Kroll Ontrack.

MEMORANDUM

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CC: Hon. Paul W. Grimm, Prof. Richard L. Marcus

Re: Kroll Ontrack Commentary Regarding Rulemaking Efforts

Date: August 31, 2011

Disclaimer: The views and perspectives in this memo do not represent the position of Kroll Ontrack as a corporate entity. Rather, they are designed to drive thought leadership and educational discourse regarding the legal technologies industry and the growing challenges facing practitioners today regarding electronic discovery.

In response to the issues to be addressed by participants at the September 9, 2011 Conference on Preservation and Sanctions,[1] we have drafted this commentary memo to provide the Rules Committee with useful input and suggestions for further research. We strongly support ongoing efforts to enhance the Federal Rules of Civil Procedure by addressing the challenges posed by preservation in this age of electronic discovery.

Kroll Ontrack is a leading provider of services and software to the e-discovery community and is also the publisher of the *Annual ESI Trends Report,* which assesses legal trends in e-discovery, including preservation and collection difficulties identified by respondents.[2]

The information contained below is primarily reflective of our work as a service provider with thousands of clients each year and includes references to anonymous case studies to provide useful illustrations. The Committee will understand, of course, that in so doing we have acted to protect the confidentiality of our clients by removing identifiable characteristics.

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[1] Memorandum, June 29, 2011, copy available at http://pdfserver.amlaw.com/ltn/Judicial_Conference_Comm_on_Rules_of_Practice_and_Procedure_Memo_20110629.pdf.
[2] Kroll Ontrack, *Fourth Annual ESI Trends Report* (2010). Available for download at: http://www.krollontrack.com/esi-trends/.

- Part One of this memo provides answers and input to questions raised by the Advisory Committee on Civil Rules in its June 29 Memorandum.
- Part Two of this memo evaluates the elements identified for potential inclusion in the rules.

We hope this information is helpful as you and the committee members consider further guideposts for our industry. Thank you for your time and diligence addressing this important issue. Feel free to contact any of us for further information.

Part One: Questions Posed By The Committee

We first address the key questions posed in the memorandum addressed to the participants dated June 29, 2011.

Question 1

Rules Committee Question*: To what extent is preservation of ESI a problem in your organization or practice?*

Response:
Typically, our clients have encountered difficulties in executing preservation obligations due to the following reasons:

1. The underlying issues and ultimate risks of the matter did not warrant the expense.
2. Locating and preserving data from a vast number of sources and locations posed too great a challenge, especially when international sources were involved.
3. Turnaround times for the preservation efforts and compliance with discovery obligations as a whole were extremely tight.

Client Example #1

A small to mid-sized web merchant contacted us after being served with a complaint alleging infringement of patents in its usage of web technologies. The client felt the plaintiff was simply looking for a settlement and licensing deal, and believed the claims were unwarranted. The client was tempted to settle due to the potential cost of preservation and discovery, which would have been fairly complex due to the number and variety of systems involved. Ultimately, the client decided against settlement to avoid setting a precedent in these types of claims. As a result, the client:

1. Created and disseminated a legal hold that was inclusive of all custodians, no matter how limited or uncertain their potential involvement.
2. Performed desktop collections for the highest priority custodians (approximately 25%).
3. Performed server e-mail collections for high and medium priority custodians.
4. Performed server shared drive collections for y high and medium priority custodians.
5. Relied on the employees receiving legal hold notices to not delete or destroy data not collected in items 2-4.

Under some circumstances, the client might have been able to preserve evidence on a wider scale, but was unable to do so because of the vast array of data sources. For a variety of reasons, the client acted unilaterally and did not communicate with opposing counsel prior to taking these actions.

Client Example #2

A small transportation company was investigated by the Department of Justice (DOJ), apparently in response to allegations of price fixing. The company was comprised of approximately 25 employees located in 8 locations. Many of the IT services were outsourced to a third party provider and little or no IT usage policies existed. This created a situation where employees and their data were literally everywhere within the company and with the third party hosting provider. Further compounding the problem were the company's limited financial resources which caused it to limit the size of the server mailboxes to 200 megabytes, forcing users to archive e-mail to PST files on their local personal computers.

With our help, the client was able to work with the DOJ to target the highest priority custodians and only collect active data from those custodians' hard drives. Without these efforts to target data, the projected cost to collect and produce the data would have exceeded the company's net profit for the previous two years.

Client Example #3

A medium sized technology company was involved in litigation regarding the implementation of various technologies. After investigation of potential preservation scope, the initial custodian count was into the thousands, but was ultimately narrowed down to 120. However, it was not possible to reduce the volume of shared network data to be reviewed, resulting in collection of an excessive amount of network data totaling tens of millions of files. Responsive search terms did a fair job of reducing this material, but millions of files remained to be reviewed for privilege and relevance prior to production. The client determined that the cost to review this volume of material was unwarranted and decided to perform privileged term searching on the data so as to isolate and review only that material. All data that did not hit on a privilege search term was then mass produced to opposing counsel without review. The client was concerned that opposing counsel might accuse them of "data dumping", but decided the cost savings were worth the risk.

Comments:
We have asked ourselves whether the current Rules were relevant to the client's willingness to take the risks in the third example. Our reaction is that except for the proportionality test outlined in Rule 26, there is neither an incentive nor adequate deterrence (apart from courts which take a firmer stance) that encourages parties to narrow requests or conduct targeted discovery. Parties, in our experience, are continuing to seek to conduct broad discovery at a prohibitive cost, moving the focus away from resolving cases on the merits. This necessarily impacts the perception that preservation must be broadly executed.

We believe, based on our experience, that it would be useful to amend the Rules so as to include firmer guidelines with regard to preservation obligations as an important step towards eliminating any room for interpretation that may confuse parties or allow them to skirt their responsibilities.

Question No. 2
Rules Committee Question: *Where are the costs incurred -- in identifying and segregating relevant ESI, in storing ESI, in reviewing ESI before production in litigation, in litigating ESI issues in court, in other ways?*

Response:
Our clients generally incur costs throughout the full range of e-discovery services, starting with information management and extending through preservation, review and production. The highest costs are often incurred during the document review process, which often accounts for double or triple e-discovery processing and labor (attorney) intensive activity, and hosting charges – especially if automated search techniques are not involved early in the process.

Early Data Assessment
Through use of early data/case assessment (EDA) technology and techniques, parties can determine if and what data must be preserved, which will impact the data which must be preserved, collected, processed, hosted and reviewed. EDA also aids in fact-finding and narrows the scope of important data early on, reduces the number of key custodians, tests key search terms and identifies critical case arguments.

Client Example #1

A Top 200 law firm represented a Fortune 100 corporation client matter concerning a large Securities and Exchange Commission (SEC) investigation. The complexity of the case suggested that the law firm and its client should gain early understanding of the data before processing. The firm had a general idea of the time frames giving rise to the investigation, but needed to isolate specific communications and people involved in the incident.

The law firm loaded 45 gigabytes of data – more than a quarter of a million documents – into an early data assessment platform. A small group of attorneys began running complex searches, seeking to drill down on precise time frames and involved individuals. They also narrowed the document set using field specificity, such as e-mails sent to or from particular individuals. Topic grouping, concept searching, e-mail threading and near-duplication technology was also used to reveal common themes. Last, the team used mathematically sound analytics features to reveal peaks and valleys in volumes of e-mail traffic, common e-mail subjects and the e-mail traffic between custodians.

Within a few days, the original 45 gigabytes of data were narrowed down to 13 gigabytes (approximately 50,000 documents) for processing and review in an online review tool. The 13 gigabytes were loaded into a review database, and the review team was assembled to determine which documents to produce to the SEC. Given the previous early data assessment work performed, the review lasted several days instead of several weeks and the client saved more than 50 percent on its processing and review costs.

Client Example #2

A Fortune 500 pharmaceutical manufacturer brought suit against its competitor. Outside counsel was an international law firm with over 500 lawyers in offices on several continents. The defendant sought identifying, preserving and collecting relevant data sources, and defensibly winnowing the enormous volume of data at issue into a manageable size for processing and review.

The defendant identified a sample set comprised of data from ten custodians central to the underlying matter. The sample set encompassed 470 GB of source data (approximate 1.6 million files), which resulted in 236 GB (almost 1 million files) for review after filtering and deduplication. The data included e-mail, shared materials and hard drive data for each of the ten custodians.

Using early data assessment technology, the defendant ran queries and repeatedly tested, analyzed, sampled and validated the sample data to measure its response to various key terms. After two days of assessing and analyzing the data, the team arrived at a list of defensible keywords that enabled the team to reduce the sample database by 90% for further review.

Computer Assisted Review

Another technology innovation driving document review efficiencies and reducing costs is computer assisted review, which expands the work of automated search beyond the traditional use of keywords through repetitive feedback and analytics. Intelligent Review Technology (IRT) augments the human-intensive aspects of the document review process in four areas:

- Automated Workflow: Minimizes human work and inconsistencies in the staging, distribution, routing, assessment and quality control of the review process
- Intelligent Prioritization: Learns what documents are most likely to be relevant to the case by analyzing human reviewer categorization decisions and elevating those documents for first review
- Intelligent Categorization: Analyzes human categorization patterns and recommends categorizations for documents not yet reviewed by a human
- Statistical Quality Control & Sampling: Monitors the progress and effectiveness of prioritization and review, enabling counsel to make defensible decisions

Client Example #1

A bank needed to design an efficient solution to manage significant amounts of data involved in a series of lawsuits. The client needed to reduce the volume of data for processing and review, strengthen defensibility and reduce costs and risk.

The client collected roughly 1,000 GB of data for 17 custodians for processing. After filtering the data, approximately 250 GB were uploaded into an online review tool. From there, the client's outside counsel utilized automated workflow technology to guide the process of the review. In this case, outside counsel designed a workflow process that was organized into two separate tracks: one for electronic documents and one for scanned documents that they wanted to treat differently.

Not only did workflow provide the desired flexibility in this case, it also increased coding accuracy by including a built-in quality control (QC) process that helped identify documents that were improperly or inconsistently coded. This sharply reduced instances of human error from the start, rather than requiring multiple QC searches to ensure that only responsive, non-privileged documents were produced. The technology instilled confidence in outside counsel and the client, and demonstrated the effectiveness of a documented, organized and defensible review method.

Client Example #2

Embroiled in a complex patent litigation, a national law firm representing a major health care provider needed to ensure the document review process was efficiently conducted to meet case critical deadlines. Already faced with 334 gigabytes of data, totaling over 750,000 documents from the outset of the case, the law firm was surprised to discover an additional 325,000 documents mid-way through the review period.

Moving the deadline for review was not an option, but reviewing the new batch of documents using traditional linear review methods would have necessitated a significant break from the budget and no guarantees that the deadline could be met.

The legal team first used an early data assessment platform to narrow the data set, excluding almost 200,000 documents before transitioning to the online review platform. Once the data was ready for review, the legal team utilized Intelligent Prioritization which elevated documents that were more likely to be responsive. This technology significantly aided the review process, allowing the team to review and produce 50,000 documents after only two weeks.

The legal team also utilized Intelligent Categorization, combined with sampling and analysis of reporting, to remove documents determined to have a 90 percent confidence rating on non-responsiveness – instantly eliminating nearly half of the documents from the new data set that was uncovered mid-way through the review process. A rigid quality control process revealed a staggering 94 percent agreement rate between a human review "dream team" and the iC determinations across the data set, and counsel was able to confidently report to the senior partners that the deadline would be met on time, within budget and without risk. The entire process using this technology saved almost $200,000 in review costs by significantly reducing the number of hours needed for review – with $65,000 attributable to iC alone.

Through the use of advanced technologies such as early data assessment and Intelligent Review Technology, we are seeing our clients proceed through the e-discovery process in a smarter, more efficient fashion, saving valuable time and money.

Question No. 3

Rules Committee Question: *The FJC study suggests that spoliation of ESI is raised rarely in federal motions practice. Is that consistent with your experience?*

Response:

Kroll Ontrack conducts an annual review in which we analyze cases summarized over the previous year. Our findings run contrary to the Federal Judicial Center study that suggests the spoliation of ESI rarely is raised in federal motions practice. Unfortunately, in our research, there appears to be a growing prevalence of making e-discovery the main battle, taking away from the merits of the case and challenging the implementation steps described.[3]

We have noted increased challenges to proper preservation techniques, the continued frustration by the judiciary for resulting discovery failures and the renewed call for cooperation amongst counsel.

From January 1, 2010 to October 31, 2010, Kroll Ontrack summarized 84 of the most significant e-discovery cases on a federal level. These 84 opinions represent the trends demonstrated in jurisdictions across the nation. The breakdown of the major issues involved in these cases is as follows:

[3] The number of instances in which litigants sought sanctions has doubled in the first half of 2011. Gibson Dunn 2011 Mid-Year E-Discovery Update, July 22, 2011, copy at http://www.gibsondunn.com/publications/pages/2011Mid-YearE-DiscoveryUpdate.aspx; *See also Rimkus Consulting Group, Inc. v. Cammarata*, 2010 WL 645253 (S.D.Tex. Feb. 19, 2010) (finding "spoliation of evidence – particularly of electronically stored information – has assumed a level of importance in litigation that raises grave concerns" and "distract[s] from the merits of a case, add[s] costs to discovery, and delay[s] resolution.").

- 39 percent of cases addressed sanctions
  - 49 percent of sanctions involved preservation and spoliation issues
  - 27 percent of sanctions involved production disputes
  - 24 percent of sanctions involved withholding discovery and other abuses
- 18 percent of cases addressed various production considerations
- 17 percent of cases addressed various procedural issues (such as searching protocol and cooperation)
- 11 percent of cases addressed privilege considerations and waivers
- 8 percent of cases addressed computer forensics protocols and experts
- 2 percent of cases addressed cost considerations
- 2 percent of cases addressed preservation and spoliation issues (but not sanctions)
- 2 percent of cases addressed discoverability and admissibility issues

Almost every case that discussed preservation and spoliation issues also included a conversation regarding sanctions. This is not surprising, given that 24 percent of respondents to the *Fourth Annual ESI Trends Report,* published by Kroll Ontrack, ranked preservation and collection difficulties as their number one concern.[4]

Thus, our case law analysis over the past several years have demonstrated that sanctions continue to be a pervasive aspect of e-discovery, with the rise of preservation and spoliation issues among the leading causes of why parties seek sanctions and why courts impose sanctions.

Question No. 4

Rules Committee Question*: How does the exploding use of social media affect litigation in general, and preservation in particular? For example, if employers monitor employee use of social media at work, or if producers of goods or services monitor social media discussions of their products, should that activity result in preservation of the material reviewed? Can prospective plaintiffs safely change their social media postings after they conclude they may have a claim?*

Response:

We are aware of statistics published indicating that Americans spent 22.7% of their time online using social networking sites and blogs as of June 2010, representing a 43% increase from June 2009.[5] People are increasingly turning to social networking sites to conduct their day-to-day communications, outpacing other mediums such as text messaging and e-mail. Businesses are also turning to sites such as Twitter, Facebook and LinkedIn to market their products and strengthen their relationships with consumers.[6] In addition, we are beginning to see requests from clients that include the need to collect, analyze and review evidence gathered from social media sites.

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[5] http://blog.nielsen.com/nielsenwire/online_mobile/what-americans-do-online-social-media-and-games-dominate-activity/. Last Accessed April 1, 2011. Gartner also predicts that social media will replace e-mail as the dominant form of communication by 2014. Gartner Predicts Social Networking to Overtake E-Mail. Computerworld.com, July 8, 2010.

[6] A 2009 study reports that consumers are 2.8 times more likely to search for a brand if they are exposed to it via social networking sites such as Twitter, Facebook and YouTube. GroupM Search, comScore, "The Influenced: Social Media, Search and the Interplay of Consideration and Consumption", October 2009. Available at http://www.searchfuel.com/2009/10/search-marketing-social-media-interplay/ (last accessed April 1, 2011).

The bottom line is that potentially relevant information is increasingly likely to be contained in cutting-edge data sources, such as social media sites. In addition, the overall trend of the judiciary seems to be moving toward greater permissiveness for e-discovery with regard to social media, as well as a strong likelihood that privacy concerns will be outweighed by the weight and relevance of the information. While there has yet to be a consistent and uniform standard, corporations and counsel clearly must anticipate and plan for requests for information from these popular communication mediums.

Question No. 5

Rules Committee Question*: What implications will cloud computing have for civil litigation?*

Response:

Although difficult to define, generally speaking, we understand cloud computing as an extension of the operations and functions of a traditional data center to resources accessible remotely via the Internet. The services outsourced to a cloud provider can include pure data storage, the provision of computer applications through Application Service Providers (ASPs), software, platform or infrastructure through Software-as-a-Service (SaaS), Platform-as-a-Service (PaaS) and Infrastructure-as-a-Service (IaaS), respectively, or some combination thereof.

Cloud computing services are often attractive because they can provide companies access to a wide range of high-quality IT services at lower costs than a company providing and maintaining these IT functions on its own. Furthermore, these variable operational costs require very little up-front investment or need for reinvestment later. Best of all, reducing IT spending allows companies to redirect more resources into core business practices. As more companies and law firms move data to the cloud issues will arise in terms of data location, privacy and collection which may impact civil litigation.

Data collection from the cloud is a developing practice that is still in relative infancy in terms of frequency and best practices. Even if the location of the information is known, significant obstacles may make access infeasible or even impossible. First, cloud providers typically maintain servers in multiple locations. Network load balancing, local outages and other factors can lead to decisions – often made without any human intervention – to relocate data, programs and processing from one location to another. Making matters worse, the data may be dynamically fragmented for efficiency, meaning that various parts of data may be stored in, and move among, multiple venues at any point in time.

Data privacy concerns also impact the collection process as granting access to servers may be illegal in some jurisdictions because of the multi-tenancy nature of cloud servers. Cloud providers are not data owners, and allowing forensic collection could result in the inadvertent seizure of an unrelated client's data, which could constitute a costly, even if unintended, data breach for both the client and cloud provider. Even the specter of this risk could be enough to make voluntary permission to access the data impossible and require litigation in a foreign court to gain access. Similar to social media, cloud computing is a growing channel where organizations will need to preserve, access and produce data. Thus, it is important that a rule designed to address preservation is broad enough to encompass these emerging technologies.

Question No. 6

Rules Committee Question*: Is there a significant cost associated with storing information preserved for litigation? If so, what is the nature of the cost? In 2000, during a mini-conference about E-Discovery, a prominent lawyer asked rhetorically "Why don't you keep all ESI forever? Storage costs no longer are a problem, so why not do that?" How would you answer that question today?*

Response:
Corporations must balance the need to comply with legal and regulatory requirements with the business efficiency and storage capacity concerns of IT. Although the costs of storage are becoming increasingly less significant in terms of storing documents indefinitely, over-retention poses significant risks, including the ability to produce relevant information in the event of litigation or an investigation, increased IT staffing and storage needs, and increased e-discovery costs by creating larger data volumes, which significantly increases document review time. At the end of the day, the costs associated with saving everything run deeper than the costs associated with simply storing the information, primarily because of the costs of review, as noted earlier

Kroll Ontrack recommends the development, implementation and enforcement of sound document retention policies, tempered by the responsibilities imposed through the litigation process and applied in a reasonable manner and in good faith in order to manage information in a more efficient fashion, saving costs down the road.

Question No. 7
Rules Committee Question*: We would appreciate your careful review of and comments on the three proposed approaches to a preservation/sanctions rule described in the Preservation/Sanctions Issues memo, as well as the questions included in the three proposals. Which of the three approaches do you find most promising and why? Least promising and why?*

Response:
Category 1: This proposed solution appears to be too limiting because of the excessive specificity included within the rule. No one can predict with absolute certainly to what bounds the "data explosion" that modern society has witnessed will reach, which includes a potential exponential increase in data volumes, sources and custodians included in litigation. Specifying amounts in a rule could severely hamper its effectiveness.

Category 2: This rule proposal is closest to what we feel would be an appropriate rule. Although the language is more general, it is necessary given the rapid expansion on the world of e-discovery. Many felt the Fed.R.Civ.P. amendments made in 2006 to include "electronically stored information" were too general in terms of defining what the term encompassed, but over the years it has proved to be an essential portion of the rule as data sources continue to expand to include such sources as social media and text messages.

Category 3: The Category 3 rule also seems insufficient as it would solely address sanctions that would be imposed. Rulemaking efforts would be better served to offer a rule directly addressing the requirements and elements of an appropriate preservation effort in order to achieve the goal of providing clearer guidance to corporations and practitioners regarding their preservation obligations.

Question No. 8
Rules Committee Question*: Are cost savings more likely to be achieved through advances in technology than through a rule of civil procedure?*

Response:
A combination of technology and rules can help achieve maximum cost savings. However, some litigants and corporations remain hesitant to implement new technologies, such as Intelligent Review Technology,

as no court or judicial opinion has commented on defensibility.[7] Kroll Ontrack and other e-discovery service providers are hosting numerous thought leadership events and discussions to help educate the legal and judicial community on this technology. Yet, until there is a overt acceptance – particularly from the judiciary – there may not be a larger push to adopt it by practitioners. As such, technology cannot develop in a vacuum without rule-making efforts and judicial commentary bringing formalized attention to and validation of these options to the masses of legal practitioners.

Question No. 9

Rules Committee Question*: Would a federal rule solve problems you now face, given that there may remain uncertainties in state law and procedure? Could a federal rule help reduce those uncertainties, perhaps by providing "leadership" for state courts and rulemakers addressing similar issues?*

Response:

Through its thought-leadership division, Kroll Ontrack tracks the evolution of state rulemaking activity with regard to electronically stored information. According to our research, over 33 states have enacted rules to address ESI in some format since 2006. However, many of the rules and requirements vary from state to state, providing a sense of confusion for practitioners and corporations that operate and litigate in multiple jurisdictions, and are involved in both state and federal court proceedings. A federal rule addressing preservation would provide uniform guidance that could then be adopted on the state level. We have started to see this effect from the adoption of Federal Rule of Evidence 502, although only a small handful of states have enacted this rule on the state level.[8] Adopting rules amendments takes time, but if a federal rule is implemented and proves to be successful in reducing costs and issues related to preservation, states may see the benefits of moving swiftly to enacting these changes on the state level.

Question No. 10

Rules Committee Question*: What are the three most important elements of a preservation/sanctions rule in your view?*

Response:

Out of the eight elements identified as important to the preservation rule, we believe trigger, litigation hold and the consequences of failure are the three most important. First, the trigger of the duty to preserve is one of the more litigated aspects in preservation disputes and is a point where case law differs vastly.

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[7] Anne Kershaw & Joe Howie, *Judges' Guide to Cost-Effective E-Discovery* (2010), published by the Electronic Discovery Institute (now referred to as The Law Institute). The largest single obstacle to more widespread adoption of technology-aided review (intelligent review technology) is the uncertainty over judicial acceptance of this approach. This paper encouraged use of intelligent review technology to lower the costs of reviewing and producing electronic evidence.

[8] Arizona adopted Arizona Rule of Evidence 502 in January 2010 to address a disclosure of a communication or information covered by the attorney-client privilege or work product protection (http://www.azcourts.gov/portals/20/2008RulesA/2009Rules/Aug2009orders/R090004.pdf). Rule of Evidence 502(f) was also adopted by Arkansas. According to the Explanatory Note for Arkansas Rule of Evidence 502: "Under new subdivision (f), disclosure of information covered by the attorney-client privilege or the work-product doctrine to a government agency conducting an investigation of the client does not constitute a general waiver of the information disclosed." (http://courts.arkansas.gov/rules/rules_of_evidence/article5/index.cfm#2). Iowa also approved Evidence Rule 5.502 which is analogous to Federal Rule of Evidence 502. This rule addresses waiver of privilege and inadvertent disclosure. (http://www.iowacourts.gov/wfData/files/CourtRules/40209RptreIREvid5_502,5_615,5_803,4&7.pdf). Rule 502 to the Washington Rules of Evidence (ER) was adopted effective September 1, 2010. ER 502 is based closely on Federal Rule of Evidence 502. (http://www.courts.wa.gov/court_rules/?fa=court_rules.adopted).

Second, the litigation hold aspect of the rule raises several serious questions that are not answered in the proposed rule language and considerations. In addition, courts have also differed on when a litigation hold that is issued (either verbally or in writing) is sufficient to fulfill the party's preservation obligation. Third, the consequences of failure is another element where case law on a nationwide basis differs and is where both parties – those requesting sanctions and those defending themselves – are impacted to varying degrees. We discuss all three of these elements in-depth, in addition to pertinent case law, in Part Two of this memo.

Part Two: Eight Rule Elements Discussed

As requested, Kroll Ontrack summarizes our observations regarding the eight elements identified by the Committee.

Element 1: Trigger

As demonstrated by the sampling of cases described below, we believe that parties are confused as to when the duty to preserve arises. A preservation rule should include the common law trigger standard (pending or reasonably foreseeable litigation) in addition to examples of specific triggers that indicate when the preservation duty arises. In our opinion, the sooner a party implements a preservation protocol, issues a litigation hold and starts utilizing cutting-edge preservation repository technologies,[9] the more defensible the process will be if called into question, in addition to being more effective at achieving proper preservation of information that is potentially relevant to the litigation.

For example, in a recent case from the Northern District of Indiana, the plaintiff requested that the court order the defendant to preserve e-mail evidence, claiming the defendant previously deleted e-mails from the plaintiff's account without her permission and had refused to issue a litigation hold prior to the Fed.R.Civ.P. 26(f) meet and confer. The defendant argued the plaintiff's request was premature as Rule 26(d)(1) prohibited a party from seeking discovery before the Rule 26(f) conference. Disagreeing with the defendant's argument, the court noted Rule 26(d)(1) prohibited requesting production – not compelling preservation – and stated that ruling to the contrary would leave a party with knowledge of an intent to destroy evidence without a remedy. Accordingly, the court found the plaintiff could suffer measurable prejudice based on the suit's heavy reliance on e-mails if evidence was destroyed and ordered the defendant to implement a litigation hold.[10]

Although the defendant put forth a novel argument, it failed to acknowledge that the duty to preserve evidence "includes an obligation to identify, locate, and maintaininformation and tangible evidence that is relevant to specific and identifiable litigation."[11]

However, the issue of when the duty *actually* arises is often a challenging one as different courts have found various triggers to be applicable. Generally, courts recognize that the "mere possibility of litigation" does not trigger the duty to preserve because litigation is "an ever-present possibility" in modern society. *Cache La Poudre Feeds, LLC v. Land O' Lakes, Inc.*, 2007 WL 684001 (D. Colo. Mar. 2, 2007).

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[9] As noted in Principle 14 of The Sedona Conference®,Sedona Principles (2nd Ed. 2007), " [a] responding party may satisfy its good faith obligation to preserve . . . by using electronic tools and processes, such as data sampling, searching or the use of selection criteria, to identify data reasonably likely to contain relevant evidence."

[10] *Haraburda v. Arcelor Mittal USA, Inc*., 2011 WL 2600756 (N.D. Ind. June 28, 2011).

[11] The Sedona Conference®, Commentary on Legal Holds: The Trigger and the Process, 11 Sedona Conf. J. 265, 267 (2010) .

However, in employment cases, the filing of a formal complaint is often held to put the defendant on notice to preserve *See, e.g., McCargo v. Texas Roadhouse, Inc*., 2011 WL 1638992 (D. Colo. May 2, 2011). In *Goodman v. Praxair Services, Inc*., the District of Maryland concluded that the defendant's duty to preserve triggered following receipt of a letter informing the defendant the plaintiff had consulted attorneys.[12] In contrast, a ruling from the Southern District of New York found the duty to preserve arose no later than the lawsuit's filing. *Green v. McClendon*, 2009 WL 2496275 (S.D.N.Y. Aug. 13, 2009).

Element 2: Scope

We do not agree with the imposition of presumptive limits on the number of key custodians whose information must be preserved.

Although the amount of ESI and data sources continues to grow exponentially, technology and processes are available to provide parties with a cost-effective method to locate, preserve and access potentially responsive information across company information systems, sources and custodians. Companies can implement preservation repositories and enterprise archiving systems that provide a central storehouse for important information, develop a data map that outlines a company's information systems and processes that can help litigators plan and pilot the e-discovery process, and can use sampling, early data assessment and intelligent review technology to locate, identify, collect, process, analyze and review data in a quick, cost-effective manner.

In particular, we believe that limiting custodians is an extremely dangerous proposition. There are several issues raised in this proposal, including what should constitute the "maximum number" and whether this limit will lead to further time and resources spent to "fight" for additional custodians. There is also a question of what actually constitutes a custodian in the first place. Is it a person of interest and all of their data sources or is it a data source? Does the size of the custodian's data matter? Does the type of data matter? What happens when a custodian is a departmental file server share that contains terabytes of data? Is it appropriate to limit discovery or argue burden simply because a litigant has poor or no data management practices and policies? These are all questions that may lead this to be a disastrous gray area.

With regard to the scope of the preservation obligation for non-parties, we do feel the rules should remain the same for this group. However, we do not believe it is fair to impose all of the costs of complying with your preservation obligations onto parties not involved directly in the litigation. Thus, we would prefer to see language in this aspect of the rule that provides cost relief to the non-party from the party requesting the information. In addition, we feel this is one aspect of a preservation rule that would benefit in particular from a discussion on proportionality.

However, as a general matter, the relationship between preservation and proportionality is a dubious one. In *Orbit One Communications v. Numerex Corp*., the Southern District of New York rejected the standard of "reasonableness and proportionality" advocated in *Victor Stanley II* and *Rimkus Consulting Group* as "too amorphous to provide much comfort to a party deciding" what information to retain. Instead, the court favored the *Zubulake IV* standard of retaining "all relevant documents . . . in existence at the time the duty to preserve attaches."[13] Nonetheless, without a consistent rule or standard in the rules, there will continue

[12] 2009 WL 1955805 (D. Md. July 7, 2009).
[13] *Orbit One Commc'ns, Inc. v. Numerex Corp*., 2010 WL 4615547 (S.D. N.Y. Oct. 26, 2010).

to be a need to vary the levels of obligations required under the duty to preserve in relation to the principles of proportionality.

Element 3: Duration

We do not agree that the upper end of the duration of the preservation obligation should be established in a Federal rule. Setting limits will likely not result in parties losing the "fear" of what may happen if they dispose of information. Typically we advise parties that a litigation hold should remain in effect until all appeals deadlines have tolled and the entered judgment and award is final, a final settlement agreement has been reached and a formal release has been signed by all parties, and/or the case is dismissed with prejudice and no outstanding related claims remain. Parties should then issue an explicit notice to lift a litigation hold that serves to officially resume scheduled disposal. However, care should be taken not to lift the hold on particular data that may be concurrently under hold for another matter.

Element 4: Ongoing duty

We do believe, however, that the rule should specify whether a duty to preserve extends to information generated after the duty has accrued. This information could be essential to the matter at hand, and should be preserved in the same manner with the same responsibilities as data created before the duty to preserve arose. This should only be a concern in matters where newly created content may be relevant. It should also be limited to systems or data sources when applicable.

Element 5: Litigation hold

According to the proposed rules discussion, one possibility is to specify that disseminating a litigation hold is sufficient to show due care under the duty to preserve. However, this raises several questions: What minimal standards apply for the litigation hold distribution? What would be required (i.e., number of people distributed to, data sources put on hold, efforts to enforce compliance)? Is issuing a litigation hold *really* sufficient to prove due care or should it be only a presumptive standard?[14] Does the litigation hold have to be in writing, or is an oral litigation hold sufficient?[15] Who in the organization should be tasked with issuing the litigation hold, or is it a responsibility of outside counsel?[16] Are there different standards imposed depending on the size of the corporation/party?[17] These are all valid questions that can be attributed to inconsistencies among jurisdictions if this element is not further developed.

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[14] *Tango Transp., LLC v. Transp. Int'l Pool, Inc*., 2009 WL 3254882 (W.D. La. Oct. 8, 2009). (Distributing a litigation hold on e-mail accounts of custodians six months after the initial request from the defendant was insufficient to satisfy the plaintiff's preservation obligation and awarded the defendant almost $13,000 in attorney fees and costs to serve as a deterrent against the plaintiff's future commission of similar discovery abuses).

[15] *See Acorn v. County of Nassau*, 2009 WL 605859 (E.D.N.Y. Mar. 9, 2009). (Defendants claimed it issued a "verbal" litigation hold and instructed key individuals to search for responsive documents despite lacking the technical resources to locate and access electronic documents. Finding the defendants had a duty to preserve evidence and were grossly negligent in failing to issue a proper litigation hold, the court granted motion costs and attorney fees. However, the court denied an adverse inference instruction citing the plaintiffs' failure to demonstrate the favorability of the lost evidence.).

[16] *See Swofford v. Eslinger*, 2009 WL 3818593 (M.D. Fla. Sept. 28, 2009). (Defendants' in-house counsel only forwarded a copy of preservation letters sent by the plaintiff to senior-level employees – who did not ensure other employees complied with the defendants' preservation obligations – and failed to issue a litigation hold. Citing *Zubulake V*, the court found that it is insufficient for in-house counsel to simply notify employees of preservation notices, but rather counsel "must take affirmative steps to monitor compliance" to ensure preservation. Finding sanctions appropriate for the preservation failures, the court issued an adverse inference sanction for the laptop wiping and deletion of e-mails. The court also awarded attorneys' fees and costs to the plaintiffs, holding the defendants and in-house counsel jointly and severally liable.)

[17] *See Voom HD Holdings LLC v. EchoStar Satellite LLC*, No. 600292/08 (N.Y.Sup. Nov. 3, 2010). (Defendant acted in bad faith in destroying relevant e-mails and engaged in the "type of offensive conduct that cannot be tolerated by the court." Court imposed an adverse inference instruction and awarded attorneys' fees and costs. In support of its findings, the court noted that

Element 6: Work product

Protecting work product from disclosure in discovery is an important right for any practitioner, as it allows parties to concentrate on advocacy and case development without falling prey to distractions regarding whether the materials they are creating in the course of defending their client are discoverable by the opposing party. Modern technology used for document review allows counsel to easily segregate work product from fact documents providing for an effective safeguard against the inadvertent production of privileged information. We also believe, however, that it would be important to have a statement in the rule or the Committee Notes addressing what actions taken in furtherance of the preservation duty are protected by work product.

There is limited case law on whether actions taken in furtherance of the preservation duty are protected by work product, and the few cases on record present conflicting opinions. In *Carlock v. Williamson*, the Central District of Illinois asserted that a litigation hold spreadsheet was inadvertently produced and was protected as work product. Addressing the litigation hold spreadsheet, the court determined it was an ordinary business record not protected by work product doctrine and was discoverable based on the virtual absence of ESI produced by the defendants, which constituted a threshold showing that they failed to preserve documents. However, the court held the spreadsheet must be properly redacted and allowed the plaintiff to refile once the redaction was completed.[18] Conversely, in *Gibson v. Ford Motor Co.*, the Northern District of Georgia denied the plaintiff's request for a copy of the defendant's litigation hold notice, finding the document was closely related to attorney work product material. The court further noted that litigation holds are often over-inclusive and the documents do not bear any relevance to the actual litigation and cautioned that compelled production of this notice would encourage other companies from not issuing litigation hold notices under fear of possible disclosure and adverse consequences.[19]

Element 7: Consequences and procedures

A rule regarding preservation would not be complete unless there were consequences outlined in the rule. As recent case law demonstrates, courts across jurisdictions vary in terms of degrees of the severity of the sanctions imposed for the failure to preserve information, particularly when the party requesting sanctions does not fully demonstrate the relevance of the lost information (a daunting task) or if the spoliating party has not acted willfully or in bad faith.

The proposal seems to support the logic of the 2010 *Pension Committee* decision to the effect that the failure to issue a written litigation hold is, in and of itself, evidence of gross negligence.[20] Whatever may be the rule in that District Court, other cases have expressed concerns that this fails to adequately address smaller cases where informal means are effective. *Orbit One Communications, Inc. v. Numerex Corp*. (also issued by a court in the Southern District of New York) respectfully disagreed with the *Pension Committee* ruling that held some level of sanctions are warranted as long as any information was lost due to inadequate preservation practices and denied the sanctions request determining there was insufficient

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the defendant is "a large public corporation with ample financial resources" to institute and enforce a proper litigation hold and referenced the fact that the defendant hired a new in-house lawyer following the Broccoli decision primarily to address these issues.).

[18] 2011 WL 308608 (C.D. Ill. Jan. 27, 2011).

[19] 2007 WL 41954 (N.D. Ga. Jan. 4, 2007).

[20] *See Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 465 (S.D. N.Y. May 28, 2010)("failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information)(emphasis in original)."

evidence that any relevant information was destroyed.[21] In *Steuben Foods, Inc. v. Country Gourmet Foods, LLC*, the court also distinguished *Pension Committee* and declined to follow the court's presumption in that case that a failure to implement a written litigation hold would support an inference of spoliation.[22] Further, in *Surowiec v. Capital Title Agency, Inc*., the court declined to apply the *Pension Committee* culpability standard, but nonetheless found the defendants' in-house counsel's failure to issue a litigation hold, suspend routine document destruction and capture evidence, constituted gross negligence.[23]

Finally, in *Rimkus Consulting Group, Inc. v. Cammarata* – one of the more discussed cases in regard to its disagreement with the *Pension Committee* standard – the court distinguished the Pension Committee ruling, finding the differences between circuits in relation to culpability of parties limited the applicability of the approach taken in Pension Committee. The court identified an additional distinction in regard to the burden of proof in relation to relevance and prejudice of spoliated evidence.[24]

The point raised by the court in *Rimkus Consulting Group* was not lost on Magistrate Judge Grimm when he authored his *Victor Stanley II* decision.[25] According to Judge Grimm, inconsistencies across the country regarding what steps a party must take to navigate data preservation successfully is troubling to "institutional clients" – including corporations – since they conduct business many jurisdictions. Judge Grimm noted that such companies must follow the requirements of the "toughest court" that has issued an opinion regarding preservation and attached a 12 page appendix analyzing the varying requirements. Creating a uniform rule and standard regarding preservation would help corporations to understand what their exact obligations are and avoid having to achieve a higher standard than necessary.

On a different note, the language in the proposed rule that "[c]ompliance with the rule should insulate a responding party from sanctions for failure to preserve" is again suspect unless the questions raised in the litigation hold element of the proposal are clearly answered and the duties are clearly outlined.

Element 8: Judicial determination

We do feel that the use of a judicial officer, such as a special master or service provider expert, can be an important aspect of resolving numerous e-discovery disputes including preservation. A recent effort to tackle e-discovery's challenges using special masters comes from the Western District of Pennsylvania. On November 16, 2010, the Board of Judges approved the establishment of the Electronic Discovery Special Masters (EDSM) program to assist litigants in certain cases where e-discovery issues may arise.

When e-discovery issues arise, the court or the parties can decide to appoint an EDSM from a special pool of candidates previously approved by the court. To qualify as an EDSM, the candidates must meet specific criteria set by the court. The court's Alternate Dispute Resolution Implementation Committee, chaired by Judge Joy Flowers Conti, developed and approved the required selection criteria which includes active bar admission, demonstrated litigation experience (particularly with electronic discovery), demonstrated training and experience with computers and technology, and mediation training and experience.

[21] 271 F.R.D. 429 (Oct. 26, 2010).
[22] 2011 WL 1549450 (W.D.N.Y. Apr. 21, 2011)
[23] 2011 WL 1671925 (D. Ariz. May 4, 2011).
[24] 688 F. Supp. 2d 598 (S.D.Tex. Feb. 19, 2010).
[25] *See Victor Stanley, Inc. v. Creative Pipe, Inc.,* 269 F.R.D. 497 (D. Md. Sept. 9, 2010).

If appointed, the court will set the scope of the EDSM's duties which may include, but are not limited to, developing protocols for the preservation, retrieval or search of potentially relevant ESI, developing protective orders to address concerns regarding the protection or confidential information, monitoring discovery compliance and resolving discovery disputes. The EDSM may also present findings of fact or conclusions of law to the court; however, these must be issued as a report and recommendation which will be subject to de novo review and opportunities for objection by the parties.

Finally, while it is still too soon to assess the effectiveness of the new EDSM program, another high-profile, local e-discovery program reported significant success in the use of discovery liaisons. The Seventh Circuit Electronic Discovery Pilot Program noted in its May 2010 report on Phase One of the multi-phase program that the participating judges "overwhelmingly felt the [program]" had a positive effect on the test cases, and "[i]n particular, the judges felt that the involvement of e-discovery liaisons required by [the program] contributes to a more efficient discovery process."[26]

The Seventh Circuit's findings and the basis for the EDSM program are encouraging, and reinforce the notion that many of the problems in the e-discovery process stem from a general lack of knowledge which e-discovery liaisons can provide until the bench and bar at large catch up. Time will tell if the EDSM program is successful, but in light of the consistent difficulties seen in e-discovery case law, any attempt to improve the process will likely be worthwhile.

[26] http://www.discoverypilot.com/about-us