

## **Decision Making in an Area of Uncertainty: Determining Preservation Obligations Prior to Discovery**

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### **I Introduction**

This paper explores territory that the 2006 E-Discovery Amendments only lightly touch. The onset of civil litigation - or even the foreseeable threat of such an occurrence - often requires unilateral decisions about the scope of preservation.<sup>2</sup>

While emerging legal principles are helpful, even the receipt of a broad preservation demand prior to suit does not create a justiciable controversy sufficient to seek court guidance in particular circumstances.<sup>3</sup> Thus, absent agreement with opposing counsel or a suitable opportunity to seek a protective order,<sup>4</sup> choices must be made based on the best judgment of counsel.<sup>5</sup>

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<sup>2</sup> *Silvestri v. General Motors*, 271 F.3d 583, 591 (4<sup>th</sup> Cir. 2001)(“The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.”).

<sup>3</sup> *Texas v. City of Frisco*, 2008 WL 828055 (E.D. Tex. March 27, 2008).

<sup>4</sup> *Kemper Mortgage v. Russell*, 2006 WL 2319858 (S.D. Ohio April 18, 2006)(refusing to opine on preservation advice or to shift the cost burden of that advice to the defendant).

<sup>5</sup> See Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, 13 RICH J. L. & TECH 9, 14-23, 26 (2007)(“[U]nilateral preservation

The issue is not new. In 2002, responding to an invitation to comment from the Rules Advisory Committee, the President of Lawyers for Civil Justice (“LCJ”), arguing for rulemaking on the topic, noted that “a producing party must often ‘guess’ [as to preservation obligations before discovery is served] which is grossly unfair in the context of those business systems that are maintained without the purpose of hiding or destroying evidence.”<sup>6</sup>

The 2006 E-discovery Amendments to the Federal Rules of Civil Procedure (“2006 Amendments”) did not fully address the issue. It is true, of course, that discussion of preservation issues is now required prior to the discovery scheduling conference.<sup>7</sup> However, this process often comes too late and, in any event, has inherent limits on its usefulness due to the fact that discovery has not begun. Moreover, the so-called “safe harbor”<sup>8</sup> added by the 2006 Amendments has so many exceptions and limitations that, in the eyes of many, it is not particularly effective and - in any event - only acts retrospectively.<sup>9</sup> Suggestions by LCJ and others were not adopted which would have materially reduced the problem.<sup>10</sup>

Accordingly, the uncertainty and angst associated with making unilateral preservation choices before discovery is served remain. While a party can gamble that particular sources of information which are not preserved will not be later sought or required in discovery, in reality the

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decisions about inaccessible sources always carry some risk of post-production challenge for potential spoliation.”).

<sup>6</sup> Letter, December, 2002, Rex Linder, President of Lawyers for Civil Justice to Professor Richard Marcus, soliciting relevant views on behalf of the Discovery Subcommittee of the Civil Rules Advisory Committee.

<sup>7</sup> Fed R. Civ. P. 26(f).

<sup>8</sup> Fed. R. Civ. P. 37(f), renumbered at 37(e)(2007).

<sup>9</sup> See *Doe v. Norwalk Community College*, 2007 WL 2066497 at \*4 (D. Conn. July 16, 2007)(refusing to consider Rule 37(e) because there was not “one consistent, ‘routine’ system in place” regarding email management); *Oklahoma ex rel Edmondson v. Tyson Foods, Inc.*, 2007 WL 1498973 at \*6 (N.D. Okla. May 17, 2007)(“The Court . . . advises the parties that they should be very cautious in relying upon any ‘safe harbor’ doctrine as describe in new Rule 37(f)”).

<sup>10</sup> See, e.g., Comments, February 15, 2005, submitted by the U.S. Chamber Institute for Legal Reform and LCJ, at p. 10, suggesting that Rule 37 should be amended to provide that:

“A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation in good faith of the party’s electronic information system unless the party intentionally or recklessly [willfully] violated an order issued in the action requiring the preservation of specified information.”

choice between over-preservation and inaction is often analogous to the “Hobson’s Choice” which Thomas Hobson (1544-1630) reportedly offered to his stable customers: rent the horse in the stall nearest the door - or not.<sup>11</sup>

This paper first evaluates the options and best practices before discussing the more difficult question of what, if any, further rulemaking might be considered.

## II. Background

The common law duty to maintain or safeguard potential evidence pending formal discovery exists when a proceeding is filed or is “foreseeable” with a reasonable degree of certainty.<sup>12</sup> It applies to evidence which a party knows or reasonably should know is relevant and the destruction of which could prejudice the other party to that litigation.<sup>13</sup>

As explained in *Principle 5* of the *Sedona Principles*,<sup>14</sup> “[i]t is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data.”<sup>15</sup> This is particularly true where inaccessible sources are involved, since, by definition, access to such sources involves issues of undue burden or cost. However, the “inaccessibility” of information does *not* per se excuse a party from preserving a source that may contain relevant and discoverable information.

The principal limitation on preservation duties arises out of application of the proportionality principle, requiring a balance between burden and benefit. This principle, as embodied in Fed. R. Civ. P. 26(B)(2)(C), was first introduced in 1983 to bring common sense to

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<sup>11</sup> Wikipedia, the online Encyclopedia (“Hobson’s Choice”).

<sup>12</sup> *Silvestri v. General Motors*, 271 F.3d 583, 591 (4<sup>th</sup> Cir. 2001)(duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence will be required).

<sup>13</sup> See *Miller v. Phillip Holzmann*, 2007 WL 172327 (D. D.C. Jan. 17, 2007), *aff’d* 2007 WL 781941 (D.D. C. March 12, 2007)(“[A] party has an obligation to preserve evidence it knew or reasonably should have known was relevant to the litigation and the destruction of which would prejudice the other party to that litigation.”).

<sup>14</sup> See THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, PRINCIPLE FIVE (2d ed. 2007), available at [http://www.thesedonaconference.org/content/miscFiles/TSC\\_PRINCP\\_2nd\\_ed\\_607.pdf](http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf).

<sup>15</sup> Compare *Zubulake v. UBS Warburg, LLC* (“*Zubulake III*”), 220 F.R.D. 212, 217 (S.D. N.Y. 2003)(no duty exists to “preserve every shed of paper, every e-mail or electronic document” but “must not destroy unique, relevant evidence that might be useful to an adversary.”).

discovery obligations. As explained in Comment 2.b. of the *Sedona Principles* (2nd. Ed. 2007), “[e]lectronic discovery burdens should be proportional to the amount in controversy and the nature of the case. Otherwise, transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly in litigation.”

When assessing the need to preserve a source which is difficult to access, it is appropriate to consider the availability of the same or similar information on more accessible sources. As noted by the former Chair of the Rules Advisory Committee, “[a] primary factor to consider [in deciding whether or not to act to preserve inaccessible sources of information] is whether the information likely to be found on those sources is also available on other, reasonably accessible sources.”<sup>16</sup>

Thus, in *Cache La Poudre Feeds, LLC v. Land O Lakes, Inc.*,<sup>17</sup> a court held that the duty to preserve “would not automatically include information maintained on inaccessible computer backup tapes.” In that case, the General Counsel testified that he believed that the information was available on other accessible sources.<sup>18</sup> The burden lies with the party demanding preservation to negate a showing of availability. In *Best Buy Stores v. Developers Diversified Realty*,<sup>19</sup> the party seeking sanctions did not prove that the information on the database in question was not also available in hard copy format.

The proportionality test is also useful in assessing the duty to preserve temporarily stored forms of electronically stored information, such as IM, “chat rooms,” web pages and the like.<sup>20</sup> In *Convolve, Inc. v. Compaq Computer Corp.*,<sup>21</sup> for example, a court rejected the argument that a party

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<sup>16</sup> See, e.g., Hon. Lee H. Rosenthal, *A Few thoughts on Electronic Discovery after December 1, 2006*. 116 Yale L.J. Pocket Part 167, 178-179 (2006)(whether the “information was either irrelevant or available elsewhere and did not need to be preserved” is made “without the distortion of hindsight”).

<sup>17</sup> 2007 WL 684001 at \*15 (D. Colo. March 2, 2007)(a reasonable investigation to identify and preserve relevant materials does not generally include inaccessible back-up tapes ).

<sup>18</sup> *Zubulake v. UBS Warburg* (“*Zubulake IV*”), 220 F.R.D. 212, 218 (S.D. N.Y. Oct.22, 2003).

<sup>19</sup> 247 F.R.D. 567 (D. Minn. November 29, 2007)(defendants did not argue that the materials were uniquely available from the database or that the producing party could not more easily obtain the materials from another source).

<sup>20</sup> See, e.g., *Malletier v. Dooney & Bourke, Inc.*, 2006 WL 3851151 (S.D. N.Y. Dec. 22, 2006)(no duty to install a system to monitor and record communications in order to retain chat room comments).

<sup>21</sup> 223 F.R.D. 162 at 177 (S.D. N.Y. Aug. 17, 2004).

should have preserved changing wave forms on an oscilloscope by printing the screen each time a parameter altered the image. The court held that would have required “heroic efforts far beyond those consistent with [the party’s] regular course of business.”

Some courts have limited the acknowledgment of preservation requirements to a forward-looking obligation where the need was not obvious. In *Columbia Pictures v. Bunnell*,<sup>22</sup> a case where the temporary information stored in RAM was essential to a case and could easily be logged, a party was required to “begin preserving and subsequently produce a particular subset of the data in RAM under [its] control” although sanctions were not imposed for having failed to do so prior to the order.<sup>23</sup>

The affirmative steps needed to effectuate preservation obligations in the electronic information context have come to be known as the “litigation hold” process. It is typically “owned” and managed by the Legal or Compliance Departments, supported by Information Technology and other relevant functional or business units. The role of “retained” counsel in implementing is increasingly subject to close scrutiny. The traditional approach placed primary responsibility on such counsel to advise its client, who has the responsibility for executing preservation obligations. Thus, in *Zubulake v. UBS Warburg* (Zubulake “V”),<sup>24</sup> the court noted that “[a]t the end of the day, however, the duty to preserve and produce documents rests on the party. Once that duty is made clear to a party, either by court order or by instructions from counsel, that party is on notice of its obligations and acts at its own peril.”

However, other courts focus on retained counsel, citing to Fed. R. Civ. P. 26(g) or to inchoate ethical duties apparently deemed enforceable as a matter of inherent court power. In *Phoenix Four v. Strategic Resources*

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<sup>22</sup> 245 F.R.D. 443 (C.D. Cal. Aug. 24, 2007), denying motion to reverse Order regarding Server log data, 2007 WL 2080419 (C.D. May 29, 2007)(Magistrate Judge Chooljian); see Thomas Y. Allman & Kevin F. Brady, *Can Random Access Memory Make Good Law?*, NAT’L L.J., Dec. 10, 2007, at E1 (a requirement to place information into a usable form for preservation and production with a “modicum of cooperation” is consistent with existing legal principles, particularly when the information is not available elsewhere)

<sup>23</sup> 245 F.R.D. 443 at 448.

<sup>24</sup> 229 F.R.D. 422 at 436 (July 20, 2004).

*Corporation*,<sup>25</sup> the District Judge held that it was not sufficient for counsel to rely on assurances of its client.<sup>26</sup> In *Qualcomm Incorporated v. Broadcom Incorporated*,<sup>27</sup> the court proposed severe sanctions for retained counsel arising out of similar infractions.

The success of the litigation hold often depends upon individual employees to “do the right thing.” Courts tend to attribute any failures by those employees, regardless of their level of responsibility, to their employers. This was a matter of concern to some at the Public Hearings on the 2006 Amendments.<sup>28</sup>

A more nuanced approach was taken in *Morris v. Union Pacific Railroad*,<sup>29</sup> where the Court of Appeals reversed a jury verdict rendered after an adverse inference instruction. The Court held that in assessing the pre-litigation destruction of voice tape, the “intent of [the] corporate employees” was relevant.<sup>30</sup> The court noted that the dispatcher believed there was no reason not to follow the 90 day retention policy. In *Hawaiian Airlines, Inc. v. Mesa Air Group*,<sup>31</sup> the court held that it was not enough to “simply” tell a high level executive who subsequently scrubbed his hard drive of the need to preserve given the risk that he might do “wrongful and foolish things, like destroying evidence, under the pressure of litigation.”<sup>32</sup>

Fed. R. Civ. P. 37(e)<sup>33</sup> helps frame the discussion of conduct under those circumstances. In *Escobar v. City of Houston*,<sup>34</sup> the court cited the

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<sup>25</sup> 2006 WL 1409413 at \*9 (S.D. N.Y. May 23, 2006)(sanctioning client and retained counsel equally by imposing monetary sanctions to serve “prophylactic, punitive and remedial purposes”).

<sup>26</sup> *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D. N.Y. July 20, 2004).

<sup>27</sup> 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), *rev'd and remanded on other grds*, March 5, 2008.

<sup>28</sup> See Kahn, Chief Litigating Assistant, City of New York Law Department., February 15, 2005, Docket O4-CV-220, at p. 4-5 (arguing that it is unfair to subject a party to sanctions for negligence of lower level employees despite reasonable efforts by counsel and management).

<sup>29</sup> 373 F. 3d 896 (8<sup>th</sup> Cir. June 28, 2004).

<sup>30</sup> *Id.* at 902-903.

<sup>31</sup> , 2007 WL 3172642 (Bkrtcy. D. Hawai'i Oct. 30, 2007).

<sup>32</sup> *Id.* at \*5 (“Mesa could have taken reasonably steps that would have prevented, or mitigated the consequences of, Mr. Murname’s destruction of evidence. . . [by making “backup” of hard drives after suit filed which] would not have been costly, burdensome, or unduly disruptive.”)

<sup>33</sup> Fed. R. Civ. P. 37(e)(2007) provides: “Electronically stored information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine good-faith operation of an electronic information system.”

rule where there was no showing of the loss of relevant information or that the producing party acted in bad faith. In *Lockheed Martin v. L-3 Communication*,<sup>35</sup> a court refused to sanction the acts of an employee in “cleaning up” his email where he did not recall receiving a litigation hold order and there was no indication that the information had not been otherwise produced.<sup>36</sup>

Many entities employ automatic deletion of email to help control storage requirements. The regular purging of e-mails or other electronic communications is “necessary to prevent a build-up of data that can overwhelm the most robust electronic information systems.”<sup>37</sup>

Administered appropriately, the purging of active files is innocuous. For example, in *Samuels v. Mitchell*, a court refused to sanction a party for use of a program which moved messages over 90 days old to a waste basket unless the user acted to preserve the email. The court held that the “system was used properly and in no way was used to willfully destroy evidence.”<sup>38</sup> As explained by the Supreme Court in *Arthur Andersen LLP v. United States*,<sup>39</sup> “[d]ocument retention polices,” which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business.”<sup>40</sup>

However, Courts become concerned when parties fail to negate the automatic deletion of email as to key employees once a preservation duty is triggered. In *Connor v. Sun Trust Bank*,<sup>41</sup> the District Judge sanctioned a party for allowing automatic deletion to continue under circumstances which indicated “bad faith. As the Eight Circuit Court of Appeals explained in

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<sup>34</sup> 2007 WL 2900581 at \*18 (S.D. Tex. Sept. 27, 2007)(citing to Rule 37(f) and noting arguments of loss of relevant information and evidence of efforts to preserve relevant information).

<sup>35</sup> 2007 WL 3171299 (M.D. Fla. Oct. 25, 2007)(“there is no evidence that the email he deleted falls within the category”).

<sup>36</sup> After the testimony concerning “clean up,” a forensic examination of the hard drive of the workstation computer was also undertaken. *Id.* at \*2.

<sup>37</sup> Roland C. Goss, *Hot Issues in Electronic Discovery: Information Retention Programs and Preservation*, 42 Tort Trial & Ins. Prac. L. J. 797, 806 (Spring 2007).

<sup>38</sup> *Id.* at \*2.

<sup>39</sup> 544 U.S. 696 (May 31, 2005)

<sup>40</sup> *Id.* at 704.

<sup>41</sup> 2008 WL 623027 (N.D. Ga. March 5, 2008)(announcing decision to give jury instruction based on inference).

*Stevenson v. Union Pacific Railroad*,<sup>42</sup> when a preservation obligation attaches, a party cannot rely on its routine document retention policy as a “shield.”

Thus, retention policies should be carefully drafted to accommodate the need for targeted suspension of email, at least for key players and where no alternative provisions are made to retain relevant and material information.<sup>43</sup>

### **III. Options and Best Practices**

Several options are available to a party facing preservation decision without access to precise discovery demands or awareness of the court views on the relevance or admissibility of particular matters. We discuss each option separately, not in any particular order or priority, recognizing that some combination of each is likely in many cases.

#### **A. Negotiated Limits on Preservation**

When it can be accomplished in a timely fashion - a luxury which is not always available - early agreement (or informed acquiescence) by opposing counsel on the intended plans for preservation can greatly reduce the possibility of subsequent disputes. As noted earlier, the primary nod to “preservation” issues in the 2006 E-discovery Amendments was the addition of a requirement in Fed. R. Civ. P. 26(f) that parties meet and confer to discuss “any issues relating to preserving discoverable information.”

A party intending to claim that a duty to preserve exists cannot hide that fact in hopes of “sandbagging” the opposite party. In *Healthcare Advocates v. Harding, Early, Follmer & Frailey*,<sup>44</sup> no duty to retain electronic screen shots was found when it was not raised and the producing

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<sup>42</sup> 354 F.3d 739 (8<sup>th</sup> Cir. Jan. 5, 2004)(affirming pre-litigation sanctions for failing to preserve voice tapes which were only contemporaneous evidence of conversations between train crew and dispatchers, but declining to sanction failure to prevent destruction of track maintenance records until after a demand was served for their production)..

<sup>43</sup> See *The Sedona Conference Commentary on Email Management Guidelines for the Selection of Retention Policy* (August 2007).

<sup>44</sup> 497 F. Supp. 2d 627, 640-41 (E.D. Pa. 2007) (“[T]hey had no reason to believe that their activities would subject them to a lawsuit for ‘hacking,’ [and the failure to preserve] is not an action that shocks the conscience.”).

party neither “knew or should have known” that temporary cache files would be sought in litigation. In *Petcouo v. C.H. Robinson Worldwide, Inc.*,<sup>45</sup> the court refused to sanction a party for failing to impose an entity-wide ban on deletion of email where the requesting party had not indicated the need to do so.

The best form of negotiated limits is one which addresses practical problems. In the case of *In re: Celexa and Lexapro Products Liability Litigation*,<sup>46</sup> a producing party created a set of back-up tapes at the outset of litigation and set them aside for discussions with opposing counsel. After negotiations, the parties entered into an agreed order that provided that the defendant would preserve those backup tapes but would otherwise resume recycling. This technique is equally applicable to more complex preservation challenges. In the case of *In re Seroquel Products Liability Litigation*,<sup>47</sup> for example, the parties agreed to steps to preserve information on databases while implementing discussions of the production complexities.<sup>48</sup>

The discussions should cover hard copy and electronic information, where information may be located and other relevant topics, including the form in which materials should be maintained pending discovery. It is often advisable to agree to maintain sources of electronically stored information in their native file formats with metadata<sup>49</sup> to preserve the ability to make production in some variant of a native file format, if necessary. In the case of *In re Priceline.Com Inc. Securities Litigation*,<sup>50</sup> a court approved an agreement where the original data would be maintained in its original native file format for the duration of the litigation.

## **B. Locking Down the Environment**

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<sup>45</sup> 2008 WL 542684 (N.D. Ga. Feb. 25, 2008)(“It does not appear that Defendant acted in bad faith in following its established policy for retention and destruction of e-mails.”).

<sup>46</sup> 2006 WL 3497757 (E.D. Mo. Nov. 13, 2006).

<sup>47</sup> 2007 WL 219989 (M.D. Fla. Jan. 26, 2007).

<sup>48</sup> The issues can be technically complex. See Douglas Herman, “Digital Investigations – Where you Forgot to Look: Why Databases Often Are Overlooked When it Comes Time to Harvest Electronic Data,” The Metropolitan Corporate Counsel, August 2006 (“To extract data from a relational structure such as a CRM or ERP database requires specific expertise and a solid understand of the underlying bases of how these databases work”).

<sup>49</sup> *Compare United States v. O’Keefe*, 2008 WL 449729 (D.D.C. Feb. 18, 2008)(court applying amended Rule 34(b) as persuasive authority in the criminal discovery context ordered preservation in its native format with metadata until ruling regarding production).

<sup>50</sup> 233 F.R.D. 88 (D. Conn. 2005).

When a producing party has no real choice but to act promptly the best (and sometimes the only) option<sup>51</sup> may be to “lock down” the active environment involving key players. In doing so, the party must make an informed judgment about the scope of the discovery anticipated. To reduce the risks with that approach, the “identification” of any inaccessible sources not being searched pursuant to Fed. R. Civ. P. 26(b)(2)(B) should be promptly furnished to opposing counsel.<sup>52</sup>

An oft-quoted statement from *Zubulake IV*<sup>53</sup> is that once a party reasonably anticipates litigation, it must suspend its routine policies relating to deletion or destruction of information and put in place an effective litigation hold to ensure preservation of potentially discoverable information. In *Zubulake V*,<sup>54</sup> the court articulated a step-by-step analysis of how a generic litigation hold should, in the opinion of that court, be executed. In carrying out the effort, skilled outside vendors or consultants are often retained in appropriate cases to provide or supplement the technical expertise needed to accomplish the tasks.

Active data is typically found on local hard drives, networked servers and distributed devices or on offline archival sources. Data and directories can be viewed in plain text files or with a computer program, such as small applications, database programs, or word processing applications.<sup>55</sup> It is also possible to access a variety of system data in a recycle bin, history files, temporary internet directory and other data caches.

It may also be useful to make a complete forensic snapshot of the hard drives of key personnel as well as their server-located mailbox and a copy of their server-located home directory. Having these “mirror images” preserves the option to make a full forensic analysis of their contents at a

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<sup>51</sup> See generally Barrasso and Haas, *Beyond the Hold Notice in the Electronic Age* 78 N.Y. St. B.J. 22 (September, 2006).

<sup>52</sup> 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 (2008).

<sup>53</sup> *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 218 (S.D. N.Y. 2003).

<sup>54</sup> *Zubulake v. UBS Warburg*, 229 F.R.D. 422, 435 (S.D. N.Y. 2004).

<sup>55</sup> See Whitney Adams and Jeffery Jacobs, “Ghost in the Machine: Legal Developments and Practical Advice in an Age of Electronic Discovery,” 22 NO. 7 ACC Docket 48 at \*70 (2004).

later time. In *Cache La Poudre Feeds, LLC v. Land O' Lakes, Inc.*,<sup>56</sup> the trial court faulted an entity for having failed to preserve the hard drives of former key employees where potentially relevant and discoverable information was known to be uniquely available there.

The possibility that information which is temporarily stored or is constantly overwritten will be sought in discovery should be carefully considered. This may involve databases and backup media as well as instantaneous communications, including IM and voicemail. Unlike text-based documents, voice mail messages are normally stored as audio files which must be transcribed and reviewed prior to production. Collection and preservation can be relatively straightforward, however, where voicemail has been integrated with e-mail systems.<sup>57</sup>

One of the most difficult “lock-down” decisions involves the extent to which existing backup media should be sequestered,<sup>58</sup> since they are often sought in discovery because of the possibility that they may contain information deleted from active sources. One cannot stand idly by if aware that potentially discoverable information is being destroyed by a routine policy or process. In *Zubulake IV*,<sup>59</sup> the Court held that “if a company can identify where particular employee documents are stored on back-up tapes, then the tapes storing the documents of ‘key players’ to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available.” In *Doctor John’s v. City of Sioux City, Iowa*,<sup>60</sup> a court held that a tape recording of closed city council meetings which were the only source of contemporaneous evidence of the motives of the members should have been preserved.

A blanket order indefinitely suspending all routine processes can quickly become expensive if there are a large number of key players or

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<sup>56</sup> 2007 WL 684001 at \*16(D.Colo. March 2, 2007)(“By wiping clean the computer hard drives of former employees who had worked on the [project], Land O’Lakes effectively eliminated a readily accessible source of potentially relevant information”).

<sup>57</sup> See Conrad J. Jacoby, *E-Discovery Update –Assessing the Importance of Voicemail in Discovery*, May, 2006 (some systems automatically export voice mail messages as .WAV files and include some phone call metadata and thus enable collection from voicemail archives without needing to access the voice mail system itself), available at <http://www.llrx.com/node/1492/print>.

<sup>58</sup> See generally Eric Friedberg, *To Recycle or Not to Recycle, That is the Hot Backup Tape Question*, 201 PLI/Crim 205, 211-12 (2006).

<sup>59</sup> 220 F.R.D. 212 at 218 (Oct. 22,2003).

<sup>60</sup> 486 F. Supp. 2d. 953 (May 17, 2007).

servers involved. However, it may be possible to narrow the scope and time frame involved. Moreover, the necessity of halting recycling of *future* backup media can be avoided by appropriate steps to save information that is subject to deletion. Ultimately, the uniqueness of the source will be decisive.

In addition, attention should be paid to “static” or “legacy” sources of information which are maintained for long-term archival, storage or record purposes. It is worth remembering that retention policies typically apply both to hard copy and electronic information. Such information may be written to removable media such as a CD, magneto-optical media, tape or other electronic storage device or may be maintained on system hard drives in compressed formats. Appropriate suspension of routine destruction must also be undertaken here as well.<sup>61</sup>

### **C. Early Court Intervention**

The 2006 Amendments contemplate that concerns over excessive preservation demands may be brought to a court by a potential producing party once the meet and confer process has been exhausted. Fed. R. Civ. P. 26(b)(2)(B) was amended after the Public Hearings to clearly make that point. As noted in the “Changes Made after Publication and Comment” section of the Final Committee Report, “The rule text has been changed to recognize that the responding party may wish to determine its search and potential preservation obligations by moving for a protective order.”

Prior to the 2006 Amendments, requesting parties often sought early court intervention, often *ex parte*, typically arguing that a producing party should be ordered to meet its preservation duties.<sup>62</sup> Producing parties were loath to seek early rulings because of the risk that a court might, and often did, rule too broadly.

However, times have changed. The 2006 Amendments make it clear that *ex parte* or blanket preservation orders are disfavored. The Committee

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<sup>61</sup> See *Tulip Computer Intern B.V. v. Dell Computer*, 2002 WL 818061 (D. Del. April 30, 2002). (belatedly production of boxes despite skepticism as to relevance except for one box destroyed by Iron Mountain pursuant to a retention policy shortly after the document request was received.).

<sup>62</sup> See *Treppel v. Biovail Corporation*, 233 F.R. D. 363, 369-372(S.D.N.Y. Feb. 6, 2006)(describing and collecting cases and applying “balancing test” to decline to issue preservation order as premature).

Note to Rule 26(f) now provides that “[a] preservation order issued over objection should be narrowly tailored [and] [*ex parte*] preservation orders should issue only in exceptional circumstances.”

Moreover, because of recent clarifications in case law, a producing party seeking a protective order from unreasonable demands has a number of alternative arguments that preservation is not required.<sup>63</sup> First of all, information must be known to be relevant and material to be preserved. Absent a reasonable belief to that effect, it need not be preserved. Second, information on inaccessible sources need not be preserved when it can be fairly argued that the same or similar information is available on other more accessible sources. Third, accessible or not, when the burdens and costs of preservation of the source outweigh the prospective discovery benefits, no duty exists to preserve. Indeed, even when temporarily stored or ephemeral information should be preserved because of the minimal effort involved, the obligation may be only forward looking because the need was not one that was or could or should have been reasonably anticipated.

In *Treppel v. Biovail Corporation*,<sup>64</sup> Judge Francis also raised the possibility that “[when] the demanding party seeks preservation of information that is likely to be of only marginal relevance but is costly to retain, . . . a court may condition it upon the requesting party assuming responsibility for part or all of the expense.” In *Kemper Mortgage v. Russell*,<sup>65</sup> the court also noted that the costs of preserving may be shifted where a party “demands[s] a litigation hold which seeks court enforcement.”

The situation is more difficult before litigation commences. In *Texas v. City of Frisco*,<sup>66</sup> the State of Texas Department of Transportation received a broad preservation demand relating to a highway project where litigation was inevitable - and promised. The Magistrate Judge refused a request for declaratory relief about the preservation demands on the grounds that a justiciable controversy did not exist. The court noted that while the

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<sup>63</sup> This paragraph owes much to the Sedona Conference® “Decision Tree,” an analytical approach developed as part of the evolution of the Sedona Conference® Commentary: Preserving and Managing Information which is Not Reasonably Accessible, Working Draft, April 2008 [Copy Posted for Members only, WG1], to be issued for public comment in the Summer of 2008.

<sup>64</sup> 233 F.R. D. 363, 372-373 (S.D.N.Y. Feb. 6, 2006).

<sup>65</sup> 2006 WL 2319858 (S.D. Ohio April 18, 2006)(refusing to “second-guess” legal advice by telling party that it is being “overly cautious – or to shift the cost burden of that caution to the defendant).

<sup>66</sup> 2008 WL 828055 (E.D. Tex. March 27, 2008).

amended Rules do not specifically address pre-suit litigation hold requests, they contemplate that “parties will act in good faith in the preservation and production of documents.”

## IV. Rulemaking Possibilities

As noted, uncertainty about the timing and extent of preservation actions before discovery remains. One answer may be to consider additional rulemaking. Among the possible suggestions that could be discussed are the following.

### A. Amend Rule 37(e)

As enacted, Rule 37(e) does not contain an explicit reference to preservation standards of conduct or to the time the preservation duty is triggered.<sup>67</sup> The 2004 Committee Proposal for Public Comment did so by providing that “. . . a court may not impose sanctions under these rules on the [producing] party for failing to provide [electronically stored information] if: (1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and (2) the failure resulted from loss of the information because of the routine operation of the party’s electronic information system.”<sup>68</sup>

The articulation of a standard could be revived and coupled with a clarification that for electronic discovery, the trigger should be based on the onset of discovery obligations,<sup>69</sup> leaving concerns for earlier destruction to existing case law, as contemplated by the exceptions to the “safe harbor.”<sup>70</sup>

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<sup>67</sup> As currently written, Rule 37(e) provides that “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.”

<sup>68</sup> The proposal also contained an exception to the “safe harbor” if a prior preservation order was violated, which was ultimately dropped based on concerns that it would encourage overuse of ex parte, broad preservation orders before discovery was adequately framed.

<sup>69</sup> In *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2<sup>nd</sup> Cir. 2001) (the court held that the obligation to preserve evidence arises when a 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).

<sup>70</sup> The Rule 37(e) requirement of “good faith” and a lack of “exceptional circumstances” would permit a court to deal with those situations.

The issue of compliance based on interpretations of earlier “triggers” emphasizing intent creates perverse incentives to over-preserve.<sup>71</sup>

Thus, combining those concepts, Rule 37(e) could be modified to read as follows:

“Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system if the party *took reasonable steps to preserve electronically stored information after having agreed or being ordered to furnish it.*” (Language added in italics).

Professor Martin H. Redish has explained<sup>72</sup> that a trigger date short of actual commencement of discovery imposes “unfair and unpredictable standards of behavior on defendants.” He suggested a presumption that an absolute duty to preserve does not arise until a party, knowing of the information to be sought and the source from which it is sought, manifests its lack of intent to object - or is ordered to do so by a court.

One issue to be addressed, of course, would be the power of the rulemaking authorities under the Rules Enabling Act (“REA”) of 1938, as amended in 1988.<sup>73</sup> It might be necessary to invoke Congressional assistance, as was done in the Public Securities Litigation Reform Act (“PSLRA”),<sup>74</sup> which requires, during the mandatory stay period, that a party “treat all documents, data compilations (including electronically recorded or stored data) . . . as if they were the subject of a continuing request for production of documents from an opposing party.

Changes to Rule 37(e) could be considered as part of upcoming packages of rule amendments over the next few years or individually as an e-discovery reform. Whether rulemaking should proceed will only become

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<sup>71</sup> Assertion of a work product privilege may be evidence of a preservation obligation since such a claim is based on anticipation of litigation. *See, e.g., Anderson v. Sotheby’s Inc. Severance Plan*, 2005 WL 2583715 (S.D. N.Y. 2005) (party’s obligation to preserve arose on date of handwritten notes later claimed to be subject to work product privilege).

<sup>72</sup> *See* Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L. J. 561, 624-625 (Nov. 2001).

<sup>73</sup> 28 U.S.U.S.C. §2072 (1982).

<sup>74</sup> 15 USC § 78u-4(b)(3)(C). .

obvious after discussions with interested groups and analysis of the the appetite of the Advisory Committee on Rules for entertaining changes and updates.

## **B. Preservation Orders**

Another approach would be to revive earlier suggestions that sanctions be based only on violation of an explicit order of preservation.<sup>75</sup> This was famously proposed by the LCJ and the U.S. Chamber Institute For Legal Reform<sup>76</sup> at the Public Hearings in conjunction with an enhanced culpability requirement. The proposal was that sanctions should not be imposed “unless the party intentionally or recklessly [willfully] violated an order issued in the action requiring the preservation of specified information.”<sup>77</sup>

The Advisory Committee did not reference the use of prior orders in the final Rule,<sup>78</sup> noting its concern that “it would [otherwise] invite routine applications for preservation orders, and often for overbroad orders.” However, given that the practice of routinely seeking *ex parte* orders is largely gone, it may well be feasible to revert to the original suggestion.

## **C. Earlier Access to Courts**

While the 2006 Amendments have now clarified<sup>79</sup> that protective orders designed to seek judicial clarification of preservation options can be

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<sup>75</sup> See Thomas Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 DEF. COUNS. J. 206 (2001); Thomas Allman, *The Case for a Preservation Safe Harbor in Requests for E-Discovery*, 70 DEF. COUNS. J. 417 (2003) and Thomas Allman, *A Preservation Safe Harbor in e-discovery*, THE ANTITRUST SOURCE (July 2003).

<sup>76</sup> U.S. Chamber Institute for Legal Reform (“ILR”) and Lawyers for Civil Justice proposal, dated February 12, 2005, available at <http://www.uscourts.gov/rules/e-discovery/04-CV-192.pdf>. Formal White Papers were submitted by LCJ in November, 2003 and March 2004, and, during the Public Hearing Process, jointly on February 12, 2005, followed by comments on April 11, 2005 (Supplemental Comments) and June 10, 2005. [Copies on File with Author and available to LCJ members on LCJ website].

<sup>77</sup> See footnote 10, *infra*, for full quotation.

<sup>78</sup> As initially proposed in 2004, the limits on rule based sanctions ultimately included in Rule 37(e) would not have applied when parties failed meet the requirements of preservation orders. See “Changes Made After Publication and Comment” section of its Final Report, Appendix C to the Standing Committee Report (2005) at Rules App. C-88-89.

<sup>79</sup> As noted in the “Changes Made after Publication and Comment” section of the Final Committee Report, “The rule text has been changed to recognize that the responding party may

sought before discovery, current case law appears to require that an action be pending despite the fact that it is imminent.<sup>80</sup>

Fed. R. Civ. P. 27,<sup>81</sup> provides for preservation of oral testimony by order sought by a person who “expects” to be a party to an action but “cannot presently bring it or cause it to be brought.” Under the Rule, a court may issue “orders like those authorized by Rules 34 and 35.” Perhaps this rule could be broadened to address the timing and scope of the preservation obligation applicable to an anticipated case.

## VI. Conclusions

Preservation practice under the 2006 Amendments remains a mixed bag. When parties collaboratively engage in the meet and confer process in “good faith”<sup>82</sup> they can often execute an effective and proactive preservation strategy. Moreover, post-Amendment decisions have clarified the analysis required in making preservation decisions and placed practical limits on sanctions for unilateral preservation decisions.<sup>83</sup>

However, the ability to secure prompt and meaningful guidance remains a major issue for parties in the period before discovery commences and rulemaking is one of the options that could be considered. A way to help focus discussion on solutions would be to encourage the Rules Advisory Committee to conduct mini-conferences like those held by the Discovery Subcommittee at the request of the Federal Rules Advisory Committee at Hastings<sup>84</sup> and Brooklyn<sup>85</sup> Law schools.

The focus could be on the status of the 2006 Amendments and the further rulemaking, if any, which would be appropriate.

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wish to determine its search and potential preservation obligations by moving for a protective order.”

<sup>80</sup> See *Texas v. City of Frisco*, 2008 WL 828055 (E.D. Tex. March 27, 2008).

<sup>81</sup> Fed. R. Civ. P. 27 (“Depositions to Perpetuate Testimony”).

<sup>82</sup> See *Texas v. City of Frisco*, 2008 WL 828055 (E.D. Tex. March 27, 2008).

<sup>83</sup> *Escobar v. City of Houston*, 2007 WL 2900581 at \*18 (S.D. Tex. Sept. 27, 2007)(refusing to sanction failure to preserve audiotape); accord, *Lockheed Martin v. L-3 Communication* 2007 WL 3171299 (M.D. Fla. Oct. 25, 2007) (failure to act on litigation hold order where no indication that the information had not been otherwise produced.).

<sup>84</sup> San Francisco (Hastings), March 27, 2000.

<sup>85</sup> New York (Brooklyn), October 27, 2000.