas following adoption of the "Texas rule" recounted its positive impact on keeping discovery within reasonable bounds.

By mandating cost shifting, the rule we propose would specifically enforce the notion of proportionality in the Federal Rules by requiring the requesting party to carefully consider the cost/benefit of discovery requests and narrowly tailor them to the needs of the specific dispute. An advantage to such a rule is that it is consistent with the fundamental principle that each party must

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[260] *See* David Lender, *Shifting Under the New Rules: Is the Landscape Changing?*, Federal Lawyer, Aug. 2007, at 4.
[261] *Id.*
[262] Redish II, *supra* note 33, at 603.
[263] *Id.*
[264] Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 Def. Couns. J. 206, 209 (2001).

bear the "ordinary burden of financing his own suit."[265] Placing, by cost sharing, financial responsibility upon the requesting party for seeking information beyond the scope of what is reasonable in the case at hand is not a new approach. Courts can, but do not often enough, strike a balance between the likely benefit of the proposed discovery and the burden of production and require that producing parties pay some or all of the extraordinary costs associated with that production.[266]

Such a change in cost allocation procedure would not only induce greater efficiency; it would comport more appropriately with established precepts of economic justice: "If one strips away the long accepted assumption as to how the American system allocates costs among litigants, the actions of the parties to a lawsuit in the discovery process would be most appropriately seen as analogous to a quasi-contractual relationship between the adversary litigants. Under the theory of *quantum meruit*, a party to a quasi-contract is legally entitled, as a matter of fundamental principles of economic justice, to be reimbursed for any benefit he confers on another person at that person's expressed or implied request….[I]t is [therefore] morally untenable to allow the requesting party to retain the benefit of its opponent's labor without, at the very least, reimbursing the costs of discovery incurred by the producing party."[267]

a. Rationale for Payment of Discovery Costs by Requesting Parties

The Federal Rules should encourage parties to pursue discovery at the lowest cost and in the least burdensome manner possible to obtain the evidence necessary for the fact finder to determine the case on the merits. Discovery rules should not provide weapons for parties to force settlements not justified by the merits. As Redish and McNamara state: "Subsidization—through allocation of the total costs to the responding party—renders discovery costs a complete externality, and removes all incentives for litigants to limit the scope of their requests."[268] A "requester-pays rule" would help achieve those results. A party who benefits by making a claim or raising a defense is in the best position to decide if information is worth the cost of obtaining it. A requester-pays rule will encourage focused requests designed to obtain that information necessary for the just adjudication of the issues without the excessive costs currently experienced. "The externalization of discovery costs, accomplished through the *defacto* hidden litigation subsidy caused by our current model of cost allocation, incentivizes what can most appropriately be labeled 'excessive discovery."[269]

b. Placing Burden on Party Seeking Information

Section (a) of proposed Rule 26 helps remedy current problems with properly limiting discovery and controlling costs. Putting the financial burden on the party seeking the information encourages parties to self-police discovery. The current approach allows the requesting party to make overly broad requests without consequence and to impose cost and burden on an adversary to increase the

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[265] *Eisen v .Carlisle & Jacquelin,* 417 U.S. 156, 179 (1974).

[266] *See, e.g.*, *In re Estate of Amijo*, 31 P.3d 372, 378 (N.M. 2001); *Berrie v. Berrie*, 457 A.2d 76, 80 (N.J. Super. Ct. Ch. Div. 1983).

[267] Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, Paper delivered at conference at Searle Center, Northwestern University School of Law on "Finding the Balance between Benefit and Cost: A Public Policy Roundtable on the Federal Rules of Civil Procedure" 6-7 (April 21-22, 2010).

[268] *Id.* at 33.

[269] *Id.* at 34.

chances of resolving the case without regard to ability to prove the merits. The risk that a requesting party will receive "bounce-back" requests also seeking excessive information has not been enough to prevent excessively expensive and burdensome discovery and, of course, is of no use in asymmetrical litigation, where the requesting party, with few records, has little to risk from a "bounce-back" request.

c. Encouraging Cooperation in Discovery.

Adoption of a requester-pays rule will create incentives to attain the goal of Rule 1: "the just, speedy, and inexpensive determination of every action and proceeding." The current rule increases costs, lengthens the time to resolve cases and too often forces results not justified by the merits

Previous amendments to the Federal Rules sought discovery cooperation among litigants to avoid disputes and to promote efficient discovery. Although the Rules create a context for cooperation by requiring parties to meet and discuss discovery early in the case, the Rules do not provide meaningful incentives for cooperation absent court involvement and direction.

A requester-pays rule would strongly encourage cooperation. Such a rule gives both parties an incentive to work together to obtain discovery needed to resolve the merits of the case in the cheapest, quickest way possible. Cooperation reduces the volume of discovery and allows the courts to better carry out their duty of deciding cases on the merits.

We wish to emphasize that we are under no illusions that a "requester pays" rule perfectly aligns costs and incentives. This is an extremely complicated matter. However, the present rules do not even approximate the objective of having parties bear the true cost of their behavior, which would align the costs and incentives; by contrast, the proposed rule dramatically moves in that direction. Thus, while it may not be a perfect solution, it is the best available, and its benefits would be enormous.

V. CONCLUSION

LCJ, DRI, FDCC, IADC, and the many defense trial lawyers and corporate counsel who contributed to the preparation of this paper commend the Rules Committee for undertaking the present review of the Federal Civil Rules and for inviting our participation in this important work. We submit this White Paper summarizing our views on the major problems in civil litigation facing federal courts now and in the future. We suggest meaningful amendments to the Rules to help solve these problems. We look forward to continued participation in the Committee's efforts.

Respectfully submitted,

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